

Date: January 26, 2021

To: Paula Boggs Muething, City Manager

From: Andrew W. Garth, City Solicitor *AWG*
Emily Smart Woerner, Deputy City Solicitor

Subject: Charter Roles, Generally and in Economic Development

This memorandum is in response to recent events culminating in three instances of corruption charges filed against a member of council by the United States Attorney for the Southern District of Ohio. In all three cases, the member of council stands accused of trading influence and official acts in return for payments by real estate developers. You requested this legal opinion to clarify the general role of city council in the administrative function of the city including, but not limited to, in relation to the city's economic development process.

As a general matter, you have raised concerns about the often well-meaning but unintended consequences of city councilmember involvement in city administrative matters. Against that context, you have asked for an opinion concerning the charter limits of council's legislative power.

The city solicitor's office has opined on related issues previously. A thorough analysis of the relative powers of the mayor, city council, and city manager occurred in an opinion dated September 2, 2015 (the "Relative Powers Opinion") (a copy of which is attached to this memorandum). However, recent events necessitate a more specific analysis of the charter roles, particularly in economic development work.

This opinion is divided into four sections. Section 1 provides a historical review of the origins of the city's council-manager form of government and the 1999 amendments to the charter. Section 2 analyzes the relative powers of council, the mayor, and the city manager under the charter. Section 3 contains analysis of roles in the economic development context. And, lastly, Section 4 of the opinion provides a non-exhaustive list of administrative steps that could be taken by the city manager's office to reinforce charter roles. The list of potential administrative actions is responsive to your request for recommendations for communication and engagement protocols between the city administration and city council that increase transparency and help to prevent future confusion about roles.

1. Historical Background: The Council-Manager Form of Government

Historical context is helpful to understanding the city charter, which was enacted in 1926 pursuant to the home rule charter provisions of the Ohio Constitution.¹ The charter established a council-manager form of government in Cincinnati, which has evolved over the years through voter-approved charter amendments. Prior to the charter reforms, Cincinnati had a city council with 26 members elected from 26 wards within the city and six members elected at large. There was also a mayor, who was directly elected and served as the chief executive of the city. The mayor appointed the city's department heads. These officials were only nominally in control, however. The reality was that the Republican party, controlled by George B. "Boss" Cox and later Rudolph Hynicka, exerted almost total control over all the decisions of city officials. This system resulted in a poorly governed city. In the years leading up to the charter vote, the city was in dire financial condition, issuing deficiency bonds to cover budget shortfalls and failing to provide basic services. In addition, city jobs and contracts were not awarded according to merit but rather to the people who demonstrated the ability to secure votes for the political party. This practice increased costs and decreased competency. In response, a reform movement gained momentum, culminating in a charter that altered the city's form of government.

The new charter provided for a council-manager form of government with a council of nine members elected at large, a mayor who served as the presiding officer of the council and was responsible for certain appointments, and a city manager who was the chief executive officer. The council would be responsible for setting the policy of the city, but it was to have no role whatsoever in the hiring or firing of city employees. The city manager, in turn, would oversee the administrative service of the city and would provide advice to and carry out the policies of the council. In essence, the charter envisioned there would be two distinct forms of city government authority: (1) legislative (council, including the mayor) and (2) executive and administrative authority (the city manager). The drafters of the charter sought to insulate the city administration from political forces and empower a civic-minded and professional administrative service.

The most radical charter amendment since 1926 occurred in 1999 (effective 2001). The amendment substantially altered the traditional council-manager form of government by placing certain of the legislative and administrative functions of government in the office of the mayor. The 1999 charter amendment followed a series of charter review committees convened between 1994 and 1998. Initially, proposals called for an executive mayor who would be the head of the executive and administrative functions of the city and exercise veto power. However, the executive mayor proposal did not have enough support and the charter review process culminated in an early 1999 compromise measure that became "Issue IV."

¹ See generally, Taft, Charles P., *City Management: the Cincinnati Experiment* (1933) for the historical information provided in this section. Charles Taft, a contemporary of Murray Seasongood, was personally involved in the various reform movements of Cincinnati in the 1920s.

Prior to Issue IV the mayor was a member of city council and firmly entrenched within the legislative authority of city government. A critique of the time was that the city manager did not provide the kind of directly-accountable leader that some sought because the city manager was unelected and served at the pleasure of an often-shifting council majority.

Issue IV retained the council-manager form of government but enlarged the importance and power of the mayor. A key member of the architects of Issue IV described the changes as follows:

Along with the mandate from the voters, the Mayor will have a critical role in the hiring and firing of the City Manager, the ability to veto Council legislation, and the ability to appoint Council committee chairs. The Mayor will have the clout and the authority to lead the city; the voters will gain the power to hold the Mayor accountable.²

The primary elements of Issue IV were (1) electing the mayor directly; (2) retaining the professional management of the city manager; (3) providing the mayor with both administrative and legislative powers; and (4) empowering the mayor as the official head and representative of the city. Issue IV proponents viewed the proposed changes as necessary to ensuring that the mayor was the political and policy leader for the city and directly accountable to the voters.³

Many of the proposed changes were vigorously debated.⁴ All groups agreed, however, that Issue IV would result in a significant increase in mayoral powers. The voters approved Issue IV and the charter amendments became effective in 2001.⁵ The resulting system of city government retains some of the hallmarks of a council-manager form of government, while also granting the mayor power and influence over both the executive and legislative functions of the city. This form of governance is distinct from the traditional council-manager form of government and the traditional executive mayor form of government.

2. Relative Powers, Generally

The relative powers of council, the mayor, and city manager under the charter shifted as a result of Issue IV. Under the canons of statutory interpretation, one must interpret the amended and the unaltered provisions of the charter together as a whole. The resulting interpretation, as discussed at length in the Relative Powers Opinion, is a system of governance that combines a set of powers exclusive to the mayor, council, and city manager with a set of powers that are shared as between the mayor and council (legislative powers) and between the mayor and city manager (administrative powers).

² *Id.* at 11, quoting Pat DeWine.

³ *Id.* at 10-11.

⁴ Howard Wilkinson, *Issue 4 Divides Interest Groups*, Cincinnati Enquirer, May 3, 1999.

⁵ Howard Wilkinson, *Cincinnati Voters Opt for Strong Mayor*, Cincinnati Enquirer, May 5, 1999.

Each such category is summarized below. Afterward, in Section 3, the opinion addresses the respective authority of council, the mayor, and the city manager in the context of economic development deals.

A. City Council Authority

Article II of the charter, “Legislative Power,” vests legislative power generally in the council, with certain legislative powers shared with or exclusively granted to the mayor.⁶ A member of council has the power (and duty) to vote on ordinances as well as the ability to introduce and pass resolutions and motions as expressions of legislative authority. The council’s legislative power is broad and includes:

- the ability to enact legislation in furtherance of the public health, safety, and welfare (the police power);
- the power to appropriate funding for public purposes;
- the ability to hold public hearings;
- the responsibility to pass the city budget; and
- the authority to establish and amend the Cincinnati Administrative Code, which is the plan of administrative organization for city departments.

The charter expressly limits council’s legislative authority by granting certain legislative powers to the mayor. For example, the mayor has sole referral power for legislative items, may appoint committee heads, and may veto legislation. In addition, council’s legislative power is constrained by the charter’s prohibition of council involvement in administrative affairs—a prohibition as old as the charter itself. “**The crucial test for determining that which is legislative from that which is administrative or executive is whether the action taken was one making a law [*i.e.*, legislative], or executing or administering a law already in existence [*i.e.*, administrative].**”⁷ Therefore, Council makes the law and the administration carries out the law.

Article IV of the charter, “Executive and Administrative Service,” enumerates the charter powers of the administration and thereby limits the power of council and the mayor. Article IV specifies how the mayor and council are to interact with the administration:

Except for the purpose of inquiry; the mayor, the council and its members shall deal with that part of the administrative service for which the city manager is responsible, solely through the city manager. (Art. IV, Sec. 2)

The charter thus prohibits the mayor and council from engaging directly with city employees on matters of administration “except for the purpose of inquiry.” Merriam Webster defines “inquiry” as “a request for information” or “a systematic investigation

⁶ The city’s legislative power is also subject home rule authority limits under the Constitution of the State of Ohio.

⁷ *Donnelly v. Fairview Park*, 13 Ohio St.2d 1, 4 (1968).

often of a matter of public interest.”⁸ Black’s Law Dictionary defines “inquiry” as “a question someone asks to elicit information.”⁹ “Inquiry” does not include directing outcomes.

Council’s power of inquiry may only be exercised in furtherance of its charter role because the various charter provisions concerning council authority are *in pari materia* and must be read together.¹⁰ Hence, council’s powers of inquiry should be understood to be powers of legislative inquiry in service of its legislative functions, namely, making law. Council has no authority to inquire of anyone besides the city manager regarding matters of administration--such as the negotiation of contracts--apart from for legislative purposes. Attempts to influence the exercise of administrative and executive functions through “inquiry” and outside the legislative process can amount to improper interference that breaches the firewall in the charter between administrative and legislative functions.

Council’s power to set legislative policy and enact laws can be exercised a few different ways with respect to the administration. First, Council can enact laws that regulate how City funds are expended (*e.g.*, minority business enterprise contracting requirements). These laws are binding on the administration. Second, council may pass ordinances that set forth council’s policies for itself in considering future action (*e.g.*, adopting an economic incentive policy stating that council will only approve future legislation that conforms with the stated policy). Such ordinances are expressions of a particular council’s rules for itself and provide guidance to the administration – but they can be altered or amended by future council action. And third, council can pass motions, which do not carry the force of law, but communicate Council’s policy preferences and priorities to the administration.

Tell admin what the rules are for council

Tell admin what council is allowed to do.

The power to legislate, however, cannot be used to circumvent the charter restraints on council’s exercise of administrative authority.¹¹ Context matters, but under the Charter council cannot enact ordinances that improperly restrict the city manager’s charter authority over control and direction of the administrative service. Informal inquiry by council (or the mayor, as discussed below) regarding administrative matters can sometimes stray from a valid legislative purpose into undue influence on administrative functions. A general rule of thumb is that council cannot use its inquiry powers to push for a particular decision or outcome in a matter that is properly before the administration. Similarly, council cannot pass legislation that improperly restricts the exercise of

⁸ “Inquiry.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/inquiry>. Accessed 31 Dec. 2020. Historically, the definition of “inquiry” has not changed. The 1842 *An American Dictionary of the English Language* by Noah Webster defines “inquiry” as “The act of inquiring; a seeking for information by asking questions.”

⁹ “Inquiry.” Black’s Law Dictionary (11th ed. 2019).

¹⁰ *State ex rel. Commt. to Repeal Ordinance No. 146-02 v. city of Lakewood*, 100 Ohio St.3d 252, 2003-Ohio-5771, 798 N.E.2d 362, ¶ 20 (explaining that different sections on the same subject must be read together).

¹¹ Charter, Article II, Section 1, and Article IV, Section 1.

authority vested by charter in the administration (e.g., **the authority to hire and fire**). The charter controls.

Example of Council and Administration Roles – Street Rehabilitation

A detailed example concerning street rehabilitation work is provided below to illustrate the above analysis.

Council has sole authority to approve an annual appropriation of funding for street rehabilitation work as part of the city's capital budget process. As part of the budget process, council could exercise its power of inquiry to ask the city manager for information on the number of lane miles to be rehabilitated and the associated cost, the conditions of streets across the City and estimates of capital budget needs, or how the administration prioritizes its work in fixing streets in poor condition. Council's action at this stage, however, is limited to debating and approving the budget.

Council might separately pass policies relating to aspects of street rehabilitation work generally. For example, council has enacted municipal code requirements concerning competitive bidding for construction contracts, setting goals for contracting with minority and women-owned businesses, and subjecting certain improvements to review by the Historic Conservation Board. The policy underlying these code provisions informs and restricts the exercise of administrative discretion. Laws enacted by council set the generally applicable rules governing the contracts and approvals that the city manager is responsible for negotiating and executing.

Once the budget has passed, the administration will negotiate and execute contracts based on its priorities using its street quality index and professional engineering judgment. At this point, council has no authority, for example, to involve itself in the competitive bidding process, to second-guess or seek to negotiate the terms of the contracts, or to direct the work of the contractor. Council can ask for progress reports and for presentations in committee, but the matter is purely within the administration's domain. Under the charter, council's role in street rehab at this stage would be to help interface with the public and to provide constituent feedback to the administration.

For example, consider if a member of council received a call from a community council asserting that its neighborhood's streets were among the worst in the city and should be first in line for rehab work. The councilmember should pass this information along to the administration and request a report or response in committee. The administration has a duty to the public to determine the validity of the complaint, including how it fits into overall city operations, and the administration might adjust its work in response to constructive feedback. **However, it is improper under the charter for a member of council to promise a result to a constituent on an administrative matter.** Council can consider researching policies and budget priorities that might influence future street rehabilitation work, but the charter limits council's role in this active administrative

matter. Namely, council's charter role is to identify and raise issues to the administration and, if needed, to grant a forum to the public for a response from the city manager.

Neighborhoods can and should advocate for city services in their neighborhoods. But communities are focused (with reason) on *their* neighborhood's interests. Similarly, it is the job of elected officials to be in the community getting feedback and understanding community needs for city services. Elected officials are called upon to communicate their findings to the administration and to use their findings in service to legislative policymaking. Council is a forum that can amplify the community's voices such as by inviting an aggrieved neighborhood council to speak at city council and by asking questions of the administration. **But neither council nor neighborhood representatives are engineers or experts in street rehabilitation — their judgment should not substitute for the professional judgment of the administrative service.** For this and other reasons, the charter has been intentionally drafted to insulate the administration from political forces so that it may serve as much as possible as a neutral steward of the city and all its inhabitants.

B. City Manager Authority

Pursuant to the charter the city manager is the chief executive and administrative officer of the city. The charter provides the city manager with very broad powers and duties with regard to the administration of the city. As set forth in article IV, section 3 of the charter:

It shall be the duty of the city manager to act as chief conservator of the peace within the city; to supervise the administration of the affairs of the city, except as otherwise specifically provided in this charter; to see that the ordinances of the city and the laws of the state are enforced; to make all appointments and removals in the administrative and executive service except as otherwise provided in this charter; to make such recommendation to the mayor and to the council concerning the affairs of the city as may to [the city manager] seem desirable; to keep the mayor and the council advised of the financial condition and future needs of the city; to prepare and submit to the mayor the annual budget estimate for the mayor's review and comment prior to its submission to the council; to prepare and submit to the mayor and to the council such reports as may be required by each and to perform such other duties as may be prescribed by this charter or required of him or her by ordinance or resolution of the council.

As provided in the above charter excerpt, the city manager has broad authority to respond to legislative inquiries. Currently, there are three formal mechanisms for response: (1) "FYI" memoranda provided by the administration to the mayor and members of council; (2) written and verbal reports to council published and tracked in response to council inquiries; and (3) providing responses to questions raised during council meetings. More informally, council may engage the city manager and her designees outside of council meetings with questions concerning the day-to-day operations of the city.

Only the city manager may bind the city through contract or exercise authority in the administration and implementation of city agreements. Neither council or the mayor has authority under the charter to compel the city manager to enter into an agreement according to terms that the city manager finds to be contrary to the interests of the public and the municipal corporation.¹² The city manager is, of course, accountable to both the council and the mayor.¹³ If the mayor or city council disagree with the city manager's exercise of administrative authority under the charter, their charter remedy is to seek to remove and replace the city manager.

C. Mayoral Authority

In contrast to council and the city manager, the mayor has a blend of legislative and administrative powers. *See also*, Relative Powers Opinion (2015). For purposes of this analysis and in the context of economic development, it is necessary to consider the differences between council and mayoral authority in the external relations of the city. A core aspect of the mayor's administrative powers resulting from Issue IV is the new provision that "[t]he mayor shall be recognized as the official head and representative of the city for all purposes, except as provided otherwise in this charter." Art. III, Sec. 2. Prior to 2001, the mayor was recognized as the official head of the city only for "ceremonial purposes, by the courts for the purpose of serving civil process, and by the governor for military purposes." The mayor's new status as "official head and representative" confers authority not previously held – something more than "ceremonial" or symbolic functions. *See* Relative Powers Opinion (2015) (the mayor has authority to speak for the municipal corporation as its head and representative with regard to external relations). Such authority must, however, be exercised within the limitations of the charter as a whole.

Publications contemporaneous with passage of Issue IV make clear that the intent of this provision was to identify one singular person as the political and policy leader of the city.¹⁴ Multiple voices seemingly representing the city in, for example, a delicate political negotiation or media interaction, would conflict with the stated intent of Issue IV amendments to clearly identify the mayor as the "person in charge" at the city.¹⁵ It is therefore consistent with the "stronger mayor" system of Issue IV that the mayor's authority to represent city interests as "official head of the city" includes the power to engage in discussion, persuasion, and other action as official representative of the city.

¹² If the city manager were to refuse to perform a clear legal duty, then the remedy would be for the city Solicitor or a taxpayer to seek a judicial order to compel the action as a matter of law. Absent a clear legal duty, the recourse of the mayor or manager under the charter is to remove the city manager.

¹³ Charter, Article III, Section 2.

¹⁴ See League of Women Voters Voting Guide, p.11; Howard Wilkinson, *Issue 4: The Good and the Bad*, Cincinnati Enquirer, April 27, 1999.

¹⁵ *Id.*

The mayor must work with the city manager.
Mayor cannot bind city.

The mayor's authority to represent the city to external actors is significantly constrained by the charter powers enumerated for the city manager as the chief administrative officer of the city. **The mayor cannot bind the city as a matter of law and the charter prohibits the mayor (or council) from sidestepping the city manager to work directly with city departments without the city manager's authorization.**¹⁶ Practically speaking, the effective exercise of the mayor's authority as head of the city requires general alignment and support of the city manager, which is consistent with the mayor's appointing authority over the city manager position. The charter allows the city manager and mayor to work together to facilitate and further the city's interests in external relations.

For example, consider if an organization were to approach the mayor about investing in a new operation or business within Cincinnati. **The mayor has the authority to engage the organization and advocate for the interest of the city. At the stage where the city administration is required to be involved, however, the mayor must work with the city manager to** (1) engage city departments, (2) approve and execute a contract, and (3) implement the contract. In addition, if legislation were required, the mayor and administration would engage city council so that city council can exercise its legislative function (e.g., to approve certain types of economic or community development incentives). The role of council in relation to development deals and other external facing negotiations is discussed at length below.

3. Charter Roles in Economic Development

The above discussion provides context for exploring the roles of the city manager, mayor, and council in connection with economic development deals. Recent events highlight the hazards of blurred charter roles with regard to economic development deals.

Consummating economic development deals involves both legislative and administrative functions. Economic development deals regularly require council ratification of development agreements that include, for example, council-required approvals of zoning and permitting relief, economic incentives, and sale or transfer of city property. The negotiating and vetting of these deals involves the administrative work of a professional corps of development officers and economic development attorneys that advocate to protect the municipal corporation and the public interest in development deals while minimizing the influence of politics and self-interested parties. The city manager supervises the department of **community and economic development**. The city solicitor supervises economic development attorneys. Neither council nor the mayor have any direct role in their supervision or function.

Denial of council approvals can be fatal to a development project and, accordingly, developers have strong incentives to pressure council to engage the administration on their behalf or to lobby for council support. Similarly, neighborhood communities may

¹⁶ Charter, Art. IV, Sec. 2.

What the mayor can do regarding development.

have strong incentives to lobby for support (or denial) of a proposed development in their communities. Accordingly, council can be under significant pressure to influence the administration. The more contact council has with development officers or development attorneys—even for purposes of inquiry—the risk of (or appearance of) improper influence or interference increases.

As noted above, the mayor is different from council in that he has a charter basis for engaging external parties that are proposing to do business in the city, including in relation to specific project proposals. The mayor can discuss the proposed development with a developer, advocate for or against the proposed development in the interests of the city, and work together with the city manager to represent the city as relates to a development project. As previously noted, the mayor's role is limited by city manager's sole power to direct the administrative service and the fact that he cannot vote on any legislation. The charter nevertheless allows the mayor to take an externally facing role representing city interests.

Council's authority is purely legislative, which in the development realm means (1) setting general policies applicable to economic development (e.g., tax incentive policy), (2) helping to communicate constituent concerns (including developers and the community) to the city manager for report and possible action, and (3) voting whether to approve the economic development project brought to council by the city administration¹⁷; and (4) voting on legislative approvals where required by law.¹⁸

Council may exercise its legislative authority to place conditions on development deals in furtherance of council policy. If council, however, were to impose conditions that interfered with the city manager's charter duties or were not supported by valid legislative policies, the city manager would have the authority to decline to enter into authorized contracts or otherwise implement those aspects of the ordinance that run afoul of the charter.

If council disagrees with a deal, it must engage CM, not developer or communities or special interest groups. Developers and others must be told this. Council must ask CM to resolve.

In addition, it bears emphasis that the charter provides that council's relationship to development deals should be through the administration. Only the city manager is empowered to negotiate and execute a development contract (with the exception of the mayor's limited role, discussed in Section 2). If council disagrees with the terms of a deal presented by the administration, the charter requires that council members engage the city administration—not the developer—in exploring options. When council engages the developer in direct negotiations it not only violates the charter, it cuts the administration out of the process which undermines the city's leverage and undercuts the integrity of the development approval process. If a developer believes it can circumvent the administration by negotiating directly with one or more councilmembers, then developers

¹⁷ See, e.g., *State ex rel. Citizen Action v. Hamilton County Bd. of Elections*, 115 Ohio St. 3d 437, 444 (2007).

¹⁸ Examples of where economic development projects require Council action include: authority for an abatement, appropriations, vacations of the public right-of-way, and transfers of public property.

have strong incentives to curry the favor of legislators and use their political leverage to circumvent administration proposals. The same reasoning applies to special interest groups that may pressure council to renegotiate the details of development deals on an ad hoc basis and bypass the administration. If council has concerns about a project before Council, then the option available under the charter is for council to work through the city manager.

This opinion does not restrict the lobbying of the elected officials by members of the public. Rather, the question you have posed is whether members of council may negotiate deals with third-party developers or intervene in such negotiations. The answer is that the negotiation of development deals is an administrative function, not a legislative function. It is no doubt tempting for public-interest-minded city councilmembers to try to broker a deal or otherwise intervene in development negotiations between the administration and third parties. Such actions, however, run contrary to the charter and undercut the city's development professionals by hampering the administration's ability to negotiate for the public interest.

4. Recommendations

You have asked the solicitor's office for recommendations for steps the administration could take to support charter roles. The following items are not exhaustive and represent options you could implement. They aim to promote the formal separation of administrative and legislative affairs by, for example, providing council with new information gathering tools to improve upon current practices.

As background, it is useful to acknowledge that the city has limited resources that must be deployed efficiently to deliver services and achieve public policy objectives. As such, it is crucial for the city manager to be able to prioritize the work of the administration, which can be difficult without full knowledge of numerous council inquiries being made to the administrative service. In addition, administrative staff understandably want to be responsive to council, which can be difficult when an employee perceives no practical difference between an inquiry and a directive from the employee's perspective. Adding structure to council inquiries and formalizing responses can increase transparency, both within the city and with the public. We therefore recommend issuance of an administrative regulation to formalize and implement any purely administrative actions you deem appropriate.

As city manager, you could:

- A. Require that inquiries from elected officials' offices to the administrative service concerning city business (some or all) be submitted centrally through the city manager's office.

- B. Direct city staff that receive inquiries from council members or the mayor on development deals (or in other areas) **to refer the requests directly to the city manager's office for coordinated response**. Requests for substitute versions of development legislation could be similarly routed through the city manager's office to be evaluated in the context of administrative authority. Responses could be issued as council-wide reports when relevant for council as a whole.
- C. Establish a system for **constituent inquiries received by council members to be forwarded to the city manager's office** for tracking and response, possibly based on the city's customer service request tracking and response system.
- D. Introduce legislation that grants the city manager authority to enter into certain types of economic development transactions or development deals **without additional city council review**. Categories for delegation could be based on value of a deal or the nature of the proposed incentive.
- E. Encourage the use of **executive session** to provide timely updates to the council as a whole. This would eliminate time-intensive one-on-one conversations, permit all members of council to receive the same information simultaneously, and protect the confidential business information of economic development assistance applicants.
- F. **Explore options to limit applicants for city economic incentives from directly lobbying councilmembers until the administration has finalized its offer of economic assistance (if any).**

Please contact me if you have any questions. Thank you.

Enact ordinances that clearly spell out to city administrative officials and council the roles of the mayor and council and what each is allowed to do and require all inquiries by council members be reported to the CM and be publicly available.

Provide whistleblower protection to administrative officials allowing them to advise council members and CM that interaction by the council member is believed to be inappropriate or should be addressed to the CM.

Tell developers of the roles of council, mayor and CM when any interest is expressed in development and at some point have the developer sign a statement that the roles will be followed.

Require council members to disclose any non public contact by a developer or special interest group concerning a development.

Once a developer submits a development proposal, prohibit developer from lobbying council except in public forums.

ATTACHMENT

CONFIDENTIAL/ATTORNEY-CLIENT PRIVILEGED DOCUMENT

Date: September 2, 2015
To: Mayor, Members of Council, City Manager
From: Paula Boggs Muething, City Solicitor *PBM*
Subject: Relative Powers of Mayor, City Council, and City Manager

This memorandum is in response to a request for a legal opinion from Councilmember Simpson and the Mayor, dated May 21, 2015. This request was related to the City budget and legislative process, specifically to identify and analyze the relative duties and powers of the Mayor, City Council, and City Manager under the Cincinnati Charter.

I. Background

The City of Cincinnati enacted the City Charter pursuant to Article XVIII of the Ohio Constitution in 1926. It instituted a council-manager form of government, which has evolved over several Charter amendments. The most radical Charter amendment occurred in 1999 (effective 2001); these amendments strengthened the office of the Mayor, with relative impacts on both roles and powers of the Manager and Council. This amendment was known at the time as Issue IV.

Prior to the 1999 Charter amendments the Mayor was not afforded independent authority but was a member of City Council, attaining the position by obtaining the most votes in the Council elections. This emphasis on obtaining the most votes was criticized as providing a disincentive to coalition building in favor of a comprehensive legislative agenda and preventing individual Council members from supporting the proposals of other members.¹ Under this Charter, the office of the City Manager did not provide the kind of directly-accountable leader that some sought because the City Manager was unelected and served at the pleasure of an often-shifting Council majority.

A group called Build Cincinnati worked throughout the summer of 1998 to meet with the community to propose reforms. Initially, Build Cincinnati proposed an executive mayor who would be the head of the executive and administrative functions of the City and exercise veto power. However, the executive mayor proposal did not have the support of many other civic groups, and Build Cincinnati and these groups met in early 1999 to reach a compromise measure that became Issue IV.

¹ William K. Woods and Edward Lee Burdell, "Preparing Citizens for the May 4th Election: A Guide to the Proposed City Charter Amendment" April 1999, p. 10 (hereinafter "League of Women Voters Voter Guide").

A. Issue IV Overview

Issue IV retained the council-manager form of government, but enlarged the importance and power of the Mayor. A key member of Build Cincinnati described Issue IV as follows:

Along with the mandate from the voters, the Mayor will have a critical role in the hiring and firing of the City Manager, the ability to veto Council legislation, and the ability to appoint Council committee chairs. The Mayor will have the clout and the authority to lead the City; the voters will gain the power to hold the Mayor accountable.²

The primary elements of Issue IV were (1) direct election of the mayor; (2) retaining the professional management of the City Manager; (3) providing the mayor with administrative and legislative powers; and (4) empowering the Mayor as the public face of the City. Issue IV proponents viewed the proposed changes as necessary to ensuring that the mayor was the political and policy leader for the City and directly accountable to the voters.³ The following chart provides an overview of the amended provisions contained within Issue IV.

	Changed Provision	Former Provision
Election	Direct election of Mayor, with a non-partisan primary and head-to-head general election; Council of nine members separately elected.	Top vote getter of 9 Council candidates becomes Mayor
Term	4 years	2 years
Role at Council Meetings	Presides at Council meetings, but not a member of Council; can call special meetings of Council	Presides over Council meetings and votes; the mayor alone cannot call special meetings of Council
Salary	Mayor receives double the Council salary	Same for all members of Council, including Mayor
Mayoral Succession	Vice Mayor becomes Mayor, election for unexpired term in some circumstances	Council chooses Mayor from its members for rest of term
Term Limits⁴	Mayor: two 4 year terms; Council: four 2 year terms	Four 2 year terms for all

² *Id.* at 11, quoting Pat Dewine.

³ *Id.* at 10-11.

⁴ Amended in 2013 to provide for 2 consecutive 4 year terms.

Role of Vice Mayor	Appointed solely by Mayor from members of Council; fills in when Mayor absent but cannot exercise veto, appointment, or removal powers	Appointed by Council; fills in when Mayor absent
Legislation	Mayor may propose, introduce and veto legislation but does not have a vote on the Council. Council may propose, introduce, vote, and override veto of legislation with 6 votes.	Council and Mayor propose, introduce and vote on legislation.
Legislative Assignment	Mayor assigns all legislative matters to the appropriate committee	Clerk of Council assigns legislative matters to appropriate committee
Veto and override	Mayor may veto; Council can override with 2/3 vote	No veto
Official head of the City	Mayor is recognized as the official head and representative of the City for all purposes except as provided otherwise	Mayor is the ceremonial head of the City
Committees and Committee Chairs	Council forms committees. Mayor appoints and removes committee chairs without Council consent	Council forms committees and chooses chairs
City Manager	Only Mayor may appoint City Manager subject to Council approval. Only Mayor may initiate removal of City Manager with Council approval	Appointed and removed by a majority vote of Council
Budget	Mayor reviews and transmits budget estimate prepared by City Manager and submit to Council, with comments, within 15 days of receipt	City Manager prepares and submits the budget estimate to Council
City Manager Reports To	Mayor and Council	Council, including Mayor

Many of the proposed changes were vigorously debated,⁵ however, all groups agreed that Issue IV would result in a significant increase in mayoral powers. Proponents of Issue IV asserted that passage would empower the voters by allowing them to directly elect a Mayor and would “establish a system of government that fosters leadership and accountability.”⁶ Changes such as the Mayor’s ability to appoint committee chairs, refer legislation to committees, and veto legislation would provide incentives for the mayor and the council to come together on specific legislative agendas.⁷ The provisions related to the hiring and firing of the City Manager would incentivize cooperation and collaboration between the Mayor and the City Manager.⁸ And, finally, establishing the mayor as the official head and representative of the City clearly identifies the mayor as the policy and political leader of the municipal corporation.⁹

Upon passage of Issue IV, the changes to the Charter became effective in 2001.¹⁰

II. Statutory Construction

As the Ohio Supreme Court stated in *State v. Cress*, “[i]n construing a statute, it is the duty of the court to give effect to the words used in a statute, not to insert words not used.”¹¹ When confronted with a question regarding charter construction, terms that are defined within the document are given the prescribed meaning but undefined language must be construed according to the ordinary and common usage.¹² In construing the open meetings provision of the City Charter, the First District similarly held that, where the language of the Charter is clear and unambiguous, “the charter means what it says.”¹³

In the case of charter amendments, a court will examine the provision as it existed prior to amendment and analyze the amended provision by giving effect to each word.¹⁴ A court must assume that each word was added for a specific purpose, and is not superfluous, and the court must give effect to the words used in order to ascertain the legislative intent.¹⁵ Thus, the starting point is the plain language of the enactment. If the plain language is clear and unambiguous, then a court simply applies the language

⁵ Howard Wilkinson, *Issue 4 Divides Interest Groups*, Cincinnati Enquirer, May 3, 1999.

⁶ League of Women Voters Voting Guide, p.11.

⁷ Howard Wilkinson, *Issue 4: The Good and the Bad*, Cincinnati Enquirer, April 27, 1999.

⁸ *Id.*

⁹ *Id.*; League of Women Voters Voting Guide, p.11.

¹⁰ Howard Wilkinson, *Cincinnati Voters Opt for Strong Mayor*, Cincinnati Enquirer, May 5, 1999.

¹¹ 112 Ohio St. 3d 72, 77 (2006)(citing *State v. S.R.*, 63 Ohio St. 3d 590, 595 (1992) and *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50, paragraph three of the syllabus (1988)).

¹² *State ex rel. Moore v. Malone*, 96 Ohio St. 3d 417, 421 (2002).

¹³ *State ex rel. Gannett Satellite Info. Network, Inc. v. Cincinnati City Council*, 137 Ohio App. 3d 589, 592-593 (1st Dist. 2000).

¹⁴ *Columbus-Suburban Coach Lines, Inc. v. Public Utilities Commission*, 20 Ohio St. 2d 125, 126-127 (1969).

¹⁵ *Id.*

without interpretation or construction.¹⁶ If the language is unclear or ambiguous, then a court considers, *inter alia*, where the language appears and the text surrounding the provision in question, construing the provision *in pari materia*, and considers the enacting legislation to ascertain the legislative intent.¹⁷

Thus, in analyzing provisions or phrases in the City Charter, where the words are otherwise undefined, a court will use the plain and ordinary meaning of the words to inform its interpretation. Where the same word occurs in different sections of the Charter it will generally be understood in the same sense when applied to the same subject-matter. The meaning of a word or phrase may also be ascertained by the accompanying text. Every word, phrase, clause, and sentence is presumed to have meaning and none will be regarded as superfluous, void, or insignificant. Where general provisions are followed by particular provisions, the general provisions are limited and restricted by the particular provisions.

III. Duties and Powers of Mayor, City Council, and City Manager

The duties and powers of the Mayor, City Council, and the City Manager, respectively, are set forth as follows. The amendments in Issue IV predominantly expanded mayoral powers. Each of the mayoral powers set forth as “exclusive powers of the mayor” was a direct result of the Issue IV Charter amendments. While the text delineating the exclusive powers of the Council and the City Manager was not necessarily amended as a result of the passage of Issue IV, those powers and duties were nevertheless altered as a result of and consistent with the expansion in mayoral powers, construing the Charter as a whole and *in pari materia*. Thus, all such powers and duties must be considered relative to the new powers granted exclusively to the Mayor. The result, as set forth in the following, is a system that combines a set of powers exclusive to the Mayor, Council, and Manager with a set of powers that are shared as between the Mayor and Council and Mayor and Manager.

A. Exclusive Powers of the Mayor

Pursuant to Article III, Sections 2-3, the Mayor is the official head and representative of the City for all purposes except as otherwise provided by the Charter. Prior to Issue IV, the Mayor was recognized as the official head of the City, “[F]or all ceremonial purposes, by the courts for the purpose of serving civil process, and by the governor for military purposes.” This language remains in the Charter; thus, the powers granted are in addition to those previously authorized. Determining the scope of this new power then requires looking to the Charter for any provisions that would expressly limit or define its effect. There is no express provision in the Charter otherwise

¹⁶ See *Bosher v. Euclid Income Tax Bd. of Rev.*, 99 Ohio St. 3d 330 (2003); *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St. 3d 50 (1988).

¹⁷ *State ex rel. Comm. for Proposed Ordinance to Repeal Ordinance No. 146-02 v. Lakewood*, 100 Ohio St. 3d 252 (2003).

designating an official spokesperson or external relations and affairs manager, and no implicit grant of such authority. Further, publications cited in this opinion make clear that the intent of this provision was to identify one clear leader, a “person in charge”, as the political and policy leader of the City.¹⁸ The clearest limitation on this power is the designation of the City Manager as the chief administrative and executive officer; this provision expressly limits the “official head and representative” authority. For example, the Mayor is not empowered to hire and fire employees in the administrative service, to conduct the day to day operations of the City government, to execute contracts or otherwise bind the City. However, the “chief administrative and executive officer” language pre-existed the enactment of Issue IV and, accordingly, the power and authority previously vested in the office of the City Manager by virtue of that provision is also limited consistent with the text of the newly enacted language.

In order to give effect to this new language, and construing the provisions of the Charter *in pari materia*, one can then surmise that the intent of this Charter amendment was to provide the Mayor with the authority to act as the singular voice for the municipal corporation and to be the representative for the City for external purposes. The statutory interpretation that leads to this conclusion is further supported by the practical consideration that multiple voices seemingly representing the City in, for example, a delicate political negotiation or media interaction, would conflict with the stated intent of identifying the “person in charge” at the City.¹⁹

The Mayor is also required to give the State of the City address. The Mayor alone may exercise the veto power and initiate the appointment or removal of the City Manager. In addition, all legislative matters must be assigned by the Mayor to the appropriate committee for consideration (an issue discussed in greater detail in a prior Solicitor’s opinion, which is attached hereto) and the Mayor has the exclusive authority to appoint and remove the Vice-Mayor and the heads of the Council committees.

B. *Exclusive Powers of the Council*

Article II, Section 1 vests all legislative powers in the Council, subject to the limits set by the Charter itself and the Constitution of the State of Ohio. Members of Council alone may vote on ordinances, resolutions, and motions. The legislative authority includes the appropriation of money/funds for specific purposes, including setting conditions on the expenditure of funds. Council also has the express authority to override any Mayoral veto with a 2/3 vote in favor of the vetoed legislation. In addition, Council is authorized to form committees and establish rules for the conduct of Council business; to designate successors to vacant Council offices; select the President Pro Tem; appoint the Clerk of Council and subordinate employees and legislative aides; and dispense with the rule requiring three readings of legislation.

¹⁸ See League of Women Voters Voting Guide, p.11; Howard Wilkinson, *Issue 4: The Good and the Bad*, Cincinnati Enquirer, April 27, 1999.

¹⁹ *Id.*

C. Exclusive Powers of the City Manager

Pursuant to Article IV, Section 1, the City Manager is the chief executive and administrative officer of the City. The City Manager exercises all other executive and administrative powers conferred by the laws of the state upon any municipal official, except as otherwise provided in the Charter. Only the City Manager may bind the City through contracts, and the City Manager has considerable discretion in the execution of those contracts. Additionally, the City Manager has the hiring and firing authority over the City Administration, with limited exceptions.²⁰ The Charter expressly provides that neither the mayor nor the members of the council shall interfere in any way with the appointment or removal of any of the officers and employees in the administrative service.

D. Shared Powers: Council & Mayor

As a result of the passage of Issue IV, the Council and the Mayor share some legislative powers. For example, both Council members and the Mayor are expressly authorized to call special sessions of Council and to propose legislation. The Charter provides instances where the Mayor can take action with the Council's consent. For example, the Mayor has the authority to recommend appointments to the various boards and commissions of the City but the Council must approve the selection. Also, in times of emergency, the Mayor is authorized to take command of the police, maintain order, and enforce the law, but only with the consent of the Council.

Of note, and somewhat unique to Cincinnati, is (1) the respective roles of the Council and the Mayor as legislation moves through committees to Council, and (2) involvement in the appointment and removal of the City Manager. These two items are discussed in further detail below.

1. Committee Process

City Council has the authority to organize itself and conduct business as it deems appropriate. This includes the formation of committees, defining the jurisdiction of those committees, and deciding upon which committees a Councilmember will serve. The Mayor, however, can appoint and remove the committee chairs without the advice and consent of Council. The Mayor refers legislative matters to the appropriate committees.

The appointment and removal of committee chairs allows the Mayor to shape the City's policy and legislative agendas. This influence is enhanced by the Mayor's authority to refer legislation to "the appropriate committee." The referral power allows the Mayor to determine which committee, and therefore which Council members, have the ability to

²⁰ The City Manager does not have this authority over the independent boards and commissions, legislative service, mayoral service, and the solicitor's assistants.

discuss and vote on items before they are approved for placement on the full Council calendar. Additionally, while the Charter does not require the Mayor to assign legislation to a committee within a specific time, concern has often been expressed that the Mayor could exercise a “pocket veto” by refusing to assign a legislative matter to a committee. To be clear, the Charter does not provide for a “pocket veto” of legislation. The Charter and the law of Ohio assumes and requires faithful execution of the duties of the office by all individuals acting in positions set forth therein. A more robust analysis of this issue is included in the attached opinion.

2. Hiring and Firing of the City Manager

Both the Mayor and City Council influence the hiring and firing of the City Manager, thereby exerting influence over the actions of the City Manager. The Mayor appoints the City Manager subject to approval by at least 5 members of Council. The Mayor must seek the advice of Council prior to a vote on the Manager’s appointment, which includes the opportunity for members to interview the candidates considered by the Mayor. If Council does not approve the Mayor’s candidate, the Mayor may submit another recommendation to Council or institute another search. Additionally, the Manager may be removed at any time at the pleasure of the Mayor and Council. However, the Mayor alone may initiate and recommend to Council the removal of the Manager, but any removal must be approved by a majority of Council.

The Mayor exercises significant, ongoing control over the Manager because the Mayor has the sole authority to select the candidates for City Manager that Council can approve and is the only person who may initiate the removal of the Manager. While this allows the Mayor to recommend only Manager candidates who will assist the Mayor with the implementation of the Mayor’s long-term agenda, it also results in the Mayor exercising some degree of control over the administrative offices of the City, and more so than is typical in a traditional council-manager form of government.

E. Shared Powers: Mayor and City Manager

The Mayor and City Manager share control over the budget that is presented to the Council and some control over the police force.

1. Budget Estimate

The City Manager prepares a budget estimate that the Manager sends to the Mayor. The Mayor must transmit the budget estimate to Council within fifteen days of his receipt and may include a letter commenting on the budget. The Mayor’s comments on the budget may provide an indication of the Mayor’s preferences, including items that may be vetoed. Effectively, the budget Council receives reflects the joint agenda of the Manager and the Mayor. There is nothing in the Charter that prohibits the Manager and the Mayor from working together to develop a budget that is mutually agreeable.

2. Control of Police Force

The Manager is the chief conservator of the peace and appoints the Police Chief, Executive Assistant Chief, and Assistant Police Chiefs. The Mayor, however, can take command of the police to maintain order and enforce the law in time of public danger or emergency with the consent of Council. During any declared time of public danger or emergency, the Mayor may, with the consent of Council, take command of the police, maintain order and enforce the law. (Article III, Sec. 2) This provision predates Issue IV.

Pursuant to Article XVIII of the City's Administrative Code, the Mayor is authorized during such periods to exercise any power or authority granted to mayors, administrative heads of cities or police chiefs by the laws of the state of Ohio.

IV. Conclusion

The Cincinnati City Charter, as amended in 1999, sets forth a unique system of government under which the City retains some of the hallmarks of a council-manager form of government while also granting the Mayor power and influence over both the executive and legislative functions of the City. This form of governance is distinct from the traditional council-manager form of government and the traditional executive mayor form of government. Thus, in determining the relationships between the various offices of the City, it is essential to consider the Charter itself, the express and implied powers granted through this document, and the way in which Charter amendments have altered those express and implied powers throughout the City's history. While this legal opinion has provided an overview of abstract legal principles, the true relationship between the various provisions and offices requires a fact specific analysis. The Solicitor's office will provide legal analysis as situations so require.

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