

**CITY OF CLEVELAND HEIGHTS
LAW DEPARTMENT
MEMORANDUM**

TO Charter Review Commission

FROM: Elizabeth Wells Rothenberg, Assistant Law Director

cc: Susanna Niermann O’Neil, Vice City Manager
L. James Juliano, Jr., Law Director

RE: Law Department Review of Proposed First Amended Charter

DATE: November 25, 2018

Attached please find a redlined version of tracked changes and comment boxes of the Law Department’s review of the draft First Amended Charter (the version circulated in advance of the November 18, 2018 Charter Review Commission). Below follows a summary of general issues identified for reviewed and also detailed discussions of issues flagged in the attached redlined version by references to “see memo” and which may require a decision by the Commission.

GENERAL ISSUES (NOT REQUIRING CRC DISCUSSION)

General Formatting Changes

- Renumbering of Articles and Sections, as discussed
- Arabic numbers in parenthesis after written numbers
- Oxford commas throughout
- Defined terms in quotes and capitalized

- When referencing a section or article within itself, no need to name the section, just capitalize to “this Section” or “this Article”
- Proper use of “less than” and “fewer than.” *Less* refers to quantity, *fewer* to a number. Consider switching “at least” to “no fewer than.”
- use of smart apostrophes and quotes throughout
- “Shall” wherever action is mandatory

General Ambiguity (throughout)

Some terms are undefined and are not terms of art and thus are ambiguous. A need for clarity is noted where needed.

General Laws (throughout)

There are references throughout the Charter to “general law.” This has a very particular meaning to those familiar with the Home Rule Doctrine. While municipalities have unfettered rights to determine their own local self-government, the same blanket of authority does not apply to their right to regulate local police, sanitary, and other similar regulations. In exercising such police powers, municipalities are limited to those that do not conflict with “general laws” of the State. This is set forth in Ohio Constitution Article XVIII, Section 3 which states: “municipalities shall have the authority to exercise all powers of local self-government, and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” There are numerous cases interpreting whether a state law is a “general law” to determine whether or not a charter municipality may adopt its own home rule over a particular matter. The definition of “general law” is constantly in flux and is subject to

judicial interpretation. Some examples include detachment of territory, annexation, prevailing wages law, and public employee collective bargaining laws. We recommend that term “general law” should only be used when referring to laws exercising police power that are not subject to Home Rule or perhaps not referring to “general law” at all to make the charter more accessible to all.

Please note that the Ohio Constitution additionally limits the extent of Home Rule without a “general law” analysis. This includes, for example, the 10 mil limitation on taxation, the lending of credit, the right to initiative and referendum (the procedures are subject to some rule), charter amendments procedure, and civil service appointments and promotions tied to merit and fitness.

Accordingly, all references to general laws have been the subject of the review and suggested edits are made within the document. Generally, the term “laws of Ohio” has been suggested.

Ordinances, Resolutions, Laws (throughout)

References to “ordinances,” “laws,” and other similar references were also reviewed. Where appropriate such references were expanded to include “ordinances and resolutions,” or “ordinances, resolutions, motions/other actions of Council.” In cases where Council should be mandated to pass an ordinance, “by ordinance” remained unexpanded. “Codified” was added to “ordinances” where appropriate.

SPECIFIC ISSUES REQUIRING CRC DECISION

Power of Council (Section 3.1)

Section 3.1 needs to be more definitive about the powers of Council. “All powers of the City” would likely not pass constitutional muster, as it is vague. See charter and comment box for suggested language. Note that Council currently has more than just legislative powers under the codified ordinances. It is the final administrative decision maker concerning use variances. This is a quasi-judicial function, not legislative.

Removal (3.3) and Vacancies (3.4)

Section 3.4 concerning Council vacancies does not explain *how* a vacancy occurs (i.e., a resignation or removal). Section 111.28 of the Codified Ordinances, for example, states, “The resignation of a member of Council shall not take effect until the resignation has been accepted by vote by a majority of Council members exclusive of the person tendering the resignation.” We recommend that the Commission consider drafting its own procedure concerning resignations. Note the codified ordinance does not discuss what happens when a person is denied a request to resign. If a resignation procedure is added that procedure should also recognize that a vacancy also could be created by a removal (Section 3.3). Death and physical or mental inability to serve should be considered as possible basis for a vacancy. More specifically, should Section 3.3 also include physical and/or mental inability as another basis for removal?

Equal Opportunity Employer (3.6)

Section 3.6 states that the City shall be an “equal opportunity employer.” The City bans employment discrimination in the entire City beyond federally protected classes. Protected classes in the City include an individual’s race, color, religion, Sex, Familial Status, national origin, Disability, Sexual Orientation, or Gender Identity or Expression. Refer to Chapter 749 of the Codified Ordinances for more information. Consider spelling out what equal opportunity means (as suggested in the edits) otherwise it may be interpreted to be limited to federal and/or state protected classes.

“Rules” in General Provisions (3.8)

There are many references to the “rules” of Council without a clear mandate that written rules should be promulgated. This may lead to confusion about how to proceed if there is supposed to be a rule to govern but there is no mandate to draft rules. Currently, there are no written rules of Council, although some procedures are codified. References to “rules” are noted throughout and a requirement to have the rules actually drafted in writing could be added to Section 3.8.

Agenda Power to President (3.11)

The Mayor currently has power to draft the agenda. Under Roberts Rules, Council should adopt the draft agenda be it becomes binding. Before this adoption, agenda items may be added or removed. This is currently done implicitly or in some other informal process. Consider formalizing the process and/or enumerating the power draft agenda to the President. How the agenda can be amended should be spelled out.

President Pro Tem (3.11)

Consider adding to Section 3.11 a procedure for Council to choose a President Pro Tem. It is quite possible for the President and VP to miss the same meeting. Under Roberts Rules, the Clerk of Council would call the meeting to order and then Council would immediately elect a President Pro Tem to preside. The majority of the present members are required to elect President Pro Tem.

Vice City Manager Requirement (4.3)

Section 4.3 sets qualifications for the Vice City Manager. This is inconsistent with the discussion about Law Director (Section 5.3) where the Commission concluded there was no reason to dictate requirements. The needed qualifications in a Vice City Manager seem even more subjective and based on the City Manager needs than the Law Director. Consider deleting “on the basis of executive and administrative training and experience appropriate to fulfill the responsibilities of the office.”

Administrative Office and Departments (Article Five & Section 10.3)

The CRC determined to list the existing departments in Article Five. However, several curiosities exist in the current structure and, as a result, reading Section 5.1 and 5.2 together may not have its intended effect. Section 10.3 in Ethics is also possibly compromised.

The listed departments do not all have directors. I.e., there is no current Director of the Department of Planning and Development but rather there is a Director of Planning and a Director of Economic Development. Also there is no Director of Community

Services. To further complicate things, there also are Directors who do not head departments: the Director of Human Resources and the Director of Communications and Public Engagement and also the Director of Planning and a Director of Economic Development (as these departments are combined). This means the City Manager would have to restructure and possibly demote people to conform to the charter requirements as drafted. This is likely not the intent.

Additionally, Housing, Fire, Police, and Building Departments are all under the Department of Public Safety. The Fire Chief, Chief of Police, and Housing Director and Building Director thus would not require Council confirmation. Only the City Manager, as Director of Public Safety, would require Council approval. While this is not a legal problem, there is an additional query as to whether it is what CRC intended.

Further, CRC should consider whether it wants to grandfather in existing directors. Massive instability could result if, on the effective date of the Charter, Council must affirm each and every existing director.

Additionally, see Section 10.3 for the public ethics requirement that “directors of departments” take an oath and disqualifying offenses. The same quandary regarding who is meant to be covered is presented. *I.e.*, Fire the Chief, Chief of Police, and Housing Director and Building Director would not be covered by either requirement.

Charter Amendments By Petition (Article Eight)

Article Eight needs clarity concerning which sections within the Article apply to Charter Amendments that were initiated by citizens. Cross-references to Article Thirteen

also should be added. Suggested changes are included in the redlines and comments.
(This may be only a drafter issue.)

Fiduciary Duty (Section 10.3)

To create a fiduciary duty likely creates liability to a person who breaches that duty, possibly personal liability. This unprecedented requirement would create a disincentive for potential employees to come work for the City. Consider deleting “fiduciary.”

Inconsistent Legislative Measures (8.4) & Amendments (Article Thirteen)

The last sentences of Section 8.4 and Article Thirteen means that that if there are two (2) or more inconsistent issues on the ballot, the issue receiving the largest affirmative vote wins, provided it gets more than 50% of the votes. But what happens if none get a majority (*e.g.*, there are three inconsistent issues) – does nothing pass? Consider deleting the majority requirement, as suggested.

Civil Service Commissioners Qualifications (12.1)

As currently drafted, Civil Service Commissioners cannot work for any municipality. This means, for example, an attorney for the county could not serve as a commissioner. Not sure if this was intended, or of it only meant to exclude City employees.

I will be attending the meeting November 29, 2018 and look forward to discussing any of the suggestions with you all in person.