

## LEGAL OPINION REGARDING THE EFFECT OF THE PROPOSED CHARTER, IF PASSED

This is in response to the Mayor's request for a legal opinion from the City Attorney regarding the effect of the proposed 2008 Lafayette Charter which will be on the ballot in March of 2009. The purpose of this opinion is neither to promote nor oppose the proposed Charter or any particular portions thereof, but rather to identify for the Mayor and Council the likely legal effect of proposed Charter provisions which would (a) alter the current manner of doing business in the City, (b) create legal conflicts, ambiguities or inconsistencies, or (c) be consistent or inconsistent with common practices of municipal governments generally. An opinion that a provision is uncommon is not intended as a value judgment, but merely as an observation based on the writer's experience as a municipal attorney.

1. Sections 1 through 7 deal primarily with boundaries and the distribution of municipal powers. These provisions are common and are generally found in most charters, with one unusual exception. Section 5 would require the City to "exercise its power to ensure the equal protection, treatment, and representation of all persons without discrimination". This provision is essentially a local "bill of rights" similar to the bills of rights in state and federal constitutions. Just as state and federal bills of rights have been subject to significant controversy and litigation, this creation of local rights could lead to similar results.
2. Section 8 prescribes mayoral responsibilities and is not uncommon. The mayor would be allowed to vote on all matters, not just to break a tie.
3. Section 9 provides for a Council President, which is common, but this section is both unique and contradictory. It provides that the Council must "elect" a Council President, but then provides that the President is to be determined by a "public drawing of lots of all eligible Councilors". This appears inconsistent unless, by "election" they mean this method. Also, drawing of lots from "all" Councilors could result in selection of a President who is unwilling to serve. The section also provides that if the mayor position becomes vacant, the council president becomes the mayor. This is different than the current charter, but not necessarily unusual.
4. Section 10, regarding councilor qualifications, would preclude an employee of the city from being on the Council. This provision is not uncommon, but is different from the current charter. The section states that the restriction is to avoid conflicts of interest, but legally, being a city employee and a city councilor is not necessarily a conflict of interest under Oregon law. This section would also establish a residency requirement and defines "residency" in a manner inconsistent with common law definitions.
5. Section 11, regarding council quorums, would require that council members be "physically present" at council meetings to constitute a quorum. That provision may preclude councilors from participating in a meeting by speaker phone when they are not able to attend in person.
6. Section 12, regarding voting, would require four affirmative votes for the council to make any decision. That is not uncommon, but it would preclude a decision from being made by a majority of a quorum as allowed by the current Charter.
7. Section 13 would require minutes of council meetings, which is required by law anyway.
8. Section 14 would require the Council to adopt rules governing its meetings. This is common. However, the rest of the proposed charter includes pages of rules governing virtually every aspect of council meetings. So, though this section seems to confer upon the Council the ability to adopt rules to control its own meetings, later sections would significantly restrict that ability.
9. Section 15 is an example of the restrictions on the Council's ability to control its own operations. This section contains several uncommon requirements detailing how councilors must conduct themselves and their business. It would require, for example, that councilors "remain

objective, despite personal feelings". Except for quasi-judicial proceedings, requiring elected officials to remain objective and avoid personal feelings is indeed uncommon, goes beyond ORS 260.452 and is probably unenforceable.

10. Section 16 regulates communications between councilors and the staff. It is uncommon in municipal charters. It would require that councilors and staff "shall work together in a spirit of mutual confidence and support". I don't know how such a mandate could be interpreted or enforced. It would require that staff cannot attempt to "influence individual Council members" outside of a meeting. This probably violates a staff member's right of freedom of speech. It also would prevent the staff from seeking support from councilors on city issues outside of public meetings. This is uncommon and may constrict the staff's ability to do its job other than at meetings.

11. Section 17 would allow the Council to create, abolish and combine appointive offices, which is common, but also allows the Council to fill such offices. This conflicts with Section 32 which would allow the City Administrator to fill appointive offices.

12. Section 18 would require that there be council "liaisons" to various committees and commissions. Such liaisons are common in cities, but requiring them in a charter is unusual.

13. Section 19 proposes to preclude conflicts of interest and bias on the Council. Such requirements are already required by state law. For that reason, such provisions are uncommon in municipal charters. Also, the provision equates bias with conflicts of interest, which are, in my opinion, two different concepts. For example, the premise of the section is that "conflicts of interest" generally arise in quasi-judicial proceedings. Actually, bias generally arises in quasi-judicial proceedings, but conflicts of interest arise in legislative and administrative proceedings as well.

14. Section 20 contains much that is already required by state law regarding ethics, but also contains some provisions which are both unusual and ambiguous. For example, it would require that councilors refrain from making decisions "involving business associates, customers, clients and competitors". Such conduct is illegal under state law only when such decision would financially benefit the councilor, his relatives or business. Therefore, this prohibition goes well beyond state ethics law. The section would prohibit a councilor from appointing relatives, clients or employees to boards and commissions; this is not illegal or unethical under state law. Finally, the section would prohibit actions benefiting "special interest groups at the expense of the City" without defining what such groups are or how to identify them. Arguably, a developer seeking a subdivision approval could be a special interest group. This is uncommon.

15. Sections 21 and 23 relate to ordinance adoption and are the same as the current charter.

16. Section 22 would require that any new or increased tax, charge or fee must be submitted to the voters. This is uncommon, but similar requirements have been adopted in a few Oregon cities recently. The section is not clear whether it would apply only to new taxes, fees and charges, or already existing ones. If the latter, then all current taxes, fees and charges, including increases, may immediately become ineffective and would have to be "ratified" by the voters to become effective again. It is unclear whether such existing taxes, fees and charges would be in effect between the date of the new charter and the date of ratification. Litigation would likely be required to resolve this ambiguity. The section would also alter the current ordinance adoption process, but although the alterations would make the ordinance adoption process more complicated, they are not entirely uncommon in Oregon cities.

17. Sections 24 through 29 deal with adoption of resolutions and orders, and are not uncommon.

18. Section 30 deals with the municipal court, and most sections are common. The section does, however, allow the judge (rather than the Council) to appoint pro-tem judges. That's not a legal problem, but it is uncommon.

19. Section 31 would require that the City Attorney be contracted on a retainer basis rather than hourly. This would be a change from the current practice, but is not uncommon. The section does not say who appoints the City Attorney. Since both the Council and the City Administrator have appointment authority under the proposed charter, it is not clear how the City Attorney would be appointed. But since the Charter also allows only the Council to enter into contracts, it is likely that the power would reside in the Council. The section would also allow any councilor to request legal services without council or mayoral approval. Since the attorney would be working on a retainer basis, such requests for service would not normally create extra cost to the City, but it could allow a councilor to make use of the attorney beyond what the retainer was designed to cover, which would necessitate either increases in the retainer or specific council approval to provide services outside the confines of the retainer.

20. Section 32 governs the City Administrator (CA) and is uncommon and ambiguous. First, it would require that the CA be appointed for a definite term of one year, but then would allow the Council to terminate the CA at anytime without cause. Most of the stated powers of the CA are similar to powers under the current Charter, but there are several unique provisions:

a. Before the CA can submit the annual budget, she must provide three "references" or "sources" for each line item. It is not clear what a reference or source is, nor is it clear what the CA would do if three such references or sources were not available.

b. The CA would be required to "prepare and pursue funding opportunities for the City in an amount not less than 10 percent of the annual budget amount". I cannot explain what that means. It seems that the CA would be required to seek significant revenue whether or not the City had a need for such revenue.

c. The CA would not be allowed to enter into any contract for services or durable goods without Council approval. Technically, therefore, the CA could not buy a \$50 cell phone, or hire a plumber to fix the toilet, without presenting it at a Council meeting.

d. The CA can only work 24 hours per week (until the population exceeds 7000). So, if the CA has already worked 24 hours in a week, and the Council then calls a Council meeting later that week, the CA would not be paid to attend even though another section of the proposed charter would require her attendance.

e. The CA would not be allowed to fire employees without Council approval (which is also in the current Charter), but in an emergency, the CA could suspend an employee and then have the termination approved by the Council at an "emergency" meeting. An emergency meeting to terminate an employee would probably be illegal under the open meetings law. A "special" meeting would be necessary. This provision may also violate existing union agreements

f. The CA would be evaluated by councilors, employees and seven appointed citizens. This process is often called a "360 degree evaluation". The proposed Charter says that the CA must receive a score of 70% or be subject to termination. However, since the CA would be subject to termination for any reason, she could be terminated even if she passes the evaluation.

g. The CA's salary is set in the proposed charter at \$29,700. If the City reaches a population of 7,000, the salary could go up to \$59,850, but no higher. Another section, however, would require the CA to become credentialed by the ICMA. Finding a qualified CA who is credentialed by ICMA for this salary may be difficult based on recent CA salaries provided in other Oregon cities. Also, there is no provision for the salary to increase to cover inflation. So, every year that the cost of living increases, the CA would receive a reduction in value. Again, this could affect

finding a qualified CA since the salary, in proportion to the cost of living, would effectively decrease each year.

h. Although the CA would apparently have the responsibility to supervise the staff during the 24 hours she is allowed to work, the proposed charter does not say who would supervise the staff during the remainder of the week. Also, this calls into question how the CA could be evaluated on her supervision of staff when she is prevented from working after the 24 hour a week limit.

i. I understand that the current City Administrator has a contract with the City. There is a principle of constitutional law that holds that a new law cannot impair an existing contract. Therefore, to the extent that this proposal would be inconsistent with the Administrator's contract, it may be that the contract would control until the current contract expires.

j. The section also would require that the CA shall not "refuse to respond to direction from Council". This begs the question whether a CA can refuse to obey an illegal order.

21. Section 33 (this is the first of two sections labeled as "33") would establish the position of "Assistant to the City Administrator". This provision is unusual for the following reasons:

a. It would establish a job position without specifying the Assistant's job duties.

b. It would set the salary for the position at \$45,000, but would allow only for a maximum of 2% cost of living increases. So the salary of the position would actually decrease over time if cost of living increases above 2%.

c. Even though the person in the job would report to the CA, the person would be hired and awarded benefits by the Council.

d. The position would be a full time job, as opposed to the CA position which is only a 24 hour per week job. So, the Assistant would be working a good deal of the time without direct supervision by the person he or she is supposed to assist.

e. The job title would be "Assistant to the City Administrator", but the person would be hired and evaluated by the Council, not the City Administrator. It is unclear, therefore, who the person actually works for.

22. Section 33 (the second section labeled "33") would require compliance with the Open Meetings Law and is normal. Section 34, however, is unique. It would require that the Council meet on the first Saturday of each month, as well as the second Thursday.

23. Section 35 would allow the Council to conduct special meetings, but would preclude the Council from considering any issue at such meeting other than the issues included in the notice of the meeting. This is more restrictive than the Open Meetings Law.

24. Sections 36 through 53 regulate Council meetings. The provisions are unusual and are very detailed because they regulate virtually all aspects of any meeting. This creates a conflict because the proposed measure would also allow the Council to adopt its own rules. It is difficult to imagine any rule which the council could adopt which is not already regulated by these sections. These sections create a number of unusual issues:

a. Section 37 says that the Mayor could set the order of business, but section 42 sets out the order of business in detail.

b. Section 42 regulates public hearings, but doesn't say when hearings are necessary.

c. Section 42 would also require time for citizen comments, but then says that the Council can take no action on issues raised by citizens until some undefined "later date".

d. These sections would require citizen comment and questions at various points in a meeting. This is not necessarily unusual, but it is not required by the Open Meetings Law.

e. Section 42 appears to require Council approval of Accounts Payable. That may imply that a bill cannot be paid until approved by the Council. An overdue bill, therefore, may not be paid until a meeting is held. If regular meetings are monthly, this could be problem.

f. Section 42 would require that "advisory committee representatives" may not speak to the Council at a meeting unless first having requested permission a week in advance. So, while citizens can address the Council without notice, the Council's own committees cannot.

g. Section 42 would also require that "all handout material will be read aloud". Thus, if a 100 page agenda packet or report is handed out at the meeting, it must be read aloud. Though Section 39 prohibits "unduly long meetings", this reading requirement would likely require long meetings in violation of Section 39.

25. Section 43 would require the CA attend all Council meetings (which is common), but doesn't say what the CA is to do if she has already worked her maximum 24 hours that week. The Section also would require that the CA be the "recorder" of the meeting, but again, if she has already put in her 24 hours, it is not clear how recording would be accomplished or by whom. Normally, cities appoint a City Recorder other than the CA.

26. Section 44 would require verbatim minutes. This is not required by the Public Records Law. However, the section would also allow the verbatim minutes to be amended "to more accurately reflect what transpired at the meeting". Normally, "verbatim" provides an accurate depiction so the need for amendment may be redundant or unnecessary.

27. Section 45 would allow two councilors to request a break in the meeting. Not unusual, but if only one councilor needed the break, he would need to get another councilor to agree.

28. Section 46 is ambiguous. One paragraph would allow the presiding officer to remove a person from a meeting for "disorderly conduct". Another paragraph, however, says that persons can be removed only for "engaging in violent actions" or "willful injury of furnishings or of the interior of the Council Chambers". Oregon law allows removal of a person for any disruptive behavior including speaking without permission, insulting comments, etc. So the council would apparently be unable to remove disruptive people unless they were violent or damaged things. This section could restrict the council from being able to control their meetings. In addition, the section would require that a violent or destructive person must first be warned before they can be removed. So, it appears that a person that acts in a violent or destructive manner may only be warned without being required to leave, unless and until they do so again. This is unusual and potentially dangerous.

29. Section 47 is common.

30. Section 48 conflicts with Section 46. Section 48 would allow removal of a person from a hearing for being "disorderly, abusive or disruptive", not violent or destructive, and no warning is required. This section would also require that no person shall be refused the right to address the Council. This is not required by the Open Meetings Law and is highly unusual. Normally, a council is allowed to determine when, how and whether the public can participate in a meeting.

31. Section 49 would provide that no testimony may be submitted in a quasi-judicial proceeding after the conclusion of a hearing. That would violate ORS 198.763 which specifically allows submission of testimony and evidence after conclusion of a hearing.

32. Section 50 would require that on any issue, the public must be allowed to speak. That is uncommon in cities. In addition, Section 54 would allow any person to raise "points of order". That also is uncommon. Roberts Rules of Order, for example, allows only members of the legislative body to raise points of order, not members of the audience.

33. Sections 51 and 53 are not uncommon.

34. Sections 54 through 60 govern elections and are common, with one exception. Section 60 would require nominations for office only by nominating petition, not by declaration of candidacy as allowed by state law.

35. Sections 61 and 62 govern filling of vacancies on the Council. Section 62 would be unusual. It provides that candidates for appointment to fill a vacancy on the Council are selected by "drawing lots" rather than by vote of the Council. But it also provides that vacancies would be filled by the Mayor with the approval of the Council. I see no way to resolve this conflict.

36. Section 63 would require that all records of the City, including existing paper records, be scanned and stored electronically. A project of this magnitude may require significant time and staff effort, or perhaps could be done by a consultant. This is unusual and is not required by the Oregon Public Records Law. The section also would require that copies of records be given without charge for the cost of locating and copying the records. This is inconsistent with the Public Records Law which allows reimbursement of such costs. Finally, this section contains a notable inconsistency; it would require compliance with State Archivist rules regarding retention of records, but then prohibits destruction of records even though the Archivist rules allow destruction.

37. Sections 64 through 71 are not uncommon.

38. Section 72 would require an election on any capital improvement project exceeding \$1,000,000. This is uncommon.

39. Section 73 would require a hearing on all contracts. This is uncommon among cities. The section would require that the CA provide bids from three additional sources before a contract can be approved. So, if there aren't three sources for a particular contract, the Council may not be able to approve the contract. For example, state contracting law allows "sole source" contracts as well as contracts where fewer than three sources are available. This charter proposal may prohibit such contracts. Finally, this section prohibits any contract which includes reimbursement of travel time or which extends beyond one year. Most consultants require travel time reimbursement, and they would be excluded from contracting with the city. And many construction contracts take longer than a year to build, so the city may be precluded from building anything that can't be built in a year, or from engaging in any multi-year program of any kind.

40. Section 74 would require that every citizen shall have an "equal opportunity to participate fully in the life of the City". In addition to being unusual, I cannot imagine all of the circumstances which could give rise to a person alleging that they have somehow been denied such an equal opportunity.

41. Section 75 governs accounting. Most of the requirements are common. Such provisions are rarely included in charters however.

42. Section 76 is unusual. It would require that all employee salaries be fixed by the Council, which means that the CA would have no control over the salaries of the people who work for her. The section also would prohibit any compensation exceeding the salary amount, which may preclude fringe benefits from being afforded to employees. Finally, this section would likely conflict with state law requiring collective bargaining of salaries and benefits.

43. Section 77 is uncommon. It would require a Citizen Advisory Committee to review citizen complaints, coordinate volunteers, perform audits and facilitate town hall meetings. In most cities, these are functions of the elected City Council rather than appointed advisors.

44. Section 78 is uncommon. It would require that City Hall be staffed and open for business Wednesday through Saturday from 8:00 to 6:30, or 10 1/2 hours per day. Unless shifts were established, this would violate state and federal law which prohibits employee hours to exceed 10 hours per day in a 4 day work week. The provision may be inconsistent with labor agreements. Also, the section appears to require City Hall to be open even on state and federal holidays, which creates issues of overtime pay for staff who would be required to work on those holidays, and potential inconsistencies with labor agreements.

45. Section 79 is uncommon. First, it would require energy conservation and avoidance of resource waste, which is undoubtedly a good thing, but it does not define "waste". Second, the section would require a public hearing before any "public asset" can be destroyed, sold, burned, disturbed or disposed of. "Public asset" is not defined. This may result in a requirement for a public hearing even for minimal transactions unless a definition of "public asset" is agreed upon.

46. Section 80 is not uncommon.