

**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

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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.

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.<sup>2</sup>

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.<sup>3</sup>

Many of the proposed changes were vigorously debated.<sup>4</sup> 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.<sup>5</sup> 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).

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<sup>2</sup> *Id.* at 11, quoting Pat DeWine.

<sup>3</sup> *Id.* at 10-11.

<sup>4</sup> Howard Wilkinson, *Issue 4 Divides Interest Groups*, Cincinnati Enquirer, May 3, 1999.

<sup>5</sup> Howard Wilkinson, *Cincinnati Voters Opt for Strong Mayor*, Cincinnati Enquirer, May 5, 1999.

often of a matter of public interest.”<sup>8</sup> Black’s Law Dictionary defines “inquiry” as “a question someone asks to elicit information.”<sup>9</sup> “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.<sup>10</sup> 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.

The power to legislate, however, cannot be used to circumvent the charter restraints on council’s exercise of administrative authority.<sup>11</sup> 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

<sup>8</sup> “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.”

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

<sup>10</sup> *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).

<sup>11</sup> Charter, Article II, Section 1, and Article IV, Section 1.

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.

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.<sup>16</sup> 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

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<sup>16</sup> Charter, Art. IV, Sec. 2.

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.

## 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.<sup>1</sup> 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.

<sup>1</sup> 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").

<b>Role of Vice Mayor</b>	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
<b>Legislation</b>	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.
<b>Legislative Assignment</b>	Mayor assigns all legislative matters to the appropriate committee	Clerk of Council assigns legislative matters to appropriate committee
<b>Veto and override</b>	Mayor may veto; Council can override with 2/3 vote	No veto
<b>Official head of the City</b>	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
<b>Committees and Committee Chairs</b>	Council forms committees. Mayor appoints and removes committee chairs without Council consent	Council forms committees and chooses chairs
<b>City Manager</b>	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
<b>Budget</b>	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
<b>City Manager Reports To</b>	Mayor and Council	Council, including Mayor

without interpretation or construction.<sup>16</sup> 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.<sup>17</sup>

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

<sup>16</sup> 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).

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

### ***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.<sup>20</sup> 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

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

## **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.

If you have any questions regarding this matter, please contact me at (513)352-3320 or at paula.boggsmuething@cincinnati-oh.gov.