

Date: March 3, 2021
To: Mayor and Members of Council
Copy to: Paula Boggs Muething, City Manager
From: Andrew W. Garth, City Solicitor *AWG*
Subject: **Report re Motion #202100592 (Mayor Role in Development)**

This report¹ is in response to Council Motion #202100060, submitted by Councilmember Wendell Young, which states as follows:

Under the City Charter, does the Mayor have legal authority to negotiate or direct any development contracts with Developers who want to do business with the City?

Executive Summary

The 1999 Charter amendments (Issue IV) gave the office of the mayor greatly expanded powers. Included among those powers is a stronger role “as official head and representative of the City,” which necessarily includes the ability to engage in negotiations with external parties considering whether to do business in the City. The Mayor’s ability to negotiate includes engaging third parties in substantive discussions, persuasion, and advocacy concerning the interests of the City. The Mayor’s authority to negotiate is limited, in practice and under the Charter, by the City Manager’s role as the chief executive and administrative officer of the City. The Mayor is not an executive mayor, and only the City Manager can commit the City to contract terms because only the City Manager (with authorization from Council as applicable) has power to execute a contract on behalf of the City or direct the actions of the administrative service. In addition, the City Manager may at her discretion invite the Mayor to assist in negotiations to the extent that she finds the Mayor’s involvement to be in furtherance of the municipal and public interest.

¹ The points made in this memo have been detailed in prior legal memoranda from this Office. This report both recaps and simplifies that advice to increase its ease of reading. The detailed analysis and citations remain available in the previous opinions.

Analysis

It is apparent from the overall public discourse that people remain confused about the extent of the Mayor's authority to represent the City in negotiations with external parties. This confusion is understandable as the Charter does not provide for roles as being "all or nothing." However, an oversimplification of the roles would not be faithful to the text of the Charter or the intent of voters who approved this unique form of government.

In 1999, the voters intentionally established new, structural incentives in the Charter for collaboration between the Mayor and Manager to create a more accountable and effective government. Better coordination between the Mayor and Manager was the goal of the Build Cincinnati coalition in drafting and campaigning for Issue IV — a goal voters approved. Only the City Manager can execute a contract or bind the City as a matter of law. But that collaboration and coordination can occur in development negotiations is the furthest thing possible from a Charter violation; it is a Charter ambition.

Issue IV – The Stronger Mayor Charter Amendments

Issue IV fundamentally changed the City's Charter to create a stronger mayor system. It has been 22 years since the vote, and it is helpful to revisit the context for Issue IV, an initiative that succeeded after nearly a decade of failed attempts to reform the City's Charter. The day after voters passed Issue IV, the Cincinnati Enquirer published an article entitled "Cincinnati voters opt for strong mayor."² Howard Wilkinson reported that "Cincinnati voters made a sweeping change to their government" by passing Issue IV, enacting a "charter amendment for direct election of a mayor with greatly enhanced powers...."³

These changes were opposed by groups that did not want to see the Mayor's authority increased, but a majority of voters disagreed. There are still persons in Cincinnati trying to fight or limit Issue IV, but the Charter has been amended and the voters' will is binding on the City and its public officials – including as relates to roles in development.

That the Mayor was intended to play a role in development matters is plainly illustrated in commentary surrounding Issue IV. The Enquirer editorial board published an opinion on the need for the changes in Issue IV, describing "Five Good Reasons for Charter Reform."⁴ As a general matter, the Enquirer argued that Issue IV would help to address what it described as "the main flaw at City Hall: weak

² Cincinnati Enquirer, "Cincinnati Voters Opt for Strong Mayor" (May 5, 1999).

³ *Id.*

⁴ Cincinnati Enquirer, "That's Not My Job: 5 Good Reasons for Charter reform" (May 2, 1999).

leadership.”⁵ It went on to say, “If the voters say yes [to Issue IV], Cincinnati will finally get a real mayor, not a cardboard cutout that is propped up at ribbon cuttings and photo-ops.”⁶ The article provided a series of examples where stronger mayoral powers under the Charter amendment would address past problems at City Hall.

There were two express examples where the Enquirer called for a stronger mayor to be directly involved in development deals. First, the Enquirer said that a stronger mayor would have helped avoid development problems with “Fountain Square West,” a complicated development that had come under criticism for lack of City leadership. The Enquirer suggested that “with nine people in charge, nobody could be held responsible” for this development deal. The solution, they suggested, was the proposal for a stronger mayor set forth Issue IV:

Cincinnati would have had a stronger mayor who served a longer, four-year term – time enough to start a project and see it through. And voters would be able to hold one person responsible for such failures: The directly elected mayor.

In other words, the newspaper of record envisioned that Issue IV would allow the Mayor to be the “one person” responsible for major development projects such as Fountain Square. This responsibility must, of course, be tempered with the Charter authority prescribed for the City Manager and Council. But it is difficult to envision how one person could play this role if he or she were prohibited from engaging in negotiations or substantive interactions with third parties concerning development matters.

In the same article, the Enquirer opined that the “stadium wars” on the Riverfront would have gone better had Issue IV been passed, stating, “The trench warfare between Hamilton County leaders and the city manager might have been avoided if a stronger mayor was recognized as a respected, regional leader, with authority to negotiate for the city and keep promises.”⁷ The stadium deals were development projects, yet the Enquirer argued that this was precisely the sort of transaction in which the new mayor would make a difference.

The extent of the Mayor’s new Charter powers was an express reason for opposition to Issue IV by some commentators including, for example, the League of Women Voters. The League observed in its Voting Guide for Issue IV, “No other council manager city concentrates as many powers in the office of mayor as does this proposal.”⁸

⁵ Cincinnati Enquirer, “That’s Not My Job: 5 Good Reasons for Charter reform” (May 2, 1999).

⁶ *Id.*

⁷ *Id.* Emphasis added.

⁸ LWVCA May 4, 1999 Election Guide (see comparison chart).

While the above excerpts are illustrative of the intent behind the 1999 Charter Amendments, they are not dispositive from a legal perspective. For the in-depth statutory analysis, please revisit the 2021 Legal Memorandum and the 2015 opinion attached thereto. The above references, however, support that voters in 1999 knew the Charter Amendment contemplated the Mayor would have a significant role in external relations – including in discussions regarding development in the City – and that the Mayor could expect to be held accountable to the voters for that role and responsibility.

Charter Limits on Mayor’s Power to Negotiate

At the same time, the Mayor’s authority to engage in negotiations or discussions with external parties is fundamentally constrained by the City Manager’s Charter authority. The Mayor cannot “go it alone” to negotiate a deal because only the City Manager can sign the contract or direct the administrative service to implement it. There is no “deal” without City Manager involvement and buy-in. Only the City Manager has the authority to enter into a development agreement on behalf of the City. As explained on page 9 of the City Solicitor’s Legal Opinion to the City Manager on “Charter Roles, Generally and in Economic Development,” dated January 26, 2021 (the “2021 Legal Memorandum”):

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.⁹ 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.

As observed in the 2021 Legal Memorandum, “The charter allows the City Manager and Mayor to work together to facilitate and further the city’s interests in external relations.”¹⁰ The City Manager has authority to work with the Mayor and the Manager may direct the administrative service to engage in work supportive of mayoral negotiations when the Manager determines it is in the interests of the City.¹¹ It is also true that the City Manager as chief administrative officer has authority to withhold support from the Mayor and may decline to engage the City’s administrative professionals or enter into contracts in support of the Mayor’s discussions with third

⁹ Charter, Art. IV, Sec. 2.

¹⁰ 2021 Legal Memorandum at p. 9.

¹¹ Mayoral involvement may be particularly useful when, for example, a mayor has expertise or experience in the relevant subject matter.

parties. And, of course, certain types of development deals require City Council authority – the Mayor has no vote on City Council.

Conclusion

In summary, the Mayor may engage in negotiations with developers and other external parties, as provided by Charter, but only the City Manager can execute an agreement. The City's system of government works best when the Mayor and Manager are aligned, and the 1999 Charter reforms were intended to create incentives for a working relationship. Prior to Issue IV, Council appointed and removed the City Manager. After Issue IV, only the Mayor may appoint the City Manager (subject to Council approval) and only the Mayor may remove the City Manager (with Council approval).

Please let me know if you have questions.