



# City of Cleveland Heights Charter Review Commission

## Decisions and Rationales

29 November 2018  
Council Chambers  
Cleveland Heights City Hall

Charter Review Commission: Present; Patrycja Ajdukiewicz, Craig Cobb, Jessica Cohen, Vice Chair, Michael Gaynier, John Newman, Jr., Chair, Howard Maier, Carla Rautenberg, Vince Reddy, Maia Rucker, Katherine Solender and James Vail. Absent: Randy Keller, David Perelman and Sarah West.

### 1. Acceptance of Decisions and Rationales from 15 November

The Chair noted that the draft charter circulated for the meeting, including the redline showing recent changes, erroneously retained a default provision regarding setting of Council salaries, under which the salary recommendations made by the Civil Service Commission would go into effect if Council failed to act on the recommendations. This will be corrected in the next version.

The Decisions and Rationales from the meeting of 15 November were accepted by acclamation.

### 2. Law Department Review of Draft Charter.

As planned, the Law Department had reviewed a full recent draft of the charter and had prepared for the Commission both a mark-up of the draft with comments and suggestions, and an overview memorandum with more detailed observations. Assistant Law Director Elizabeth Rothenberg, the author of the materials, was present at the meeting to discuss them and to answer questions. She had undertaken and completed her very substantial work on the draft despite a very tight schedule and an upcoming planned move to a new position outside of city employment. The Commission expressed its sincere appreciation for the extraordinary effort that she put into her review, as well as for the sustained attention and support she has given to the Commission throughout the entire year-long charter review process.

-- General items

The initial portion of the memorandum offered certain nonessential formatting and language suggestions for consideration; noted the need for clarification from time to time in the draft; commented on references in the draft to “general law,” and gave suggestions for how to analyze and possibly replace these references with other terms; addressed circumstances in which actions by Council might more appropriately be reflected through the terms “resolutions” and “motions/other actions,” in addition to “ordinances;” and stated a desirability in certain circumstances to add “codified” as a modifier for “ordinances.” All of these items are reflected in edits on the Law Department markup and will be considered for adoption in the drafting process. None warranted discussion at the meeting, except for certain instances in conjunction with substantive points treated in the discussion that followed.

-- Potentially Substantive Observations

Power of Council

The first item reviewed was the statement of power of Council in section 3.1. The draft changed the basic statement from “legislative power” to “all powers” other than as limited elsewhere in the charter or by state law, the purpose of the change being to address concerns that Council could legitimately wish to exercise authority beyond what could be regarded as purely legislative. The Law Department felt this was unduly vague and might not satisfy constitutional requirements. The suggestion was to retain “legislative power” as the base description, along with the concept of “additional powers” that might be “expressly granted” elsewhere in the charter, but to add an additional clause that explicitly enable Council to expand that power, thus: ... “and such additional powers as may be expressly granted by this Charter or by ordinance, thereafter codified.” As part of the consideration of this point, there was discussion of the term “codified” ordinance,” which refers to a collection of laws organized by topic and sequentially numbered within topic, and in readily available in that form. Many ordinances, such as for example those setting annual salaries, are not codified. The Commission accepted by consensus the Law Department’s suggested change in describing Council powers, including the reference to codification.

Length of Council Term

Referring to the same section, the Law Department had originally suggested that, in describing the length of the term of Council members as four years, the Law Department originally recommended eliminating the phrase “or until his

or her respective successor is chosen and qualified,” but following discussion, that recommendation was withdrawn.

Jim Vail moved to accept the agreed change to section 3.1 as discussed. Jack Newman seconded the motion.

**Vote on the Motion:** Yes – 11                      No – 0                      Abstain – 0

### Council Vacancies and Removal

Discussion turned to Council vacancies and removal of Council members. As to vacancies, the Law Department noted the absence from the charter of specifics for how vacancies occur, including for dealing with resignations. It was agreed by consensus that these items were the type of detailed matters with which a charter ought not attempt to deal; in this connection, it was noted that there is already an ordinance dealing with the mechanics of resignations.

As to removal, it was suggested that perhaps in addition to the particular conduct-based justifications, the Commission may want to consider including the notion of physically or mentally unable to perform the duties of the office as a ground for removal. Following discussion about practical and other difficulties that could arise in attempts to administer a provision like this, including in particular potential mechanisms for making the determination that would be required, was decided not to add a disability provision, but to regard it as fairly falling under implied authority of Council to determine if a member could serve.

### Council as Judge of Qualifications

The attention to removal prompted reference to the first sentence of the section, under which the Council is deemed the judge of the election and qualification of its own members. Some expressed an inability to understand the provision and concern about how it might be applied. Others noted that it is a standard provision found in the fundamental documents establishing legislative bodies generally, including both houses of the U.S. Congress, as to which the Constitution (read aloud by the Facilitator) says that the House and the Senate shall each “be the judge of the Elections, Returns and Qualifications of its own Members” and “with the Concurrence of two-thirds, expel a Member.” It was indicated that further research was warranted and would be undertaken.

Jim Vail moved to strike the first sentence of Section 3.3 conferring authority to Council to judge qualifications and election of members. The second

sentence would start with, “The Council” and become the first sentence of the section. Howard Maier seconded the motion.

**Vote on the Motion:** Yes – 8      No – 3      Abstain – 0

As a follow up, in explanation of one of the no votes, it was suggested that the item had been passed without sufficient information on the legal significance of the sentence and thus of the consequences of its elimination.

In response, Jim Vail sought to repeat his motion, but with the addendum that it was subject to there being further research on the provision. Legal staff noted there was no need for such a motion. With the expectation of further information forthcoming at an ensuing meeting, there could be additional discussion and a change made at that later time. In view of that comment, the motion was not pursued.

#### Possible Need for Definitions

A related discussion ensued about the need, or not, to set out (perhaps in a glossary that would include terms used elsewhere in the Charter) definitions of terms such as “misconduct” and “malfeasance” that can be grounds for expulsion of a Council member. The argument in favor was that the boundaries of the terms were not clear and specific. Others suggested that it would be difficult if not impossible to attempt specification of all types of behavior that could prompt removal of a member. Moreover, attempting to define terms that had a usage history could lead to contested interpretation, could be mistakenly under-inclusive, and could inject rigidity where adaptability to changing circumstances and interpretations would be desirable. It was concluded not to go with definitions but rather continue the current approach of relying on Council to exercise its judgment regarding application of the standards for removal.

#### Possible Need for Written Council Rules

Discussion turned the notion of “rules of Council,” a phrase that appears in several places in the Charter (including with respect to removal of Council members), and in particular whether there should be a provision requiring that any such “rules” be in writing. Some “rules” might already appear in writing, such as in the City’s administrative code, that is, codified ordinances, but many practices of Council are not written down, and there is no comprehensive compilation. After evaluating the burden of creating and staying current on a rulebook and existence (or not) of articulable problems with the current system such that a rulebook would be necessary, the

Commission determined that a requirement for a written anthology of rules would not be included in the Charter.

Scope of Equal Employment Opportunity

The final paragraph of Section 3.6 sets an equal opportunity policy for employment by the City. It was noted by Law staff that, as articulated in the current charter, the policy might be taken to refer to the scope of protection only under federal and possibly state law, whereas the City, by ordinance, provides broader protection. Consideration was given to setting out in the Charter a specific list of all classes protected in the City, but that idea was not adopted. Among other things, that approach might prove under-inclusive and might inhibit the City’s ability to react to changing circumstances in the employment rights sphere other than via a charter amendment. Focus turned to the potential for using a more general reference to protected classes as understood within the jurisdiction of the City, which would include those covered by any of federal, state or local law. This would provide a broad foundation of equal opportunity and allow new developments to be incorporated without having to change the charter.

Vince Reddy moved to revise the existing paragraph to state equal opportunity by reference generally to all protected classes recognized within the jurisdiction of City. Patty Ajdukiewicz seconded the motion.

**Vote on the Motion:** Yes – 10                      No – 0                      Abstain – 1

“Vote of the People” v. “Initiative”

Brief consideration was given to the final phrase in Section 3.8, which noted that the kinds of ordinances covered in the section could be changed or repealed by, among other means, “vote of the people.” Since this phrase appears to refer only to an initiative process (not also to referendum, which involves a pre-effectiveness challenge an ordinance adopted by council, rather than, as here, creation of a new ordinance by vote of the citizenry), it was suggested that a better approach would be to say so directly and explicitly. The Commission agreed to substitute the phrase “initiative under section 8.1 for “vote by the people.”

Council President to Prepare Agenda

Following a brief discussion on a recommendation of the legal staff, the Commission determined to add a specific clause to Section 3.11 specifying that the President of Council would be responsible for preparing the agenda for Council meetings. Agenda setting is seen as the most important function

differentiating the President (who is also concurrently the Mayor, although that title would be eliminated in the new charter) from other members of Council and is the principal justification for the President's larger salary. This is currently how matters operate in fact, but nothing in the existing charter addresses the topic.

### President Pro Tem

In addition, staff noted that both the President and Vice President may be absent from a meeting, in which case there would be a need for a President Pro Tem to direct the meeting. Currently, if the President and Vice President were both absent, this would leave at most five members at the meeting. The current charter does not address how the Pro Tem would be designated, but the view is that at least four affirmative votes, a majority of the entire Council, would be required for the purpose. The suggestion was to embed in the charter the applicable provision from Robert's Rules of Order, which sets a vote of a majority of those present as the standard, thus, in the City's case, reducing the necessary vote from four to three.

Patty Ajdukiewicz moved to include in the charter a provision on President Pro Tem, and to provide that election occur as suggested in the discussion, via reference to Robert's Rules. Jim Vail seconded the motion.

**Vote on the Motion:** Yes – 10                      No – 0                      Abstain – 1

### Statement of Qualifications for Vice City Manager

Discussion turned to the clause in Section 4.3 prescribing a general "basis" for the City Manager's selection of the Vice City Manager. The legal staff noted that setting what amounted to a qualification appeared inconsistent with other decisions to limit the setting of specific qualifications in order to generate as broad a pool of candidates as possible, and instead to rely on the process of selection/confirmation to ensure selection of the best candidate for the job.

Mike Gaynier moved to remove the statement of basis for selection of the Vice City Manager. Jessica Cohen seconded the motion.

**Vote on the Motion:** Yes – 11                      No – 0                      Abstain – 0

### Coverage of Fiduciary Duty

At the suggestion of the staff, the discussion moved ahead to the new ethics article, and in particular the first paragraph of Section 10.3, under which a fiduciary duty to the City is imposed on all directors of administrative

departments. It was suggested that this is unusual and imposes a major duty on offices not all of which need that level of duty. The Commission agreed by consensus that, as among directors of administrative departments, a fiduciary duty would be recognized only for the directors of Law and Finance.

#### Competing, Conflicting Initiatives

Staff raised a question about clauses in Section 8.4 (legislative initiative) and Article Thirteen (charter initiative) under which, in the event of two or more competing, inconsistent initiatives, the one with the most votes would win, provided it received a majority of votes. The stated concern was that if there were three or more provisions, there may be none that gets a majority, and so perhaps the majority requirement should be eliminated, leaving the victor as the one with the plurality. But upon discussion, it was recognized that the hypothetical competing measures were not mutually exclusive as to receiving votes; that in fact, voters could vote for more than one; and that a majority of votes not only could be, but should be, required, lest all proposals be defeated but the one with the largest number of affirmative votes, no matter how small, come into effect. The question was withdrawn and the proposed change not further pursued.

#### Qualification for Civil Service Commission

Discussion moved on to consideration of the portion of Section 12.1 that provides that no one holding a “municipal office or employment” is eligible to serve on the Civil Service Commission. The provision appeared to be aimed at keeping Cleveland Heights personnel from serving on the Commission, not at forbidding those serving other local government. In fact, a current member of the Commission is employed by Cuyahoga County (admittedly, not strictly a municipality). The Committee agreed that there was no reason to prohibit persons employed in government jobs outside the City from service on the commission, and so a change will be made accordingly.

#### Administrative Departments and Directors

There was an extensive discussion of the concept of “departments” and “directors” as those terms are used in the charter and as used in daily operations in the City, the two not necessarily being consistent. Thus, for example, there seven “departments” presented on the published organization chart of the City, but several other units, some underneath one of the seven, and some separate and outside the seven, referred to on their own as “departments,” such as police, fire and economic development. Similarly, there are “directors” responsible for functions, such as human resources and management information services, that are not within any of the seven

departments. All of this was recognized as being the product of exigencies of daily operation of a complex municipal apparatus, with much fluidity over time, as required to respond to personnel and other needs.

The proposed charter would require Council confirmation of “directors,” meaning those in charge of the seven published departments, but not meaning “directors” performing other functions. The determination was to recognize and designate these seven as “Administrative Departments,” with initial capitals in the charter, and to recognize their heads as “Directors,” also with initial capitals in the charter. Only these require Council confirmation. Also, this same usage and capitalization convention would apply in Article 10 on ethics. To the extent Council concludes that a particular function not within one of the seven departments is important enough to warrant that Council have a formal hand in the decision as to its head, Council can pass legislation making it an Administrative Department. Similarly, to the extent Council concludes that an existing Administrative Department does not warrant that level of attention from it, it can abolish it as a separate Administrative Department. The Commission determined that the report that will accompany the proposed charter will call Council’s attention to the fact that the seven Administrative Departments have been included in the charter because it is understood that this reflects the current chosen method of organization, but that Council may wish to direct its attention to that type of organization and determine whether it is satisfactory and meaningful or calls for change. The charter gives the Council power to make changes it deems warranted.

An observation was made that the expansion of Council’s confirmation role to cover appointment of Directors of all Administrative Departments might be seen as being in derogation of the Council-Manager system. At the same time, it was noted that the proposed charter overall enhances the authority and expectations for the City Manager (who continues to have authority to terminate personnel, including Directors of Administrative Departments, on her own, without having to secure Council’s approval. Thus, it ought not be regarded as inappropriate to give Council somewhat broader authority over approval of certain key appointments

The chair noted that there were several additional items mentioned by the legal staff that fell into the category of optional edits, that they would be accepted or not in a revised draft that would be put before the Commission in advance of the next meeting for the Commission’s consideration.

### 3. Article Nine – Finances

Ms. Rothenberg advised that she had no comments on the proposed finance article. It was reported that, through the City Manager, the City’s bond

counsel had advised that the provision on temporary loans, Section 9.6, was fully covered by state law, and therefore was not necessary and could be eliminated. In addition, it was observed that the two paragraphs on limitation of property tax millage addressed very similar topics in similar ways, but that one clause varied without clear reason and inquiry had been made of the City manager whether the two paragraphs could be conformed without creating difficulty. The issue awaits a response.

#### 4. Law Director and serving as Vice City Manager or Acting City Manager

The current informal practice is that if both the City Manager and the Vice City Manager are unavailable to perform the functions of city manager, the Director of law steps in for the purpose. A circumstance like this, which has happened infrequently, would be expected to last for only a very short period of time, and if there were a more extended problem, council exercise its charter-given power to appoint an Acting City manager. The suggestion was to incorporate this practice formally into the charter, with the Director of law, or possibly the Director of Planning, being the designee. Some concern was expressed over whether the current Director of law was an employee of the city, and it was confirmed that he is. An additional concern raised was his status as a council member in Pepper Pike, opening the possibility of a conflict. It was noted in response that virtually anyone designated for the temporary role contemplated could have a conflict in a particular circumstance, that in any event the provision was contemplating a longer term situation not dependent for its wisdom on the circumstances of a particular current occupant, and that if a conflict were to develop for anyone, that person would be expected to step aside from handling the issue.

#### 5. Report of the Commission

It was suggested that the report would be more digestible if it were to include bullet points and similar formatting devices to break up long paragraphs.

#### 6. Public Meeting

Jessica Cohen shared that Katie Solender and she will distribute some written thoughts on the public meeting.

#### 7. Additional Business

There was an observation that it might useful to provide, at future meetings, paper copies of at least some of the materials that are circulated electronically in advance, given the number of pages sometimes involved.

8. Public Comment

There were no public comments.

9. Adjournment

The Committee agreed by consent to adjourn.