

Memorandum

To: Mayor Russ Axelrod and
West Linn City Council

From: Jeffrey G. Condit, P.C.

Client: City of West Linn (the "City")

Subject: West Linn Charter Issues Regarding the Position of City Attorney

Date: April 12, 2019; Clarified June 12, 2019

The City Council has asked for our opinion regarding the interpretation of the West Linn Charter (the "Charter") related to the position of city attorney.

BACKGROUND

Before turning to the Council's specific questions, it is useful to set forth the general legal framework for the opinion.

Charter Authority and Construction. Oregon cities are granted broad home-rule authority under Article XI, Section 2, and Article IV, Section 1(5), of the Oregon Constitution. The home-rule provision empowers city voters to adopt a home-rule charter granting a city broad powers over all matters of municipal concern. Cities under a home-rule charter do not require express statutory authority to act in a particular area, but may legislate on any matter of local concern unless that authority is expressly preempted by state statute. *Thunderbird Mob. Club v. City of Wilsonville*, 234 Or App 457, 469-79, 228 P3d 650, *rev denied*, 348 Or 524 (2010). "The validity of local action depends, first, on whether it is authorized by the local charter or by a statute [, and] second, on whether it contravenes state or federal law." *Rogue Valley Sewer Services v. City of Phoenix*, 357 Or 437, 450, 353 P3d 581 (2015), citing *LaGrande/Astoria v. PERB*, 281 Or 137, 142, 576 P2d 1204, *adh'd to on recons*, 284 Or 173, 586 P2d 765 (1978).

To determine the meaning of a provision in a city charter, a court applies the framework for statutory construction established in *PGE v. Bureau of Labor and Indus.*, 317 Or 606, 610-12, 859 P2d 1143 (1993) and *State v. Gaines*, 346 Or 160, 171-73, 206 P3d 1042 (2009). Under the *PGE/Gaines* framework, a court construes a statute based on its text, its context in the statutory scheme, and its legislative history. *PGE* and *Gaines* involve the construction of state statutes, but the courts have ruled that same framework applies to construction of local enactments. *Church v. Grant Cnty.*,

187 Or App 518, 527 n.4, 69 P3d 759 (2003), citing *Lincoln Loan Co. v. City of Portland*, 317 Or 192, 199, 855 P2d 151 (1993).

The courts apply a similar interpretive methodology to provisions enacted by the voters, except that the "legislative history" includes the ballot title, explanatory statement, and other materials contained in the voters' pamphlet. *Ecumenical Ministries v. Oregon State Lottery Comm.*, 318 Or 551, 559-60, 871 P2d 106 (1994); *State v. Allison*, 143 Or App 241, 251, 923 P2d 1224, *rev denied*, 324 Or 487, 930 P2d 852 (1996).

Rules of statutory construction applicable to construction of the text and context of an ambiguous provision include that a specific provision controls over a general provision and, in cases of apparent conflict between provisions, a court must construe them to be consistent and to give effect to both provisions, if possible. See ORS 174.010, 174.020.

Structure of the Charter. The Charter appears to be based at least in part on an older version of the League of Oregon Cities Model Charter. The Charter establishes a council/manager form of government. This is the most common form of government for cities in Oregon. In a council/manager form of government, an elected city council is the legislative and policy body and approves the budget, while the city manager serves as the chief executive officer of the city. Sections 4 and 5 of the Charter grant the City the fullest extent of home-rule powers available under the Oregon Constitution. Section 6 states:

"Except as this Charter prescribes otherwise and as the Oregon Constitution reserves municipal legislative power to the voters of the City, all powers of the City are vested in the Council."

QUESTIONS PRESENTED

Question 1: When current Section 23(a) was added to the Charter in 2013, did it effectively repeal Section 8(f)? Or is there an argument that the question was not adequately presented to the voters? Does the November 7, 2017, vote on Measure 3-524 affect this analysis?

Discussion: Section 23A states:

"The office of city attorney is established as the chief legal officer of the City. The city attorney shall be appointed and removed by a majority of all incumbent members of the Council."

This provision was part of a Charter amendment referred to the voters at the September 17, 2013, election. The Council referred the amendment in accordance with Resolution No. 2013-10. Attachment A to the resolution set forth the proposed amendment, which included adding the new provision above and repealing former Section 8(f), which stated:

"The Council may retain legal advisors as it deems prudent. The legal advisors shall report to and serve at the discretion of the Council."

Neither the ballot title nor the explanatory statement was clear regarding the text to be added or the text to be repealed. The measure summary stated:

"The City Council currently hires a city attorney to represent the City in legal matters. The city attorney is appointed and removed by the Council; therefore, the city attorney reports directly to the City Council. This addition to the Charter recognizes the City's current practice."

The explanatory statement was a one-sentence-longer version of the summary:

"The City Council currently hires a city attorney to represent the City in legal matters. The city attorney is appointed and removed by the Council; therefore, the city attorney reports directly to the City Council. Removal of the city attorney would require a majority vote of all currently elected councilors. This addition to the Charter recognizes the City's current practice."

A citizen reading the ballot title would think that the City was simply codifying current practice, as opposed to establishing the city attorney as a Charter officer and repealing the former language relating to appointment of all legal advisors. In my opinion, a person could have successfully challenged the adequacy of the ballot title under ORS 250.035(1)(c) (requiring the summary to be "a concise and impartial statement * * * summarizing the measure and its major effect"). But a challenge to a ballot title has to be filed not more than seven days after the date that the draft ballot title is filed with the city elections officer. ORS 250.296. If a challenge is not filed within that time, the adequacy of the ballot title cannot be subsequently challenged. *See* ORS 258.016 (grounds for contest of an election).

For these reasons, the 2013 Charter amendment adding Section 23A and repealing Section 8(f) was effective and is final.

The 2017 Charter amendment (Measure 3-524) does not affect my analysis as to the validity of the 2013 amendment. The proposed amendment would have added back a modified version of Section 8(f) to the Charter and clarified that the city attorney would oversee all legal advice provided to the Council. Both the summary and explanatory statement, however, stated that the amendment would not preclude the city manager from employing a staff attorney for general city administration and operations. This amendment attracted five arguments in opposition, the gist of which was opposition to the city manager's employment of a staff attorney. The amendment failed. The failure of the amendment, however, does not answer the question whether the city manager has that authority under the 2013 amendment.

Question 2: Does the location/numbering of Sections 21A and 23A in the Charter affect the construction of those sections and, if so, how?

Discussion: Section 21A states:

"No City Council member may directly or indirectly, by suggestion, or otherwise, attempt to interfere, influence, or coerce the City Manager in the award of a public contract or the hiring, discipline, or termination of any personnel. This shall not prevent a City Council member from providing input to the City Manager relating to City business or the performance of an employee or department."

Section 21A is appropriately located in Chapter IV (Council) because it is a limitation on the Council's authority.

Similarly, Section 23A is appropriately located in Chapter V (Powers and Duties of Officers) because the purpose of the provision according to Resolution No. 2013-10 was to create the office of city attorney as a Charter officer.

In context, it does not appear that Sections 21A or 23A were intended to be subsections of Sections 21 (Appointment and Evaluation of City Manager) or 23 (City Manager). First, Sections 21 and 21A, and 23 and 23A, are substantively different. Second, subsections throughout the rest of the Charter are designated by lowercase letters in parentheses—i.e., (a), (b), (c), (d), etc. The most reasonable interpretation of this scheme is that Sections 21A and 23A were intended to be independent sections but that the drafters did not want to have to renumber the rest of the sections of the Charter in order to insert them in the appropriate chapters. The Oregon legislature employs the same approach when they run out of room in the Oregon Revised Statutes. *See, e.g.*, ORS 279A, 279B, 279C (Public Contracting Code).

For these reasons, I do not believe that the numbering of Sections 21A or 23A has any bearing on the appropriate construction of those provisions.

Question 3: How should Sections 21A and 23A be construed both individually and in conjunction with one another? Specifically:

- Does Section 21A preclude the Council from discussing, objecting to, or refusing to fund an in-house assistant city attorney position?
- Does Section 23A preclude the hiring of an in-house assistant city attorney reporting to the city manager?

Section 21A is a common council/manager charter provision.¹ It is designed to limit the City Council's authority to get involved in personnel decisions in order to preserve the distinction between the Council's role as the legislative and policy body and the city manager's authority as the chief executive officer. Under this structure, interference by the Council in personnel matters can undermine the city manager's authority and increase the risk of liability to the City. In *Still v. Benton*, 251 Or 463, 445 P2d 492 (1968), the Supreme Court applied a similar charter provision to find that the Mayor of Baker, Oregon, acted outside the scope of his authority under the charter in pressuring the manager to discharge the police chief, and awarded the former chief punitive and general damages against the mayor.

Section 21A was amended by the voters in November 2017. The legislative history of this amendment provides some guidance on how the provision should be construed. Measure 3-523 amended former Section 21A as follows:

"No City Council member may directly or indirectly, by suggestion, or otherwise, attempt to interfere, influence, or coerce the City Manager in the award of a public contract or the hiring, discipline, or termination of any personnel decision. This shall not prevent a City Council member from providing input to the City Manager relating to City business or the performance of an employee or department."

The summary and explanatory statement indicate that the Measure was intended to clarify the Council's ability to raise issues regarding City business and the performance of City departments and staff. The Council was concerned that the former language, which provided that the Council could not interfere in "any personnel decision" precluded the Council from raising such issues. The summary stated:

¹ For example, Section 8.1(i) of the League of Oregon Cities Model Charter states:

"No council member may directly or indirectly attempt to coerce the manager or a candidate for the office of manager in the appointment or removal of any city employee, or in administrative decisions regarding city property or contracts. Violation of this prohibition is grounds for removal from office by a majority of the council after a public hearing. In council meetings, councilors may discuss or suggest anything with the manager relating to city business."

Section 20(E) of the City of Lake Oswego Charter states:

"No Council member may directly or indirectly, by suggestion, or otherwise, attempt to influence or coerce the Manager in the making of any appointment or the removal of any employee, in the purchase of supplies or to exact a promise relative to an appointment from any candidate for Manager. A violation of this Subsection forfeits the office of the offending Council member after a public hearing by the Council is held and the Council determines that a violation of this Subsection has taken place. Nothing in this Subsection, however, prohibits the Council in open session from fully and freely discussing with or suggesting to the Manager anything pertaining to City affairs or the interest of the City."

"This amendment makes clear that City Council members may discuss their concerns, so long as their actions do not attempt to interfere, influence, or coerce the City Manager in the award of a public contract or the hiring, discipline, or termination of any personnel."

The clarifying text thus limits the noninterference directive to the hire, termination, and discipline of employees, and the legislative history makes it clear that this was the intent. As noted above, Section 6 provides that all municipal power vests in the City Council except as prescribed by the Charter. For these reasons, I do not believe that Section 21A precludes the Council from debating the policy or administrative wisdom of having an in-house assistant city attorney position or from deciding to eliminate or not fund that position.

For similar reasons, however, I do not believe that Section 23A precludes an in-house assistant city attorney position hired by the city manager. By its text, Section 23A provides that the City Council hires and terminates the city attorney and that the city attorney is the chief legal officer of the City. It is silent about other attorney positions.

In contrast, Section 8.2 of the League of Oregon Cities Model Charter expressly delegates the authority to appoint the city attorney's staff to the city attorney:

"The office of city attorney is established as the chief legal officer of the city government. A majority of the council must appoint and may remove the attorney. The attorney may appoint, supervise, and may remove any employees who work in and for the city attorney's office."

Similarly, Section 21(A)(3) of the City of Lake Oswego Charter expressly provides that the city attorney shall:

"Appoint and may remove all members of his or her staff, such employees to be under the City Attorney's direction and control and subject to the provisions of the City personnel system."

These more specific provisions control the city manager's general authority to appoint, discipline, or remove employees.

Because the Charter does not specify how other attorneys will be appointed or employed, the Council has the discretion to make that determination under its general authority. Nothing in the Charter prohibits the City from creating an in-house assistant city attorney appointed by the city manager, as long as the city attorney remains the chief legal officer of the City. I concur with city attorney Tim Ramis's analysis of this issue and his recommendations on making it work.

Question 4: Does Section 23(c)(3) give control of the employment and supervision of all City employees to the city manager? How does that affect the analysis of the above-noted sections?

Discussion: Section 23(c)(3) states:

"The City Manager shall designate a custodian of records and such other officers and employees as required, and shall appoint and may remove appointive City officers and employees except as this Charter otherwise provides, and shall have general supervision and control over them and their work with power to transfer an employee from one department to another. The City Manager shall supervise the departments to the end of obtaining the utmost efficiency in each of them. The City Manager shall have no control, however, over the strictly judicial activities of the Municipal Judge." (Emphasis added.)

Under the Charter, the Council appoints two city officers: The city manager and the city attorney. All other employee positions are appointed by the city manager or under his or her authority under Section 23(c)(3). This is standard operating procedure under a council/manager form of government. For these reasons, the city manager has the sole authority to recruit, hire, supervise, and terminate an in-house assistant city attorney under Section 23(c)(3), and the Council cannot interfere with that authority under Section 21A.

Nothing in this section or elsewhere, however, gives the city manager unilateral authority to create employee positions or require the Council to fund those positions. For this reason, I believe that the Council has the authority under Section 6 of the Charter to decide to have an in-house assistant city attorney or contract for those services with Jordan Ramis or another law firm. If the Council decides to have an in-house assistant city attorney, however, then any person filling that position must be appointed and supervised by the city manager.²

Question 5: What is the authority of the Council to adopt ordinances or resolutions interpreting the Charter?

Discussion: The Council may interpret the Charter in any manner it sees fit, but any interpretation would be subject to judicial review under the methodology for statutory construction discussed in the introduction. In other words, the Council's interpretation would have to be based on the text, context, and legislative history of the Charter provision at issue.

I was not able to find any case law on point, but a Council interpretation of the Charter would probably not be entitled to any judicial deference. As you may know, the Council's interpretation of the City's land use regulations is entitled to some deference—if the Council's interpretation of an ambiguous land use regulation is plausible, the Land Use Board of Appeals and the courts must uphold it. The original

² The City Council could decide to have an in-house employee City Attorney that would be appointed and terminated by the City Council under Section 23A. The specific authorization in Section 23A would control over the City Manager's general authority to appoint and remove employees under Section 23(c)(3).

basis for that deference, however, is that the Council is the legislative body that enacts the City's land use regulations and is presumably in the best position to know what its regulations mean. *See Clark v. Jackson County*, 313 Or 508, 836 P2d 710 (1992). Since the Charter may only be enacted or amended by the City voters, that rationale would not apply to interpretation of the Charter.

Deference or not, the Council cannot amend the Charter under the guise of interpretation. The Council could not, for example, decide that the voters were misled by the ballot title in 2013 and enact an ordinance interpreting the Charter as still including Section 8(f). Because the ballot title was not challenged in 2013, Section 8(f) was lawfully repealed, and the only method to restore it to the Charter would be to refer a Charter amendment to the voters.³

CONCLUSION

The Charter does not control the question whether the City must or cannot have an in-house assistant city attorney. An in-house assistant city attorney hired by the city manager does not violate the terms of Section 23A. As the League of Oregon Cities and Lake Oswego examples demonstrate, where the voters have intended to grant the authority to the city attorney to hire and terminate city attorney staff, that authority is explicitly set forth in the charter. Further, having a city attorney appointed by the Council and a assistant city attorney hired by the city manager, although unusual, does not create an inherent conflict of interest. As I noted during the Council work session on this issue, any attorney, whether hired by the city manager or appointed by the city council, represents the city as an entity and owes their ethical and legal allegiance to the entity under the Oregon Rules of Professional Conduct. That means the attorney must respect the relative authority of both the city manager and city council and give impartial legal advice to the benefit of the entity regardless of who appoints them. Although I have never done an actual survey, I would estimate, based on my experience, that about half the city attorneys in Oregon are hired or appointed by the city manager and about half are hired or appointed by the city council.

The Charter also does not require the Council to authorize an in-house assistant city attorney position or continue the existing position. The decision to authorize and fund such a position is within the discretion of the Council under Section 6 of the Charter. If the Council authorizes or continues the in-house assistant city attorney position, however, then the employee must be hired, terminated, and supervised by the city manager.

³ During the work session, some of the councilors mentioned the ordinance to adopt a new cost-of-living index because the index established by Section 11 of the Charter no longer exists. This is not an amendment or interpretation of the Charter, however; this is an exercise of the Council's authority under Section 6, because the Charter provision is unenforceable and no longer constrains the Council's legislative authority. It would be the same if a provision of the Charter were overturned as unconstitutional or preempted by state law. (I would still recommend cleaning up this provision next time the Council refers Charter updates or amendments to the voters.)

The city manager has expressed a desire to continue an in-house position because she has found it beneficial to have a lawyer on staff to assist with the day-to-day business of managing the City. This request is within her authority as the chief executive officer of the City, given the directive under Charter Section 23(c) that "the City Manager shall supervise the departments to the end of obtaining the utmost efficiency in each of them." The Council has expressed concern about conflicting legal advice between the in-house position and the appointed city attorney, who is the chief legal officer of the City under the Charter. This is a risk where the city attorney does not directly supervise the assistant city attorney, but City attorney Tim Ramis has provided a memorandum on how to structure the relationship to limit this conflict. The Council needs to weigh these policy and administrative considerations and make a decision on whether to continue an in-house assistant city attorney position.

If the Council wishes to permanently prohibit an in-house assistant city attorney position appointed by the manager or wishes to appoint or supervise that position itself, then the Council needs to refer a Charter amendment to the voters.

If you have any additional questions, please feel free to ask.