

COLUMBUS CHARTER REVIEW COMMISSION

REPORT TO COLUMBUS CITY COUNCIL

March, 1993

INTRODUCTION

Mayor Dana G. Rinehart, Columbus City Council President Cynthia Lazarus and City Attorney Ronald O'Brien established a commission to review the Columbus City Charter. The Charter, drafted in 1914, was last fully reviewed in 1981 and received minor revisions in 1984.

Selected to serve on the Commission were Mr. Jerry Hammond, former City Council President, currently head of Mr. Hammond & Associates, a consulting firm; Ms. Sally W. Bloomfield, Esq. of the Bricker & Eckler law firm; Mr. James E. Daley, President, Council of Southside Organizations; Dr. Rodney Smith, Dean, Capital University Law School; Mr. Frank Casto, President, South Central Ohio District Council, Labor Organization.

Chairman Hammond convened the first meeting of the Commission on July 11, 1991. It was determined that the entire Charter would be reviewed section by section with input from all city departments and divisions and related local governmental agencies. In addition, more than four-hundred letters were sent to area commissions/civic organizations seeking their input and setting the dates for two public hearings for the general citizenry. Information was solicited and received from the National League of Cities, The Ohio Municipal League and other Ohio cities.

To date, the Commission has held seventeen regular meetings, two public hearings and a meeting with the Columbus Civil Rights Advisory Committee. The Commission has also held numerous working sessions with the staff and individual members to research and document responses to suggested charter amendments.

Having reviewed the proposed amendments to the Columbus City Charter and after consultation with Mayor Lashutka, City Council President Lazarus and City Attorney O'Brien, the Columbus Charter Review Commission respectfully submits the following report.

COLUMBUS CHARTER REVIEW COMMISSION

REPORT AND RECOMMENDATIONS

1. Section 3: Should Columbus City Council ("Council") be expanded either by the addition of council members who are elected at large, by district, or by a combination of at large and district?

Written responses of Far North Community Coalition, Southside Civic Association proposed that Council be increased to 11 council members with 6 to be elected by districts; Civil Rights Advisory Committee proposed that council members be elected from 7 districts.

The Columbus Charter Review Commission ("CCRC") carefully considered this issue and concluded that it presented many legal and policy issues that required separate study. *Therefore, it recommends that Council set up a special committee to consider this issue at length and in detail and study carefully the legal and policy consequences.* Below is given a summary of some of the legal and policy issues that this proposal raises.

Race. Restrictions on the voting right based on racial classifications has been held to be unconstitutional. In Rogers v. Lodge, 458 U.S. 613 (1982), for example, the Supreme Court upheld lower court rulings finding that an at-large election system for the commissioners of a rural county violated the equal protection clause. The majority held that the lower courts had properly required plaintiffs to prove that the voting system was maintained for a racially discriminatory purpose and that there was sufficient evidence that the standard had been met where no black person had ever been elected in at-large elections and that

power was exercised in a manner that disregarded the interests and concerns of members of racial minorities within the county.

Statistical proof of the racially discriminatory impact of a voting regulation is relevant but no determinative proof in cases where a governmental act is challenged on the basis of the fourteenth or fifteenth amendment. See, Mobile v. Bolden, 446 U.S. 55 (1980), in which the Court refused to invalidate city commission system whereby all three members of the city's governing body were elected at-large, even though statistical evidence was offered to demonstrate that no black member had been elected. Thus, it is clear that more than statistical proof of exclusion is required to establish the discriminatory intent required by the 14th and 15th amendments.

The existence of a racially improper motive is a matter of fact. Lower courts will be given substantial latitude in finding facts in such cases.

It should be noted, however, that less proof might be required under a statute or a state constitution. State courts may provide more protection than that which is afforded under the 14th and 15th amendments to the United States Constitution.

Implementing any provision designed to change voting methodology (e.g., adding members with elections on an at-large or by-district method) would no doubt be questioned on racial grounds. Racial impact would have to be taken into account in implementing any such change, both from a legal and a political point of view.

One person, one vote. The concept of one person, one vote would also have to be taken into consideration. When the Supreme Court examines population differences in voter districts, the Court will compare the size of the most and least populous districts with the theoretically ideal district. A variance of 10% has not typically required special justification by the government. A variance of almost 20% has been upheld where other justifications were present. Variances in excess of 20% are suspect and will be difficult to support. Therefore, in any districting plan, variances would have to be taken into consideration. While racial motives and the one person, one vote concepts are independent, variances in districts of differing racial make up would also be scrutinized.

Equal Protection. In Fortson v. Dorsey, 379 U.S. 433 (1965), the Court held that the equal protection clause of the 14th amendment does not require that even one house of a bicameral state legislature consist of single-member election districts. It is clear, however, that multimember districts will be invalidated if "designedly or otherwise" they "minimize or cancel out the voting strength of racial or political elements of the voting population." 379 U.S. at 439. Multimember districts are permitted, but they will be scrutinized to assure that racial and political elements are not being deprived of their capacity to participate.

Prudential Concerns. In addition to the legal concerns raised above, some prudential concerns should be raised. The

addition of new districts or changes in the districting methodology may be suggested for political or other purposes that may be suspect. Intentions, both disclosed and undisclosed, should be considered, both as a legal and a prudential matter. On the other hand, a legitimate motive for creating council districts may be to increase participation on the part of the electorate, as well as to increase accessibility to elected representatives. As Columbus grows, both in terms of population and in terms of the complexity of governmental operations, access and participation issues should be considered.

2. **Section 5: Should appointees to Council run for election at the next scheduled election rather than at the end of the term that s/he holds?**

Northwest Civic Association and Mr. Joe Testa (July 1991) proposed that appointed council members run at the next election.

Inasmuch as the requirement to stand for election at the next scheduled election applied to most of the other elected city officers, CCRC could find no public policy reason for council members to be exempt. *Thus the CCRC recommends that council appointees stand for election at the next scheduled election.*

3. **Section 6: Should council members be able to serve on boards/commissions?**

Raised by CCRC members.

The CCRC members concluded that currently the ability of council members to serve on boards and commissions was somewhat unclear from a legal standpoint although in specific instances

the city attorney has opined that the Charter does not preclude board service by council members. Furthermore, there are benefits to such participation, including: 1) council participation adds legitimacy to the work of the commission; 2) participation on a commission provides a council member with an effective means of gaining information related to issues of significance considered by the commission; 3) given 1) and 2), council participation may make for a more efficient means of dealing with difficult issues, because a member could become immersed in the work of the commission and return and report to the full council in a manner that would increase the likelihood of action being taken.

The state ethics law (Ohio Revised Code Chapter 102 has been subject to interpretation and the result is not always consistent with the result that council members can service on other boards and commissions, it seems prudent to clarify the Charter which would take legal precedence over the state ethics law. Therefore, *the CCRC recommends that the Charter be amended to state that in enumerated circumstances, council members may serve on boards and commissions.*

4. Section 8: Should the time of 8:00 p.m. on the first Monday in January be removed from the Charter?

Raised by the CCRC members.

The specific mention of the date and time for the meeting of the newly elected council members has caused problems, especially where the first Monday falls on New Year's Day. Therefore, the

CCRC recommends (1) deleting the reference to the hour and (2) specifying an exception for New Year's Day or deleting the first sentence of Section 8 altogether which would allow Council to determine the time and dates of its own meetings.

5. **Section 18:** Should the Charter require a two-thirds vote of Council to overrule a recommendation of the Development Commission?

Northwest Development Task Force proposed the two-thirds vote be required of Council to overrule, in effect, a recommendation of the Development Council (would apply to zoning proposals).

The CCRC unanimously recommends that no change be made to Section 18. It appears to be inappropriate to delegate, in effect, more power to the Development Commission which is only an advisory body to the Council than to the elected Council. In effect, the proposal erodes, even usurps to an extent, Council's legislative powers because it results in a Development Commission recommendation (e.g. a simple majority of its members) controlling over a simple majority of Council.

6. **Section 22:** Should there be a third type of legislation in addition to the thirty day and emergency types?

Mr. Hoyle of the Public Service Department suggests a middle ground in addition to the regular and emergency ordinances: a 14 day ordinance for routine business that would require two readings with the legislation effective immediately upon passage.

The CCRC noted that most Councils are predisposed not to utilize emergency legislation except in the case of emergencies. However, Councils have been compelled to utilize emergency

legislation more than they would like due primarily to time constraints rather than the more accepted definition of emergency. It seems appropriate to create a third type of legislation, a fourteen day ordinance, that would be effective immediately upon passage after two readings. The pace of modern government makes thirty day legislation unduly slow in conducting routine city business. There is a long lead time inherent in the legislative process before Council even sees an ordinance; thirty day legislation adds at least thirty-seven days to the process of effecting contracts and making vendor payments (seven days for the second reading and thirty days after passage to be effective).

The CCRC recommends that the Charter be amended with the result that the following three types of legislation would be authorized:

- (1) emergency ordinances for emergencies (as defined in the original, historical sense) effective immediately after passage - one reading (currently in effect);
- (2) fourteen day ordinances for routine business effective immediately after passage - two readings (new proposal);
- (3) thirty day ordinances for code amendments and other matters where extraordinary citizen input is important effective thirty days after passage - two readings, but Council can waive the second reading (currently in effect).

7. Sections 25-27: Should there be a biennial, rather than an annual budget?

Wyatt Kingseed, Director of Budget and Management proposes a biennial budget cycle; Hugh Dorrian, City Auditor is neutral but sees some duplication in annual submissions necessary to meet requirements of state laws.

The CCRC takes no position with respect to the proposal for a biennial budget. There appear to be legitimate reasons for both biennial and annual budget periods. The CCRC believes that Council should determine whether it desires a Charter amendment with respect to this issue.

8. **Section 36:** Should the term "Supplemental" be deleted in the title of Section 36. "(Supplemental) Income Tax"?

Raised by the CCRC members.

The CCRC views this proposal as a clean-up item. Effectively, the city income tax has been permanent for many years. The CCRC recommends that the Charter should be amended to recognize that fact.

9. **Section 45:** Should there be a limitation on the requirement that once a referendum has been defeated, the only way to re-address the same issue is by another referendum?

Currently if a referendum is defeated the same issue must be submitted to the voters even if the issue was defeated many years before. Mr. George Painter proposes a "sunset" provision of five years on the requirement of voter submission where a referendum has been defeated. Thereafter Council would be able to pass another ordinance on the same subject and it would again have to be defeated by referendum.

The CCRC members also discussed a limitation on the effectiveness of a referendum.

The CCRC recommends a five year sunset provision to any referendum that is passed by the electorate in recognition of the fast pace of changing times and events that require another consideration after a reasonable period of time. The idea that

one generation of voters could foreclose future Council action for an indefinite period of time does not appear to be consistent with 21st Century thinking.

10. **Sections 41-56: Initiatives and Referenda:** should the number of required signatures be reduced and/or the time requirements be changed?

Northwest Civic Association, Southside Civic Association, Far North Columbus Communities Coalition proposed that the number of signatures on a referendum be reduced from 5% to 3%; Northwest Development Task Force recommends reducing the number of signatures to 2%; Mr. George Painter recommends that both initiatives and referenda: (a) be submitted to the electorate within 90 days from the date that Council fails to take action or rejects a report, (b) have their signatures verified 40 days before the election, (c) have the requirement that the petitions that are circulated reference the title, number of ordinance and date of passage, and (e) have a new section that defines referendum and initiative.

The unanimous recommendation of the CCRC was not to change the Charter provisions. Factors that the CCRC considered include:

The push for plebiscites, particularly through increased access to the initiative and referendum, appears to be on the increase. See Clayton P. Gillette, "Plebiscites, Participation, and Collective Action in Local Government Law", 86 Mich. L. Rev. 930 (1988). Efforts to increase public participation in the electoral process have tended to focus on relaxing initiative and referenda requirements at the local government level. This is not surprising, given that access to state and federal governments is even more attenuated than at the local level.

Proponents of relaxed initiative and referenda processes have assumed that plebiscites facilitate participation in the political process and that such participation is good. Opponents have argued, however, that, "Plebiscitary processes are less likely than representative ones to generate decisions that reflect common conceptions of the public interest or social welfare." For example, as to initiatives and referenda related to land use issues (a major motivation for some of the proponents of such mechanisms to enhance public participation, it might be asserted that the planning function will be undermined and decision making will become atomized -- the work of professional planners and planning on a city-wide basis could be undermined.

Proponents have argued that, "Referendum and initiative appear to be the only meaningful halfway houses available to localities that desire some increased popular role." They have urged that the initiative and referendum fulfill an educative (they educate the electorate) and a communitarian (they build a sense of community) role that is beneficial. Arguments are raised on both sides -- by those favoring the plebiscite and those opposed to increased access in that form -- that special interests will/will not control the process. The author of the Michigan Law Review article indicates that there is no empirical evidence to support either view.

However, legal challenges increasingly have been mounted against the initiative and referenda processes. Challenges have been raised on the following grounds: "(1) the measure, if

passed, would be substantively invalid because it conflicts with a federal or state constitutional or statutory provision; (2) the procedural requirements for placing the measure on the ballot have not been met; and (3) the subject matter is not proper for direct legislation." See, James D. Gordon III and David B. Magleby, "Pre-election Judicial Review of Initiatives and Referendums", 64 Notre Dame L. Rev. 298 (1989). If there is an easing of the requirements for initiatives and referenda, there is likely to be an increase in litigation.

Finally, providing for plebiscites within districts or areas covered by civic associations might well balkanize the city, with civic association fighting against civic association, and might give rise to racial and other objections, particularly when districts or civic associations are less representative of minority and other political groups that exist on a city-wide basis.

11. Sections 60 and 148: Should the mayor have the power to appoint or remove all directors and deputy directors?

Raised by the CCRC members.

The CCRC noted that currently the Charter limits the mayor, council, auditor and city attorney as to the number and type of unclassified employees that they may hire. *The CCRC recommends that the mayor, city auditor and city attorney be permitted a small unclassified staff of six, three and three persons, respectively, and that the types of staff positions for the mayor, auditor and city attorney be unspecified.*

Furthermore the CCRC believes that the Charter should be amended to allow the mayor the prerogative to appoint and remove all director and deputy directors except those heading the Department of Recreation and Parks and the Department of Health.

12. **Section 148:** Should permanent versus provisional status be changed with respect to test taking after the provisional employee has served in a position for a given length of time?

Barbara Gates McGrath, Executive Director of the Civil Service Commission recommends keeping the testing provision as it is. Verbally the majority of council members, the mayor's representatives, and the city auditor support a cut-off date for the testing of provisional employees (e.g., after two years of service in a particular position, if the provisional employee has not been tested by the Civil Service Commission, s/he will become a permanent civil service employee.

The CCRC recommends that after two years in provisional status, if the provisional employee has not been tested by the Civil Service Commission, his/her provisional status should become permanent.

Systematic, reliable and valid testing techniques can be very costly to develop for each position in city government, particularly for the City of Columbus that has a large number of jobs that may be available. Time, personnel and budget constraints can lead to lengthy delays in testing. Although the Civil Service Commission has made progress in the testing procedures of provisional employees, there remains a significant number of employees performing their work duties in a very satisfactory manner who have never been tested.

A test is a selection tool used to predict the skill, knowledge and ability to perform a job. Provisional employees who have been through a selection process and have proven their ability to perform in a satisfactory manner for two or more years no longer require a process to predict their ability; they have demonstrated it by job performance.

13. **Section 158-1: Should there be residency requirements for city employees?**

The Civil Rights Advisory Committee recommends that all city employees reside in the city. It is believed that the unions, including police and firefighters, as well as many others oppose this limitation.

The CCRC discussed this issue at length. *However, it did not reach a conclusion because there are numerous legal and policy issues that are involved with any change.*

Below is given a synopsis of some of the considerations that should be addressed if an amendment were to be proposed:

There are a number of cases that have dealt with residency requirements, particularly in the police and fire protection areas. See, "Validity, Construction, and Application of Enactments Relating to Requirement of Residency Within or Near Specified Governmental Unit As Condition of Continued Employment for Policemen or Firemen," 4 ALR 4th 380. Cases have dealt with other areas, as well. See, e.g., "Validity, Construction, and Effect of Municipal Residency Requirements for Teachers, Principals, and Other School Employees," 75th ALR 4th 272.

Courts typically have upheld municipal efforts to implement residency requirements, although acceptance has been far from universal. For example, enactments requiring that police and fire personnel reside within or near a municipality as a condition of continued employment have been held to be valid despite challenges on the ground that such requirements violate the right to travel. For example, in Fraternal Order of Police Youngstown Lodge No. 28 v. Hunter, 49 Ohio App. 2d 185, motion over, cert. den., 424 U.S. 977 (1975), the Court held that Youngstown's civil service commission rule requiring city employees and officers to reside within the city limits was not unconstitutional as applied to policemen hired after the passage of the rule. In reaching this determination, the Court took public notice of the duties of law enforcement personnel in finding that the city had a compelling interest in requiring policemen to reside within the city. The compelling interest, in turn, was based on the fact that law enforcement personnel are distinguishable from other city personnel in that police are subject to immediate mobilization and that there is a special relationship between the municipality and the law enforcement officials, even when they are off duty. Police or fire personnel are in a sense always accessible, should a need arise, if they live within the city.

Courts also have upheld similar residency requirements against challenges on due process, equal protection, vagueness and ex post facto grounds. In the ex post facto cases, courts

have upheld ordinances requiring policemen, firemen, and other municipal employees to establish residence within a certain time as a condition of continued employment. It is clear that reasonable time should be given for the change to be made, however. However, not all jurisdictions have decided this issue.

Residence requirements are vulnerable on the ground that they conflict with miscellaneous state constitutional or statutory provisions, which limit the authority of a municipality to enact such requirements. Thus in the Fraternal Order of Police Youngstown Lodge No. 28 case, the court held that the ordinance providing for a residence requirement was invalid because it conflicted with the charter. The charter incorporated by general reference the state's laws relating to civil service, which did not mandate a residence requirement, and which provided that the tenure of civil service employees shall be during good behavior and efficient service.

Finally, courts have held that a requirement that school employees reside within a school district in order to be eligible for promotion constituted a mandatory subject of collective bargaining, thus invalidating a residency requirement which was unilaterally adopted by the school board. Where a bargaining unit is recognized, therefore, the residency requirement must be made a part of the collective bargaining process.

In addition to legal concerns that will need further elaboration prior to proposing any residency requirement, some prudential concerns come to mind. Arguments favoring residence

requirement include: (1) law enforcement, fire and educational personnel (as well as others, perhaps) who live in the city are able to serve even when they are not working -- an off-duty law enforcement officer, for example, can offer assistance when needed, if she happens to be present at the scene; (2) the city is strengthened by having its employees reside in the city because they will be more likely to participate in the betterment of the city and will be more likely to support businesses located (and paying taxes) within the city; and (3) by residing within the city, city employees will be more likely to support other city services such as education.

Arguments opposing residence requirements include: (1) the right of the employee to decide where she will live (the freedom of choice is a pervasive notion in our society); (2) the quality of employee may drop because the best applicants will take jobs outside the city; and (3) and change should be prospective, so that current employees will not be forced to move.

14. Section 186: Should the format of the language concerning public improvements by contract or direct labor be clarified.

City Attorney Ronald J. O'Brien raised this issue.

It was brought to the attention of the CCRC that a recent case Ohio Contractors Assoc., et al. v. City of Columbus, Ohio, et al., 733 Fed. Supp. 1156 (1990), interpreted this Charter provision. *Because the provision was not parsed or formatted in a way that was easily deciphered, the CCRC recommends the technical clarification below.*

Public improvements of all kinds may be made by the appropriate department, by any of the following methods:

- a. by direct employment of the necessary labor and the purchase of the necessary supplies and materials, with separate accounting as to each improvement so made; or
- b. by contract duly let after competitive bidding either for a gross price or upon basis for the improvement; or
- c. without competitive bidding by contract containing a guaranteed maximum and stipulating that the City shall pay within such maximum the cost of labor and materials, plus a fixed percentage of profit to the contractor.

The council shall by ordinance determined by which of the foregoing methods any improvements shall be made. Contracts may provide a bonus day per day for completion of the contract prior to a specified date and liquidated damages to the City to be exacted in like sum for every day of delay beyond a specific date.

15. Section 202 (a) (2), (3), and (5): Should the petition signatures requirements for all city official candidates be uniform; should the number of elector signatures be changed; should the city adopt the state standards for petition form and circulation?

Terry Casey and Fran Ryan, County chairpersons for the Republican and Democratic parties, respectively, raised these issues.

Currently Section 202 (a) (2) of the Charter provides for a difference in the number of signatures required for the placing of a candidate's name on the primary ballot: city council

candidates are required to obtain not less than one half of one percent of the total number of registered electors in the city as of the last preceding regular municipal election, while candidates for mayor, city attorney and auditor are required to obtain not less than one percent. Each of the city office holders represent the same constituency, that is, all of the residents of the City of Columbus. Since the universe of voters is the same, it appears logical, as well as equitable, that all candidates for city-wide office be required to meet the same criteria with respect to the number of petition signatures.

The Charter's requirement that the number of petition signatures be based upon a percentage of the total number of registered electors in the city as of the last preceding regular election appears to have become obsolete considering the growth of the city's population. The policy of requiring a substantial number of electors to support a candidate before his/her name is placed on the ballot is still valid, but the number of signatures should be a fixed number, such as 1,000, rather than a percentage that requires calculation after each municipal election. The present system has become burdensome to administer because after each election the number of required signatures changes. The constant recalculations can also lead to controversy and confusion on the part of candidates.

Furthermore, it also seems prudent to specify a limit to the number of required signatures to be submitted in order to promote administrative efficiency in the election process. Today there

is no limit to the number of signatures that may be submitted on petitions and the counting of all signatures even though the required number has already been reached is an useless exercise. If candidates are reasonably careful in securing petition signatures, three times the number of required signatures should provide them a sufficient margin of comfort that enough signatures will be found to be valid.

Section 202 (a) (4) of the Charter sets forth the requirements for the petition itself and requires an affidavit of the person circulating the petition. This provision is not consistent with the state requirements for petitions set forth in Ohio Revised Code Section 3513.26 applicable to most other offices---state, county and municipal (where city charters do not set forth a separate procedure, as does the Columbus City Charter). Though it may have been important in historical times for the Columbus City Charter to specify petition form requirements, the State of Ohio having adopted a uniform procedure, there is no more need for the Charter to address the topic. Moreover, because the standards in the Charter are different from state law, the result has been unintended confusion and invalidation where the candidates' petitions meet the state law, but not the Charter requirements. Therefore, it seems appropriate to recommend that the current Charter petition form requirements be deleted.

Section 202 (a) (5) states that candidates' petitions are to be filed with election authorities not less than ninety days

before the primary election. If the recommendation to amend subparagraph (a) (2) is accepted which lowers the number of candidates' petition signatures to 1,000, the amount of time required to count the signatures will be lessened. Recognizing this fact, it seems appropriate to shorten the period for filing the petitions to 75 days.

Currently the Charter does not state a specific hour by which the petitions are to be filed on the filing date. Therefore the offices of the election authorities have had to be prepared to accept candidates' petitions until midnight of the 90th day prior to a municipal election. At the state law level, many statutes specify the hour by which filings are to be made so that there is clear notice provided to the parties who make filings and to provide the government offices with the ability to maintain regular business hours. Therefore, it is recommended that the Charter also specify that petitions must be filed by 4:00 p.m. of the 75th day before a municipal election.

In summary, the CCRC recommends that the Charter be amended with the result that:

- (1) Candidates for city council, mayor, city attorney and city auditor be subject to uniform petition signature requirements;*
- (2) That the number of petition signatures be changed from a percentage of the total number of registered electors in the last preceding regular municipal election to a minimum of 1,000 but a limit of submitting 3,000 signatures;*
- (3) That the form of the petition form and circulation details be removed from the Charter so that the petition form and circulation requirements will become*

consistent with uniform requirements of Ohio Revised Code Section 3513.261;

- (4) That the number of days prior to an municipal election by which petitions are to be filed be changed to 75 days from 90 days; and
- (5) That the Charter specify that the candidates' petitions be filed no later than 4:00 p.m. on the 75th day prior to a municipal election.

16. **Omnibus provisions:** Should a provision be placed in the Charter to enable future non-substantive changes or updates to be made under a blanket provision in lieu of itemizing each change that results in a "bedsheet" ballot?

The CCRC discussed proposing an amendment to the Charter that would allow sections of the Charter to be amended by groupings rather than submitting a change in each section as a separate referendum. *It proposes that technical and/or clarifying amendments could be considered together and also that amendment dealing with the same subject matter could be grouped together.* For example, all changes dealing with Civil Service could be grouped together as a single issue; it would be possible to have a technical or clarification amendments appear as a single issue and there could be a miscellaneous or omnibus issues. This would enable Charter amendments to be considered in a manner similar to legislation at the state level.

