

MEMO

TO: CHARLOTTE CITY COUNCIL

FROM: THOMAS M. HITCH, CITY ATTORNEY

RE: PROCEDURE AND PROCESS FOR CHARTER AMENDMENTS AND
CHARTER REVISION, THE DETERMINATION WHETHER A CHARTER
REVISION IS NECESSARY AND THE ESTIMATED COSTS

DATE: September 9, 2016

The purpose of this memorandum is to review the process and procedure regarding amending the city charter of a home rule city, and its counterpart, the revision of a city charter by city council. Each process will be examined separately.

A. Amendments to the Charter. The charter amendment process is governed by Sections 21 through 25 of the Home Rule City Act, MCL 117.21-25. An amendment may be initiated either by city council or through an initiatory petition. In either case, the proposed amendment must be confined to one subject. See MCL 117.21. At the end of the process, an election must be held by the voters within the city and any number of amendments may be presented at one time for consideration by the voters.

The procedure for council-sponsored charter amendments is set forth as follows:

1. Resolution proposing amendment and setting date for election adopted. Requires 3/5 vote of members-elect of governing body.
2. City clerk sends copy of proposed amendment to Governor for approval.
3. City clerk sends copy of "statement of purpose" of proposed amendment to Attorney General.

4. City clerk publishes proposed amendment in full with charter sections altered or abrogated, as directed by governing body.
5. City clerk publishes notice of last day for registration (first publication at least 40 days before election day).
6. City clerk publishes election notice (first publication at least 10 days before election day).
7. Election day (at least 60 days after adoption of resolution).
8. City clerk will file approved amendment with Secretary of State and county clerk (within 30 days after election day).

B. Charter Revision. The procedure for completely revising a city charter is significantly more complex. Like amendments to the charter, it may be initiated by city council or through an initiatory petition. At MCL 117.18, when its legislative body adopts by a 3/5 vote of its members to declare a general revision of the charter, the question of having a general charter revision shall be submitted to the electors within the city for adoption at the next general or municipal election, or at a special election.

In addition to an election on whether the charter should be revised, there is provided for the election of nine commissioners to the charter commission. Typically, the election of the commissioners occurs at the same time as the election on the issue whether to revise the charter for reasons of cost. If the commissioners are not elected at the same time, the election must be held within 60 days after a favorable vote for revision.

The statutes also provide for certain advisory votes on the changes that may be considered in the form of the city government or the continuation of various powers, limitations, or procedures. Those advisory votes may be held at the time of the initial electoral determination whether there should be a revision and, if not, at the same time as the election of the commissioners.

Prior to the election, the city council shall fix the place of the commission meetings, the compensation for its members, the money for expenses thereof and, if necessary, the cost for the elections. If a vote of the election for a charter revision is in the affirmative, the charter commission shall convene on the second Tuesday after the election at the place designated by city council. The city clerk shall preside at the first meeting, shall administer the oath of office of the members elect, and shall act as clerk of the commission. The charter commission shall be the sole judge of the qualifications, elections, and returns of the members, and shall choose its officers, except clerk, shall determine the rules of its proceedings, and shall keep a journal.

The statute, MCL 117.20, is very precise in the requirements how the charter commission may conduct its proceedings. In pertinent part, MCL 117.20 provides:

“A roll call of the members on a question shall be entered on the journal at the request of 1/5 of the members or less if the commission shall so determine. The commission may fill a vacancy in its membership, and shall fix the time for the submission of the charter to the electors. A member shall not receive compensation for more than 90 meetings of the commission, and only for actual attendance. A member of the commission shall not be paid for more than 1 meeting per day. A majority of the members shall constitute a quorum, and the sessions of the commission shall be public.”

The conducting of meetings and business must also comply with the Open Meetings Act and the Freedom of Information Act.

Once a charter is approved by the commission, it is voted upon by the electorate. At the same time as the consideration of the charter itself, the city council may provide for the consideration of separate advisory propositions in a form approved by the Attorney General as to clarity and impartiality. The adoption of the proposed charter shall require a simple majority of those voting on the question. See MCL 117.23.

If the proposed revised charter is rejected by the electors of the city, the charter commission shall immediately reconvene and determine whether to take no further action (in which case it shall terminate and cease to exist) or whether to provide a revision of, or amendments to, the revised charter previously prepared by the commission. The proposed revised charter with amendments shall be resubmitted to the qualified electors of the city in the same manner and with like notice and proceedings as initially required. A proposed revised charter, as originally submitted or as resubmitted with amendments, shall be submitted not to exceed three times to the qualified electors within the city. If the charter is rejected three times, or if no revised charter is adopted during three years following the adoption of the proposition to revise the charter, then the commission shall terminate and cease to exist.

As noted above, the procedure to revise a city charter is significantly more complex, and thus, more costly than the amendment process. For example, the Attorney General noted that such a process was “long and costly” in its opinion on what constitutes a charter revision in OAG No. 4916, issued January 22, 1976. As I am sure you would be aware, once the commission is established, it takes on a life of its own and can undertake its duties for up to three years after the affirmative vote on whether to revise the charter.

It is difficult to estimate the time frame in which a revised charter could be produced; a fair estimate would, in my opinion, be at least nine months to one year and could take as long as

up to 18 months. Given the time and effort necessary to revise a charter, one could reasonably anticipate that if the charter was rejected, a commission, having put in such time and effort, would more than likely continue to function and continue to make changes in order to succeed in the charter revision process.

Given the time frame, the 90-meeting compensation limit established by statute is reasonable. In addition to the cost of the extra elections and the significant cost in attorneys fees, some communities in addition choose to hire an outside consultant who specializes in the process.

C. Charter Amendment or Charter Revision. As the Council can observe, the charter amendment process is significantly different than a charter revision. Once a charter is initially enacted, charters are frequently amended but the courts in Michigan have been mindful that not all amendments are valid if they attempt, through the charter amendment process, to significantly alter, disrupt or destroy the fundamental relationships established in the charter that is sought to be amended.

In Michigan, as elsewhere, the courts have recognized the substantial distinction between the terms “revision” and “amendment”. In *Kelly v Laing*, 259 Mich 212, 217 (1932), the Michigan Supreme Court stated:

“Revision” and “amendment” have the common characteristics of working changes in the charter and are sometimes used inexactly, but there is an essential difference between them. Revision implies a re-examination of the whole law and a redraft without obligation to maintain the form, scheme, or structure of the old. As applied to fundamental law, such as a constitution or charter, it suggests a convention to examine the whole subject and to prepare and submit a new instrument, whether the desired changes from the old be few or many. Amendment implies continuance of the general plan and purpose of the law, with corrections to better accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail.

In that opinion, the court cited favorably the dissent in a Colorado Supreme Court decision which gives some guidance in understanding the distinction. In quoting from the dissenting justices, the Michigan Supreme Court stated:

While the so-called amendments are germane to municipal government, they are in no sense germane to, nor *within the lines* of the existing charter...Provisions which would be proper in *any* charter are not the distinguishing features of government, and, therefore, cannot be employed as a criterion in determining whether a proposed change is in reality a new charter or an amendment to an

existing charter. The distinguishing feature of a charter of a municipality, or of the organic law of a State, is essentially the form and frame of government prescribed therein.

* * *

Now, the charter of the city and county of Denver is the organic law thereof, and constitutes the instrument that may be amended. That charter, therefore, is the subject of legislation, and a “charter amendment” to it, therefore, to be proper, must be germane to *the* plan or scheme of government therein prescribed. *Id.*, *age* 220.

From that line of reasoning, the Supreme Court stated:

“The reasoning of the dissenting opinion seems to us the better, especially as applied to a case where the statute draws a distinction between revision and amendment as a method of altering a charter and confines each to its own sphere. It is a specific instrument, the charter, as to which the change must be ‘within the lines’ in order to constitute an amendment, not the general ‘subject of municipal government’ or ‘local self-government.’ The latter, however, is a proper and principal consideration on revision.” *Id.*, *at* 221.

The courts in Michigan have applied this concept to changes in a charter which significantly alter the city council/city manager form of government. In *Midland v Arbury*, 38 Mich App 771 (1972), the Michigan Court of Appeals was asked to consider whether a charter amendment initiated by the electors, and passed by the electorate of the City of Midland, was a proper amendment or, as argued by the city, a fundamental change in the city manager form of government which would require a charter revision. In that case, the amendment provided that the city manager could be recalled by a vote of the citizens, just as Council Members could be recalled.

The city argued that introducing the electorate into the process of removing the city manager fundamentally altered the city council/city manager relationship. After considering the distinction of revision and amendment, as set forth in *Kelly*, *supra*, the Court of Appeals agreed with, and quoted, the trial court’s decision on this issue where it wrote:

The effect of the amendment providing for the recall of the city manager, in the opinion of this court, changes the fundamental concept of commission-city manager government. The charter places certain responsibilities upon the city manager. These, amongst others, consist of recommendations from him to the council and vest him with the entire administration of the city subject to the directives and policy decisions of the council. If the city manager is not performing his functions correctly, he can be removed under the charter by the city council in accordance with the procedures therein set up. Under the

amendments, a city manager who is performing his duties properly, legally and in exact accordance with his instructions could be recalled merely because he had incurred the disfavor of the electorate. The effect of this provision means that the city manager would no longer be controlled by the city council but would be obliged to curry favor with the public under penalty of being recalled. In short, he could have two masters and it would be impossible for him to serve both properly. *Id.*, at 775-776

The Court of Appeals concluded that the impact of this amendment would be to effectively destroy the city manager form of government and would constitute a substantial revision of the charter. *Id.*, p 76.

It is my understanding that the city council has asked me to set out these provisions providing for charter amendments or charter revisions in order to determine whether a change to Section 4.8, which would provide that an employee may only be fired upon the approval of city council, could be accomplished by an amendment, or a charter revision. Section 4.8 reads, in pertinent part, as follows:

“Neither the Council nor any of its members or committees shall dictate the appointment of any person to city office or employment by the City Manager or in any way interfere with the City Manager or any other city officer to prevent him from exercising his judgment in the conduct of the duties of his office or the appointment or employment of officers and employees in the administrative service.”

As I indicated to the Council in an oral opinion, it was my opinion that this section prohibited the city council from being engaged in employee relations matters, except where it is otherwise provided for regarding department heads. For the city council to have any involvement in the firing of city employees, it is my opinion that this section would have to be altered.

It is my opinion that, following the reasoning of *Midland*, as set forth above, providing for another method of firing employees, other than by the city manager, would constitute a fundamental change of the city manager form of government. In this case, it would be analogous to the *Midland* case, as such an amendment would essentially create two masters for city employees. A city employee could be performing his/her job in an inadequate manner, in the eyes of the city manager, yet having the favor of a majority of Council members, the amendment would prevent the employee from being subject to termination by the City Manager. Likewise, an employee may be performing adequately in the eyes of the city manager, and the city council would assumptively be able to terminate the employee if, in their collective view, the employee was not performing adequately. That would, in my opinion, substantially alter the existing “organic law” as embodied in the charter as presently written. It is, therefore, my opinion that to effect such a change, the Council could only do so by seeking to revise the charter, through a charter commission, and not pursuant to the amendment process.

D. Costs of Amending Charter and Revising Charter. In estimating costs, it is always difficult to set forth firm estimates. It is my opinion, however, that the costs for amending the charter as opposed to the costs of revising the charter would be substantially different.

In terms of amending the charter, it would be my estimation that the costs would be in the range of several thousands of dollars. There would be attorney time and staff time that would principally make up that cost. The process of drafting, obtaining approval of the city council, then obtaining the required approvals from the Attorney General's Office and the Governor's Office would make up the bulk of the costs unless there is a special election. The several thousands of dollars is obviously not an insubstantial number, but nonetheless not significant in relation to the city's budget.

As it pertains to going through the process of revising the charter, with the establishment of a charter commission and the resultant elections, the funding of the charter commission would be very expensive. My estimation is that the cost would be measured in the tens of thousands of dollars. In this regard, because the Council would have no control over the number of meetings, except as provided by statute (90), there would be no effective control of any costs. The fact that the city council only wanted one section of the charter amended would be immaterial to the charter commission as it is empowered pursuant to the statute to consider other advisory amendments and, indeed, "revise" the existing charter. It would be my opinion that the costs of a charter revision would be substantial, and would be spread over, at a minimum, two to three fiscal years.

TMH:ddy