



City of Portland Charter Commission Agenda

Charter Commission Meeting
April 6, 2022 at 6:00 PM

1. Zoom Information

a.

Due to the existence of an "emergency or urgent issue", the Charter Commission Committees will conduct this meeting by remote methods/technology at the Zoom link provided below, in accordance with the requirements of 1 M.R.S. section 403 -B and the Charter Commission Remote Participation Policy.

This meeting will be held remotely pursuant to the Remote Meeting Policy adopted by the Charter Commission and as authorized under 1 M.R.S. 403-B because of the existence of an emergency or urgent issue that requires the committee to meet by remote methods. Allow your computer to install the free Zoom app to get the best meeting experience. If you are not able to attend live, a recording will be available following the meeting.

For public comment, you will need to use the "raise your hand" feature. To raise your hand via the telephone, please use *9. You will be unmuted by the host when it is time for public comment.

Please click the link below to join the webinar:

<https://us06web.zoom.us/j/83324586849?>

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Passcode: 484949

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2. Call to Order
3. Approval of the prior meeting minutes
 - a. Approval of the Draft March 30, 2022 Charter Commission meeting minutes.
4. Deliberation and Vote on Governance Models (6:10-8:55pm)
 - a. Description: Commissioners will deliberate and vote on reforms to the basic structure of Portland's government.
Relevant Document(s):
 - a. Chann-O'Brien proposal
 - b. Amendment to Chann-O'Brien Proposal (amended by Commissioners Buxton, Sheikh-Yousef, Buxton, Kebede)Older documents
 - c. Commissioner Sheik-Yousef's governance model proposal
 - d. Matrix comparison of two models
 - e. Commissioner Barowitz's organizational charts
 - f. Relevant research and interviews
 - g. Office of Information Proposal

(Breaks 7:50-7:55; 8:55-9:00)
5. Public Hearing, deliberation, and vote on Code of Ethics proposal from Procedures Committee (9:00-9:30 pm).
 - a. Description: Commissioners will hold a public hearing, then deliberate and vote on this proposal.
Relevant document(s):
 - a. Proposal on Code of Ethics
6. Public hearing, deliberation, and vote on School Budget Process Proposal from Education Committee (9:30-10:05 pm)
 - a. Description: Commissioners will hold a public hearing, then deliberate and vote on this proposal.
Relevant document(s):
 - a. Proposal for school budget process
 - b. Legal Memo
7. Public hearing, deliberation, and vote on Capital Improvement Program Process Proposal from Education Committee (10:05-10:35)
 - a. Description: Commissioners will hold a public hearing, then deliberate and vote on this proposal.
 - a. Proposal for capital improvement program process.

8. First Reading on School Board Vacancies
 - a. First reading on School Board Vacancies
9. New Business
10. Adjourn



City of Portland Charter Commission Meeting Minutes

March 30, 2022 (Remote via Zoom)

1. Zoom Information

The meeting was conducted as a remote meeting by Zoom videoconference in accordance with the Commission's Remote Participation Policy and State law (1 M.R.S. §403-B).

2. Call to Order

Chair Kebede called the meeting to order at 6:20 p.m. (The meeting was delayed by technical difficulties.)

Commissioners present were Barowitz, Buxton, Chann, Eglinton, Houston, Kebede, Lizanecz, O'Brien, Sheikh-Yousef, Stewart-Bouley, Washburn, Waxman. (Quorum established)

3. Review and Approval of Minutes

On motion by Commissioner Washburn, seconded by Commissioner Eglinton, the Commission voted to approve the draft meeting minutes of March 23, 2022 by roll-call vote of 12-0.

4. Deliberation and Vote on Governance Models

Commissioners deliberated and conducted straw poll votes on reforms to the basic structure of Portland's government. There was consensus to proceed with the slides that described the overlap between the most recent proposals and to discuss differences. The provisions in the Chann-O'Brien proposal were colored in blue font and provisions from the proposal from Buxton, Washburn, Sheikh-Yousef, and Kebede were colored in purple font.

Commissioners Buxton and Stewart-Bouley suggested they were not sure if Commissioners are as much in agreement as may think, so will look at this slide-by-slide.

Commissioner Eglinton asked if whatever elements of a governance model that the Commission votes will come back for a public hearing on a single framework?

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Commissioners Barowitz and Waxman agreed – this exercise is more of a set of straw polls and the public will have an opportunity to weigh in.

Using the charts under “Two Plans for Portland – An Overlap Analysis,” the Commissioners conducted straw polls on the topic headings and concepts included therein:

1) Mayor as Chief Executive

Chann-O’Brien (Blue) - 2 in favor (Chann, O’Brien)

Chann-O’Brien Amended (Purple) – 5 in favor (Washburn, Buxton, Houston, Kebede, Sheikh-Yousef)

Commissioner O’Brien expressed his concern that “supervision” is a human resources term; mayor should conduct annual performance review of manager – a high-level oversight, not involved in day-to-day operations of manager. Commissioner Eglinton doesn’t support either, but may support a modified proposal if there is to be an executive mayor. Commissioner Waxman of similar mind; concerned with mayor’s control over city manager – feels like an overreach.

- a. “Oversight and supervision” – underlying aim is to flesh out the concept of “chief executive officer.” Chair Kebede explained this is meant to capture the shift from Council-Manager to Council-Mayor, with professional management available. He envisions a more constrained chief executive mayor than say in Westbrook, who has the power to hire and fire. Commissioners Washburn and Sheikh-Yousef agreed. Commissioner O’Brien agreed on implementation of council policy as being an executive task, and drew the line at micromanaging day-to-day management.
- b. Mayor is chief executive officer (but difference as to how constrained that authority is). The Chief Executive Officer (CEO) supervises the Chief Operations Officer (COO), but does not manage the rest of City staff. (8 in favor – Washburn, Barowitz, Chann, O’Brien, Sheikh-Yousef, Houston, Kebede, Buxton; 2 opposed – Waxman, Eglinton; and 2 abstain – Lizanecz, Stewart-Bouley.)
- c. Mayor oversees the implementation of Council policy (Same vote as b. above; 8-2-2)
- d. Guardrails around the supervisory powers of the mayor over the COO/Manager (Administration – what flexibility? Traditional notion of supervision – direct supervision?) There are between 15 and 20 city departments. Chair Kebede said it is common for mayor and manager to jointly supervise department heads. He suggested that the COO is expert in execution and puts mayor’s vision into motion. He said he understands concerns over imperious leadership. Commissioner Buxton said she supports a model of equals among manger and department heads to uphold expertise. Commissioner O’Brien expressed concern with prospect of department heads having two bosses. There was consensus that City staff is managed exclusively by department heads (12-0). Chair Kebede suggested using term Chief Operating Officer (COO) rather than similar term of “City Manager” or “City Administrator” because City Manager is such a loaded term at present.
- e. Mayor has supervisory role over the COO and they will work on a coordinated approach to management of department heads. (7 in favor – Barowitz, Buxton, Houston, O’Brien, Kebede, Sheikh-Yousef, Washburn; 2 opposed – Waxman, Chann; and 2 abstain – Eglinton, Lizanecz.)

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- f. Title for the COO – something other than City Manager. (8 in favor – Barowitz, Buxton, Houston, O’Brien, Kebede, Eglinton, Washburn, Waxman; and 2 opposed – Stewart-Bouley, Chann.)

2) Council as Legislative Branch

- a. Mayor to preside as chair of City council. Commissioners O’Brien and Chann supported the concept – like the Vice President and the U.S. Senate. Chair Kebede did not support – retaining mayor on City council blurs meaning of chief executive officer; there is no division of executive and policy roles. Adding both lawmaking power and leadership to a mayor with executive power is too much. A clear separation of powers will avoid concentration of power in mayor.
Commissioner Chann expressed that a mayor who is the champion for the City and a leader establishing a vision will have time to also preside over the City Council, and while this may muddy division of branches, it provides clarity as to who is political leader of the City. If mayor runs on policy, they have to have an outlet.
Commissioner Sheikh-Yousef questioned whether it would be awkward for executive mayor to also chair Council and set agenda – the mayor could use veto authority instead. Commissioner Barowitz stated that the person leading the legislative body – the council – should be a member of that body. Commissioner O’Brien said he does not want to put faith in “they will collaborate” because in Portland, the Mayor and City Manager “buted heads” for 8 years. He also asked who would be the political leader of the City – executive mayor or Council president? He said he wants to make clear who is the political leader of the City. He added that not having the mayor chair the Council would potentially set up an adversarial relationship between the mayor/executive branch and Council/legislative branch, since every at-large councilor will want to be mayor.
- b. Should Mayor preside as council chair?
Yes – 6 (O’Brien, Eglinton, Chann, Waxman, Lizancez, Stewart-Bouley)
No – 6 (Kebede, Washburn, Sheikh-Yousef, Barowitz, Buxton, Houston)
Commissioner Kebede noted that if the mayor is not part of council, can have the veto authority like a president or the governor, that can be overridden by council – majority or supermajority
Commissioner Chann expressed that this is why he preferred acting on a package; now that a strong executive mayor has been adopted, anything added to mayor’s powers looks like too much power; he has lost faith in this process.
Commissioner O’Brien offered a concept of mayor as facilitator of the council meeting, with no vote, the council sets agendas, and the mayor and executive committee assign subcommittee membership. Commissioner Kebede was willing to support a substantially unempowered mayor as council chair if that mayor is executive mayor.
Yes – 9 (Buxton, O’Brien, Sheikh-Yousef, Eglinton, Houston, Kebede, Lizancez, Chann, Stewart-Bouley)
No – 2 (Barowitz, Washburn)
Abstain – 1 (Waxman)
- c. Veto Power of Mayor
Yes – 3 (Barowitz, O’Brien, Sheikh-Yousef)

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No – 3 (Washburn, Eglinton, Chann)

Abstain – 4 (Buxton, Houston, Lizanecz, Kebede)

Commissioners agreed there needed to be more discussion on the topic.

Commissioner O'Brien suggested a veto for policy and ordinances and budget veto as to entire budget. Commissioner Barowitz would like to see a line-item veto. The Commission agreed to table this topic for now.

3) Budgetary Powers

Commissioner O'Brien said he envisions a 2-step process: mayor presents budget and council adopts it, with mayor directing the COO in the preparation of the budget and communicates the budget to council. Mayor does not "get into the weeds" with the budget.

Chair Kebede both envisions mayor overseeing the drafting of the budget and presenting it to Council to consider and adopt. He said that many charters say the mayor will prepare the budget, but that does not mean that the mayor goes into detail.

With agreement in concept, the Commission considered this proposal: the mayor directs the COO in the preparation of the budget and communicates it to the council for consideration and adoption.

Yes – 9 (O'Brien, Barowitz, Kebede, Buxton, Lizanecz, Houston, Eglinton, Stewart-Bouley, Washburn)

No – 1 (Waxman)

a. Veto power for budget (leave veto for policy for another day)

Commissioner O'Brien noted that this is the one place a mayor can put a platform in effect if they cannot vote – the only leverage mayor has is the veto. Chair Kebede was persuaded by Commissioner O'Brien.

Mayor may veto city budget and council may override veto by 2/3 vote:

10 – Yes (O'Brien, Barowitz, Kebede, Buxton, Lizanecz, Houston, Eglinton, Stewart-Bouley, Chann, Sheikh-Yousef)

1 – No (Washburn)

1 – Abstain (Waxman)

5. **Public hearing, deliberation, and vote on Code of Ethics proposal from Procedures Committee**

Commissioner Lizanecz summarized the proposal, which includes a Charter amendment to require a Code of Ethics Ordinance to be prepared by an Ethics Commission and enacted by City Council, with Ethics Commission to provide non-binding guidance and advisory opinions and to interpret the Charter.

Public Comment was taken. Deliberation was postponed to the next meeting of the Commission.

6. **Public hearing, deliberation, and vote on School Budget Process Proposal From Education Committee**

The Commission tabled this item until the next meeting.

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7. Public hearing, deliberation, and vote on Capital Improvement Program Budget Process Proposal from Education Committee

The Commission tabled this item until the next meeting.

8. Vote on Final Language for Citizen Police Oversight Board

On motion by Commissioner Chann, seconded by Commissioner Sheikh-Yousef, the Commission approve the final language of the Citizen Police Oversight Board proposal by roll-call vote of 11-0 (Waxman was absent).

9. New Business

Commissioner O'Brien said that he would like to bring the concept of an Office of Information as a proposal before the Commission at a future meeting.

10. Adjourn

On motion by Commissioner Washburn, seconded by Commissioner Sheikh-Yousef, the Commission approved a motion to adjourn by roll-call vote of 11-0 (Waxman was absent). The meeting adjourned at 10:41 p.m.

Governance Committee Colleagues,

I present the below proposal so that we can consider a system of government for Portland that more fully moves us away from our current undemocratic City Manager. It was developed based on the principles I told the voters I would represent, one-on-one feedback from fellow commissioners who also ran on these principles, testimony from our committee hearings (although we need to expand that input as described below), emails and comments many of us have received, my own research, and input from community members.

The core components of the model I am proposing are:

- **Democracy first;**
- **Strong checks and balances between both branches;**
- **Efficient administration;**
- **Public accessibility/accountability.**

What I outline is based on the Mayor-Council forms of government that almost all other states in America have in their largest cities (see attached document). Of particular note, I looked at the eight other northeast states, which all have elected mayors in their largest city (From [Bridgeport](#) to [Manchester](#) to [Providence](#) to [Boston](#), etc.). I also looked closely at [Wilmington, Delaware](#). Wilmington is perhaps the closest to Portland in terms of population vs ratio to the state (70,000 in Wilmington/1,000,000 in Delaware). It is also Delaware's service center, economic engine, and one of its most diverse cities, much like Portland.

That said, no individual model from another city will work perfectly for us. After reviewing and discussing the below proposal, I would suggest the committee invite a number of elected mayors from neighboring states to join us by zoom. We could then get their direct input on how their model works and what they would advise as we develop ours.

As you will see, I have tried to address some of the committee concerns regarding the day-to-day operations and ensuring that our elected Mayor does not get bogged down in the minutia, while still ensuring public accountability that services are being implemented according to our values.

Additionally, please note that my proposal contains an elected public advocate (PA). The public advocate position, as you'll see, is a bit of a bridge, but also creates third party accountability. It will be able to fulfill some of the roles that were described in the committee's version of a council chief of staff. The particulars are outlined below.

Thanks, and I look forward to discussing this further.

-Nasreen

Strong Council & Elected Mayor

Powers of the Council

City Council becomes the chief policy-making body of the city, including powers to enact all policy proposals, approve/reject all nominees for department heads and boards/commissions, approval of the city budget and all revenue changes (including ongoing scrutiny of expenditures/revenues), and emergency power approvals (further detail of these powers described in sections below). Councilors serve three-year terms, rotating, sworn in on the first Monday in January after the November election. No term limits.

City Council elects 2-year Council President from its own ranks with majority vote (removal by 2/3rds). The Council President is the voice of the Council and meets with the Mayor regularly. President chairs Council meetings, sets Council rules/agenda, and creates/appoints/removes all standing committees/committee members/chairs. The President may create and appoint members to any ad-hoc committee to investigate a particular policy and/or investigate government malfeasance. Plus, any/all other duties bestowed upon the office by a majority vote of the Council. Council Presidents may not serve more than 4 consecutive terms.

The City Council will have its own independent staff to meet its responsibilities, policy development, public communications, and administrative tasks. Council's budget will be determined within the annual city budget proposed by the Mayor and reviewed in accordance with the budget process.

Powers of the Mayor

Elected Mayor ensures the implementation of policy and oversees the efficient administration of the city. No longer a member of the Council and does not have a vote. Does have the ability to propose policy for Council review and must sign/veto all legislation enacted by the Council (described below).

The Mayor will nominate for Council review and approval a "City Administrator" who will be responsible for the day-to-day supervision of all Department Heads, also nominated by the Mayor, and city operations. The "City Administrator" will serve under the direction of the Mayor, however, will be required to attend any Council Committee meeting when a committee chair requests it.

Mayor is elected on the same cycle as the US President (effective 2024) and sworn in on the first Monday in January after the November election. May serve only two consecutive 4-year terms.

Nomination and Oversight of Department Heads

The Council reviews/approves/rejects all Mayoral nominees of Department Heads to lead city staff (Chief of Police, Director of Public Works, Director of HHS, etc.). Council approves/rejects each nominee with majority vote after the council committee of jurisdiction holds public hearings/vote on each nominee (for instance: Public Safety Committee reviews nominee for Chief of Police). Staff below department heads are hired by their respective supervisors and do not need Council approval.

All Department Heads, after review/approval by Council, will report to and serve at the will of the Mayor after approval by Council, with day-to-day oversight administered by the City Administrator. All Department Heads, or designee, are required to provide all requested information to council committees of jurisdiction and testify to committees when called upon. All Department Heads may request to attend a Committee meeting to report on any matter pertaining to the committee's jurisdiction.

Policy Development

All policy proposals must go through Council for public review/amendment/final disposition.

All Councilors and the Mayor will have the right to submit policy proposals for Council consideration/review/action. All Department Heads, or their designee, will be available to elected officials for the purpose of any proposed policy development. (If a staff member or constituent wants to propose an idea for Council consideration, they can ask an elected official to sponsor the proposal).

All policies, ordinances, orders, expenditures, revenue changes, etc. approved by Council must then be signed into law by the Mayor or vetoed within 10 days of passage. Council may override all vetoes within 15 days, with 75%+ super-majority. If Council overrides, policy is enacted. If council fails to override, policy is not enacted. If Council fails to override, Council may amend to generate 75% support of Council or to gain Mayor's signature.

Council actions that solely impact the operations of the Council (rules, procedures, committee structures, vacancies, etc.) or that are non-binding statements do not need to be signed by the Mayor nor can they be vetoed.

Development, Passage and Implementation of Budgets

Mayor develops/proposes City budget, excluding education expenditures, for Council consideration. Council amends/approves after public hearings. Same veto standard.

The Mayor oversees implementation of the City budget through Department Heads. Council monitors implementation of the budget through committees of jurisdiction. May request that any Department Head under their jurisdiction attend their committee meeting to present budget progress and answer any questions.

Mayor develops/proposes schoolwide education budget, in consultation with School Board Chair and Superintendent, for School Board consideration. School Board amends/approves after public hearings and sends to voters for approval. The city council no longer votes on the school budget.

Compensation

Council salaries increased to \$17K a year (from \$6K), with annual COLA based on CPI (likely proposal from Procedures Committee member). Current benefits (HC/Pension, etc.) not changed. Commensurate for School Board members.

Mayor salary increased to twice the average income for a family of four in Portland as defined by the annual census (up from 1.5x to recognize the increased responsibilities). Adjusted at the start of each new term.

Succession Plan

In the event of a vacancy or incapacity of the Mayor, the “Elected Public Advocate” (described below) is first in line to replace the Mayor. Council President is second.

In the event of a Council or School Board vacancy, the Mayor nominates three people for consideration. Council or School Board may only seat from the list of nominations. Should they reject all three, the Mayor must nominate three others. Once seated, the nominee remains in place until the next general election. The seated individual may run for the seat.

Elected Public Advocate

The Elected Public Advocate serves as an independent ombudsperson for city government whose mission is to improve the transparency, responsiveness, and accountability of City government. An additional set of eyes and ears on the council and mayor branches.

Public Advocate is elected on the same cycle as the US President (effective 2024). May serve only two consecutive 4-year terms.

Duties of the Public Advocate

Public Advocate is charged with meeting constituent needs (direct or referred by any other elected official), providing outside review of city agencies, responding to FOIA requests, investigating citizens' complaints about city services, and making proposals to address perceived structural shortcomings or failures for Mayor or Council consideration. Public Advocate has authority to propose structural changes to city government and/or greater oversight controls for Council deliberation and consideration. In the event of a vacancy or incapacity of the mayor, the Public Advocate is first in line to become Mayor until the end of the elected term.

Nomination of the City Clerk

The City Clerk, overseeing elections and Clerk functions, becomes an independent office of the executive and legislative branches by being nominated by the Public Advocate at the beginning of their term. City Clerk is approved/rejected by the Council. Once approved, the City Clerk reports to the Public Advocate and may not be removed without recommendation by the Public Advocate and 66% approval by the Council. The City Clerk is not term-limited and may cross over administrations.

Nomination of the City Attorney

The City Attorney, providing legal advice to the Council/Mayor and constituents, becomes an independent office of the executive and legislative branches by being nominated by the Public Advocate and approved/rejected by the Council. Once approved, the City Attorney reports to the Public Advocate and may not be removed without recommendation by the Public Advocate and 66% approval by the Council. The City Attorney is not term-limited and may cross over administrations.

Development, Passage and Implementation of Budget

The Public Advocate's office will be funded with no less than .05% (half a percent) of total revenue to the city in order to keep it independent of Mayor/Council determinations (current City Clerk/Attorney budgets total \$1.5M). If they need additional funds, they may request such from Council for approval through the normal budget process.

Appointments to City Committees and Boards

The Council reviews all nominations to board and commissions for final approval/rejection, which are now made by the Public Advocate through an open and transparent application process. Council approves/rejects each nominee with majority vote after the council committee of jurisdiction holds public hearings/vote on each nominee.

Public Advocate's Salary:

Public Advocate will be paid 1.5x the average salary for a family of four in Portland as determined by the annual census.

Succession Plan

In the event of a vacancy or incapacity of the Public Advocate, the Council will appoint a Council member to fill the role, and a special election will be held to fill the term of the Public Advocate vacancy at the next general election.

Cost Analysis

This proposal is projected to be revenue neutral.

Implementing this Strong Council and Elected Mayor will save approximately \$200,000. With the elimination of the City Manager, the City will save about \$250,000 in salary and benefit costs. \$50K of that would be used for the enhancement of the Mayor's salary/benefits. The salary for the proposed City Administrator salary can be pulled from the current Chief of Staff position in the City Manager's office.

The Public Advocate's salary will be covered by shifting the current Deputy City Manager salary (will save about \$50K) and the Clerk and Attorney budgets will stay the same. The department

will then have around \$250,000 for community liaisons, administrative work, and investigation costs.

The cost for the increase to Councilor’s salaries is being explored by the “Procedures committee” and will be priced out in that committee. This proposal should take into account that a future Council may want to provide an additional stipend for the Council President.

All that said, obviously if this passes, the annual city budgeting process will determine whether any particular provision should receive more or fewer resources.

<u>Forms of government for the largest city of every state</u>			
<u>State</u>	<u>Largest City</u>	<u>Population</u>	<u>Chief Executive</u>
<u>Vermont</u>	<u>Burlington</u>	42,899	Mayor
<u>West Virginia</u>	<u>Charleston</u>	47,215	Mayor
<u>Wyoming</u>	<u>Cheyenne</u>	63,957	Mayor
<u>Maine</u>	<u>Portland</u>	66,417	Manager
<u>Delaware</u>	<u>Wilmington</u>	70,635	Mayor
<u>New Hampshire</u>	<u>Manchester</u>	112,525	Mayor
<u>Montana</u>	<u>Billings</u>	116,827	Mayor
<u>North Dakota</u>	<u>Fargo</u>	124,844	Mayor
<u>South Carolina</u>	<u>Charleston</u>	136,208	Mayor
<u>Connecticut</u>	<u>Bridgeport</u>	144,900	Mayor
<u>Mississippi</u>	<u>Jackson</u>	164,422	Mayor
<u>Rhode Island</u>	<u>Providence</u>	179,335	Mayor
<u>South Dakota</u>	<u>Sioux Falls</u>	181,883	Mayor
<u>Arkansas</u>	<u>Little Rock</u>	197,881	Mayor
<u>Utah</u>	<u>Salt Lake City</u>	200,591	Mayor
<u>Alabama</u>	<u>Birmingham</u>	208,928	Mayor
<u>Iowa</u>	<u>Des Moines</u>	216,853	Manager

<u>Idaho</u>	<u>Boise</u>	228,790	Mayor
<u>New Jersey</u>	<u>Newark</u>	282,090	Mayor
<u>Alaska</u>	<u>Anchorage</u>	291,538	Mayor
<u>Hawaii</u>	<u>Honolulu</u>	347,397	Mayor
<u>Kansas</u>	<u>Wichita</u>	389,225	Manager
<u>Louisiana</u>	<u>New Orleans</u>	399,187	Mayor
<u>Minnesota</u>	<u>Minneapolis</u>	427,728	Mayor
<u>Virginia</u>	<u>Virginia Beach</u>	450,189	Manager
<u>Nebraska</u>	<u>Omaha</u>	468,262	Mayor
<u>Georgia</u>	<u>Atlanta</u>	504,527	Mayor
<u>Missouri</u>	<u>Kansas City</u>	507,928	Mayor
<u>New Mexico</u>	<u>Albuquerque</u>	560,218	Mayor
<u>Wisconsin</u>	<u>Milwaukee</u>	592,025	Mayor
<u>Maryland</u>	<u>Baltimore</u>	599,827	Mayor
<u>Kentucky</u>	<u>Louisville</u>	620,578	Mayor
<u>Nevada</u>	<u>Las Vegas</u>	647,829	Manager
<u>Oklahoma</u>	<u>Oklahoma City</u>	649,021	Manager
<u>Oregon</u>	<u>Portland</u>	661,189	Commission
<u>Michigan</u>	<u>Detroit</u>	672,662	Mayor
<u>Tennessee</u>	<u>Nashville</u>	681,928	Mayor
<u>Massachusetts</u>	<u>Boston</u>	699,927	Mayor
<u>District of Columbia</u>	<u>Washington, D.C.</u>	702,455	Mayor
<u>Colorado</u>	<u>Denver</u>	716,492	Mayor
<u>Washington</u>	<u>Seattle</u>	749,627	Mayor
<u>Indiana</u>	<u>Indianapolis</u>	867,125	Mayor

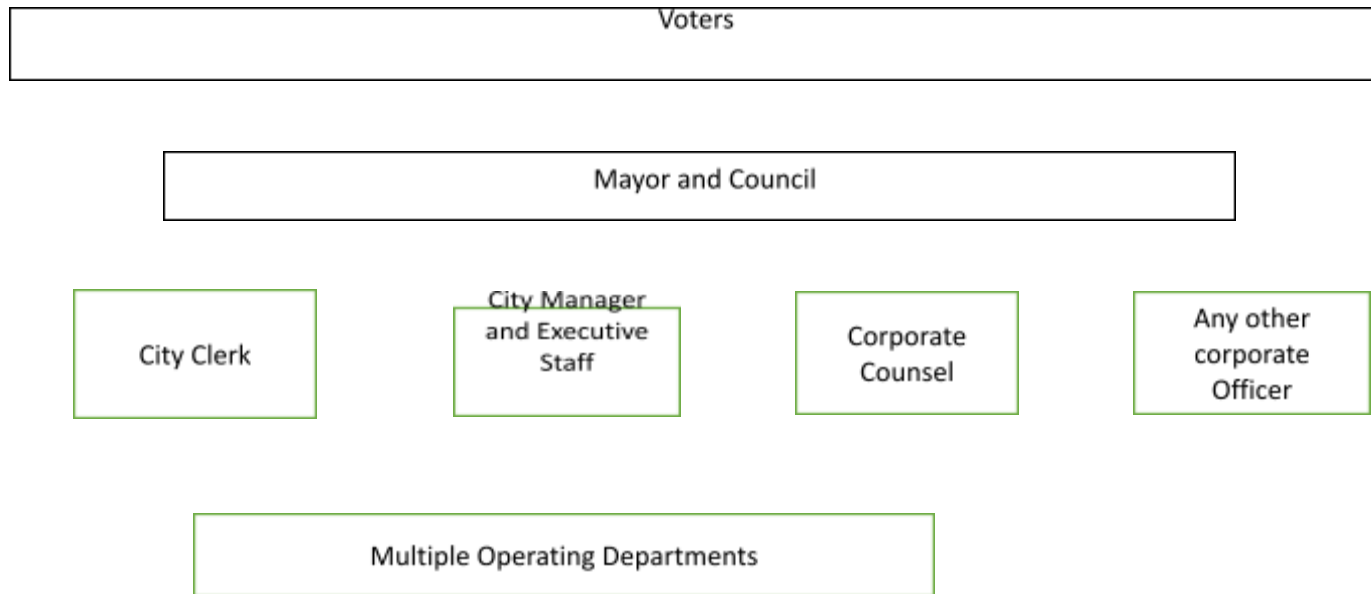
North Carolina	Charlotte	881,819	Manager
Ohio	Columbus	895,477	Mayor
Florida	Jacksonville	903,889	Mayor
Pennsylvania	Philadelphia	1,587,828	Mayor
Arizona	Phoenix	1,660,272	Manager
Texas	Houston	2,325,502	Mayor
Illinois	Chicago	2,705,994	Mayor
California	Los Angeles	3,994,928	Mayor
New York	New York City	8,879,928	Mayor
Total Population		39,829,721	
Pop. Mayor Cities		34,206,907	
% in Mayor Cities		86%	
Almost 90% of Americans, in comparable cities to Portland, operate with a directly elected mayor.			

Structural Examination of Systems of City Government

A Visual Representation of the Elements of City Government

Submitted by Zack Barowitz, D3

One Branch



Defining Characteristics

- 1) Council has all executive, legislative, and oversight powers.
- 2) Mayor is head of Council, sets meeting agendas, and typically has some other legislative powers no other council member has.
- 3) All (most) executive powers delegated by Council to an appointed City Manager

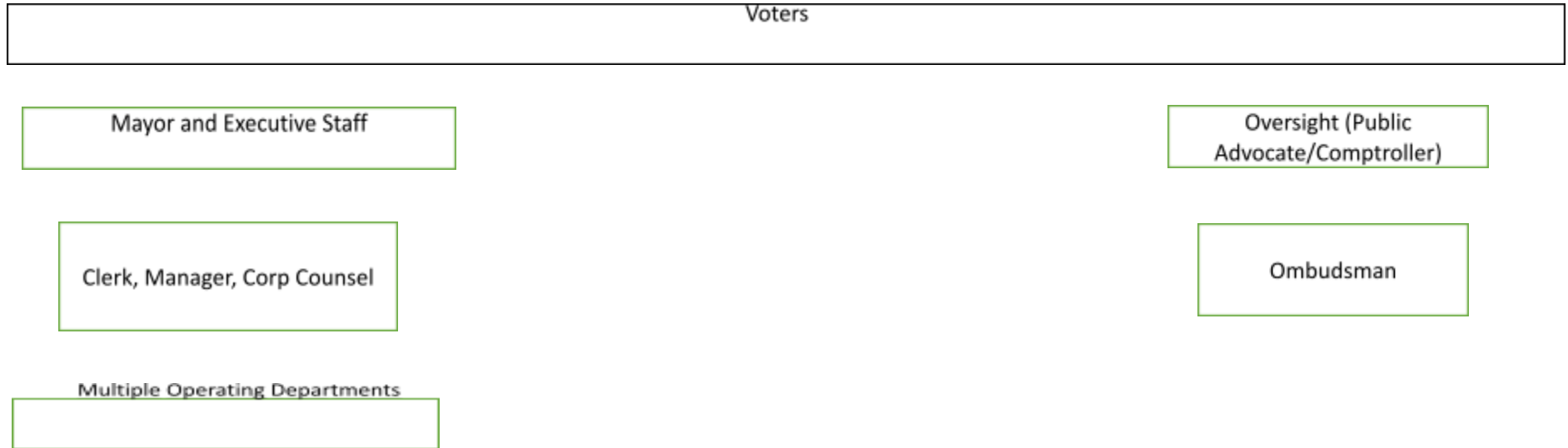
Often Cited Advantages of this form

- a) Executive decisions are made by a professionally trained expert in city management
- b) CEO is not influenced by political considerations relating to his/her own electoral interests
- c) CEO devotes more time to administrative functions including policy implementation than to policy development
- d) No interbranch divisiveness and maximal congruence between policy development and policy implementation

Often Cited Disadvantages of this form

- a) CEO is not accountable to the voters, a fundamental disconnect with the principle that government decision-makers should be accountable to the people they serve.
- b) No direct incentive for CEO to be responsive to individual citizen or interest group concerns
- c) Little to no incentive for meaningful oversight of government agencies, programs, and policies or individual behavior of corporate officers

One Branch + Elected Oversight



Defining Characteristics

- 1) Single branch for legislative & administrative
- 2) Oversight branch has investigatory and advisory powers but not adjudicative ones

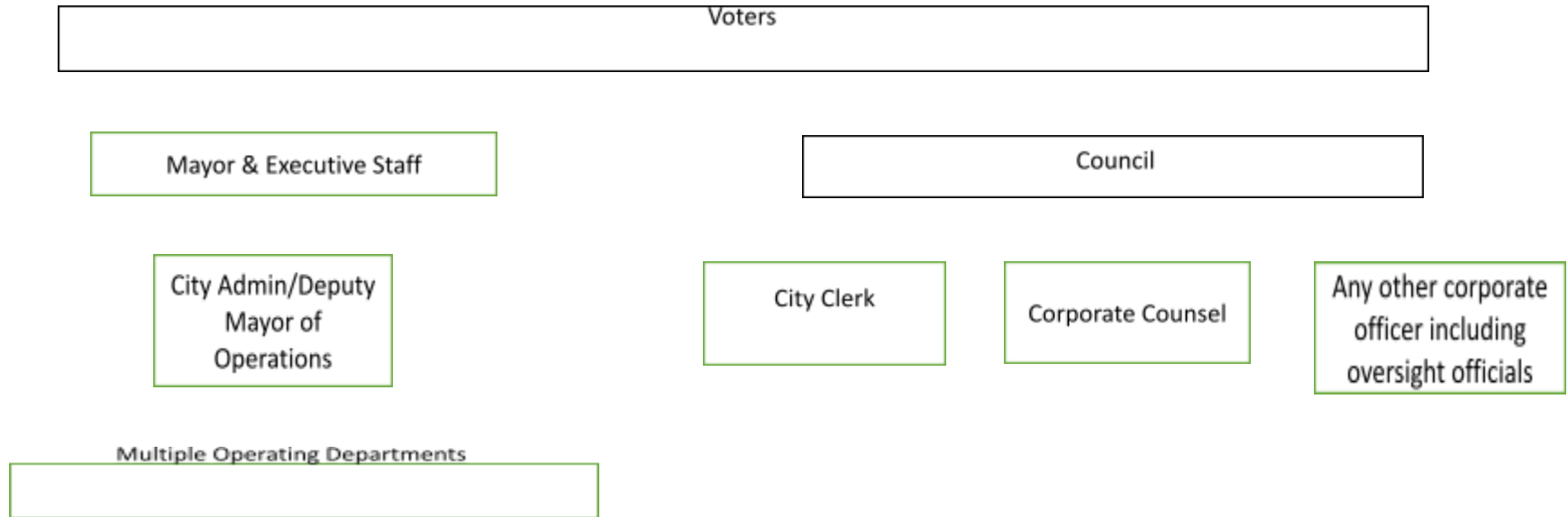
Often-cited Advantages of this form

- a) Branch dedicated to government oversight will lead to more comprehensive investigation and reporting of how city government is functioning
- b) Independence of oversight branch reduces influence of other government officials in determination of what is investigated/researched, what recommendations are made, and what final reports actually say
- c) Independent branch dedicated to reviewing operations of city government is best place to house "ombudsman" providing non-judicial recourse for citizens dissatisfied with executive and/or legislative branch decisions

Often-cited Disadvantages

- a) Single branch gives less authority to elected officials

Two Branches



Defining Characteristics

- 1) Separate branches for executive and legislative functions
- 2) Mayor not a member of the Council

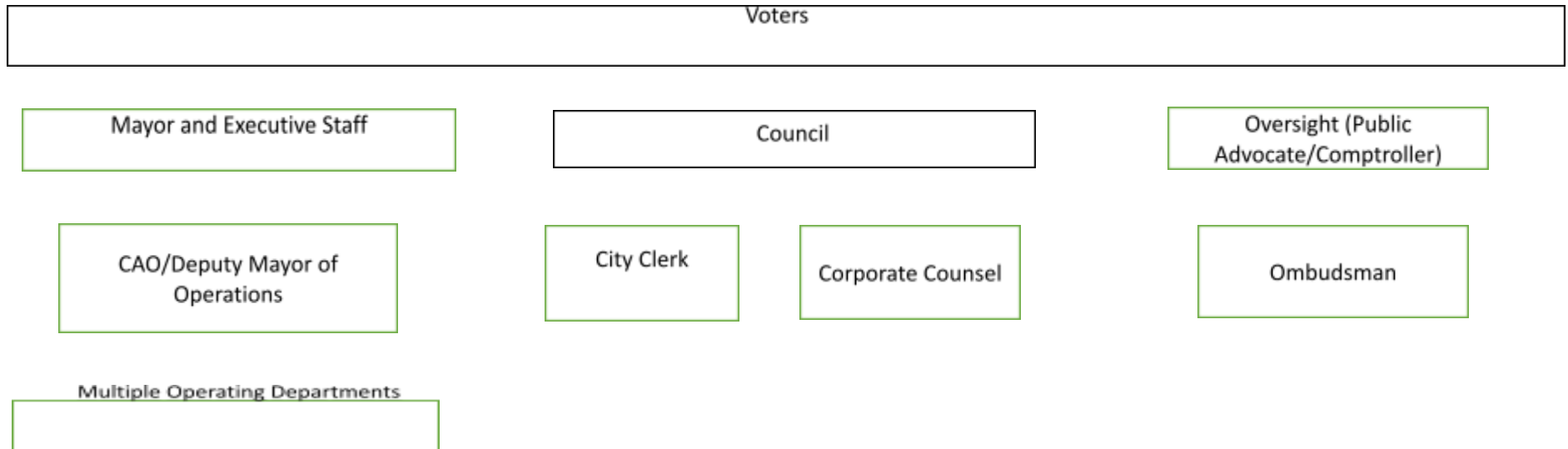
Often Cited Advantages of this form

- a) Leaders responsible for executive and legislative functions are directly accountable to voters
- b) Leaders of both branches have electoral incentives to be responsive to individual citizens and interest groups
- c) Checks and balances between both branches, including legislative branch oversight of city agencies, are typically built-in

Often Cited Disadvantages

- a) CEO (Mayor) typically has little to no city management experience
- b) Potential politicization of city services
- c) Interbranch divisiveness has tendency to develop

Three Branches



Defining Characteristics

- 3) Separate branches for executive, legislative, and government oversight functions, each with elected leaders
- 4) Oversight branch has investigatory and advisory powers but not adjudicative ones
- 5) Public Advocate position tends to be breeding ground for individuals with ambitions for higher office

Often-cited Advantages of this form

- d) Branch dedicated to government oversight will lead to more comprehensive investigation and reporting of how city government is functioning
- e) Independence of oversight branch reduces influence of other government officials in determination of what is investigated/researched, what recommendations are made, and what final reports actually say
- f) Independent branch dedicated to reviewing operations of city government is best place to house "ombudsman" providing non-judicial recourse for citizens dissatisfied with executive and/or legislative branch decisions

Often-cited Disadvantages

- b) Additional branch increases likelihood of interbranch divisiveness

Evaluation of the systems based on goals, values, and anticipated outcomes.

Because values are more easily agreed upon than methods, I think a consideration of goals is a good place to start. My current thinking on structure of government is to test various models against various values, goals, and expected outcomes. These could include:

- Responsiveness of government to constituent needs—and to change, innovation, and unexpected events
- Efficient administration
- Provide avenues for public recourse
- Transparent oversight/daylight to minimize waste, fraud, and abuse
- Empower the legislative/elected body
- Mitigate red tape
- Increase public participation

NB: *This is presented for the sake of illustration not necessarily as a methodological framework.*

Example:

	Current System (One Branch)	Enhanced One Branch	One Branch w/elected oversight	Two Branches: Council-Mayor	Three Elected Branches: Council-Mayor-Oversight
Efficient Admin					
Empowered Elected Officials					
Public/Transparent Oversight					
Avenues for Public Recourse					
Cost					

Proposed Process for Commission Decision Making

- 1) Using the above charts, commissioners discuss how many branches Portland's government should have
- 2) At the end of discussion, a straw-vote is taken on the above question.
- 3) After straw vote is taken, the Powers/Authority Matrix is used to flesh out the specific powers of the officers in whichever government form has won the most votes. A "Commission Proposal" Column has been added to the previous Matrix to facilitate this "fleshing out". All of the cells in that column are currently blank. Some will be filled in as a result of the above straw-vote (i.e., who is the CEO? And who manages day-to-day operations of city staff?). The Commissioners will then proceed (row by row) to decide how to complete each unfilled cell in the Commission Proposal Column, picking from what's been proposed in the other columns for each row or coming up with some other option entirely. After discussing all the options for each row, further straw-votes would be taken on what goes into each blank cell.
- 4) After all cells are completed on a straw-vote basis, the Commissioners would then take a final vote on what is contained in the Commission Proposal column as a whole. Presumably some commissioners may disagree with how some of the cells have been completed, but they may still decide to vote in favor of the Commission Proposal as a whole.

Note: To speed up the process described in (3) above, one idea is to give each commissioner their own matrix and have them complete each blank cell themselves. Then all the individual responses could be tabulated (anonymously) to see how much agreement or disagreement there is in terms of each cell. Cells where there is substantial disagreement would (presumably) be the place where discussion and debate would begin.

[NB: This process in particular, and much of the work on this document generally, was developed by Valerie Kelly and Phil Steele, who worked in close collaboration with Cmsr. Barowitz.]

Portland's Current Distribution of Powers & Authority Compared to Proposals for Change

<u>Powers & Authority</u>	<u>Current Portland Charter</u>	<u>Governance Committee Proposal</u>	<u>Shiekh-Yousef Proposal</u>
1) Who is the Chief Executive Officer?	City Manager	City Manager	Mayor
2) Who has policy making authority?	City Council	City Council; Mayor has special right to form staffed public task force on policy not taken up by Council Committee.	City Council; Mayor can propose policy to Council, which would be required to consider and vote on it.
3) Who oversees policy implementation?	City Manager	City Manager	Mayor
4) Who are the top city officials?(note 1)	City Manager, City Clerk, Corporation Counsel	City Manager, City Clerk, Corporation Counsel, Chief of Staff (note 2)	City Administrator, City Clerk, Corporation Counsel, Public Advocate (note 3)
5) What is the process for filling top city official positions	Mayor chairs committee with at least 2 other Council members to nominate City Manager, Clerk, and Corporate Counsel. Council confirms by majority vote.	Same as current for City Manager, Clerk, Counsel, and Chief of Staff	Public Advocate is elected. Clerk and Counsel nominated by Public Advocate. Administrator nominated by Mayor. Council confirms all by majority vote.
6) What is the process for removing top city officials	Mayor-chaired 3 person Council Committee may recommend removal; Council approves by majority vote.	No change	Public Advocate may recommend removal of City Clerk or Corporate Counsel; Council must approve with 2/3rds vote. City Administrator serves at will of the Mayor. Public Advocate may be removed by citizen's recall.
7) Who manages day to day operations of city affairs?	City Manager	City Manager	City Administrator under direct supervision of Mayor
8) How are Department Heads hired/supervised/ removed?	City Manager nominates, Council approves. Heads serve at will of the City Manager.	no change	Mayor nominates, Council approves; department heads serve at will of the Mayor.

<u>Powers & Authority</u>	<u>Current Portland Charter</u>	<u>Governance Committee Proposal</u>	<u>Shiekh-Yousef Proposal</u>
9) Is mayor a member of Council? If yes, does mayor have a vote?	Mayor is voting member and chairs the Council.	no change	Mayor is not a member. Council elects its own President from amongst its members.
10) Who Creates and Appoints members to Council Committees?	Mayor, but council may override with 2/3 vote.	no change	President of Council can create committees and appoint members.
11) Who appoints members of city boards and commissions?	Council	no change	PA nominates; Council approves/ rejects by majority vote.
12) Who has authority for preparing/ approving Municipal Budget	City Manager prepares with "guidance" from Mayor; Council approves.	Mayor prepares with assistance from Manager; Council approves.	Mayor prepares with assistance of Administrator; Council approves.
13) Who has authority for preparing/ approving School Budget?	School Board/Superintendent with guidance from Council; approval by Council and then by voters.	no change	Mayor prepares with School Board Chair and Superintendent; School Board approves and sends to voters; no Council vote.
14) Can Mayor veto the municipal budget approved by the Council?	Yes Override requires 6 (of 8) votes. Mayor does not vote.	No	Yes; 75% majority needed to override veto.
15) Can Mayor veto other Council decisions?	No	No	Yes -- full veto power over all policies, ordinances, orders, expenditures, etc.; Council requires 75% vote to override.
16) How long does the Mayor serve in office?	4 years	4 years	4 years, corresponding with Presidential election years
17) Are their mayoral term limits?	3 terms	3 terms	2 terms
18) Can Mayor be removed before term is over?	Via citizens' recall	Via citizens' recall	Via citizens' recall

Powers & Authority

Current Portland Charter

Governance Committee Proposal

Shiekh-Yousef Proposal

19) Have new powers/authority been proposed for non-city officials

Not applicable

Charter Arbitration Panel (note 4) and required City Council hearing for Referendum Advocates (note 5). Council required to develop procedures through which citizens may formally propose policies for council consideration (note 6). None

Notes:

- 1) For purposes of this chart, current top city officials (other than mayor) include the city manager/administrator, city clerk, and corporate counsel as these are often in a town's Charter. New top positions proposed include a Chief of Staff and a Public Advocate.
- 2) Duties of proposed Chief of Staff: coordinate Council staffing need; receive and track constituent services and FOIA requests; post notices of city meetings and post all materials.
- 3) Duties of proposed Public Advocate: serve as independent ombudsman to improve city government. Provide outside review of city agencies, investigate citizen complaints, and make proposals for improvement to Mayor and Council. Respond to FOIA requests. Serves as Mayor in case of vacancy or incapacity of elected Mayor.
- 4) Arbitration panel will convene when called to act by City Council to interpret Charter language and provide a formal decision. Panel to consist of 3 members from previous Charter Commission.
- 5) When a referendum campaign has collected 2/3 of the required signatures, City Council will be required to hold a public hearing.



City of Portland, Maine
Charter Commission

GOVERNANCE COMMITTEE

WORK PLAN

ELECTION OF OFFICERS & DEVELOPMENT OF WORK PLAN

September 8, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=39849

Minutes: <https://tinyurl.com/minutes-sept-8>

VALUES MAPPING & DESIRED OUTCOMES

September 22, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=40131

Notes about Values: <https://tinyurl.com/commission-values>

- With facilitator David Plumb

MAYORS INTERVIEWS

October 13, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=40566

Notes from Mayors interviews: <https://tinyurl.com/mayor-interviews>

- Kate Snyder
- Michael Brennan
- Panel of Jill Duson, Jim Cohen, and Karen Geraghty
- Ethan Strimling

EXPERTS INTERVIEWS

November 8, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=41035

Notes from Expert interviews: <https://tinyurl.com/expert-interviews>

- Dr. Chyrl Laird, recent Government professor at Bowdoin, now at U Maryland
- Dominick Pangallo, Chief of Staff in Salem, MA
- Dr. Jim Svava, UNC researcher/editor of 4th ed. of National Civic League's *Model City Charter*

MANAGERS INTERVIEWS

November 10, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=41102

Notes from Manager interviews: <https://tinyurl.com/manager-interviews>

- Joe Gray, former City Manager of Portland
- Tanisha Briley, City Manager in Gaithersburg, MD; formerly in Columbus Heights, OH
- Kevin Sutherland, ex Chief of Staff in Ithaca, ex City Administrator in Saco, finalist for City Manager in Bar Harbor
- Sheila Hill-Christian, former Acting City Manager in Portland
- Note: Jon Jennings was invited but formally declined

CITY COUNCILORS INTERVIEWS

November 29, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=41552

Notes from Councilor interviews: <https://tinyurl.com/council-interviews>

- Belinda Ray, 2015-2021
- David A. Marshall, 2006-2015
- Pious Ali, 2016-present
- Kimberly Cook, 2017-2020

LEADERSHIP MODEL DELIBERATIONS

December 8, 2021

Recording: https://townhallstreams.com/stream.php?location_id=42&id=41743

Notes from deliberations: <https://tinyurl.com/deliberation-notes>

- With facilitator David Plumb

GOVERNANCE COMPROMISE

Co-Sponsors: Commissioners CHANN and O'BRIEN

MAYOR AS CHIEF EXECUTIVE

- The Mayor shall be the chief executive officer of the City of Portland with supervision of the City Manager and the implementation of policies passed by the City Council.
- The Mayor shall preside as chair of the City Council.
- The Mayor shall cast a vote only in the event of a tie.
- The Mayor and At-Large Councilors shall together form an Executive Committee, who will appoint Council members to committees.
- The Executive Committee will develop and propose Council rules of procedure for adoption by the City Council.
- The Executive Committee will serve as the official channel for the Mayor and Council to communicate with Constitutional Officers about policies, priorities, and to set agendas for Council meetings.

PUBLIC FIGUREHEAD

- Mayor shall serve as the official representative of the City in Augusta and Washington, D.C.
- Mayor shall serve as the official spokesperson for the City.
- May form public task force by right with reasonable staffing support for any issue not taken up by Council.

BUDGETARY POWERS

- The Mayor shall present the City Budget to the Council for adoption.
- The Mayor shall communicate their and City Council's priorities for the drafting of the City Budget by the City Manager, who will work with Department Heads to develop their departmental budgets.
- The Mayor may veto the City Budget and the Council can override with a 2/3 majority vote.

HIRING & FIRING OF CITY STAFF

- The City Manager, Corporation Counsel, and City Clerk shall be hired following a search process that includes the Mayor and City Council and a majority vote of the City Council.
- The Mayor shall chair the City Manager, Corporation Counsel, and City Clerk's annual performance review and may call, at any time, an executive session of the Council to discuss performance. These officers may be removed following a majority vote of the City Council.
- The Mayor shall not have the power to unilaterally hire and fire city staff, including the City Manager, City Attorney, City Clerk, Department Heads.
- The Mayor advises and consents to City Manager's nominations of Department Heads and presents to City Council for confirmation.

POLICY IMPLEMENTATION, ECONOMIC DEV & DAY-TO-DAY OPERATIONS

- The Mayor shall ensure that policies passed by the Council are implemented by the City Manager and city staff and shall meet regularly with the Executive Committee and the City Manager to develop a plan for implementation to help ensure and measure accountability.
- The Mayor shall lead an economic development task force.

GOVERNANCE COMPROMISE

(AMENDMENT)

Co-Sponsors: Commissioners CHANN and O'BRIEN amended by BUXTON, KEBEDE, SHEIKH-YOUSEF, and WASHBURN

MAYOR AS CHIEF EXECUTIVE

- The mayor shall be the chief executive officer of the City of Portland, overseeing and supervising the city administrator and implementing policies passed by the City Council.
- The mayor is no longer a member of the Council and does not have a council vote.

COUNCIL AS LEGISLATIVE BRANCH

- Councilors shall together form an Executive Committee, which appoints members to committees and elects a 2-year council president.
- The council president develops and proposes council rules of procedure for adoption by the council.
- The council president serves as the official channel for Council to communicate with constitutional officers about policies, priorities, and agendas for Council meetings.
- The mayor may propose legislation to be taken up by council. Individual council members may sponsor legislation. All city staff and members of the public may petition a councilor to sponsor legislation to be taken up on their behalf.

PUBLIC FIGUREHEAD

- The mayor shall serve as the official representative of the city in Augusta and Washington, D.C.
- The mayor shall serve as the official spokesperson for the city.
- The mayor may form public task forces with staffing support for any issue not taken up by the council.

BUDGETARY POWERS

- The mayor, with the assistance of department heads and the city administrator, drafts and presents the annual city budget to the council for adoption.
- The mayor, with the assistance of the city administrator, works with department heads to develop their departmental budgets.

REMOVAL OF MAYOR

- If the mayor is convicted of a felony materially related to their official duties, the City Council may, upon a vote of $\frac{3}{4}$ of its members, remove the mayor from their office.
- If the mayor engages in official misconduct or neglect of duty, the council may schedule a recall election by a $\frac{3}{4}$ ths vote. (from Westbrook)

APPOINTMENTS AND STAFFING

- The mayor may not unilaterally hire and fire city staff, including the city administrator, city attorney, city clerk, and department heads.
- The mayor nominates department heads and the city administrator, and presents nominations to the City Council for confirmation.

- Only department heads may fire and hire city staff.
- The council cannot unilaterally fire or hire officers, including the city administrator or department heads. The mayor shall recommend removal of an officer, and the council can approve with simple majority. If council seeks to discharge an officer, they should seek approval of the mayor, who will make the recommendation for removal to be approved by a majority of the council. Should the council seek to remove an officer without mayoral approval, they may only do so with a $\frac{3}{4}$ majority vote.

POLICY IMPLEMENTATION, ECONOMIC DEVELOPMENT, AND DAY-TO-DAY OPERATIONS

- The mayor oversees the implementation of policies passed by the council and shall meet regularly with the Council Executive Committee to develop implementation plans and report on results and measure accountability.
- The mayor shall direct the city administrator and department heads to implement council policies.
- The mayor shall lead an economic development task force.
- The mayor shall chair the city administrator's annual performance review and may call, at any time, an executive session of the council to discuss performance.

[CHANGES TRACKED]

GOVERNANCE COMPROMISE

Co-Sponsors: Commissioners CHANN and O'BRIEN amended by KEBEDE, BUXTON, SHEIKH-YUSUF, and WASHBURN

MAYOR AS CHIEF EXECUTIVE

- The mayor shall be the chief executive officer of the City of Portland, overseeing and supervising the ~~City Manager~~ city administrator and implementing policies passed by the City Council.
- The mayor is no longer a member of the Council and does not have a vote.
- ~~The mayor signs or vetoes all legislation enacted by the Council.~~
- ~~The mayor shall preside as chair of a twelve (12) member council.~~
- ~~The mayor shall cast a vote only in the event of a tie.~~
- ~~The mayor and At-Large Councilors shall together form an Executive Committee, who will appoint Council members to committees.~~
- ~~The Executive Committee will develop and propose Council rules of procedure for adoption by the City Council.~~
- ~~The Executive Committee will serve as the official channel for the mayor and Council to communicate with Constitutional Officers about policies, priorities, and to set agendas for Council meetings.~~

COUNCIL AS LEGISLATIVE BRANCH

- Councilors shall ~~together~~ form an Executive Committee, which appoints members to committees and elects a 2-year council president.
- The council president develops and proposes council rules of procedure for adoption by the council.
- The council president serves as the official channel for Council to communicate with constitutional officers about policies, priorities, and agendas for Council meetings.
- CB added: The mayor may propose legislation to be taken up by council. Individual council members may sponsor legislation. All city staff and members of the public may petition a councilor to sponsor legislation to be taken up on their behalf.

PUBLIC FIGUREHEAD

- The mayor shall serve as the official representative of the city in Augusta and Washington, D.C.
- The mayor shall serve as the official spokesperson for the city.
- The mayor may form public task forces ~~by right~~ with staffing support for any issue not taken up by the council.

BUDGETARY POWERS

- The mayor, with the assistance of department heads and the city administrator, drafts and presents the annual city budget to the council for adoption.

Commented [1]: Veto power was not in original document Michael sent. I think the veto powers significantly alters the powers of the mayor and makes this **much** less of a compromise proposal than Michael's original text. I'm still not sure where I land on veto power, but I think if the goal is still to encourage some council-mayor collaboration, it might be better to allow Mayor to sponsor legislation (and spell this out in detail in this proposal) and form legislative tasks force, rather than give mayor veto power. If the mayor doesn't have veto power and instead needs to collaborate w/ councilors to push their agenda, is that more collaborative? I don't think their lack of a veto makes them any less "accountable" to voters, we've just seen veto power abused pretty extensively in Maine, especially with such a split electorate.

Either way-- I think veto power is up for debate and I think we should hash it out as commission. I don't know if i can sign on to something with veto power for the mayor.

Commented [2]: Is this a Committee of the Whole or do councilors elect a few of their members as executives?

Commented [3R3]: Similar question: I think the WHOLE council should elect the whole of their executive committee-- so they all vote on their president and 2(?) other committee members to serve on Exec.

broader q is do they need an exec committee or is it better just to have 1 CP?

Commented [4]: this was a common thread b/tw Gov Committee and NSY proposal.

- The mayor, ~~with the assistance of the~~ shall direct the drafting of the City Budget by the ~~City Manager, who will work with~~ and city administrator, ~~shall~~ works with department heads to develop their departmental budgets.

REMOVAL OF MAYOR

- ~~If the mayor is convicted of a felony materially related to their the performance of the Mayor's official duties, the City Council may, upon a vote of 3/4 of its members, remove the mayor from their office.~~
- ~~If the mayor engages in official misconduct or neglect of duty, the council may schedule a recall election by a 3/4ths vote. (from Westbrook)~~

APPOINTMENTS AND STAFFING

- The mayor may not unilaterally hire and fire city staff, including the ~~City Manager~~ city administrator, city attorney, city clerk, and department heads.
- ~~The mayor advises and consents to City Manager's~~ shall nominate ~~sions~~ department heads ~~and the city administrator,~~ and presents nominations to the City Council for confirmation.
- Only department heads may fire and hire city staff.
- ~~The city council may not unilaterally discharge department heads or the city administrator. These individuals Department heads/City Administrator may only be fired if the Mayor recommends such action and a majority of the council approves. The council cannot unilaterally fire or hire officers, including city administrator or department heads. The mayor shall recommend to remove an officer, council can approve with simple majority. If council seeks to discharge an officer, they should seek approval of mayor, who will make the recommendation for removal to be approved by majority of council. Should the council seek to remove an officer without mayoral approval, they may only do so with a 3/4 majority vote.~~

POLICY IMPLEMENTATION, ECONOMIC DEVELOPMENT, AND DAY-TO-DAY OPERATIONS

- The mayor oversees the implementation of policies passed by the council and shall meet regularly with the Council Executive Committee to develop ~~a plan for implementation~~ plans and report on results to help ensure and measure accountability.
- The mayor shall direct the city administrator ~~and department heads~~ ~~City Manager~~ to implement council policies.
- The mayor shall lead an economic development task force.
- The mayor shall chair the ~~City Manager~~ city administrator's annual performance review and may call, at any time, an executive session of the council to discuss performance.

Commented [5]: I'm not sure I'm 100% behind this addition, I think it makes sense for the council to not be able to fire a mayor's staff out from under them, but at the same time...what if a mayor hires someone who turns out to be a real dumpster fire of a person, but they won't fire them because they're a personal friend, you'd want a check on that thru the council, right?)

Does it make more sense that the mayor can nom, hire, fire w/ a vote of 2/3rds of council, and council likewise can by 2/3 or even larger majority opt to remove a high level staffer? It offers a balance on power and addresses some folks concerns about cronyism better.

Commented [6]: This section feels a little convoluted. Does it make sense to say more simply: "Mayor may hire and fire department heads and the city administrator with nomination and approval for any new hires or discharges with a 2/3 council vote? Department heads are responsible for hiring and firing of their own staffers."

CHARTER COMMISSION
City of Portland, Maine

PROPOSAL: OFFICE OF INFORMATION

Sponsor: Robert O'Brien
Date: April 3, 2022

PURPOSE

To consolidate city services related to communicating with the public, the press, and policy makers, and for the efficient and unbiased transfer of city documents.

PURVIEW

The Office of Information's duties shall include communications for all city departments, the Mayor's office, and the Council; constituent services; fulfilling Freedom of Information Act (FOIA) requests; the legal noticing of public meetings and accompanying documents; and procuring city documents or answers to clarifying questions from staff upon request from a councilor according to Council rules.

STRUCTURE

The City shall have a new Office of Information and the Council shall name its director, on parity with other constitutional officers in the Charter.

CHIEF OP. OFFICER	OFFICE OF INFORMATION	CITY CLERK	CORP. COUNSEL
	Communications		
	Constituent Services		
	FOIA Requests		
	Meeting Noticing		
	Councilor requests for docs/clarifying questions for staff, according to council rules		

C. Non-Exempt Employees (Grades 1 -6)

1. Reductions in force of permanent hourly employees will be made by classification and within departments. Hourly employees in an affected classification within a department will be laid off by seniority with the least senior person laid off first. Seniority is defined as continuous permanent City service, including probationary time.
2. Hourly employees faced with lay-off may transfer or bump into other positions on the following basis:
 - a. An employee who would be laid off under Section 1 above may transfer to a vacant position within the City which the employee is qualified to perform as determined by the City.
 - b. If there is no suitable vacant position, the employee may bump a less senior employee in a position within the City which the employee faced with lay-off once held.
 - c. If there is no less senior employee in a position once held, the employee faced with lay-off may bump less senior employees in positions within the City which the employee is qualified to perform, as determined by the City.
3. Employees who transfer or bump into a position under Section 2 above will be compensated at the rate provided in the City's pay plan for that position.

Employees cannot transfer or bump into a promotional position nor can they transfer or bump into a union-covered position. Part-time employees cannot transfer or bump into full-time positions.
4. Employees faced with lay-off may accept lay-off rather than transfer or bump into a position under subsection 2 above.
5. Employees who are in fact laid off will receive any separation pay to which they may be entitled.
6. Employees who are laid off will have a 15 month recall to the classification in the Department from which they were laid off. Employees will be recalled in order of seniority.

IX. MISCELLANEOUS PROVISIONS

A. Political Activity

While employed by the City, employees may seek or accept nomination or election to any non-partisan office in municipal government (i.e., City or School office), however, in connection with an employee's campaign, no employee will use City facilities, equipment, materials or supplies to advocate for his or her candidacy, or discuss the employee's campaign with city or school personnel during the workday, or use any time during the work day for campaigning purposes.

At no time may an employee use his or her City position, nor use City facilities, equipment, materials or supplies to communicate, organize, assist or advocate for or against any candidate for elected office, including but not limited to his or her own candidacy, whether for a local, state or federal office, and whether the employee is on or off duty at the time of such use.

While employed by the City, employees are to refrain from using their influence publicly for or against any candidate for municipal elective office. City employees are not to circulate campaign literature for elective city officials, nor be in any way concerned with soliciting or receiving subscriptions, contributions, or political service from any person on behalf of any candidate for municipal elective office. Nothing in this paragraph shall be construed to apply to an employee who is seeking any office in municipal government while that employee is working on his or her campaign, subject to the limitation in the paragraphs above.

This rule is not to be construed to prevent any City employees from becoming, or continuing to be, members of any political organization, from attending political meetings, or from voting with complete freedom in any election.

Employees who are working directly or indirectly under a federal funding status must check with the U.S. Civil Service Commission as to the extent to which participation in State or Federal political activities is allowed under Federal Law.

B. Conflicts of Interest

In addition to adhering to general standards of conduct for employees of any organization, public employees are expected to treat everyone they serve with complete impartiality and are prohibited from using their official position for personal profit or the profit of friends and family. Employees must comply with the conflict of interest standards of State law 30-A M.R.S.A. Sec. 2605.

Outside employment which must be reviewed by the City as part of its regulatory or reviewing authority is prohibited. Employees must also comply with any departmental rules and regulations regarding outside employment.

C. Employment of Relatives

1. The City discourages the employment of individuals to work in a direct or indirect line of supervision with an employee who is a member of the individual's family. The City further prohibits an officer or employee of the City from using his or her official position to advance, advocate, hire or promote the employment of that officer's or employee's relatives in any City position. An officer or employee of the City may provide a personal reference for a relative who is applying for a position over which that officer or employee does not exercise any direct or indirect supervision or control. An officer or employee of the City shall not be involved in the hiring process for any position if it involves a relative.
- 2a. The City reserves the right to refuse to appoint a person to a position in the same department, division or facility, wherein his or her relationship to another employee has the potential for creating adverse impact on supervision, safety, security or morale, or involves a potential conflict of interest. The Department Head shall make the determination as to whether such adverse impact exists, subject to review by the City Manager.
- 2b. In the case of a finding of adverse impact, the Department Head shall make a reasonable effort to see if a written management plan governing the assignment and evaluation of such employee can be put in place which would avoid the conflict and mitigate any adverse impact, prevent favoritism or other improper influences. Any such management plan will be subject to approval by the City Manager at the time of hire and to ongoing oversight by the Director of Human Resources. If the structure or size of the Department does not permit such a management plan, then the City may refuse to appoint that person to the position.
3. The provisions of this section shall apply when a relationship is formed after the date of hire such as through a marriage or domestic partnership.
4. An individual violating these provisions, or hired in violation of these provisions as a result of applicant failure to disclose a relationship, may be subject to disciplinary action, up to and including termination.
5. For purposes of the above provisions, a "relative" is defined as: grandfather, grandmother, father, mother, son, daughter, child of domestic partner, grandson, granddaughter, brother, sister, uncle, aunt, first cousin, nephew, niece, husband, wife, domestic partner, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, step-father, step-mother, step-son, step-daughter, step-brother, step-sister, half-brother, or half-sister.

- 6 The City Manager may provide specific instructions concerning employees or applicants affected by this provision in a manner to safeguard the hiring and promotional opportunities of the individual as well as the objectivity of the process.

Running a Local Municipal Ethics Board: Ten Steps to a Better Board

By Steven G. Leventhal

The members of a local municipal ethics board are often respected members of the community with no background in government. They may be drawn from the clergy, and have strong grounding in the principles of their respective faiths; they may be accomplished members of the Bar, thoroughly versed in the code of professional responsibility that governs the practice of law, or they may be civic minded citizens, committed to public service and confident in the wisdom of their own moral compasses.



But even with these impressive credentials, board members may be uncertain of the board's purpose and function, unaware of the standards of conduct applicable to municipal officers and employees, and unfamiliar with the structure, operation and language of government.

This article is intended to offer them guidance in organizing and running their boards.

Step 1: Understand Your Mission

Logic and experience indicate that the vast majority of municipal officers and employees are honest, and genuinely wish to do the right thing. The dual goals of a municipal ethics program are to assist municipal officers and employees in avoiding ethical missteps before they occur, and to assure a skeptical public that the decisions of its government are based on the public interest and not on the private interests of the decision makers.

Many people use the words "morality" and "ethics" as if they had the same meaning. This is understandable, because their meanings are similar. Morality comes from the Latin word *mores*, for the characteristic customs and conventions of a community. Ethics comes from the Greek word *ethos*, for the characteristic spirit or tone of a community. But in the applied context of government ethics, it is inaccurate and unhelpful to think of these words as having the same meanings.

To illustrate the difference between morality and ethics, consider that an honest municipal employee, recognizing that she has a conflict of interest in a particular matter, may choose the official action that advances the public interest, even at the expense of

her own personal interest. Has she acted immorally? Certainly not. However, our well-meaning municipal employee has acted unethically, because even an innocent conflict of interest tends to undermine public confidence in government and justifies the suspicion that an official action was motivated by personal considerations rather than by the public interest.

It is unhelpful to think of government ethics in moral terms, because doing so implies a moral failure among municipal officers and employees, and breeds resentment among the honest majority, who take rightful pride in their personal integrity.

"Logic and experience indicate that the vast majority of municipal officers and employees are honest, and genuinely wish to do the right thing."

Some laws prohibit conduct that is inherently immoral, such as murder and larceny. This type of misconduct is known as a *malum in se*. It is prohibited because it is wrong. But some laws prohibit and even criminalize conduct that would otherwise be perfectly moral because we find it a safer, more economical or more efficient way to organize our society. The Vehicle and Traffic Law and the Internal Revenue Code are examples of laws that prohibit conduct that is not inherently immoral. This type of misconduct is known as a *malum prohibitum*. It is wrong because it is illegal.

Similarly, a local municipal ethics code does not prohibit conduct because the conduct is morally wrong.¹ Rather, it regulates official conduct in order to achieve the dual goals of assisting honest officers and employees in avoiding ethical missteps before they occur, and inspiring public confidence in government by encouraging high standards of conduct among municipal officers and employees. Ethics regulations are the rules of the road for official conduct.

Step 2: Learn How to Analyze a Government Ethics Problem

So where do you find these rules of the road? They are scattered about in many legal nooks and crannies, including the State Constitution, various state and local statutes, published court decisions, and agency regulations. But don't be discouraged. In New York, most ethics problems can be analyzed by considering three questions:

- Does the conduct violate Article 18 of the New York General Municipal Law?
- If not, does the conduct violate the local municipal code of ethics?
- If not, does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?

Article 18 of the New York General Municipal Law is the state law that establishes minimum standards of conduct for the officers and employees of all municipalities within the State, except the City of New York.² Among other things, Article 18 prohibits a municipal officer and employee from having a financial interest in certain municipal contracts that he or she has the power to control individually or as a board member,³ from accepting gifts or favors worth \$75 or more where it might appear that the gift was intended to reward or influence an official action,⁴ from disclosing confidential government information,⁵ from receiving payment in connection with any matter before his or her own agency,⁶ and from receiving a contingency fee in connection with a matter before any agency of the municipality.⁷

If you find that the conduct under review violates Article 18, you are finished with your analysis. The conduct is prohibited by state law and you need go no further. But if you find that the conduct does not violate Article 18, you must ask yourself the second question: Does the conduct under review violate the local municipal code of ethics?

Local municipalities are authorized by Article 18 to adopt their own codes of ethics.⁸ A local ethics code may not permit conduct that is prohibited by Article 18. However, a local code may be stricter than Article 18. It may prohibit conduct that Article 18 would allow.⁹ Local ethics codes typically fill gaps in the coverage of Article 18 by, among other things, closing the “revolving door” (post-employment contacts with the municipality), establishing rules for the wearing of “two hats” (the holding of two government positions, or moonlighting in the private sector) and, in some cases, prohibiting “pay to play” practices and the political solicitation of subordinates, vendors and contractors.

If, after determining that the conduct under review does not violate Article 18, you find that it does violate your local ethics code, your analysis is done. The conduct is prohibited by local law. But, if you find that the conduct neither violates Article 18 nor the local code of ethics, there is yet another question that you must consider.

Ethics regulations are not only designed to promote high standards of official conduct, but also to

foster public confidence in government. An appearance of impropriety undermines public confidence. Therefore, courts in some cases have found that government officials have an implied duty to avoid conduct that seriously and substantially violates the spirit and intent of ethics regulations, even where no specific statute is violated.¹⁰

Accordingly, the third question in this protocol for analyzing government ethics problems—Does the conduct seriously and substantially violate the spirit and intent of the law, and thus create a prohibited appearance of impropriety?—may well be posed instead as: How will this conduct look on the front page of the local newspaper?

The goal of prevention—and just plain fairness—requires that officers and employees have clear advance knowledge of what conduct is prohibited, and what conduct is not. Discernable standards of conduct help dedicated municipal officers and employees to avoid unintended violations and unwarranted suspicion. When the board finds that there is a prohibited appearance of impropriety, the finding should have a rational basis, and the board’s reasoning should be clear and convincing. Such a finding should be reserved for the rare cases involving conduct that is contrary to public policy, and that raise the specter of self-interest or partiality. It should not be found in cases where the improper appearances are speculative or trivial.¹¹

Where a contemplated action by an official might create an appearance of impropriety, the board should recommend that the official refrain from acting. But ethics boards should be restrained in finding, after the fact, that an official’s conduct violated the implied duty to avoid appearances of impropriety. They should be especially restrained in finding that a member of a voting board, and in particular a legislator, was required to refrain from participating in a matter called for a vote, because an abstention by a member of a voting body will normally be counted as a “nay” vote,¹² and because the recusal of a legislator disenfranchises voters.

Step 3: Set the Right Tone—Be Credible

By setting the right tone, the board can better advance the dual goals of helping the municipal workforce avoid ethical missteps before they occur and inspiring public confidence in government decision making.

One clear lesson of recently publicized scandals is that an otherwise forgiving public will not abide hypocrisy. Board members should scrutinize their own investment, business or political activities, and rid themselves of conflicts. They should avoid entanglements that might cast doubt on their objectivity.

A board that is perceived as politically motivated will have no credibility as the source of ethics advice or the arbiter of ethics disputes. Rather than inspire public confidence, it will reinforce public cynicism. Board members should avoid partisanship in their official and unofficial activities. They should banish political considerations from their deliberations and decision-making.

Most ethics inquiries escape public notice. But some draw intense public attention and attract press inquiries. The board is a deliberative body and speaks only through its duly rendered opinions and decisions. Individual board members should avoid public statements that may send mixed messages, and may undermine the force and credibility of the board's determinations.

According to Socrates, there are four things that a judge must do: listen patiently, speak wisely, deliberate soberly, and decide impartially. This ancient admonition is a worthy guide for the members of a municipal ethics board in the discharge of their official duties.

Step 4: Empower the Board to Control Its Own Business—Be Independent

There is an understandable tendency for a municipal administration to exercise direct or indirect influence over its appointed boards and commissions. This may occur with the best of intentions. For example, a municipal attorney or other official appointed to a board may feel that he or she is in the best position to call meetings, set the agenda, or guide the board in its deliberations. But an ethics board dominated by administration insiders cannot exercise independent judgment and oversight.

To ensure both the reality and the perception that the board can and does operate independently, the board should select its own chair. Like all boards, the ethics board must conduct its business at meetings attended in person by a quorum of its members.¹³ Meetings should be called by the chair, or by a majority of the members.

A clerical employee should be appointed by the municipality to serve as secretary to the board, under direction of the chair. The secretary should be responsible for sending notices, receiving inquiries and complaints, keeping minutes, maintaining the transactional, applicant and annual disclosure statements filed with the board,¹⁴ and keeping an indexed file of the board's opinions and decisions.

Under normal circumstances, the municipal attorney will serve as counsel to the board. The board should have a modest but sufficient budget to obtain independent legal advice on the rare occasions when the municipal attorney may have a conflict of interest,

and to allow for the services of a stenographer when a hearing is conducted. Because the activities of the board may sometimes be controversial, its expenditures for these purposes, within the limits of a modest budget, should not be subject to external approval.

Step 5: Get the Message Out—Be Proactive

Many local ethics boards never meet, and are completely ignored by their respective municipalities. But because the municipal ethics program is designed to help officers and employees avoid inadvertent ethical violations, it is essential that the board actively promote awareness among them of their ethical obligations, and encourage them to seek ethics advice when questions arise.

Ethics codes tend to be drafted by lawyers, written in *legalese*, and unintelligible to the common reader. Yet the municipal workforce is mostly composed of non-lawyers, all of whom must adhere to the code of ethics. Therefore, every municipality should prepare and distribute a plain-language guide to government ethics no more than two or three pages in length.¹⁵

The plain-language guide should include a short and simple statement of purpose. It should note that the guide was prepared to assist officers and employees in avoiding actual or potential conflicts of interest, but that it is not intended to replace the actual text of the local code of ethics. It should incorporate—in plain language—the mandates of Article 18 and the standards adopted by the local municipality in its code of ethics, and should advise against conduct that creates an appearance of impropriety.

The plain language guide should inform municipal officers and employees that they may obtain free, confidential ethics advice from the board of ethics, and provide the board's contact information. It should encourage officers and employees to resolve any doubts they may have about their ethical obligations by obtaining the board's advice before acting.

Ethics training is another important means of getting the message out. A regular series of educational programs should be conducted at convenient times and places so that they may be widely attended by the municipal officers and employees. Experience indicates that daytime programs will be widely attended by employees, even if attendance is not mandatory. Evening programs are generally more convenient for the members of boards and commissions, many of whom hold full-time outside employment.

Step 6: Master the Art of Giving Ethics Advice

The day will come. You may be at a cocktail party, or at a community event. You will be approached by an acquaintance who has heard of your appointment to

the ethics board and wishes to discuss an ethics question. But beware. You probably won't have all the facts that you will need to give a proper answer. Certainly, you don't want to be cited as having approved a code violation. Ethics inquiries often involve the exercise of judgment. The exchange of opinions among board members is an important part of the decision-making process. All ethics inquiries should be referred to the full board for determination.

The board should respond only to written requests for ethics advice, and should only decide actual "cases and controversies." Fact-finding is a critical step in rendering ethics advice. Only the facts of a particular case will determine the issues that you must consider. The particular facts of an actual case will often determine the outcome of an ethics inquiry. When a request is made for general information about the ethics code, the board should respond by providing the inquiring party with a copy of the plain-language guide.

The board of ethics should maintain a record of the question that was posed, and the information that it relied on in reaching its opinion. It should carefully consider whether it has all the facts that it needs to form an opinion. Ethics questions are often more complicated than they appear. If an employee holds a civil service title, you may need to review the job description associated with that title. But perhaps the employee is working "out of title," performing functions that are not part of his or her job description. Conflicts may sometimes arise based on the duties associated with a job title, or they may arise based on the duties actually performed. You may need to know whether a particular employee is a "policy maker," or is in a position to influence policy making. You may need to know how a particular agency interacts with another. Once you have gathered your facts, you still may not know the whole story. To avoid setting a bad precedent, limit the application of your opinion to the facts presented.

Article 18 authorizes a county ethics board to act with respect to officers and employees of the county, and with respect to officers and employees of a municipality within the county that has not established its own board of ethics.¹⁶ A municipal ethics board other than a county board may act only with respect to its own officers and employees.¹⁷ Ethics advice is intended to provide a shield against unwarranted criticism for honest officers and employees, not a sword for use by political or personal foes. Typically, a local municipal ethics board is authorized to give advice only to officers and employees inquiring about themselves.

The board should act promptly when it receives a request for ethics advice. Many inquiries will be time sensitive. For example, an outside job opportunity may be lost while a municipal employee waits for the ethics board to determine whether the duties of the

outside job would be compatible with the employee's government duties.¹⁸ Untimely ethics advice is useless to the inquiring officer or employee, discourages officers and employees from seeking advice before acting, and undermines the purpose of preventing ethics violations before they occur.

The board's job is to interpret the obligations of officers and employees under the code of ethics and related authorities. Not every question posed to the board of ethics will raise a government ethics issue. For example, the professional conduct of attorneys—even municipal attorneys—is governed by the Lawyer's Code of Professional Responsibility.¹⁹ Officers and employees seeking advice about the professional obligations of attorneys should be referred to the professional ethics committee of the local bar association. Inquiries that pose questions of municipal law should be referred to the municipal attorney.

In drafting your advisory opinions, remember that confidentiality advances the purposes of the municipal ethics program by encouraging officers and employees to seek advice before acting. Where possible, an advisory opinion should omit the name of the inquiring officer or employee, and any other identifying facts.

Your task will be easier if you develop a template for drafting opinions. First frame the issue presented. Next, set forth the governing authority. Discuss how the law applies to the facts, and then state the board's conclusion. Advisory opinions should identify which board members participated in the matter, and any members who may have recused themselves.²⁰ They should be dated and signed by the chair, and delivered only to the inquiring officer or employee unless he or she consents to a broader distribution.

In framing the issue, keep in mind that if the advice applies only to the inquiring officer or employee, the board's opinion is more likely to be exempt from disclosure under the New York Freedom of Information Law, and it is more likely that the board's deliberations may be conducted in executive session under the Open Meetings Law.²¹ On the other hand, determinations that are broad declarations of policy may be subject to disclosure under the Freedom of Information Law, and the proceedings that produce them may be subject to public access under the Open Meetings Law.²² Because officers and employees are more likely to seek ethics advice when their inquiries are treated as confidential, local municipal ethics boards should conduct their advisory function in a manner that is likely to preserve the privacy of the inquiring parties.

Courts give great weight to the advisory opinions of local municipal ethics boards.²³ In giving ethics advice, be reasonable and practical. Keep in mind that inconsistent rulings encourage skepticism. But don't

ignore the lessons of experience. Respect your own precedents, but take a fresh look when warranted. Remember that your goals are to assist honest officers and employees in avoiding ethical missteps before they occur, and to inspire public confidence in government by encouraging high standards of conduct among municipal officers and employees. Treat every request for ethics advice as a teaching opportunity. Write advisory opinions that are clear, explanatory and educational.

Step 7: Adopt Rules of Procedure for Investigating Complaints

Unlike a request for ethics advice, an ethics complaint can normally be filed by anyone—even anonymously—or the board may initiate an investigation on its own. Article 18 does not provide guidelines for the investigation of complaints by a local ethics board. Particular practices vary from one municipality to another, based on the board's mandate as set forth in the local code of ethics.

Consistent with the authority conferred on the board by the local code of ethics, the board should adopt its own rules of procedure for investigating complaints, and have them in place before a complaint is received or an investigation is required. In adopting its rules, the board should be mindful of the fundamental requirements of due process: notice and an opportunity to be heard.²⁴

The board should preserve a record of the complaint, all notices to and from the board, and all evidence that it receives in the course of its investigation including documents and testimony. The board should work closely with its counsel to ensure that the result of its investigation will withstand judicial review. (For a discussion of what to expect if the board or its members are sued, see Step 9.)

If the facts alleged by the complainant or discovered by the board raise the suspicion that a crime may have been committed, the matter should be referred to the District Attorney. To avoid interfering with the District Attorney's investigation or prosecution of the case, the board should refrain from acting while the matter is under investigation or prosecution by the District Attorney's office.

Step 8: Develop Procedures for Review of Annual Disclosure Statements

In municipalities having populations of 50,000 or more, the board of ethics is usually charged with the responsibility of administering the financial disclosure law adopted pursuant to Article 18.²⁵ Depending upon the number of officers and employees required to file financial disclosure statements, the board of ethics

may not have the resources to adequately discharge this responsibility on its own without the assistance of staff assigned by the municipality to handle the daily administrative and clerical duties that such a program entails.

Even where the board of ethics has delegated the day-to-day administration of the financial disclosure law to staff, it still may be called upon to inspect the annual disclosure statements for the purpose of detecting any actual or potential conflicts that they may reveal. Undoubtedly, this task will be performed without the assistance of investigators, auditors or forensic experts. The board should exercise care in developing procedures for the review of annual disclosure statements, and in establishing the parameters of its review, in order to avoid the potential that its members will later be blamed for failing to catch an actual or potential conflict.

Step 9: Know What to Expect if the Board or Its Members Are Sued

Because they are not "final determinations," the advice given by an ethics board is not subject to judicial review and reversal.²⁶ As a result, there are few reported cases involving challenges to the decisions of local municipal ethics boards. But when an ethics board engages in the quasi-judicial function of determining whether an ethics violation has occurred, or imposes a fine or other penalty, its decisions will be subject to judicial review in a proceeding under Article 78 of the New York Civil Practice Law and Rules.²⁷

In an Article 78 proceeding, the petitioner will have the burden of proving that the board's determination was illegal, arbitrary or capricious, that the board abused its discretion, or that the decision was unsupported by substantial evidence.²⁸

Lawsuits brought against the board will normally be handled by the municipal attorney, or other counsel retained by the municipality, at no cost to the individual board members. But what if the individual board members are sued by an aggrieved party? The individual members of a local municipal ethics board are entitled to a qualified immunity from individual liability where they exercised discretion within the scope of their official duties, and where they have not violated a plaintiff's constitutional rights.²⁹

A municipality may, by local law, provide for the defense and indemnification of its officers and employees in civil claims arising out of their acts or omissions while acting within the scope of their official duties, except where the claim is brought by or on behalf of the municipality. The indemnification will not apply to judgments based on intentional wrongdoing or recklessness, or to awards of punitive damages.³⁰ Where

the municipality provides an officer or employee with defense and indemnification, any settlement of the claim is subject to approval by the municipality.³¹

The municipality may purchase insurance to fund its obligations under the indemnity,³² or it may purchase liability insurance to protect its officers and employees from liability arising out of the performance their official duties even without a local law providing for the defense and indemnification of officers and employees by the municipality.³³ Board members should inquire whether their municipality has adopted a local law providing for the defense and indemnification of its officers and employees, and whether the municipality has purchased insurance to protect them from liability arising from the performance of their official duties.

A lawsuit against the board of ethics or its members may pit the interests of branches, departments or agencies of government, or those of individual officers or employees, against one another, and may present the municipal attorney with a professional conflict of interest. It is sometimes difficult to determine whether a municipal attorney has a professional conflict of interest because he or she may, at various times, owe a duty of loyalty to one or more individual officers or employees, branches, departments or agencies of government, the government as a whole, or directly to the public.³⁴ This distinction is important because conversations with a municipal attorney will not be privileged unless they occur between the municipal attorney and his or her client.³⁵

The joint defense of a municipality and the individual members of a municipal board will give rise to a professional conflict where the defendants assert inconsistent defenses. A professional conflict would also arise where the individual board members are sued for punitive damages, because a municipality cannot be liable for punitive damages.³⁶ Clients may waive the professional conflict by giving informed consent if a disinterested lawyer would conclude that defense counsel's professional judgment would not be impaired by the joint representation.³⁷ In cases where the municipal attorney has a professional conflict of interest, the indemnified officer or employee is entitled to be represented by private counsel of his or her choice.³⁸

Step 10: Take Advantage of Ethics Resources

We are fortunate that several dedicated government ethicists have labored in recent years to organize the subject of government ethics into a coherent discipline, and to develop a body of written materials available to assist local municipal ethics boards in doing their important and difficult work.

Articles by Professors Mark Davies, Patty Salkin, Les Steinman and others are available online. For example, back issues of this publication, the NYSBA/MLRC *Municipal Lawyer*, are available to members of NYSBA's Municipal Law Section on its Web site at www.nysba.org/MunicipalLawyer. The Association's Municipal Law Section is a ready source of ethics education and support. An extensive online ethics library is available at the Web site of the New York City Conflicts of Interest Board.

An extensive library of local municipal codes is available on the Web site of "e-codes." Advisory opinions of the New York Attorney General and the New York Comptroller are available on their respective Web sites. Helpful information is available online to members of the New York State Association of Counties, the Association of Towns of the State of New York, the New York Conference of Mayors and Municipal Officials, and the Conference on Government Ethics Laws.

Congratulations and good luck. Your work is among the most important in government.

Endnotes

1. In some instances, a municipal officer or employee may engage in morally culpable misconduct. But such cases are more likely to be prosecuted by the local district attorney's office than by the local municipal ethics board, and they are more likely to be prosecuted as violations of the New York Penal Law than as violations of the state or local codes of ethics. See, e.g., Penal Law § 195.00 (official misconduct) and art. 200 (bribery involving public servants and related offenses).
2. For a helpful summary of Gen. Mun. Law Article 18, see Davies, *Article 18: A Conflicts of Interest Checklist for Municipal Officer and Employees*, NYSBA/MLRC *Municipal Lawyer*, Summer 2005, Vol. 19, No. 3, pp. 10–12.
3. See Gen. Mun. Law §§ 800–805.
4. See Gen. Mun. Law § 805-a.
5. *Id.* N.B. The phrase "confidential information" is not defined in Gen. Mun. Law Article 18. Taken together, the Freedom of Information Law (Pub. Off. Law, art. 6) and the Open Meetings Law (Pub. Off. Law, art. 7) are a powerful legislative declaration that public policy disfavors government secrecy. See Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC *Municipal Lawyer*, Spring 2004, Vol. 18, No. 2, pp. 22–24. For a suggested definition of "confidential information" in the context of Gen. Mun. Law, Article 18, see Leventhal, *Running a Local Municipal Ethics Board: Glossary of Municipal Ethics Terms*, NYSBA/MLRC *Municipal Lawyer*, Spring 2006, Vol. 20, No. 2, pp. 20–21 (*Confidential Information*. Information in any format that is either (1) prohibited by federal or state law from disclosure to the public, or (2) prohibited from disclosure by local law, ordinance, or resolution of the municipality, and exempt from mandatory disclosure under the New York State Freedom of Information Law (FOIL) and the New York State Open Meetings Law).
6. *Supra*, n. 4.
7. *Id.*
8. See Gen. Mun. Law § 806.

9. See Davies, *Enacting a Local Ethics Law—Part I: Code of Ethics*, NYSBA/MLRC Municipal Lawyer, Summer 2007, Vol. 21, No. 3, pp. 4–8.
10. See, e.g., *Zagoreos v. Conklin*, 109 A.D.2d 281, 491 N.Y.S.2d 358 (2d Dep’t 1985); *Tuxedo Conservation and Taxpayer Association v. Town Board of Tuxedo*, 69 A.D.2d 320, 418 N.Y.S.2d 638 (2d Dep’t 1979).
11. See *Peterson v. Corbin*, 275 A.D.2d 35, 713 N.Y.S.2d 361 (2d Dep’t 2000).
12. See Gen. Const. Law § 41.
13. Pub. Off. Law §§ 100–111 (Open Meetings Law); see Freeman, *Board of Ethics: Public Disclosure?* NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2, pp. 12–15; Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, NYSBA/MLRC Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22–24.
14. For a thorough discussion of the types of disclosure statements typically filed with a local municipal ethics board, see Davies, *Enacting a Local Ethics Law—Part II: Disclosure*, NYSBA/MLRC Municipal Lawyer, Fall 2007, Vol. 21, No. 4, pp. 8–17.
15. A library of plain-language guides and leaflets is posted on the Web site of the New York City Conflicts of Interest Board.
16. See Gen. Mun. Law §§ 808(2)–808(4).
17. *Id.*
18. In the absence of a constitutional or statutory prohibition, an official may hold two public offices, or a public office and a position of secondary employment, unless the duties of the two positions are incompatible. See *People ex rel. Ryan v. Green*, 58 N.Y. 295 (1874).
19. N.Y. Comp. Codes R. & Regs. Tit. 22, § 1200.
20. Where a board member recuses himself or herself due to a conflict of interest, the member should refrain from participating in the discussion, deliberations or vote on the matter. See 1995 Op. Atty. Gen. 2. For a helpful discussion of the principles applicable to recusal and abstention, see Steinman, *Recusal and Abstention from Voting: Guiding Principles*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 17–19.
21. See Leventhal and Ulrich, *Running a Municipal Ethics Board: Is Ethics Advice Confidential?*, Municipal Lawyer, Spring 2004, Vol. 18, No. 2, pp. 22–24; N.Y. Comm. on Open Gov’t. FOIL Adv. Op. 8922 (1995); OML Adv. Ops. 2269 (1993), 2805 (1997).
22. *Id.*; see also Freeman, *Board of Ethics: Public Disclosure?*, NYSBA/MLRC Municipal Lawyer, Spring 2008, Vol. 22, No. 2, pp. 12–15.
23. See *Byer v. Town of Poestenkill*, 232 A.D.2d 851, 648 N.Y.S.2d 768 (3d Dep’t 1996); *Parker v. Gardiner Planning Bd.*, 184 A.D.2d 937, 585 N.Y.S.2d 571 (3d Dep’t 1992); *DiLucia v. Mandelker*, 110 A.D.2d 260, 263, 493 N.Y.S.2d 769, 771 (1st Dept. 1985), *aff’d*, 68 N.Y.2d 844 (1986).
24. For further advice on investigations and enforcement procedures, see Davies, *Enacting a Local Ethics Law—Part III: Administration*, NYSBA/MLRC Municipal Lawyer, Winter 2008, Vol. 22, No. 1, pp. 11–16.
25. See Gen. Mun. Law §§ 810, 811, 812.
26. See *Best Payphones, Inc. v. Department of Info. Tech. & Telecom. of City of N.Y.*, 5 N.Y.3d 30 (2005), *reargument den.* 5 N.Y.3d 824 (2005); *Stop-The-Barge v. Cahill*, 1 N.Y.3d 218 (2003); *Scarpati-Reilly v. Town of Huntington Bd. of Ethics & Fin. Disc.*, 300 A.D.2d 404, 751 N.Y.S.2d 753 (2d Dep’t 2002); *Neale v. Cohen*, 281 A.D.2d 421, 721 N.Y.S.2d 110 (2d Dep’t 2001); *Hammer v. Veteran*, 86 Misc. 2d 1056, 386 N.Y.S.2d 170 (Sup. Ct. West. 1975), *aff’d*, 53 A.D.2d 629, 385 N.Y.S. 2d 1017 (2d Dep’t 1976).
27. See, e.g., *Gray v. Epstein*, 2008 N.Y. Slip Op 51706U (Suff. Co. Sup. Ct. 2008) (Petitioner appealed decision of the Town of Smithtown Ethics Board that she violated the town code of ethics, and imposed a civil penalty of \$3,500; court affirmed the board’s decision, but set aside the monetary penalty because the Code did not provide the Ethics Board with the authority to impose monetary penalties.).
28. See N.Y. Civ. Prac. Law & Rules § 7803.
29. See *Shechter v. Comptroller of City of New York*, 79 F.3d 265 (2d Cir. 1996).
30. Pub. Off. Law § 18 (Defense and indemnification of officers and public entities).
31. *Id.*
32. *Id.*
33. Gen. Mun. Law § 52 (Liability insurance for officers and employees).
34. See Salkin, *Beware: What You Say to Your Government Lawyer May Be Held Against You—The Erosion of the Government Attorney-Client Confidentiality*, 35 Urb. Law 283 (2003); Salkin and Phillips, Program On Law And State Government Fellowship Symposium: *Integrity in Public Service: Living Up to the Public Trust? Eliminating Political Maneuvering: A Light in the Tunnel for the Government Attorney-Client Privilege*, 39 Ind. L. Rev. 561 (2006).
35. *Id.*
36. See *Cook County, Illinois v. U.S. ex rel. Chandler*, 538 U.S. 119, 129 (2003) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 259–260 (1981); *Sharapata v. Islip*, 56 N.Y.2d 332 (1982)).
37. N.Y. Comp. Codes R. & Regs. Tit. 22, § 1200.24(c)(DR 5–105).
38. Pub. Off. Law § 18 (Defense and indemnification of officers and public entities).

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FROM RUMBLINGS TO REALITY: ONE CITY'S STORY OF ETHICS REFORM

Julie Meadows-Keefe*

I. INTRODUCTION

We will never bring disgrace on this our City by an act of dishonesty or cowardice. We will fight for the ideals and Sacred Things of the City both alone and with many. We will revere and obey the City's laws, and will do our best to incite a like reverence and respect in those above us who are prone to annul them or set them at naught. We will strive unceasingly to quicken the public's sense of civic duty. Thus, in all these ways, we will transmit this City not only, not less, but greater and more beautiful than it was transmitted to us.¹

Thousands of years after the authorship of the Athenian Oath, this Article tells one City's story of the evolution of its ethics program and reflects my experience as the first Ethics Officer in the City of Tallahassee.² It provides both a history of Tallahassee's Independent Ethics Board³ and a framework of sorts for other local governments to consider as they enhance or develop their own ethics programs.

* © 2017, Julie Meadows-Keefe. All rights reserved. Independent Ethics Officer, City of Tallahassee. J.D., Florida State University, 1993; B.A., Stetson University, 1990. Phi Beta Kappa; Florida State Law Review; Florida State Moot Court Team. The Author would like to thank the "original six" Independent Ethics Board Members, Chair Lila Jaber (Stetson, B.A. and J.D.), co-chair Richard Herring, Cecil Davis Funmi Ojetayo, Tom Friedman, and Renee McNeill for actively helping to build this Board from the ground up. The Author would like to dedicate this Article to retired Stetson faculty member Dr. T. Wayne Bailey, who influenced her and so many others to pursue careers in law and government.

1. The ATHENIAN OATH, NAT'L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-factoids/the-athenian-oath> (last visited Apr. 18, 2017).

2. *Taking the Lead on Ethics*, CITY OF TALLAHASSEE (Sept. 30, 2014), <https://www.talgov.com/main/news/4393.aspx>. My perspective on being the Ethics Officer provided fodder for a talk, which I gave at a TEDx event at Florida State University. Julie Meadows-Keefe, *Exiting the Echo Chamber to Enter Civic Engagement* (TEDx Talk Video June 29, 2016), <https://www.youtube.com/watch?v=qzDwygnrDsc>.

3. *Ethics Board: Background Information*, CITY OF TALLAHASSEE, available at <https://www.talgov.com/main/ethics.aspx> (last visited Apr. 18, 2017).

The media, polls, and widely expressed citizen attitudes would seem to indicate that, overall, people lack high levels of trust in government.⁴ However, Florida's Constitution declares that "[a] public office is a public trust."⁵ In 1968, Florida was one of the first states to adopt an ethics code. It went on to establish the Florida Commission on Ethics in 1976.⁶ The Florida Ethics Code contains standards of ethical conduct and disclosures applicable to all public officers, employees, candidates, lobbyists, and others involved with Florida's state and local government. The Code, however, does not apply to judges.⁷

The "ethics law[s] rest[] upon a triad of provisions: an understandable and comprehensive Code, . . . sensible disclosure, and a reasonable enforcement mechanism."⁸ Issues to grapple

4. See, e.g., *Beyond Distrust: How Americans View Their Government*, PEW RES. CENTER (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/> (providing a survey sample of citizens' concerns regarding the ability of the government to solve important national problems); but see Justin McCarthy, *Americans Still Trust Local Government More Than State*, GALLUP (Sep. 22, 2014), <http://www.gallup.com/poll/176846/americans-trust-local-government-state.aspx> (indicating that citizens tend to have more trust in local government than in national government).

5. FLA. CONST. art. II, § 8. See also *History*, FLA. COMMISSION ON ETHICS, <http://www.ethics.state.fl.us/AboutUs/History.aspx> (last visited Apr. 18, 2017) (describing the implementation of Florida's ethical standards for public officials in order to protect the public trust against abuses); *Guide to the Sunshine Amendment and Code of Ethics for Public Officers and Employees*, FLA COMMISSION ON ETHICS 1 (2016), <http://www.ethics.state.fl.us/Documents/Publications/GuideBookletInternet.pdf> (describing the purpose of the Code of Ethics as "to ensure that public officials conduct themselves independently and impartially, not using their offices for private gain other than compensation provided by law").

6. FLA. COMMISSION ON ETHICS, *supra* note 5, at 1.

7. FLA. STAT. § 112.311(5) (2016).

8. Mark Davies, *Keeping the Faith: A Model Local Ethics Law—Content and Commentary*, 21 *FORDHAM URB. L.J.* 61, 68 (1993) [hereinafter *Keeping the Faith*]. See also *Wyzykowski v. Rizas*, 626 A.2d 406, 414 (N.J. 1993) (citing the "Pane Principles," which identify the various circumstances requiring disqualification for ethical challenge). These include:

- (1) "Direct pecuniary interests," when an official votes on a matter benefiting the official's own property or affording a direct financial gain;
- (2) "Indirect pecuniary interests," when an official votes on a matter that financially benefits one closely tied to the official, such as an employer, or family member;
- (3) "Direct personal interest," when an official votes on a matter that benefits a blood relative or close friend in a non-financial way[;] . . . and
- (4) "Indirect Personal Interest," when an official votes on a matter in which an individual's judgment may be affected because of membership in some organization and a desire to help that organization further its policies.

Id. (quoting Michael A. Pane, *Conflict of Interest: Sometimes a Confusing Maze, Part II, New Jersey Municipalities* at 8–9 (Mar. 1980)).

with in government ethics include using public office for private gain; recusal, gifts; conflicts of interest; disclosure; political solicitation; improper influence of officials by private persons; outside employment; and revolving doors, which speaks to leaving a public-sector job and going into the private sector utilizing connections made in public service.⁹ “Appearances and public perception play an enormously important role in the effectiveness of officials and in the well-being of their communities.”¹⁰ Adding complexity to this situation is that conduct, which presents poor optics to the public, does not always violate any federal, state, or local ethics law—it simply fails to pass “the smell test.”¹¹ As one court noted, “Whether conspicuously or not, the co-mingling of business and legislative interests to date has resulted in a Darwinian hybrid where it is difficult to discern where the legislative responsibilities separate from . . . business responsibilities.”¹²

The public legitimately expects public officials and employees to be impartial, responsible, honest, trustworthy, and independent of outside influence.¹³ Indeed, most public servants

9. *Keeping the Faith*, *supra* note 8, at 69–71; see also Vincent R. Johnson, *Ethics in Government at the Local Level*, 36 SETON HALL L. REV. 715, 728 (2006) (identifying a similar list of concerns to be addressed in an effective local government ethics code); Deborah Markowitz, *A Crisis in Confidence: Municipal Officials Under Fire*, 16 VT. L. REV. 579, 597 (1992) (listing a similar group of ethical concerns faced by municipal officials); Robert Wechsler, *Revolving Door Provisions in Local Government Ethics Codes*, CITYETHICS.ORG (Mar. 23, 2010), <http://www.cityethics.org/content/revolving-door-provisions-local-government-ethics-codes> (discussing specific ethical issues involved in allowing public officials to move between the public and private sector).

10. *Keeping the Faith*, *supra* note 8, at 66; see also John M. Carbone, *Ethics: More Than Not Being Indicted*, N.J. LAW., December 2006, at 29 (stating that a public official, independently of his good intentions, will be judged by his acts).

11. See, e.g., Patricia E. Salkin, *Ethics in Land Use: Using Ethical Allegations as a Sword Rather as a Shield*, 33 REAL EST. L.J. 100, 100–01 (2004) [hereinafter *Ethics in Land Use*] (discussing courts’ findings of ethical misconduct in land use cases in which there has not been a particular violation of state or federal law); Patricia E. Salkin, *Ethics Allegations in Land Use Continue to Fill the Court Dockets*, 26 ZONING & PLAN. L. REP. 1, 1–3, 6–7 (Apr. 2003) (providing a sample of land use cases, some of which were decided by the courts upon considerations of appearance of improper ethical conduct); Patricia E. Salkin, *Municipal Ethics Remain A Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers*, 14 BYU J. PUB. L. 209, 210 (2000) (discussing legal ethics considerations for municipal lawyers, including the concept of “community standards,” which have the potential to make conduct unacceptable behavior).

12. *Ethics in Land Use*, *supra* note 11, at 107.

13. “Procedural fairness’ is the ethical responsibility of municipal officials both to conduct proceedings and to fulfill their other duties with openness and objectivity and to treat all that come before them equally.” Markowitz, *supra* note 9, at 603–04. It encompasses such things as “conflict[s] of interest . . . and discrimination.” *Id.* at 604.

display these characteristics.¹⁴ “However, . . . the very structure of some local government functions cause ethical conflicts for elected and appointed officials which exacerbates the difficulty of conducting assigned responsibilities [openly] and [equitably].”¹⁵ “[F]requent incidents of unethical behavior by municipal officials have a clear deleterious effect on the public’s trust in local government.”¹⁶ There is a strong argument that ethics in government should start at the local level because actions of local officials most directly impact citizens.¹⁷ Additionally, many elected officials begin their careers at the local government level and if ethics are inculcated at the beginning of a career, chances increase that as the individual moves to a higher office, the high ethical standards will travel with them. Local governments must also strike a delicate balance between ensuring that ethical standards are followed, while simultaneously avoiding overly burdensome requirements that would cause hardship and possibly discourage good people from entering public service.¹⁸

Often, county or city ethics initiatives spring up after major corruption scandals.¹⁹ For example, in 2009, Palm Beach County was named the “Capital of Florida Corruption” by *Time* magazine.²⁰ However, there are numerous other instances of

14. Mark Davies, *Governmental Ethics Laws: Myths and Mythos*, 40 N.Y.L. SCH. L. REV. 177, 178 (1995) [hereinafter *Governmental Ethics Laws*]; see also Patricia E. Salkin, *Failure to Articulate Clear Ethics Rules and Standards at the Local Level Continues to Haunt Local Land Use Decision Makers*, 43 URB. LAW. 757, 773 (2011) (recognizing that public servants for the most part act honestly and ethically, and discussing the need for clear ethical rules in land use to encourage this conduct).

15. Douglas Larson, *A Model Ethical Code for Appointed Municipal Officials*, 9 HAMLIN J. PUB. L. & POLY 395, 395 (1989).

16. Markowitz, *supra* note 9, at 605.

17. Johnson, *supra* note 9, at 716–17.

18. *Id.* at 752–53. See FLA. STAT. § 112.311(2) (2016) (establishing that conflict of interest rules should be designed in a way not to unnecessarily prevent the hiring of those best qualified to serve as public servants); *Governmental Ethics Laws*, *supra* note 14, at 181 (“[E]thics regulations must encourage, not discourage, good citizens from serving in government. If they do not do that, they have failed and belong in the rubbish heap.”).

19. See Michael Josephson, *The Peculiar Concept of Ethics Laws*, CITY OF JACKSONVILLE, <http://www.coj.net/departments/ethics-office/docs/the-peculiar-concept-of-ethics-laws.aspx> (last visited Apr. 18, 2017) (“Historically, legislative bodies have been reactive rather than proactive, doing only what they absolutely must. Thus, existing laws often are a hodgepodge of regulations designed to prevent reoccurrence of specific past improprieties. That’s a big part of the problem.”).

20. Hector Florin, *Palm Beach: The New Capital of Florida Corruption*, TIME (Jan. 10, 2009), <http://content.time.com/time/nation/article/0,8599,1870853,00.html>. See also Opinion Staff, *Does Palm Beach Still Deserve Moniker, ‘Corruption County’?*, PALM BEACH POST, available at <http://opinionzone.blog.palmbeachpost.com/2014/11/25/does-palm-beach-still-deserve-moniker-corruption-county/> (last updated Nov. 25, 2014) (discussing

corruption in Florida and other states dating back decades.²¹ To address local concerns, counties and municipalities are permitted under the Florida Ethics Code to enact local ethics codes or ordinances that are stricter than the Florida Ethics Code.²² Twelve counties have adopted ethics codes that are stricter than the state's ethics code.²³ The focus of the stricter codes and ordinances tends to be in the area of voting conflicts, gifts, and financial disclosures.²⁴

Generally, county ethics boards come first and fold into their coverage participating municipalities. Tallahassee did not follow that pattern—there is no county ethics board covering or addressing Leon County where Tallahassee is located. So how did Tallahassee's rather unique structure come to pass? Part II of this Article sets the scene and describes how citizen perception of the ethical climate in Tallahassee came to a tipping point, which led to the formation of an Ethics Advisory Panel. Part III discusses the activities of the Ethics Advisory Panel and its findings. Part IV sets forth how the City Commission responded to the report. Part V relates to continued citizen engagement and

some of the problems with the structure of the Palm Beach County Commission created to combat corruption in the City); OFFICE OF PROGRAM POLICY ANALYSIS & GOVERNMENT ACCOUNTABILITY, PALM BEACH COUNTY COMMISSION ON ETHICS WAS CREATED USING SEVERAL BEST PRACTICES; SOME PROCESSES COULD BE ENHANCED, REP. NO. 13-10, at 1 (Fla. 2013) (providing a review of the Palm Beach County Commission on Ethics, which emerged out of recommendations from a May 2009 grand jury created to propose changes to provide oversight, transparency, and accountability for county and municipal government); *Comm'n on Ethics E-Book*, PALM BEACH CNTY. COMMISSION ON ETHICS, www.palmbeachcountyethics.com/pdf/Ethics_eBook.pdf. (last visited Apr. 18, 2017) (providing an overview of the Palm Beach County Commission ethics program).

21. See, e.g., Selwyn Raab, *Inspectors Seized in Wide Extortion from Restaurants*, N.Y. TIMES, Mar. 25, 1988, at A1 (reporting that “[t]wenty-eight . . . health inspectors . . . were charged . . . with extorting hundreds of thousands of dollars from restaurants by threatening to close them or to cite them for sanitation violations”); see also Markowitz, *supra* note 9, at 579–80 (citing different examples of unethical conduct by state officials around the country).

22. See FLA. STAT. § 112.326 (2016) (“Nothing in this act shall prohibit the governing body of any political subdivision, . . . from imposing upon its own officers and employees additional or more stringent standards of conduct and disclosure requirements than those specified in this part . . .”).

23. *Tough Choices: Florida Counties Bridge the Ethical Policy Gap*, LEROY COLLINS INST. 1, 2 (Nov. 2012), http://www.integrityflorida.org/wp-content/uploads/2013/03/Integrity_Florida_and_LeRoy-Collins-Institute-Tough-Choices-Florida-Counties-Bridge-the-Ethics-Policy-Gap-11.29.12.pdf. These counties include Broward, Clay, Duval, Escambia, Indian River, Lake, Miami-Dade, Orange, Palm Beach, Sarasota, Seminole, and St. Johns. *Id.*

24. *Id.* at 2, 5, 9–10, 13–14.

activism on ethics reform, which ultimately led to the formation and activities of Tallahassee's Independent Ethics Board. Part VI serves to give an overview of the Independent Ethics Board's progress during its first eighteen months. Finally, Part VII covers lessons learned and recommendations for other municipalities seeking to implement or enhance their ethics compliance programs.

II. *BACKDROP FOR CHANGE: CLIMATE AND CONTROVERSIAL VOTES*

Tallahassee internally audited its ethics program in 2008 and determined that "the City's ethics program indicated that the program includes many of the components recommended for a strong ethics and compliance program."²⁵ The audit also found that the program was working effectively to encourage ethical behavior.²⁶ Suggestions included:

- Centralizing resources and directing employees where to obtain ethics assistance;
- Asking employees during department meetings to share ethical dilemmas and how they handled them;
- Cultivating an atmosphere where violation reporting is encouraged and retaliation for reporting is discouraged;
- Improving identification and notification of those required to file ethics disclosure forms.²⁷

Of most concern was the lack of a central point of contact on ethics matters. Employees generally relied on the City Attorney's office or supervisors to guide them.²⁸ However, this structure had arguably served the City well. From 2002–2012, eleven complaints against City officials had been filed with the Florida

25. Sam M. McCall, *Audit of the City's Ethics Program, Audit Report # 0912*, CITY OF TALLAHASSEE, intro page (Apr. 9, 2009), <https://www.talgov.com/Uploads/Public/Documents/auditing/pdf/0912-ethics.pdf>.

26. *Id.* at 1. The City of Tallahassee had a comprehensive ethics and character course for employees. Employees are required to think beyond what the law requires by keeping things like discretion, justice, alertness, tolerance, boldness, responsibility, cautiousness, and wisdom.

27. *Id.* at intro page.

28. *Id.* at 37–38.

Commission on Ethics.²⁹ In no case was it found that a violation was committed by an elected official. Additionally, no elected official in Tallahassee has ever been arrested for a criminal act.³⁰ Against this rather benign history, what tipped the balance?

Mayor John Marks was first elected in 2003 and served three terms—making him Tallahassee’s longest serving mayor.³¹ The incumbent Democratic Mayor was challenged in 2010 by a Republican opponent.³² Amid the economic downturn in Tallahassee, the election produced acrimony and increased scrutiny of elected officials.³³ The Mayor won a third term in August 2010.³⁴ However, acrimony continued. City Hall critics then focused on the past, 2007 and 2008, when Mayor Marks voted four times on matters involving a company represented by his law firm.³⁵ Then, on September 15, 2010, Mayor Marks voted to approve a \$1.2 million federal grant involving the City and grant partners Alliance for Digital Equality (“ADE”)³⁶ and the Go Beyond Foundation, while he was a paid member of ADE’s board of advisors.³⁷

Some citizens were critical of these votes and actions.³⁸ One particularly vocal citizen, who unsuccessfully ran for City Commission, habitually came to City Commission meetings and

29. Ethics Advisory Panel, *Regular Meeting Minutes*, at 5 (May 30, 2013), available at <http://www.tal.gov.com/Uploads/Public/Documents/treasurer/pdf/eap/130530-eap-min.pdf>.

30. *Id.*

31. City of Tallahassee, *Celebration Planned to Say Farewell and Thank You to Mayor John Marks*, TALLAHASSEE DEMOCRAT (Oct. 18, 2014, 9:22 PM), <http://www.tallahassee.com/story/life/chronicle/2014/10/18/celebration-planned-say-farewell-thank-mayor-john-marks/17527875/>.

32. Matthew Isbell, *The Spectacular Self-Destruction of Steve Stewart*, MCI MAPS (Sep. 13, 2014), <http://mcimaps.com/the-spectacular-self-destruction-of-steve-stewart/>.

33. *Id.*

34. Liza Park, *John Marks Captures Third Term as Tallahassee Mayor*, WCTV (Aug. 25, 2010, 7:16 AM), <http://www.wctv.tv/home/headlines/101446819.html?site=mobile>.

35. Jeff Burlew, *Settlement Unlikely as Court Date Nears in Mayor Marks Case*, TALLAHASSEE DEMOCRAT: STAFF BLOGS (Sep. 12, 2012), <http://blogs.tallahassee.com/settlement-unlikely-as-mayor-marks-court-date-nears/>; see also Lanetra Bennett, *More Ethics Complaints Filed Against Tallahassee Mayor*, WCTV (May 24, 2011, 5:54 PM), http://www.wctv.tv/home/headlines/Two_Ethics_Complaints_Filed_Against_Tallahassee_Mayor_120677539.html.

36. James Taylor, *Tallahassee Mayor Verbally Attacks Citizen Who Filed Ethics Charges*, MEDIA TRACKERS (June 28, 2012), <http://mediatrackers.org/florida/2012/06/28/tallahassee-mayor-verbally-attacks-citizen-who-filed-ethics-charges>.

37. Burlew, *supra* note 35.

38. Sean Rossman, *City Commission Gets Rid of ‘Kill Switch,’* TALLAHASSEE DEMOCRAT (July 3, 2014, 11:16 AM ET), <http://www.tallahassee.com/story/news/local/2014/07/02/city-commission-gets-rid-of-kill-switch/12116797/>.

was highly critical of the Mayor, other commissioners, and City staff.³⁹ The comments became so inflammatory a kill switch was installed in the Commission chamber microphone used during public comment, but after outcry about that practice, it was quickly discontinued.⁴⁰ This same citizen filed multiple complaints with the Florida Commission on Ethics based upon the Mayor's votes in 2007, 2008, and 2010 to approve the City of Tallahassee's participation in the Federal Broadband Technology Opportunity Program in partnership with the ADE, and his votes on matters that inured to the gain of a company that was a client of his law firm.⁴¹ The Florida Commission on Ethics ultimately exonerated Mayor Marks on all complaints.⁴²

However, on September 19, 2012, in spite of the Mayor's exoneration and amid additional criticism from members of the public, "the City Commission authorized the creation of a citizen's Ethics Advisory Panel to 'examine the existing policies, procedures and practices relating to ethics, financial disclosure and transparency' of the City of Tallahassee and where appropriate to make recommendations for improvements."⁴³ "On November 7, 2012, drawing from a pool of interested citizens who were willing to serve, the City Commission appointed a nine member Panel."⁴⁴ It was asked to prepare and submit a report to the City Commission by April 1, 2013.⁴⁵

III. PANEL MEETINGS AND FINDINGS

The Ethics Advisory Panel ("Panel") conducted its first meeting on November 8, 2012.⁴⁶ The Panel then held eighteen

39. Isbell, *supra* note 32.

40. Rossman, *supra* note 38.

41. See Final Order at background, disposition, *In re John Marks* (Jan. 25, 2013) (No. 13-004), <http://www.ethics.state.fl.us/Documents/Orders/2011/11-053fo.html> (explaining how it was alleged that "Respondent voted to approve the City of Tallahassee's participation in the Federal Broadband Technology Opportunity Program in partnership with the Alliance for Digital Equality, a business entity for which the Respondent served in a compensated position, and that he voted on matters which inured to the gain of Honeywell, a principal by which the Respondent was retained").

42. *Id.*

43. Ethics Advisory Panel, *Report of Recommendations*, CITY OF TALLAHASSEE (July 10, 2013), available at <https://www.talgov.com/uploads/public/documents/treasurer/pdf/eap/eap-final-report.pdf> [hereinafter 2013 *Report of Recommendations*].

44. *Id.*

45. *Id.* at 9.

46. *Id.* at Exhibit A.

meetings in eight months, including two public hearings.⁴⁷ The first public hearing allowed citizens to suggest a direction for the Panel.⁴⁸ During this first public hearing, a citizen proposed establishing a local city ethics commission, with members appointed by various community organizations.⁴⁹ “The Panel discussed whether there was a need for an independent body to respond to ethics complaints.”⁵⁰ The Panel did not ultimately recommend a city ethics commission.⁵¹ The second public hearing was to gauge public reaction to the Panel’s proposals before the recommendations were finalized.

The Panel’s stated Mission was

to review matters of ethics in view of best practices as they affect Elected Officials and City staff. The purpose of this review is to evaluate existing City policies and procedures, seeking to ensure that policies are adequate to serve their purpose, understood by those who are to abide by them, and accessible to the public. The Panel will recommend improvements to the City Commission for consideration and action addressing, but not limited to, a Code of Ethics, financial disclosure, and transparency.⁵²

The Chair and board members commented that the actions of the Panel were not in any way related to allegations against the Mayor, and the Panel instead focused on improving an already-strong ethical foundation and culture within the City government.⁵³ The Ethics Advisory Panel Chair, Martha W. Barnett, ultimately thanked the City Commission “for its foresight in making ethics a continuing priority for the City of Tallahassee. The Panel had the luxury of addressing these issues during a period of stability, unlike some local governments that have had to act in a time of crisis.”⁵⁴

47. *Id.* at 4.

48. *Id.*

49. *Id.* at 9.

50. *Id.*

51. *Id.* at 10.

52. *Id.* at title page.

53. City Ethics Board, *Special Meeting Minutes*, CITY OF TALLAHASSEE (Nov. 20, 2013), available at <http://www.tal.gov.com/Uploads/Public/Documents/ethics/131120.pdf> [hereinafter Nov. 20, 2013 *Special Meeting*].

54. 2013 *Report of Recommendations*, *supra* note 43, at 2.

The Report examined the City's Code of Ethics, oversight, training, complaint reporting procedures, financial disclosures, voting conflicts, procurement policy, lobbyist registration, campaign finance, and revolving doors. The Panel reviewed numerous documents⁵⁵ and heard from numerous speakers.⁵⁶ The key preliminary recommendations of the Ethics Advisory Panel included:

- Rename and promote an existing hotline as an Ethics and Fraud Hotline to make it easy for citizens and employees to share potential concerns[;]⁵⁷
- Establish a “one-stop shop” of ethics information on the City's website to promote additional transparency and easy access to information[;]⁵⁸
- Maintain the existing financial disclosure requirements for employees, appointed officials and advisory boards[;]⁵⁹
- Identify a way for elected leaders to disclose additional information beyond State-mandated disclosure, such as membership on boards, land ownership,⁶⁰ and business relationships with current or prospective City vendors or employees[;]⁶¹
- Eliminate awarding points to vendors in the bid process for making charitable contributions[;]⁶²
- Strengthen the City's lobbyist registration ordinance, including fines and penalties for noncompliance[;]⁶³
- Adopt an ordinance similar to (or with reference to) State law, but which requires Elected Officials to abstain from voting if, under a duty of ‘reasonable inquiry,’ the Official knew or should likely have known that the measure would inure to his or her special private gain or loss[; and]⁶⁴

55. *Id.* at Exhibit B.

56. Speakers included the City Attorney; the City Manager; the Executive Director of Integrity Florida; the City Auditor; Mr. Talbot “Sandy” D’Alemberte, President Emeritus of Florida State University; and Mr. Phil Claypool, former Executive Director of the Florida Commission on Ethics. *Id.* at Exhibit A.

57. *Ethics Panel Seeks Citizen Comments*, CITY OF TALLAHASSEE (May 24, 2013) (on file with *Stetson Law Review*).

58. *Id.*

59. *Id.*

60. “It is not uncommon for allegations of conflicts to arise where a board member or other public official lives in close proximity to the parcel or area subject to review or action.” Salkin, *supra* note 14, at 765.

61. *Ethics Panel Seeks Citizen Comments*, *supra* note 57.

62. *Id.*

63. *Id.*

64. 2013 *Report of Recommendations*, *supra* note 43, at 13. More specifically, once an elected official declares a conflict under the above requirement, the official shall not

- Prohibit elected and appointed officials from appearing before the City Commission as a paid employee or representative for two years after their term ends.⁶⁵

All recommendations of the Panel were accepted unanimously, with the exception of the oversight authority.⁶⁶ The majority of the Panel members agreed, after reviewing emerging best practices from other progressive communities, the trend was the creation of an ethics officer.⁶⁷ However, some members believed an ethics officer should be an appointed official, while others felt this officer needed to report to an individual or individuals other than the City Commission.⁶⁸ Some Panel members noted that any ethics officer could not be totally independent because the ethics officer would be a City employee.⁶⁹ However, the Chair pointed out that the Ethics Officer's independence would stem largely from transparency and public involvement, and the public's knowledge of what was occurring within the government.⁷⁰ It was envisioned that the Ethics Officer could serve as an advisor to the elected officials regarding ethical issues, augment the advice officials currently received from the City Attorney, provide advice to employees, establish standards, create a collection of case studies or examples for training purposes, function as ombudsman to the community, monitor the fraud/abuse hotline, provide whistleblower protection, and conduct an annual ethics assessment.⁷¹ The Panel was unanimous in its vote to establish

engage in discussion about the measure and leave the chambers until the item is concluded. They would also continue to follow the statutory requirement that an elected official with a voting conflict on the day of the vote must abstain from voting. It was also suggested that a requirement that an elected official must declare a voting conflict and abstain from voting due to a business relationship which existed at any time when said relationship personally involved the elected official and specifically involved the item under consideration. If there is no special private gain or loss and the elected official was not personally involved in the item under consideration, but the official had a past business relationship with a person or company identified in an agenda item within the past three years, the elected official may participate and vote, but the relationship shall be disclosed at the time the measure is presented and prior to any vote being cast. *Id.*

65. *Ethics Panel Seeks Citizen Comments*, *supra* note 57.

66. *2013 Report of Recommendations*, *supra* note 43, at 4.

67. *Id.* at 8–9.

68. *Id.*

69. *Id.* at 4–5.

70. Ethics Advisory Panel, *Regular Meeting Minutes*, CITY OF TALLAHASSEE 8 (Apr. 18, 2013), <http://www.talgov.com/Uploads/Public/Documents/ethics/130418.pdf>.

71. *Id.*

an ethics officer and stressed that it was up to the will of the City Commission to determine the specifics of the position.⁷² Many citizens appearing at meetings wanted an independent ethics officer reporting to a board.⁷³ However, the Panel did not recommend an independent board.⁷⁴ “The Panel officially adopted this Report and Recommendations to the City Commission on June 26, 2013.”⁷⁵

IV. COMMISSION ACTION

The City Commission accepted the final Panel report on July 10, 2013. Subsequently, two separate City Commission workshops were held. The first workshop occurred on November 20, 2013, and over half of the Panel’s recommendations were approved and adopted. However, at the outset, Mayor Marks indicated that the Panel’s process was “a solution in search of a problem,” and that none of the allegations against him were substantiated.⁷⁶ In contrast, another Commissioner indicated that the Panel’s purpose was the pursuit of the best local government operation possible, and not aimed at any particular individual.⁷⁷

The City Commission unanimously accepted the recommendation to adopt a formal, centralized, and comprehensive Code of Ethics that is easily accessible to citizens and includes reference to state law, city code, and policy provisions. They also agreed to incorporate a preamble, which states:

72. *Id.* at 5.

73. Ethics Advisory Panel, *Town Hall Meeting Minutes*, CITY OF TALLAHASSEE (Jan. 10, 2013), <http://www.talgov.com/uploads/public/documents/treasurer/pdf/eap/130110-eap-min.pdf>.

74. 2013 *Report of Recommendations*, *supra* note 43, at 4.

75. *Id.*

76. Nov. 20, 2013 *Special Meeting*, *supra* note 53, at 7. Mayor Marks was not alone in his assessment. Member of the Ethics Advisory Panel and pastor of First Presbyterian Church in Tallahassee, Brant Copeland, later said that the Panel was “impressed with the ethics in city government, by the amount of training in ethics, by the level of ethics found throughout city government. . . . [They] found no smoking gun. There was no ethics problem in city government.” Gerald Ensley, *Ethics Proposal is Wrong and Unnecessary*, TALLAHASSEE DEMOCRAT (Oct. 24, 2014, 12:30 PM ET), <http://www.tallahassee.com/story/opinion/columnists/ensley/2014/10/24/gerald-ensley-ethics-proposal-wrong-unnecessary/17833971/> (internal quotation marks omitted).

77. Nov. 20, 2013 *Special Meeting*, *supra* note 53, at 19.

Whereas the citizens of Tallahassee have determined that they will be best served by adopting a municipal form of local government; and whereas the citizens have vested in the public officials and employees of that municipal government the responsibility and trust for operating that government for the benefit of its citizens; and whereas those citizens are entitled to a government that is open, ethical, responsive and accountable to the highest degree possible; now, therefore, the following ethics code is adopted[.]⁷⁸

The Commission also unanimously agreed to require all officials and employees to swear an Oath of Office, as follows:

I, _____, a citizen of the State of Florida and of the United States of America, and being employed by or an officer of and a recipient of public funds as such employee or officer, do hereby solemnly swear or affirm that I will support the Constitution of the United States and of the State of Florida.⁷⁹

I further solemnly swear or affirm that I have a commitment to the public trust, the highest standards of professionalism and ethics including a commitment to the constant appearance of propriety, always putting public trust first and never allowing personal benefit to affect my decisions and service as a public servant.⁸⁰

Other recommendations unanimously adopted included:

- Crea[ti]on of] a handbook to help citizens and employees understand the City's *Code of Ethics* . . . [;]⁸¹
- Expan[sion of] the . . . Fraud Hotline to include Ethics . . . [;]⁸²
- Repeal [of] the Charitable Contribution preference points program in relation to the competitive bidding process[;]⁸³
- Inclu[sion] of standardized "boilerplate" language in City contracts to put vendors on notice that they must adhere to the City's ethics policies[;]⁸⁴

78. *Id.* at 5.

79. FLA. STAT. § 876.05(1) (2016).

80. Nov. 20, 2013 *Special Meeting*, *supra* note 53, at 5.

81. *Id.* (emphasis added).

82. *Id.*

83. *Id.* at 6.

84. *Id.*

- Prohibit[ion of] future Appointed Officials (in addition to Elected Officials) from appearing before the City Commission for compensation for a [two]-year period after the official leaves the employ of the City;⁸⁵
- [Expansion of requirement to disclose job offers extended by City vendors to Elected Officials as well as for Appointed Officials and selected City employees;]⁸⁶
- Require the Elected Officials to participate in an initial comprehensive ethics training course within [sixty] days of taking office, with refresher ethics training conducted on an annual basis and documentation of attendance and completion of all courses in the Official's personnel file[;]⁸⁷
- Incorporate training on the Voting Conflicts and the "reasonable inquiry" expectation into the Ethics Training Program for Elected Officials[;]⁸⁸
- Provide training to Elected Officials and their Aides relative to the Florida gift ban law and gift reporting requirements[;]⁸⁹
- Incorporate training on Florida election laws relating to campaign contributions, prohibitions on campaigning while performing official duties, and prohibitions on collecting campaign contributions within government buildings[;]⁹⁰
- Continue with the current practice and expand and enhance the recruitment, selection, initial orientation, appointment, and promotional procedures and processes to ensure that only the most ethical individuals are employed, appointed, and/or promoted items.⁹¹

Items requiring further Commission discussion related to the role and reporting structure for the Ethics Official, enhanced disclosure for elected officials, reasonable inquiry prior to voting, City lobbyist reporting requirements, adopting fines for violations, and evaluation of ethics training.⁹²

The second workshop was held on March 12, 2014, when these additional provisions were discussed.⁹³ The Commission

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 6, 15, 19.

93. City Ethics Board, *Special Meeting Minutes*, CITY OF TALLAHASSEE 2, 5 (Mar. 12, 2014), available at <http://www.talgov.com/Uploads/Public/Documents/ethics/140312.pdf> [hereinafter Mar. 12, 2014 Minutes].

discussed how the Ethics Officer would take office—either (1) the Ethics Officer would be an appointed official, or (2) the Ethics Officer would be jointly interviewed and hired by the City Auditor and City Attorney, and housed in the City Auditor’s Office.⁹⁴ Ultimately, the Commission decided that the Ethics Officer would jointly report to the City Auditor and City Attorney.

The Commission then voted to adopt recommendations to create an appointed five-member Citizens’ Advisory Committee on Ethics to monitor the implementation of the Panel’s recommendations and to present a report to the City Commission after one year.⁹⁵

Next, the Commission took note of the Ethics Code provision in section 112.3143(3)(a), Florida Statutes, which states that:

No county, municipal, or other local public officer shall vote in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained⁹⁶

The Commission then adopted an ordinance “which requires Elected Officials to abstain from voting if, under a duty of ‘reasonable inquiry,’ the Official knew or should likely have known that the measure would inure to his or her special private gain or loss.”⁹⁷ Once a conflict is declared, the Official “shall not engage in discussion about the measure, and must leave the chambers until the item is concluded.”⁹⁸ Whereas state ethics law only examines the day a particular vote was cast to determine if a conflict existed on that particular day, the Commission accepted the Panel’s recommendation requiring that officials exercise due diligence and make additional disclosures.⁹⁹

Further, the Commission mandated lobbyist registration and enacted requirements for lobbyists to disclose clients.¹⁰⁰ A process

94. Nov. 20, 2013 *Special Meeting*, *supra* note 53, at 21.

95. *Id.* at 8–9.

96. FLA. STAT. § 112.3143(3)(a) (2016).

97. Mar. 12, 2014 Minutes, *supra* note 93, at 3.

98. 2013 *Report of Recommendations*, *supra* note 43, at 5.

99. *Id.* at 15–16.

100. *Id.* at 14.

was also put in place for barring lobbyists and fining noncompliant lobbyists.¹⁰¹ The Commission also adopted enhanced disclosure for elected officials, including business relationships with City vendors, business relationships with City employees, membership on corporate boards, membership on not-for-profit boards, and any land ownership.¹⁰² The Commission then passed a comprehensive ethics ordinance reflective of those votes.¹⁰³

The City widely advertised to fill the position of Ethics Officer, who would report to the City Auditor and City Attorney—over 150 applicants applied.¹⁰⁴ I was jointly interviewed by the City Auditor and City Attorney. The second-round interview was with the City Auditor and City Attorney, joined by the City Manager and Treasurer Clerk. I started working on October 1, 2014.¹⁰⁵ However, these actions were unsatisfactory to some community members. Many had wanted the Ethics Officer to be an appointed official, while others wanted an Independent Ethics Officer reporting to a Board.¹⁰⁶ This dissatisfaction led to further citizen action.

V. CITIZEN ACTION

An amendment to the City Charter was presented and promoted by Citizens for Ethics Reform and a national organization, Represent Us.¹⁰⁷ The Referendum's purpose was to

101. *Id.* at 15.

102. *Id.* at 5; see also City of Tallahassee, *Financial Disclosure For Elected Officials* (FORM EB1), (June 2015), available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/eb-financial-disclosure-elected-officials.pdf>.

103. CITY OF TALLAHASSEE, FLA., ORDINANCE NO. 14-0-44AA (Sept. 22, 2014).

104. Jeff Burlew, *City Ethics Post Attracts 150-Plus Applicants*, TALLAHASSEE DEMOCRAT (Sept. 13, 2014, 11:39 AM ET), <http://www.tallahassee.com/story/news/politics/2014/09/13/tallahassee-searches-ethics-officer/15578639/>; see also Job Description: Ethics Officer, City of Tallahassee, available at <http://www.talgov.com/Uploads/Public/Documents/hr/hr/specs/791.pdf> (last updated Oct. 1, 2015) (describing the functions, duties, and qualifications necessary to become the Ethics Officer).

105. TaMaryn Waters, *Julie Meadows-Keefe Hired as New Ethics Officer*, TALLAHASSEE DEMOCRAT (Sept. 30, 2014, 11:34 PM ET), <http://www.tallahassee.com/story/news/local/2014/09/30/julie-meadows-keefe-hired-new-ethics-officer/16516757/>.

106. See Jeff Burlew, *Ethics Board Facing Criticism from Amendment Backers*, TALLAHASSEE DEMOCRAT (July 25, 2015, 1:26 PM ET), <http://www.tallahassee.com/story/news/politics/2015/07/24/ethics-board-facing-criticism-amendment-backers/30628291/>.

107. Sam Shanky, *Anti-corruption Movement Scores Major Victories at the Polls*, BULLETIN.REPRESENT.US (Nov. 5 2014), <http://bulletin.represent.us/anti-corruption-movement-scores-major-victory-polls/>.

amend the City Charter on ethics and campaign finance matters, including a provision for partial public funding of elections.¹⁰⁸ The Charter Amendment Referendum read as follows:

Shall the Charter of the City of Tallahassee be amended to establish an ethics and anti-corruption policy; require the enactment of an ethics code, establishment of an independent ethics board with broad powers, creation of an ethics office and officer; limit campaign contributions to City Commissioners to \$250 per contributor per election and establish a citizen campaign finance program with refunds from city funds for contributions and provide for severability.¹⁰⁹

The Charter Amendment required:

- “Enact[ment of] an ethics . . . code with jurisdiction over the officers and employees of the City of Tallahassee, whether elected or appointed, paid or unpaid, and over the members, officers and employees of any boards, commissions, or committees thereof. The ethics code may, as allowed by law, supplement state ethics laws”;¹¹⁰
- Creation of an ethics Board with appointments by “the City Commission, the Chief Judge for the Second Judicial Circuit, the State Attorney for the Second Judicial Circuit, the President of Florida State University and the President of Florida A&M University. Two Board members shall be appointed by the Ethics Board.”¹¹¹ The Board would, in part, make recommendations to the City Commission on various matters, including proposed ethics ordinances and employ an Ethics Officer;¹¹²
- “[E]stablishment of a citywide Ethics Office . . . reporting to the independent Ethics Board” with sufficient City Commission funding to function “at a level sufficient to discharge the Office’s responsibilities”;¹¹³

108. *Referendum Amending City of Tallahassee Charter*, available at https://www.talgov.com/Uploads/Public/Documents/ethics/pdf/referendum_150210.pdf (last visited Apr. 18, 2017) [hereinafter *Referendum*].

109. *Id.*

110. *Id.* at Section 2a.

111. *Id.* at Section 2b.

112. *Id.*

113. *Id.* at Section 3.

- Reduction of “campaign contributions from any contributor, including a political committee . . . [to] \$250”;¹¹⁴ and
- Establishment of a Campaign contribution refund program to refund city electors a maximum of \$25 for contributions to city candidates.¹¹⁵

Some believed that the ethics proposal was going too far.¹¹⁶ The most significant bone of contention was the proposal to establish the campaign contribution refund program. The local organizers of the initiative, Citizens for Ethics Reform, partnered with United Republic and Represent Us, two Massachusetts-based organizations committed to undoing *Citizens United* and instituting campaign finance reform.¹¹⁷ United Republic contributed over \$120,000 to assist with signature collection.¹¹⁸

Nine thousand signatures were required to place the measure on the ballot. Citizens for Ethics Reform, through a petition drive, was able to collect more than twenty thousand signatures.¹¹⁹ However, the City believed that the ballot title and summary did not fairly inform voters of its chief purpose and was misleading. Of particular concern was that the proposal for the \$25 campaign contribution rebate program did not fit within the single subject of ethics reform.¹²⁰ The City challenge made it uncertain whether the measure would make the September 5, 2014, deadline for placement on the ballot. An expedited hearing was conducted, and the Circuit Judge decided that the measure

114. *Id.* at Section 4.

115. Ensley, *supra* note 76.

116. *Id.*

117. *Id.* See Represent Us, *The Truth About Citizens United*, REPRESENT US, <https://act.represent.us/sign/Citizens-United/> (last visited Apr. 18, 2017) (describing Represent Us’ commitment to overruling *Citizens United* and ending political corruption on a broad scale).

118. Jeff Burlew, *City Ethics Amendment Passes by Wide Margin*, TALLAHASSEE DEMOCRAT (Nov. 5, 2014, 8:12 AM ET), <http://www.tallahassee.com/story/news/politics/2014/11/04/voters-decide-city-ethics-proposal/18459015/>.

119. Jeff Burlew, *Ethics Proposal Gets Enough Signatures for Ballot*, TALLAHASSEE DEMOCRAT (Aug. 5, 2014, 2:47 PM ET), <http://www.tallahassee.com/story/news/local/2014/08/05/ethics-proposal-gets-enough-signatures-for-ballot/13625497/>.

120. TaMaryn Waters, *Ethics Initiative Proponents Seek Quick Resolution to City Challenge*, TALLAHASSEE DEMOCRAT (Aug. 20, 2014, 10:11 PM ET), <http://www.tallahassee.com/story/news/politics/2014/08/20/ethics-initiative-proponents-seek-quick-resolution-to-city-challenge/14370451/>.

should be placed on the ballot because the language was not confusing, deceptive, inflammatory, or misleading.¹²¹

The Commission decided not to instruct the City Attorney to appeal the ruling so that the measure could go before voters.¹²² The Charter Amendment passed on November 4, 2014, with sixty-seven percent of the vote. Represent Us touted the victory in a marketing video designed to instruct and motivate other communities to enact similar measures.¹²³

VI. A NEW BOARD IS FORMED

The Charter amendment requires that the City of Tallahassee's Independent Ethics Board consist of the following appointees:

- One appointed by the City Commission;
- One appointed by the State Attorney;
- One appointed by Florida State University;
- One appointed by Florida A&M University;
- Two board-appointed members; and
- One member Appointed by Chief Judge (unfilled).¹²⁴

121. Jeff Burlew, *City Charter Amendments Will Go on November Ballots*, TALLAHASSEE DEMOCRAT (Aug. 29, 2014, 11:13 PM ET), <http://www.tallahassee.com/story/news/politics/2014/08/29/city-charter-amendment-will-go-november-ballots/14839761/>.

122. *Id.*

123. *First Anti-Corruption Act in US History Passes* 1:13–3:30 (Represent Us video Nov. 6, 2014), <https://www.youtube.com/watch?v=LhEFehRWApM>.

124. Members of the first full board included City appointee, Lila Jaber, who served as first Chair; FAMU appointee, Funmi Ojetayo; FSU appointee, Richard Herring; State Attorney appointee, Cecil Davis, Jr.; Thomas J. Friedman, at-large; and Renee McNeil, at-large. Jeff Burlew, *City Ethics Board Meets for First Time*, TALLAHASSEE DEMOCRAT (Feb. 10, 2015, 4:49 PM ET), <http://www.tallahassee.com/story/news/2015/02/10/city-ethics-board-meets-for-first-time/23181609/>. Chief Judge Francis declined to make an appointment after reviewing Florida Supreme Court Judicial Ethics Advisory Committee Opinion 2009-14. See *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD 2 (Mar. 12, 2015), available at <https://www.tal.gov/uploads/public/documents/ethics/pdf/ethics-board-agenda-150312.pdf> (showing an email from Lew Shelley to Jim Cooke); see also Florida Judicial Ethics Advisory Committee, Formal Op. 2009-14 (Aug. 31, 2009), available at <http://www.jud6.org/legalcommunity/legalpractice/opinions/jeacopinions/2009/2009-14.html>. The Board wrote to the Chief Judge succeeding Judge Francis, Judge Sjostrom, asking if he would be willing to make an appointment. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE 9 (Aug. 20, 2015) available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/ethics-board-minutes-150820.pdf> [hereinafter Aug. 20, 2015 Minutes]. However, he declined. Letter from Johnathan Sjostrom to Lila Jaber, *Ethics Board Appointment* (Sep. 3, 2015), available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/eb-skm-150916.pdf>. The Board will most likely not ask again based on the legal opinion from Board counsel. Letter from

The first meeting occurred on February 10, 2015, with the City Commission, Florida State University, Florida A&M University, and the State Attorney's Office appointees.¹²⁵ Both Chief Circuit Judges that have presided during the Board's existence have declined to make appointments based on a Florida Supreme Court Judicial Ethics Advisory Committee opinion.¹²⁶ The Board received various briefings and instructed the City's assistance in securing two additional members.¹²⁷ At their second meeting on March 12, 2015, those members appointed two additional citizen members drawn from a pool of qualified applicants.¹²⁸ The first full board meeting occurred on March 23, 2015,¹²⁹ and the Chair and Vice Chair were elected.¹³⁰ At the first several meetings, it was necessary for City staff to be present and

Gerald B. Curington to Lila Jaber, Chair, Tallahassee Independent Ethics Bd., *Re: Tallahassee Ethics Opinion 2015-3* (Sept. 24, 2015), <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-addmem-151014.pdf>. See also Sean Rossman, *Ethics Board Completes Year of Building: Panel Labored Over Authority, Bylaws, Complaints, Penalties*, TALLAHASSEE DEMOCRAT, Jan. 20, 2016, 1A. Board members file form 1 and form 9 if gifts are received. See City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 2 (Feb. 10, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150210.pdf> [hereinafter Feb. 10, 2015 Minutes]. Currently, Richard Herring serves as Chair and Ms. Sunny Phillips has replaced Ms. Jaber as the City Commission appointee. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 1, 4 (Jan. 19, 2016), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160216-minutes-160119.pdf> [hereinafter Jan. 19, 2016 Minutes].

125. Burlew, *supra* note 124; see also February 10, 2015 Minutes, *supra* note 124, at 1 (“The City of Tallahassee Ethics Board held its first regular session on February 10, 2015 in the City Hall Commission Chambers. Present were Board members Davis, Jaber, Herring, and Ojetayo.”).

126. *Supra* note 124; see also Florida Judicial Ethics Advisory Committee, *supra* note 124, at 2 (“For the foregoing reasons, this Committee recommends that the chief judge respectfully decline to appoint members of the Board of Ethics.”). See also Rossman, *supra* note 124, at 1A, 6A.

127. See February 10, 2015 Minutes, *supra* note 124, at 1 (noting that the Board requested the Treasurer-Clerk to solicit applications for the remaining seats on the Board).

128. See City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 1 (Mar. 12, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150312.pdf> (noting that applicant qualification consists of being a registered City Tallahassee elector, with appropriate subject matter expertise, none of whom may be an officer or employee of local government); Referendum, *supra* note 108, at Section 2b (“There is hereby created an independent, appointed, ongoing citizens Ethics Board of seven members, whose membership shall consist of registered City of Tallahassee electors who have appropriate subject matter expertise none of whom may be an officer or employee of local government.”).

129. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 1 (March 23, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150323.pdf>.

130. *Id.*

to assist the board in becoming established, staffed, supported, and functional;¹³¹ however, the public clamored for the Board to quickly demonstrate independence.¹³² As each meeting occurred, City staff became less visible. Currently, staff is invited to meetings to provide education to Board members about various City functions, and they may choose to attend because the meetings are public.¹³³

One of the Board's first tasks was to adopt a mission statement, which states: "To promote the actual and perceived integrity of our city government and to prevent unethical conduct before it occurs."¹³⁴ The mission statement recognized that the overall aim of the Ethics Board was to improve both the perception and reality of integrity in local government and to encourage public participation.¹³⁵ Another urgent task for the Board was to establish an operational budget.¹³⁶ The Charter Amendment requires that the City "shall be funded by the City Commission within its discretionary budgetary authority at a level sufficient to discharge the Board's responsibilities."¹³⁷

131. See Feb. 10, 2015 Minutes, *supra* note 124, at 2.

132. Rossman, *supra* note 124, at 6A (noting that at the first Board meeting, City Attorney Lew Shelley advised the board that they were independent and that they should "feel free at any point in time, if it's the will of the majority, to ignore what any of us say").

133. See, e.g., *Procurement Overview: Department of Management and Administration*, CITY OF TALLAHASSEE, <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151112-11d-presentation.pdf> (last visited Apr. 18, 2017) (providing a presentation on "Procurement Overview").

134. Independent Ethics Board, *Bylaws of the City of Tallahassee* 1 (Jan. 19, 2016), <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160216-bylaws-ethics-board-proposed-technical-amends.pdf>. Indeed, there is additional support for the proposition that the purpose of any ethics board is to promote the reality and the perception of integrity in government. See *Governmental Ethics Laws*, *supra* note 14, at 186 ("[E]nforcement actions and fines are not an ethics commission's successes; they are its failures.").

135. *Governmental Ethics Laws*, *supra* note 14, at 119.

136. See, e.g., *Funds Available FY15*, CITY OF TALLAHASSEE ETHICS OFFICE (Feb. 28, 2015), <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/ethics-budget-150219.pdf> (delineating the various expenses and budget considerations the board has encountered during 2015).

137. Referendum, *supra* note 108, at Section 2b. See also Feb. 10, 2015 Minutes, *supra* note 124, at 2–3 (discussing how the allocation of certain costs is contingent upon the Board's decision to hire employees or independent contractors); *Updated Budget*, CITY OF TALLAHASSEE ETHICS BOARD (Mar. 31, 2015), <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/ethics-board-budget16.pdf> (outlining projected expenses for the 2016 fiscal year). Furthermore, it became necessary to ask the City Commission for a supplemental appropriation for fiscal year 2016. *Supplemental Appropriation for Independent Ethics Board*, CITY OF TALLAHASSEE INDEPENDENT ETHICS OFFICE (Feb. 24, 2016), <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160119-draft-cc-suplmt-appr-req-011416.pdf>; see also Jan. 19, 2016 Minutes, *supra* note 124, at 3–4

Further, the Charter Amendment requires the Independent Ethics Board to undertake the following tasks:

- Review and develop a City Ethics Code;¹³⁸
- Adopt bylaws and due process procedures;¹³⁹
- Manage existing ethics and fraud hotline;¹⁴⁰
- Manage and coordinate training;¹⁴¹
- Recommend resolutions, ordinances, or charter amendments;¹⁴²
- Investigate complaints and levy civil penalties;¹⁴³
- Employ staff and supervises the ethics officer;¹⁴⁴
- Administer campaign contribution refund program;¹⁴⁵
- Ensure independence and impartiality,¹⁴⁶ and
- Provide for the maximum practicable input from citizens and community organizations.¹⁴⁷

The Board's attention to these tasks will now be examined in a bit more detail. Functions that are similar will be grouped together.

(noting that the Board unanimously agreed to request a supplemental appropriation from the City Commission covering various expenditures such as startup costs and legal fees). Annual costs for the Board were initially approximately \$137,000 annually. A budget request for approximately \$344,000 has been submitted for FY 2017–2018. The increase is largely due to having to retain outside counsel and to budget for investigators and court reporters that the Board may or may not need depending on the number of complaints received.

138. Referendum, *supra* note 108, at Section 2a.

139. *Id.* at Section 2b.

140. *Id.*

141. The Ethics Officer trained the City Commission and executive team in January 2015 and January 2016, partially based upon the requirement in section 112.3142(2)(b). See Mark Davies, *Enacting a Local Ethics Law—Part III: Administration*, 22 MUN. LAW. 11, 12 (2008) (“[O]ne municipal ethics ordinance subjects high-level officials to a \$500 fine if, within 120 days of assuming their position and every four years thereafter, they fail to attend an ethics education seminar offered by the ethics board.”).

142. Referendum, *supra* note 108, at Section 2b.

143. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD (Nov. 12, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151215-Minutes.111215.pdf> [hereinafter Nov. 12, 2015 Minutes]; *Draft of Agenda Item Details*, CITY OF TALLAHASSEE ETHICS BOARD (Mar. 23, 2016), [http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160315-penalties-\(2\).pdf](http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160315-penalties-(2).pdf).

144. *Id.*

145. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 2–3 (July 13, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150713.pdf> [hereinafter July 13, 2015 Minutes].

146. Referendum, *supra* note 108, at Section 2b.

147. *Id.*

A. Review and Development of City Ethics Code and Recommendations of Resolutions, Ordinances, and Charter Amendments

In 2015, the City passed an Ethics Ordinance in response to the Panel's report. The Board carefully reviewed and discussed those provisions.¹⁴⁸ Subsequently, an ordinance was passed to establish the Independent Ethics Board and set Board terms.¹⁴⁹ The Board counsel later made recommendations for revisions to the City Ethics Code, which the Board advanced to the City Commission for passage.¹⁵⁰ In May 2016, Board counsel opined that the Charter Amendment does not allow the Board to exercise concurrent jurisdiction with the Florida Commission on Ethics and the Board's sole jurisdiction is for violations of the City's Ethics Code.¹⁵¹ This has increased the Board's sense of urgency to recommend additional provisions for passage by the City Commission.

B. Adoption of Bylaws and Due Process Procedures

The Board was deliberative as it "slogged" through the adoption of bylaws and procedures such that one reporter described it as "laboring."¹⁵² However, preliminary bylaws and

148. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD (May 21, 2015), available at <https://talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150521.pdf> [hereinafter May 21, 2015 Minutes].

149. TALLAHASSEE, FLA., ORDINANCE § 2-13 (2015).

150. Letter from Gerald B. Curington to Lila Jaber, Chair, Tallahassee Independent Ethics Bd., *Recommendations to City Commission Regarding Ethics Board 2–3* (Aug. 6, 2015), available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/eb-recommendations-150820.pdf>; see also Memorandum from Julie Meadows-Keefe, Independent Ethics Officer, to Lewis Shelley, City Attorney, *Ethics Board Recommendations for Modifications to City Ethics Ordinances* (Aug. 17, 2015), available at <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-rec-ec-signed-memo-150916.pdf>.

151. May 21, 2015 Minutes, *supra* note 148.

152. Rossman, *supra* note 124, at 1A; see also, e.g., City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD (June 4, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150604.pdf> ("After completing a page-by-page review of the proposed bylaws, Ms. Jaber stated that she understood the Board's concerns, and that she, along with Ethics Officer Meadows-Keefe, would make the requested changes to the proposed bylaws."); Nov. 12, 2015 Minutes, *supra* note 143 ("A motion was made by Mr. Herring and seconded by Mr. Ojetayo that the Bylaws be amended as presented."); *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD (April 6, 2015), <https://www.talgov.com/Uploads/Public/Documents/ethics/pdf/apr6-agenda.pdf> (stating that there was a "[d]iscussion of draft Bylaws"); May 21, 2015 Minutes, *supra* note 148 ("City Ethics Officer Meadows-Keefe

processes were stood up in short order so that the Board had a structure in place for governance.¹⁵³ Later, when the Board counsel was hired, he was tasked with examining the existing bylaws and making recommendations that were discussed and in most cases adopted.¹⁵⁴ A hallmark of this Board is that because it is relatively new, it is a continuous work-in-progress and seeks to consistently improve and adopt the best practices.¹⁵⁵ Additionally, due process procedures were examined in 2016 through a Committee process to ensure the fairest process for both the citizens and officials.¹⁵⁶ There is also an interest in moving complaints expeditiously through the process. Therefore, the bylaws allow for probable cause committees to process complaints between meetings and for contested matters to be adjudicated at the Department of Administrative Hearings (“DOAH”).

C. Management and Coordination of Ethics Training

Noting that ethics commissions in other local governments have been criticized for insufficiently training board members,¹⁵⁷ Tallahassee’s Independent Ethics Board has first emphasized educating itself.¹⁵⁸ The Board receives annual ethics training each April.¹⁵⁹ Current Board Chair, Richard Herring, has also instituted “Ethics Moments” at the beginning of each Board meeting, where recent decisions by the Florida Ethics

reported that the proposed draft bylaws provided to the Board were patterned after Robert’s Rules of Order”); *Draft Bylaws of the City of Tallahassee Independent Ethics Board*, CITY OF TALLAHASSEE ETHICS BOARD, <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/ethics-board-bylaws-draft.pdf> (last visited Apr. 18, 2017).

153. See, e.g., May 21, 2015 Minutes, *supra* note 148, at 1–2 (addressing each article and section of the proposed bylaws and agreeing to establish a hearing process).

154. See Feb. 10, 2015 Minutes, *supra* note 124, at 1 (discussing City Attorney Shelly’s briefing on the City Commission’s enactment of the Ethics Advisory Panel’s recommendations).

155. See Rossman, *supra* note 124, at 1A (discussing the Board’s development throughout its first year of existence).

156. May 21, 2015 Minutes, *supra* note 148, at 2 (discussing the Board’s decision to establish a hearing process).

157. Office of Program Policy Analysis and Government Accountability, *Palm Beach County Commission On Ethics Was Created Using Several Best Practices; Some Practices Could Be Enhanced*, Report No. 13-10, at 8–9 (Oct. 2013).

158. E.g., Julie Meadows-Keefe, *PowerPoint on Government Ethics*, CITY OF TALLAHASSEE ETHICS OFFICE (May 21, 2015), available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/pp.pdf>; see also May 21, 2015 Minutes, *supra* note 148, at 4 (proposing to obtain the services of independent counsel to advise the Board on various matters).

159. Meadows-Keefe, *supra* note 158.

Commission or relevant items of interest and applicability are brought to the Board and discussed to enhance Board understanding of ethics issues.¹⁶⁰

Even before passage of the Charter Amendment, the Ethics Officer's role was envisioned to be the central point of contact for ethics matters within the City. I provided annual ethics training to the City Commission, staff, and executive management in January 2015¹⁶¹ and January 2016.¹⁶² I have also personally provided ethics education to city advisory boards and councils, and provided general staff training.

Additionally, from Board inception, outside speakers have come to educate the Board about the Sunshine and Public Meeting Laws, the role of the Florida Commission on Ethics, and the role of the Florida Elections Commission.¹⁶³ City staff has also regularly made presentations to the Board, so that members may understand such functions as procurement, communications, and City management and organization.¹⁶⁴ The Board also reviewed the ethics training provided to all City employees and heard from the staff member who organizes general employee ethics education.¹⁶⁵

160. See, e.g., *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD (July 19, 2016), available at [http://www.boarddocs.com/fla/talgov/Board.nsf/files/ABVK4U4F4E26/\\$file/Ethics%20Board%20Agenda%20July%202016.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/ABVK4U4F4E26/$file/Ethics%20Board%20Agenda%20July%202016.pdf) (reserving time at the beginning of the meeting for the "Ethics Moment").

161. See Feb. 10, 2015 Minutes, *supra* note 124, at 3 (noting that Ms. Meadows-Keefe assumed the responsibility of providing ethics training).

162. Rossman, *supra* note 124, at 6A.

163. See *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD (Apr. 19, 2016), available at [http://www.boarddocs.com/fla/talgov/Board.nsf/files/A8ZGAP42A1F8/\\$file/Agenda.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/A8ZGAP42A1F8/$file/Agenda.pdf) (Hon. Simone Marstiller); *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD (Nov. 12, 2015), <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151112-agenda.pdf> (Pat Gleason); City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD (Oct. 14, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151112-02-minutes.pdf> [hereinafter Oct. 14, 2015 Minutes] (Elections Commission Director); Aug. 20, 2015 Minutes, *supra* note 124 (Ethics Commission staff).

164. *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD (Feb. 16, 2016), <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160216-agenda.pdf>.

165. E.g., *Ethics for a Modern Workforce*, CITY OF TALLAHASSEE DEP'T OF EQUITY & WORKFORCE DEV. 3–4, <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151215-Ethics%20Training%20Presentation.pdf> (last visited Apr. 18, 2017); City of Tallahassee, *Ethics Meeting December 15, 2015* (YouTube video Dec. 15, 2015), <https://www.youtube.com/watch?v=kf0RIIFjcXw&feature=youtu.be>.

D. Management of the Existing Ethics and Fraud Hotline, Investigation of Complaints, and Assessment of Civil Penalties

I began staffing the Ethics and Fraud Hotline as of October 1, 2014, and this continues as of this publication.¹⁶⁶ All calls to the hotline and inquiries received via email¹⁶⁷ or other means are tracked and reported to the Board monthly. There have been approximately seventy-eight calls and inquiries between October 1, 2014, and September 2016.¹⁶⁸ Many times, callers have general questions or believe that they have reached someone who can assist them with issues unrelated to City Ethics violations. It enhances community trust in the Board to try to assist those callers in reaching the appropriate venue for resolution of their issues.

Once the Board was empaneled, it discussed over several meetings the desired format for complaints. The Florida Ethics Commission requires sworn complaints,¹⁶⁹ as do other jurisdictions such as Palm Beach and Jacksonville.¹⁷⁰ However, the Tallahassee Board decided to not require sworn complaints, but to make many means available to initiate complaints.¹⁷¹ Much public comment and discussion took place to assure that

166. See Feb. 10, 2015 Minutes, *supra* note 124, at 3 (stating that Ms. Meadows-Keefe directly receives and responds to calls made to the Ethics and Fraud hotline); see also *Ethics Hotline Tracking Spreadsheet*, CITY OF TALLAHASSEE ETHICS BOARD, <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/ethics-board-tracking.pdf> (last visited Apr. 18, 2017) (listing details of complaints made to the Ethics and Fraud Hotline).

167. The Board adopted an easy-to-remember email address for ethics inquiries, ethics@talgov.com.

168. It is likely that some complaints will be deemed invalid. See Johnson, *supra* note 9, at 758 (explaining that even when there are penalties for making frivolous reports, there will still be some unfounded complaints).

169. See Complaint Form, FLA. COMMISSION ON ETHICS (CE FORM 50—EFF. 4/2008), available at <http://www.ethics.state.fl.us/Documents/Forms/Complaint%20Form.PDF?cp=2017412> (last visited Apr. 18, 2017) (requiring that complaints are “sworn before a notary or other official authorized to administer oaths”).

170. See Complaint Form, JACKSONVILLE ETHICS COMMISSION, <http://www.coj.net/departments/boards-and-commissions/docs/ethics-commission/complaint-form-april-2010-ext.aspx> (last visited Apr. 18, 2017) (requiring complaint forms to be sworn before a notary or other authorized person); Complaint Form, PALM BEACH COUNTY COMMISSION ON ETHICS, available at http://www.palmbeachcountyethics.com/pdf/Forms/Complaint_Form_and_Instructions.pdf (last visited Apr. 18, 2017) (requiring complaint forms to be sworn and notarized).

171. See Letter from Richard Herring to Members of the Ethics Board, *Interim Interaction with the City 1* (March 30, 2015), available at http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/interim_complaint_process.pdf (explaining that filed complaints may be sworn or unsworn, and permitting anonymous complaints).

the complaint process would be accessible to all, simple and transparent, easy to obtain and locate, and clearly understandable.¹⁷² The form is available online.¹⁷³ Another distinguishing characteristic is that the Board, unlike the Florida Ethics Commission, can self-initiate complaints and investigations.¹⁷⁴ It has not yet done so.

Generally, when a complaint or inquiry is relayed to the ethics office, the Ethics Officer determines whether the accusation would violate state or local ethics codes if it were to be found true. If it would be a violation, he or she turns all investigatory materials over to the Board along with a recommendation. The Board then convenes in a closed meeting to determine whether or not there is probable cause to believe a violation has been committed. No matter the outcome, all documents related to the case are made public following the closed-door meeting. If they do determine probable cause, the Board notifies the alleged violator in writing. That person is entitled to a public hearing in front of the Board—complete with witnesses and testimony—or they could settle. At the end of the hearing, the Board will make a written decision or refer the case to proper authorities. If the person is found in violation of the City's Ethics Code, the Board may levy civil penalties.

The Board also has a process for appropriate referral of matters to other entities inside and outside the City. One example occurred following an unsubstantiated ethics complaint alleging that energy auditors were utilizing their positions to gain clients for their personal heating and air conditioning businesses. Subsequently, after meeting with the concerned citizens, the City Auditor conducted a system-wide audit of the

172. Aug. 20, 2015 Minutes, *supra* note at 124, at 4–5; see also Complaint Form, INDEPENDENT ETHICS BOARD FOR THE CITY OF TALLAHASSEE COMPLAINT FORM, <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-complaint-form.pdf> (last visited Apr. 18, 2017) (providing clear and simple directions to make a complaint and specifically stating that complaints may be anonymous).

173. Complaint Form, *supra* note 172.

174. *Keeping the Faith*, *supra* note 8, at 113; see also Letter from Gerald B. Curington, Counsel at Ausley McMullen, to Lila A. Jaber, Chair, Tallahassee Independent Ethics Bd., *Board Initiated Complaints* (Nov. 4, 2015), <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151112-12-initiation-legalopinion.pdf> (discussing that it was intended by the legislature that the ethics board be self-regulatory).

City energy audit program.¹⁷⁵ Although there were no findings of ethics violations in the audit, there were recommendations made that served to enhance the controls present in the program to prevent real or perceived conflicts of interest.¹⁷⁶

The first complaint that wound its way through the probable cause process was one involving the police chief who had developed a personal relationship with another member of the police department.¹⁷⁷ The Board examined the matter to determine if the Chief had misused his position in the course of the relationship. The Board did not believe the conduct rose to that level and closed the complaint. This required the Board go into a “shade” meeting as required by sections 112.324(2)(a), (c), (e), Florida Statutes, which provides in pertinent part:

The complaint and records relating to the complaint or to any preliminary investigation held by . . . a Commission on Ethics and Public Trust established by any . . . municipality . . . are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution. . . . Any . . . proceeding conducted by . . . a Commission on Ethics and Public Trust, . . . pursuant to a complaint or preliminary investigation, is exempt from [the provisions of] s. 286.011, s. 24(b), Art. I of the State Constitution, and s. 120.525. The exemptions in paragraphs (a)-(d) apply until: 1. The complaint is dismissed as legally insufficient; 2. The alleged violator

175. Memorandum from T. Bert Fletcher, City Auditor, to Mayor and Members of the City Commission, *Inquiry into Potential Conflicts of Interest Regarding City Energy Auditors and Their Secondary Employment* (Nov. 12, 2015), available at <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151215-EA.pdf>; see also *Final Audit Follow-up: Inquiry into Potential Conflicts of Interest Regarding City Energy Auditors and Their Secondary Employment* (Report #1611), CITY OF TALLAHASSEE 1–2 (Nov. 12, 2015), <https://www.talgov.com/Uploads/Public/Documents/auditing/pdf/fy16/1611.pdf> [hereinafter *Final Audit Follow-Up*] (detailing the concerns of the accusations and then outlining the investigation launched as a result of the accusations).

176. *Final Audit Follow-Up*, *supra* note 175.

177. See Rossman, *supra* note 124, at 6A (noting that the complaint about the police chief was the only complaint that rose to the level of triggering the Board to discuss a possible ethics violation); see also Jeff Burlew, *Ethics Complaint Dropped Against TPD Chief DeLeo*, TALLAHASSEE DEMOCRAT (Oct. 15, 2015, 7:38 AM ET), <http://www.tallahassee.com/story/news/2015/10/14/ethics-complaint-dropped-against-tpd-chief-deleo/73944636/> (explaining the background of the complaint and the procedures followed after receiving the complaint); Jeff Burlew, *City Ethics Board Taking Up First Complaint*, TALLAHASSEE DEMOCRAT (October 13, 2015, 10:15 PM ET), <http://www.tallahassee.com/story/news/2015/10/13/city-ethics-board-taking-up-first-complaint/73877788/> (issuing that the Board had received its first ethics complaint and describing the procedure through which the Board would respond) [hereinafter *Taking Up First Complaint*].

requests in writing that such records and proceedings be made public; 3. The commission determines that it will not investigate the referral; or 4. [A] Commission on Ethics and Public Trust . . . determines, based on such investigation, whether probable cause exists to believe that a violation has occurred.¹⁷⁸

The Board explained the reasoning for the “shade” session prior to it taking place.¹⁷⁹ At the conclusion of the session, all documents pertaining to the investigation and the final order were immediately provided to the public and news reporters. Additionally, after the session, the Board held a public debrief at the following meeting to refine its complaint investigation process.¹⁸⁰

The second complaint that required the Board to go into a “shade” session involved the amount and ongoing payment of a retired Commissioner’s deferred compensation.¹⁸¹ Again, a clear explanation was given to the public for the “shade” session.¹⁸² The Board found that the complaint was legally insufficient and closed it.¹⁸³ As in the first complaint, a public debrief was held regarding the complaint and the Board received additional information from City staff regarding how deferred compensation had been calculated for this Commissioner.¹⁸⁴

The Board also recommended penalties for ethics violations that were passed by the City Commission in 2016.¹⁸⁵

178. FLA. STAT. §§ 112.324(2)(a), (c), (e) (2016).

179. Oct. 14, 2015 Minutes, *supra* note 163, at 17.

180. Nov. 12, 2015 Minutes, *supra* note 143, at 6.

181. Jeff Burlew, *City Ethics Board Drops Lightsey Complaint*, TALLAHASSEE DEMOCRAT (June 21, 2016, 9:29 PM ET), <http://www.tallahassee.com/story/news/2016/06/21/city-ethics-board-drops-lightsey-complaint/86213840/> (explaining the nature of the complaint and why the Board voted to toss out the complaint).

182. *Notice of Executive Session*, CITY OF TALLAHASSEE ETHICS BOARD (June 6, 2016), [http://www.boarddocs.com/fla/talgov/Board.nsf/files/AAWH57453AFF/\\$file/Notice%20of%20Executive%20Session%20060616.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/AAWH57453AFF/$file/Notice%20of%20Executive%20Session%20060616.pdf).

183. May 21, 2015 Minutes, *supra* note 148, at 3.

184. *Independent Ethics Board Agenda*, CITY COMMISSION CHAMBER 1 (July 19, 2016), available at [http://www.boarddocs.com/fla/talgov/Board.nsf/files/ABVK4U4F4E26/\\$file/Ethics%20Board%20Agenda%20July%202016.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/ABVK4U4F4E26/$file/Ethics%20Board%20Agenda%20July%202016.pdf).

185. “Enforcement mechanisms may include: disciplinary action, liability for damages or injunctive relief, civil fines, perjury prosecution for perjury or other crimes; voiding of a contract; disqualification from contracting with the city; and forfeiture of improper financial benefits.” Johnson, *supra* note 9, at 759–60 (footnotes omitted); see also ROBERT F. WECHSLER, LOCAL GOVERNMENT ETHICS PROGRAMS: A RESOURCE FOR ETHICS COMMISSION MEMBERS, LOCAL OFFICIALS, ATTORNEYS, JOURNALISTS AND STUDENTS, AND A MANUAL FOR ETHICS REFORM 723–820 (2d ed. 2013) (providing ideas on establishing a

E. Employment of Staff and Ethics Officer

At the Board's inception, I was the only employee.¹⁸⁶ At the third Board meeting, the Board received a report of my activities since commencing the role.¹⁸⁷ The Ethics Officer's job description was also modified to track the new reporting structure for the position and modified responsibilities.¹⁸⁸ Throughout the first few Board meetings there was ongoing tension over whether the new Board would re-open a hiring process, do a national search and interview a range of candidates, or decide to allow me to continue to function in the role without going through another hiring process. The concern expressed by critics was whether an ethics officer hired by the City could serve citizens objectively.¹⁸⁹ This was the subject of discussion at meetings and by the media.¹⁹⁰ However, the Board's first hiring decision came in the form of retaining outside legal counsel.¹⁹¹ Although I am an attorney and several Board members are attorneys, the consensus of the Board and best practices indicate that an attorney is necessary to represent the Board, whereas the Ethics Officer function is more of an Executive Director role. Soon after the Board counsel was

disciplinary policy for violations of ethics rules); Memorandum from Julie Meadows-Keefe, Independent Ethics Officer, to Independent Ethics Board, *Penalties for Ethics Violations* (Oct. 28, 2015), available at <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-151112-10-penalties-memo.pdf> (establishing the penalties the Board is authorized to impose for ethics violations); TALLAHASSEE, FLA., DRAFT OF ORDINANCE NO. 16-O-07, (Mar. 2016), available at <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160315-16-o-07.pdf> (codifying the penalties for ethics violations).

186. Feb. 10, 2015 Minutes, *supra* note 124, at 2.

187. See *Report on Ethics Activities*, CITY OF TALLAHASSEE ETHICS ADVISORY BOARD (Mar. 19, 2015), available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/ethics-officer-report.pdf> (outlining, by month, the duties performed by Ms. Meadows-Keefe).

188. See *Job Description: Ethics Officer*, CITY OF TALLAHASSEE, available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/ethics-officer-job%20description.pdf> (last visited Apr. 18, 2017) (establishing the duties of the ethics officers as well as the knowledge, abilities, skills, and training an ethics officer must possess).

189. Aug. 20, 2015 Minutes, *supra* note 124.

190. July 13, 2015 Minutes, *supra* note 145; see also Jeff Burlew, *Ethics Board Facing New Round of Criticisms*, TALLAHASSEE DEMOCRAT (Sept. 15, 2015, 4:58 PM ET), <http://www.tallahassee.com/story/news/politics/2015/09/15/ethics-board-facing-new-round-criticism/72314558/> (citing conflict of interests concerns regarding the Boards' members).

191. July 13, 2015 Minutes, *supra* note 145; see also Burlew, *supra* note 106 (discussing that the Board hired Jerry Currington as outside counsel to advise the Board); May 21, 2015 Minutes, *supra* note 148, at 3–4 (providing background on the Board's decision to retain outside counsel, the purpose hiring outside counsel would provide, and the compensation structure for said outside counsel).

retained, he opined that the Board could establish its own hiring process, which could include retaining me.¹⁹² I was officially hired as the Independent Ethics Officer at a spirited meeting on August 20, 2015.¹⁹³ I commenced written monthly reporting to the Board in November 2015.¹⁹⁴

Currently, these reports include the office's monthly activities, the budget, the number of complaints received, and, during the election season, a report of the number of contribution requests received.¹⁹⁵ There is now one, part-time staff member to provide administrative support to the Ethics Officer and the Board.¹⁹⁶ There is also a mechanism to retain investigative services and to hire an advocate to prosecute matters that require a formal hearing.¹⁹⁷

F. Administration of Campaign Contribution Refund Program

The Charter Amendment included a provision for a Campaign Contribution Refund program.¹⁹⁸ The program allows an individual registered as a City of Tallahassee elector to receive a one-time-per-election-cycle refund of up to twenty-five dollars

192. Letter from Gerald B. Curington, Counsel at Ausley McMullen, to Lila A. Jaber, Chair, Tallahassee Independent Ethics Bd., *Hiring Protocol for Ethics Officers* (July 30, 2015), available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/eb-hire-opinion-150820.pdf>.

193. Aug. 20, 2015 Minutes, *supra* note 124, at 7–10.

194. Nov. 12, 2015 Minutes, *supra* note 143, at 1.

195. See, e.g., *Ethics Board Agenda*, CITY OF TALLAHASSEE ETHICS BOARD (Aug. 16, 2016), [http://www.boarddocs.com/fla/talgov/Board.nsf/files/ACQKSG5241FF/\\$file/Ethics%20Board%20Agenda%20August%202016%20081016.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/ACQKSG5241FF/$file/Ethics%20Board%20Agenda%20August%202016%20081016.pdf) (noting what is included in the Ethics Officer's report).

196. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 7–8 (Sept. 16, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/ethics-board-minutes-150916.pdf> [hereinafter Sept. 16, 2015 Minutes].

197. May 21, 2015 Minutes, *supra* note 148, at 3.

198. Sean Rossman, *Contribution Rebate Program Off to Slow Start*, TALLAHASSEE DEMOCRAT (May 11, 2016, 4:42 PM ET), <http://www.tallahassee.com/story/news/2016/05/11/contribution-rebate-program-off-slow-start/84224062/>; see also *Refund Program: Tracking Language and Identifying Board Role*, CITY OF TALLAHASSEE (Jun. 4, 2015), available at <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/eb-refund-program-150604.pdf> [hereinafter "Refund Program PowerPoint"] (summarizing the charter amendment campaign contribution program); *Modified Campaign Contribution Refund Process PowerPoint*, CITY OF TALLAHASSEE (Feb. 16, 2016), <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160216-board-pres-re-modified-process.pdf> (explaining the steps to be taken for a donor to complete the campaign contribution refund process).

donated to a Mayoral or City Commission candidate.¹⁹⁹ The Board is charged with administration of the program and the refunds are paid by the City from general revenue.²⁰⁰ Budgeting presented a challenge because the popularity of the program was an unknown. Twenty thousand dollars was allocated for fiscal year 2016.²⁰¹ The initial process was revised to streamline for both donors and candidates.²⁰² The program has been controversial and not particularly popular, and it has received only eighteen refund requests as of September 9, 2016.²⁰³

G. Ensuring Independence and Impartiality

There is an inherent strain in the relationship between the Board and the City because the City funds the Board, including the salary of Board staff and provision of space.²⁰⁴ However, many similar boards are funded by the entity over whom they oversee.²⁰⁵ The Board strives to be independent and impartial, providing maximum practicable input from citizens and community organizations in spite of the fact that it is funded by the City Commission. Proponents of the Charter Amendment were consistent in their pressure to see the Board stand up as an

199. Refund Program PowerPoint, *supra* note 198; *see also* Jan. 19, 2016 Minutes, *supra* note 124, at 4 (showing that the City Ethics Board discussed the measure and passed a motion to move forward unanimously).

200. *Process PowerPoint*, CITY OF TALLAHASSEE ETHICS BOARD, available at <http://www.tal.gov/uploads/public/documents/treasurer/pdf/ethics/eb-process-150604.pdf> (last visited Apr. 18, 2017); *see also City of Tallahassee Ethics Board Campaign Contribution Refund Application 2016 Election Cycle*, CITY OF TALLAHASSEE (Sep. 16, 2016), available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/eb-cc-refund-app-150916.pdf> (identifying the Ethics Board as the recipient of applications for campaign contribution refunds).

201. *Budget*, CITY OF TALLAHASSEE ETHICS BOARD, available at [http://www.boarddocs.com/fla/tal.gov/Board.nsf/files/A9W38573B89E/\\$file/Copy%20of%20Ethics%20Working%20File%20051016.pdf](http://www.boarddocs.com/fla/tal.gov/Board.nsf/files/A9W38573B89E/$file/Copy%20of%20Ethics%20Working%20File%20051016.pdf) (last visited Apr. 18, 2017).

202. *City of Tallahassee Independent Ethics Board Campaign Contribution Refund Claim Form 2016 Election Cycle*, CITY OF TALLAHASSEE, available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/eb-160216-ccrefund-pkg-021016.pdf> (last visited Apr. 18, 2017).

203. Rossman, *supra* note 198.

204. Aug. 20, 2015 Minutes, *supra* note 124, at 7–8.

205. New York's Conflict of Interest Board has sought for several years to obtain a Charter Amendment to provide it with an independent and protected budget. *See Report on the Fiscal Year 2015 Executive Budget for Conflicts of Interests Board*, COUNCIL OF THE CITY OF NEW YORK (May 22, 2014), available at <http://council.nyc.gov/downloads/pdf/budget/2015/15/eb/coib.pdf> (highlighting a goal to amend the charter to provide the Board with an independent budget to keep the Board looking independent to the public).

independent entity to the greatest extent possible.²⁰⁶ Additionally, the Board has demonstrated independence by implementing a process for preparing advisory opinions after the Board counsel opined that this was within Board authority.²⁰⁷ The City expressed disagreement with this opinion.²⁰⁸ Although there have been times when the Board's independence has been questioned, at the end of 2015, Ben Wilcox of Citizens for Ethics Reform stated that the Board had a "good sense of its independence" and that "we have to celebrate the fact that we now have an ethics board where citizens can bring complaints."²⁰⁹

H. Provision for Maximum Practicable Input From Citizens and Community Organizations

The Board was fortunate that its first chair, Lila Jaber, had served on the Ethics Advisory Panel and had a strong commitment to civic engagement and consensus building. She acknowledged that although civic engagement can be difficult and at times may feel like a personal attack, it was vital to the building process for the Board and the building of public trust.²¹⁰

The Board imposed no time limits on speakers and would often take public comment throughout the meeting. Citizen suggestions were often incorporated into Board practices and procedures. Specifically, the Board received and incorporated

206. Aug. 20, 2015 Minutes, *supra* note 124, at 3.

207. See *Taking Up First Complaint*, *supra* note 177 (noting that the Ethics Board is in the process of dealing with complaints); see also *Keeping the Faith*, *supra* note 8, at 117 (outlining how ethics boards generally offer advisory opinions upon request of municipal employees or officers); Johnson, *supra* note 9, at 764–65 (opining that cities should have ethics officers and a process for requesting written ethics opinions); Letter from Gerald B. Curington, Counsel at Ausley McMullen, to Richard Herring, Chair, Tallahassee Independent Ethics Bd., *Tallahassee Ethics Opinion 2016-1* (Jan 14, 2016), available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/eb-160119-legal-opinion-011416.pdf> (summarizing that the Ethics Board has the authority to render advisory opinions when requested); *Advisory Opinion Flow Chart*, CITY OF TALLAHASSEE (Feb. 16, 2016), available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/eb-160216-advisory-opinion-flow-chart-020416.pdf> (outlining the process to create an advisory opinion); see also *Draft Bylaw: Article XI – Issuance of Advisory Opinions*, CITY OF TALLAHASSEE ETHICS BOARD, available at <http://www.tal.gov/uploads/public/documents/ethics/pdf/eb-160315-advisor-opinion-bylaw-draft-3-4-all-edits.pdf> (last visited Apr. 18, 2017) (identifying potential authority of the Ethics Board to create an advisory opinion, and outlining the process by which it would be created).

208. Jan. 19, 2016 Minutes, *supra* note 124, at 2.

209. Rossman, *supra* note 124, at 1A, 6A.

210. Sep. 16, 2015 Minutes, *supra* note 196, at 7.

public input regarding the complaint process.²¹¹ Additionally, the Board received consistent input from citizens regarding the mindset of board members.²¹² Related to this, a member of the public supported by other interested persons proposed a pledge to be executed by Board Members.²¹³ The Board counsel determined that the Charter Amendment language did not allow for a mandatory pledge,²¹⁴ but that Board members could execute a voluntary document—the Board approved a form for a voluntary pledge in August 2016.²¹⁵

In September 2015, the Board began broadcasting its meetings on a City TV channel and YouTube.²¹⁶ The Board also seeks to engage with citizens and community organizations. I have spoken at general meetings of these community organizations, such as the League of Women Voters, the Florida Government Bar Association, and local candidate forums, to educate citizens about the Board and items such as the Campaign Contribution Refund Program.

211. See, e.g., Aug. 20, 2015 Minutes, *supra* note 124, at 1–2 (outlining a request for anonymous ethics complaints).

212. E.g., Sep. 16, 2015 Minutes, *supra* note 196, at 5–6.

213. *Taking Up First Complaint*, *supra* note 177. Sean Rossman, *Ethics Board Approves Self-Initiation*, TALLAHASSEE DEMOCRAT (Jan. 20, 2016, 6:43 AM ET), <http://www.tallahassee.com/story/news/2015/10/13/city-ethics-board-taking-up-first-complaint/73877788/>; Oct. 14, 2015 Minutes, *supra* note 163; *Pledge*, CITY OF TALLAHASSEE ETHICS OFFICE, <http://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160216-pledge-pkg-021016.pdf> (last visited Apr. 18, 2017) (identifying the different pledges for board members, city officials, and others involved with the Ethics Board); City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 5 (Dec. 15, 2015), available at <https://www.talgov.com/uploads/public/documents/ethics/pdf/eb-160119-minutes-121515.pdf> (requesting that the pledge issue be discussed at the January 2016 meeting).

214. Letter from Gerald B. Curington, Counsel at Ausley McMullen, to Richard Herring, Chair, Tallahassee Independent Ethics Bd., *Proposed Ethics Board Member Pledge 1* (June 3, 2016), available at [http://www.boarddocs.com/fla/talgov/Board.nsf/files/AAWH4D4509BE/\\$file/Informal%20Opinion%20re%20Pledge%20060316.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/AAWH4D4509BE/$file/Informal%20Opinion%20re%20Pledge%20060316.pdf).

215. July 19, 2015 Minutes, *supra* note 124, at 2–3.

216. See Markowitz, *supra* note 9, at 606 (stating that in order to be successful, “[p]rinciples of representative democracy require policy to be made in the shadow of public accountability”) (footnotes omitted); City of Tallahassee, *Ethics Meeting August 16, 2016* (YouTube video Aug. 17, 2016), <https://www.youtube.com/watch?v=3k8O2MajJkU> (presenting the full ethics meeting that was held on August 16, 2016); City of Tallahassee, *COTNews Featuring WCOT*, YOUTUBE, <https://www.youtube.com/user/WCOT> (last visited Apr. 18, 2017) (providing a channel to watch videos posted by the city of Tallahassee).

VII. MOVING FORWARD WITH ETHICS REFORM AND TIPS FOR OTHER LOCAL GOVERNMENT ETHICS PROGRAMS.

Lila Jaber, who also served as the First Board Chair, resigned in December 2015.²¹⁷ The Board elected Florida State University's appointee, Richard Herring, as Chair in 2016.²¹⁸ The Chair has continued the practice of robust citizen engagement. He also initiated Board committees to look at issues such as Board procedures and due process, budget, city policies and procedures, transparency, and investigatory techniques.²¹⁹

What lessons can be learned by looking at the City of Tallahassee's experience that may be applied to a local government seeking to create or enhance a local government program?

1. Initiating a discussion at the local government level about enhancing ethics compliance is not an indictment on anyone. It is instead a best practice to be proactive and think about your program during a time when there is no glaring issue. If you reside in a community where things are quiet on the ethics front, this is the perfect time to look at processes that can ensure it continues. Having to respond to a crisis with rushed ethics reform will not yield the most desirable effect. Even if we believe we only elect good and moral individuals in our communities, human beings cannot always be relied upon to use good judgment. Rules and guidelines serve as guardrails for public officials and employees. People are even willing to forgive government officials from misconduct if those individuals are generally likeable and committed to reforming their behavior.²²⁰

217. Jeff Burlew, *Jaber Resigning from Ethics Board*, TALLAHASSEE DEMOCRAT (Oct. 14, 2015, 10:31 PM ET), <http://www.tallahassee.com/story/news/2015/10/14/ethics-complaint-dropped-against-tpd-chief-deleo/73944636/>. There were also concerns expressed by some about her law firm's prior representation of the City. See Rossman, *supra* note 124, at 1A, 6A (discussing some of the hurdles the Ethics Board overcame during its first year). See also Sept. 16, 2015 Minutes, *supra* note 196, at 1 (providing statements by Jaber that her firm did not undertake any representation of the City of Tallahassee while she served on the Ethics Board).

218. Jan. 19, 2015 Minutes, *supra* note 124.

219. City Ethics Board, *Regular Meeting Minutes*, CITY OF TALLAHASSEE ETHICS BOARD 5 (Feb. 16, 2016), [http://www.boarddocs.com/fla/talgov/Board.nsf/files/A8ZGBX42DC29/\\$file/Minutes%20021616.pdf](http://www.boarddocs.com/fla/talgov/Board.nsf/files/A8ZGBX42DC29/$file/Minutes%20021616.pdf).

220. It can be argued that the main objective of ethics laws is to achieve compliance rather than exact penalties.

2. Citizens want a system of accountability within local government. When an ethical lapse happens, people are often surprised that their city or county does not have its own, coherent ethics codes that are clearly communicated to officials and staff.²²¹ Localities often presume that state ethics codes are sufficient to address community concerns, only to find out later that the community wants higher standards. Hallmarks of a good local ethics program impart consistency, predictability, and fairness.²²²

3. When initiating a new ethics program, it can be helpful to get a panel of outside experts, as occurred with Tallahassee's Ethics Advisory Panel. Those experts should review current state ethics laws, charter documents, existing ordinances or codes and policies, and consider how a program may be enhanced or improved.²²³ Additionally, experts should obtain buy-in of leadership and encourage citizen engagement that is inclusive of and respectful of critics. Do not reinvent the wheel. Look to other jurisdictions and model codes for help.²²⁴

What we need is nonpartisan statesmanship and visionary leadership willing to face up to the fact that relying on the individual judgment of each elected official is a failed strategy that guarantees a continuous flow of scandals that discredits their institutions and even the enterprise of democratic government itself. While I wish more emphasis was placed on character rather than compliance, the raw reality is that voters do not consistently demand scrupulous integrity as evidenced by the re-election of people severely stained by scandal.

Michael Josephson, *The Peculiar Concept of Ethics Laws*, COJ.NET, <http://www.coj.net/departments/ethics-office/docs/the-peculiar-concept-of-ethics-laws.aspx> (last visited Apr. 18, 2017).

221. See Johnson, *supra* note 9, at 725 (finding that few municipalities have a code of ethics to guide their officers and employees).

222. See *id.* at 726–27 (observing that while the Ethics Code has a limit in being able to cover the ethical conduct for all situations, a well-drafted code can help overcome those limits).

223. See, e.g., Wechsler, *supra* note 9 (discussing the use of revolving door provisions in cities' ethics codes); Georgia Municipal Association, *Ethics in Government: Charting the Right Course*, GMA LEGAL REPORT (July 2010), available at <http://gmanet.com/GMASite/media/PDF/publications/ethics.pdf> (providing a sample ethics ordinance and encouraging cities to modify it to fit their specific circumstances).

224. *Keeping the Faith*, *supra* note 8, at 61, 66; see also, e.g., *Complaint Procedures*, CITY OF JACKSONVILLE ETHICS COMMISSION (June 2, 2014), <http://www.talgov.com/uploads/public/documents/treasurer/pdf/ethics/florida-examples.pdf> (showcasing examples of programs in Jacksonville and Palm Beach County, Florida).

4. Realize that an ethics program costs money.²²⁵ Hiring someone on a full- or part-time basis to serve as the single-point-of-contact for ethics matters in a local government is probably the most cost-effective method and is a practical solution for localities where an ethics program has not been a point of concentration or has limited resources. In larger local governments, a community may opt for an Inspector General's Office. Offices of Inspectors are commonly known as "watchdog" agencies and are found at all levels of local, state, and federal government.²²⁶ This becomes a more expensive solution.

5. A local ethics program must have enforcement authority to have credibility.²²⁷ Although one hallmark of a successful ethics compliance program is a paucity of enforcement actions,²²⁸ there will be some community members who will not be satisfied until someone is led from City Hall or Commission Chambers in handcuffs. There must be tools in place to penalize violators.

In summation, it is vital for local governments to set out clear principles to help public officials know their proper boundaries, understand the long term implications of their decisions and conduct, and consider how the public will perceive them. Local ethics laws, officials, and boards are not just an academic or window-dressing exercise. Their purpose is not to require more disclosure forms or prohibit officials' actions merely for the sake of public perception. Instead, communities grappling with local ethics issues should consider the impact of ethics laws

225. See *Governmental Ethics Laws*, *supra* note 14, at 187 ("Training, education, and quick advice to government employees, all of which cost money, mean fewer ethical lapses."). See also Johnson, *supra* note 9, at 765 (establishing a robust ethics program at the local level may be costly).

226. *Mission Statement*, MIAMI-DADE COUNTY: OFFICE OF THE INSPECTOR GENERAL, <http://www.miamidadeig.org/whatwedo2.htm> (last visited Apr. 18, 2017).

227. Marie Louisa Victor, *Enforcement: An Indispensable Component in the Success of Municipal Ethics Boards*, 18 MUN. LAW. 4, 6 (2004). This stated as follows:

Ethics boards without full and effective enforcement power have often been criticized as toothless tigers—and worse. Such boards raise and then dash hopes of prompt and fair adjudication of ethics complaints and thus only increase the public's cynicism about the honesty and integrity of our public servants. Therefore, municipalities that adopt new ethics laws should do so *only* if they are prepared to grant their ethics boards the powers and duties outlined above. Anything less may well reap a whirlwind of censure and derision.

Id.

228. *Governmental Ethics Laws*, *supra* note 14, at 186.

on the officials elected to serve their communities.²²⁹ Ethics codes should embody service orientation, procedural fairness, and the ethics of democratic responsibility.²³⁰ They should be simple for everyone to understand—officials and citizens alike.²³¹ Rules should be easily accessible for everyone and be the result of collaborative efforts with citizens.²³²

As the first Board Chair, Lila Jaber, noted at the conclusion of her term, “Even though [the Board] was hard to create and not always a pleasant experience for the [C]ity, it was an example of citizen engagement making a difference and then seeing the fruit of their effort.”²³³ Localities seeking to enhance or establish an ethics program should expect a similar experience. As it was in Athens, so it is today. Difficult things are worth doing well and have lasting value for years to come.

229. *Keeping the Faith*, *supra* note 8, at 66.

230. MIAMI-DADE COUNTY: OFFICE OF THE INSPECTOR GENERAL, <http://www.miamidadeig.org/> (last visited Apr. 18, 2017).

231. See generally *Conflicts of Interest Board, Basis, Structure, and Administration of Conflicts of Interest (Government Ethics) Laws and Annual Financial Disclosure (Asset Declaration) Laws*, CITY OF NEW YORK CONFLICTS OF INTEREST BOARD (Mar. 2003), available at <http://www.nyc.gov/html/conflicts/downloads/pdf/visitors.pdf> (discussing how to make an effective government ethics program that works); see also *Governmental Ethics Laws*, *supra* note 14, at 177–80 (“[E]thics regulations must always be written and interpreted in light of reason, common sense, and everyday experience” and drafters should “know their customer[s]. . . . An ethics provision that is good for a state or major city may devastate a small municipality.”).

232. See *Governmental Ethics Laws*, *supra* note 14 (finding that easy access to ethics laws is required for their purpose to be achieved).

233. Rossman, *supra* note 124, at 6A.

Missouri Municipal Ethics Survey: Do Ethics Measures Work at the Municipal Level?

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This article addresses the marked lack of scholarly work correlating common measures meant to improve ethical performance in local government (ethics codes and training) with actual levels of unethical behavior. Analyzing data from a survey specifically optimized to encourage honest reporting on ethical infractions, and administered to local government officials and employees in Missouri, this study is the first of its kind to adopt Lasthuizen's typology of governmental ethical infractions. Results suggest that ethics training regimens (but not ethics codes by themselves) are correlated with measurable drops in reported levels of several of the most commonly observed ethical infraction types, though the relationship is more complex than previously reported. A surprising finding is that larger municipalities were subject to higher infraction rates, but were not more likely to implement ethics measures, indicating that these are the lowest-hanging fruit regarding ethics reforms. Further implications are discussed regarding the content and limited impact of ethics training, leading to recommendations for both practitioners and researchers regarding the full range of ethics measures.

Keywords: ethical infractions, ethics codes, ethics measures, ethics training, local government

As a part of a renewed focus on local government ethics in recent decades, a variety of measures to address ethical issues at the municipal level have become widespread. These ethics measures include good-government reforms of various kinds, such as ethics laws, ethics codes, ethics training, and the creation of ethics commissions and complaint processes. In particular, ethics codes and ethics training have become a central feature of local government reform around the country (Berman, West, & Cava, 1994; Feldheim & Wang, 2004; Kaptein & Avelino, 2005). However, with one notable exception, scholars have obtained minimal direct evidence regarding the effect of any of these measures on ethical infraction frequencies in the public sphere aside from a vast wealth of anecdotal stories (Lasthuizen, Huberts, & Heres, 2011; Menzel & Benton, 1991; Van Montfort, Beck, & Twijnstra, 2013; West & Berman, 2004). The one notable exception, not mentioned by any of the above, is the Ethics Resource Center's (2007) *National Government Ethics Survey* (NGES). The current paucity of data on this front has not prevented various agencies from making claims about those effects; the website of the Office of the New York State Comptroller claims that ethics training can accomplish a number of things, and at the top of the list is the assertion that it can "reduce the instances of unethical behavior" (<http://www.osc.state.ny.us/localgov/training/modules/protecting/two/train1.htm>).

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Empirical data regarding actual levels of ethical misbehavior in public agencies can be problematically difficult to develop. Conclusions gained from analyzing public scandals might say much more about levels of transparency and scrutiny than actual violation frequencies. On the other hand, answers on survey questionnaires about infractions are subject to a strong social desirability bias. This is especially true in the public sector, given the expectations of publicity that come along with it. Additionally, the variability and descriptive subjectivity of ethical violations can cause problems for any attempt at correlating violation types with underlying factors.

This article presents the results of a pilot study that was the first of its kind to build on recent work in public ethics violation typology and utilize an anonymous online survey methodology optimized to address these issues. The 2013 Missouri Municipal Ethics Survey (MMES) was administered to municipal government officials, administrators, and employees across the state of Missouri. The main objective of the survey was to shed some light on an important area of public ethics that has not received substantial treatment in public administration scholarship: namely, the degree to which ethics codes and ethics training impact observed rates of ethical infractions in specific categories. The authors were particularly interested in seeing how the implementation and impact of these ethics measures differ across municipality size.

The results show that the frequency of observed ethics violations differs in relation to the level of emphasis participants perceive their department to be devoting to ethics training. However, compared to the NGES, the relationship between ethics measures and violations is shown to be more complicated. The results provide the strongest evidence of ethics training impact for three kinds of ethics violations: carelessness with confidential information, indecent treatment of colleagues, customers, or citizens, and improperly accepting personal gifts. While the results provide a limited validation for the impact of ethics measures, the study also highlights the degree to which such measures are poorly understood, haphazardly implemented, and rarely evaluated for effectiveness. These findings lead to a variety of implications for both researchers and public officials.

The article is organized as follows: The first section provides an overview of the relevant literature. Particular emphasis is given to Lasthuizen et al. (2011), upon which the ethical infraction categories in the study are predicated. The second section builds upon these infraction categories to develop four hypotheses regarding the relationships between observed infraction rates in those categories, on the one hand, and levels of ethics training, implementation of ethics codes, and variation in municipal size, on the other. The third section covers the data and methods employed in the MMES, which is designed to test these hypotheses, followed by presentation of the results of the survey in detail in the fourth section. Finally, in the fifth section, the implications of these results for practitioners and researchers are discussed.

LITERATURE REVIEW

Ethics Training and Ethics Codes

While there is something of a lacuna in the literature regarding actual observed ethical infraction levels in the public sphere, it is also true that ethics training and ethics codes—the ethics measures and policies that this study is looking to connect to infraction rates—have received

generous attention. A study by West and Berman (2004) of cities with populations over 50,000 finds that 64% offer some form of ethics training activity, though only 36% call it “ethics training.” Training is mandatory for managers in approximately half of the cities that offered it. The West and Berman study also links ethics training to ethical culture, labor–management relations, and employee productivity. Feldheim and Wang (2004) find that 28.2% of cities surveyed have mandatory ethics training for managers, and 31.9% have some ethics training programs.

When it comes to the content of ethics training, the most widespread model is a “compliance model” (Menzel, 2007). This kind of content focuses on conforming to applicable rules and regulations. It is often referred to as the “low road,” in the sense that it is designed to spur compliance with minimal legal and regulatory thresholds for ethical behavior (Lewis, 1991). This stands in contrast to what Hejka-Ekins (1988) calls a “high-road” approach; that is, one that focuses on the values underlying the regulations. The high-road approach stresses character education, promoting responsibility and moral autonomy in public servants at all levels, with an emphasis on moral reasoning and knowledge (Menzel, 2007).

Van Montfort et al. (2013) delineate a number of dimensions on which the characteristics of training programs can vary: whether the training is mandatory or voluntary, whether it is an insider or outsider doing the training, whether the training is open to training examples from the participants, whether there are follow-up meetings, what the duration of the program is, as well as the size of the participant group. Of course, these variables operate within the wider organizational context; the organization may or may not be conducive to good discussions of ethical issues, and their effects may or may not be conditional upon the characteristics of the participants.

With respect to codes of ethics, Feldheim and Wang’s (2004) work suggests that 7 of 10 large cities have a code of ethics. This makes ethics codes by far the ubiquitous form of municipally implemented ethics measure. Ethics codes have become a foundational part of professional public administration at the local, national, and international levels. The Organization of American States Inter-American Convention Against Corruption states that public servants “should be subject to codes of conduct,” including “requirements for financial and other disclosures, and appropriate disciplinary measures” (cited in Gilman, 2005, p. 5). As with the content of ethics training, the content of codes of ethics can roughly be divided between low-road compliance strictures and high-road “aspirational” language. Meine and Dunn (2013) provide a useful overview of a number of public sector codes of ethics and their elements with respect to developing ethical competency. Svensson and Wood (2004) develop a typology specific to public sector codes of ethics. Gilman (2005) describes successful codes as having practical behavioral goals, being connected to the emotional import of the norms therein, and being institutionally supported and subject to feedback as a living document.

Other empirical studies focused on observed ethical states of affairs in the public sphere address a wide range of factors. Menzel and Benton (1991) examine several databases, including ethics complaints filed with the Florida Commission on Ethics, in an attempt to define some historical/cultural, political, bureaucratic, and demographic features of local jurisdictions that might correlate with levels of ethics complaints. They find that levels of population growth and education levels are the two most influential factors influencing ethics complaints. Feldheim and Wang (2004) report on a national study of cities with populations over 50,000, linking ethical behaviors with public trust. They find that cities where managers have higher perceptions of ethical behavior are also cities where perceptions of public trust are higher. Their recommendations include integrity training, transparency and openness within the organization,

promoting “frank communications between employees and managers,” loyalty to changing public needs, and performance evaluations involving public servants and citizens (p. 73).

Other studies that use surveys to measure public ethics factors concentrate on ethical attitudes and environments nationally (Bowman, 1990 ; Bowman & Knox, 2008 ; Bowman & Williams, 1997); practitioner’s values and expectations (Schmidt & Posner, 1986); comparing the public and private spheres (Berman et al., 1994); measuring and survey methodology (Giacalone, Jurkiewicz, & Knouse, 2003; Kaptein, Huberts, Avelino, & Lasthuizen, 2005); correlations of ethical climates with damage claims and complaints against the municipality, as well as injury and sick leave (Waring, 2004); and correlations between ethical climate and organizational performance (Menzel, 1993). Menzel (2007) provides a survey of large metropolitan cities and counties with ethics management programs.

Measuring and Categorizing Ethics Infractions

Two recent studies focus specifically on observed levels of ethical infractions in various types of public organizations: the Ethics Resource Center’s National Government Ethics Survey (2007), which is one element of a longitudinal National Workplace Ethics Study focused primarily on the private sector, and Kaptein and Avelino’s “Measuring Corporate Integrity: A Survey-Based Approach” (2005), which also includes a subset of public entities in the survey. Generally, both studies find that observed ethical violations trend toward parity between the public and private spheres. Kaptein and Avelino (2005) further find that two information categories show increases in the public sector: “false/misleading information to public or media” and “false/misleading statements to government regulators” (p. 73). Given the importance of transparency in governmental functioning (and the link between accurate reporting and accountability), this finding should be somewhat alarming.

The NGES breaks out the results by federal, state, and local government. Again, in each case the broad trend is toward parity with the private sector, with a majority of categories near the national average. However, whereas the federal government shows two categories significantly below national averages (lying to stakeholders and misreporting hours worked), and a number of categories significantly above the national averages (environmental violations, Internet abuse, misuse of confidential information, and safety violations), state and local governments have no categories below the national average. In fact, a number of them are significantly above national averages (at the state level: using competitor’s inside information, misuse of confidential information, discrimination, improper hiring practices, abusive behavior, lying to employees, and putting own interests ahead of organization’s; at the local level: environmental violations, improper hiring practices, Internet abuse, and abusive behavior).

Kaptein and Avelino (2005) publish no correlations of ethical measures and environments with rates of observed violations. However, the NGES makes very strong claims on this front. According to the NGES report, the presence of both a well-implemented ethics-and-compliance program and a strong ethical culture can reduce misconduct by 60% (NGES p. v). The NGES is a broad survey that addresses a wide variety of infractions in tandem with their contributing factors: ethical culture, ethics codes and training, ethics reporting mechanisms and rates, and ethical components of employee evaluations. The MMES is a more focused project, one that examines more closely—and brings into some doubt—assumptions made in the NGES.

Despite their contributions, these studies have limitations. First, the NGES investigators assume that traditional methods of ensuring anonymity in surveys are sufficient to overcome the social desirability bias when asking about ethics violations in the public sphere. Telephone surveys involve a live conversation in which a respondent is asked to admit to a live interviewer, for example, having observed but not reported one or more instances of criminal ethical violation. Indeed, the public sphere is particularly susceptible to the social desirability bias. However, given that new survey technologies (online surveys) are now available to help mitigate that bias, this is an assumption that should no longer be relied upon.

Second, the NGES investigators assume that misconduct that is overtly illegal is “more likely to be documented” (NGES p. 3). It may be true that such infractions are more likely to draw attention once they are documented. However, considering both the inherently surreptitious nature of such actions and the increased pressure of the social desirability bias when respondents are asked to report on illegal actions, it is not implausible to conclude that directly criminal behavior is, in fact, less likely to be documented via either a survey or official reporting.

Third, both studies were primarily addressed to the private business sphere. The NGES is a subset in a wider survey comprising only 22% ($n = 774$) of the respondents to the National Workplace Ethics Study, and only 15% ($n = 344$) of the respondents in Kaptein and Avelino (2005) were public employees. A much greater amount of data regarding ethical states of affairs is available for the private sector than for the public sector. However, the private and public sectors are significantly different, and should be studied independently. To begin with, the private and public sectors diverge along fundamental normative dimensions, including the monopoly on the use of justified coercion, mandates to represent limited private vs. all-encompassing public interests, limited vs. almost limitless pervasive impact on constituents’ lives, and voluntary vs. involuntary membership (Rawls, 1971). They also diverge along significant organizational and cultural dimensions, including differences in market exposure, legal and formal constraints, public oversight, and political influences (Boston, Martin, Pallot, & Walsh, 1996). These differences clearly warrant an independent focus on the public sphere regarding these issues, and that focus is beginning to emerge (Van Montfort et al., 2013).

Finally, neither study utilized any research-supported standardized infraction category scheme. The lack of standardized categories or descriptive language to delineate the various kinds of infractions and infraction families has been a central difficulty in attempting to compare ethical infraction data in the public sphere. Without such empirically verified standards differentiating infraction types, it is problematically subjective for both the researcher and the respondent. When taken together, these limitations at least demand a re-examination of the strong claims the NGES makes with respect to the effect of ethics measures and culture on ethical infraction rates.

Lasthuizen et al. (2011) provide the first comprehensive attempt to introduce some standardized categories and descriptive specificity into the rapidly expanding literature on ethics violations in governance. A central goal of their work is to address the almost exclusive focus on “corruption” in international studies on public ethics, arguing that this excludes a large array of moral breaches that are central to ethics and integrity discussions in the Western world. Lasthuizen et al. (2011) offer a validated typology of ethical infractions in governance that seeks to avoid problems of “oversimplification, overgeneralization and/or immediate

condemnation” when infraction types are not distinguished (p. 387). As a broad and inclusive starting point, the violations they seek to address include:

- All types of behavior relevant to the organization: behavior within the organization, interactions with external actors (citizens), and private-time behavior as far as it is considered relevant for the organization;
- All types of relevant moral norms and values: in laws and rules, in internal codes and procedures, and in informal norms and values not written down; and
- Behavior contrary to the organization’s interests but also behavior favoring the organization but harming relevant social norms and values.

Drawing on previous work by Hubert (1998) on police integrity, Lasthuizen et al. (2011) develop a questionnaire with 64 manifestations of integrity violations. In each case there is an item querying the rate of observation, as well as an item querying the respondent’s moral judgment, measuring the acceptability of the violation. Using a multiple-step principal-component factor analysis, the authors develop 10 families of infraction types that vary along frequency and acceptability dimensions. Within each of these, more serious and less serious forms of behavior can be distinguished (see Table 1).

Although the study is limited to examining one type of public organization (police) in one society (the Netherlands), the development of the typology included considerations and comparisons from other fields of study, including organizational sciences, theories of ethics in business and public administration, and police research. The resulting families of integrity violations are

TABLE 1
Lasthuizen Infraction Categories and Their Descriptions

<i>Violation category</i>	<i>Category description</i>
1. Corruption: Bribing	Misuse of (public) power for private gain; asking, offering, accepting bribes
2. Corruption: Favoritism	Misuse of authority or position to favor family (nepotism), friends (cronyism), or party (patronage)
3. Fraud and theft of resources	Improper private gain acquired from organization or from colleagues and citizens, with no involvement of external actor
4. Conflict of (public and private) interest through gifts	Interference (or potential interference) of personal interest with e public/organizational interest because of gifts, services, assets, or promises taken
5. Conflict of (private and public) interest through sideline activities	Interference (or potential interference) of personal interest with public/organizational interest because of jobs or activities practiced outside organization
6. Improper use of authority	Use of illegal/improper means or methods to achieve organizational goals (sometimes for “noble causes”)
7. Misuse and manipulation of information	Intended or unintended abuse of (access to) information, such as cheating, violation of secrecy rules, breaching confidentiality of information, or concealing information
8. Indecent treatment of colleagues or citizens	Includes not only discrimination (based on gender, race, or sexual orientation), intimidation, and sexual harassment but also improper behavior like bullying, nagging, and gossiping
9. Waste and abuse of organizational resources	Failure to comply with organizational standards and/or improper performance or incorrect/dysfunctional internal behavior
10. Misconduct during private time	Conduct during private time that harms people's trust in (public) organization

anticipated to be “universal, and are thus useful for describing unethical behavior in almost all (public) organizational contexts” (Lasthuizen et al., 2011, p. 389).

HYPOTHESES

The literature on ethics infraction rates and ethics policy measures provides a strong foundation on which to hypothesize regarding the actual effects of ethics policies on ethical infraction rates. Indeed, the Lasthuizen et al. (2011) study offers an improvement in examining ethical violations. Despite its contribution, few studies thus far have attempted to ascertain whether the implementation of ethics codes and an emphasis on actively training employees on ethics issues have any meaningful effect on actual infraction rates. Following is a discussion of four testable hypotheses that begin to fill the gaps that emerge from a review of the literature on ethics violations in municipalities.

First, it is anticipated that the frequency of reported ethical infractions will be positively correlated to municipal population size (H1). This hypothesis rests on the assumption that as the size of the administrative body increases, the temptation to infract (bigger, more complex budgets, larger stakes) and the opportunity to infract (more interactions and transactions, and more personnel involved) increase as well. Menzel and Benton (1991) show that common assumptions about what influences public attention to ethics (such as the size of the population in question) might be mistaken. It may be that common assumptions about what variables influence the number of ethical infractions are also wrong.

Second, it is also posited that the implementation of ethics codes and ethics training for municipal officials, managers, and employees will be positively correlated to municipal population size (H2). This hypothesis rests on the assumption that the greater incidence of ethical infractions in larger municipalities should increase pressure to develop ethical tools, as well as the idea that a larger population with more resources and a more complex and professional oversight structure will put greater pressure on its administration to institute an ethics regimen, even if only for appearances. Ethics codes are the most ubiquitous of ethics measures, but they are still implemented in less than three quarters of large cities (Feldheim & Wang, 2004).

The main contention of this article is that scholars must take the lead in evaluating whether the emphasis on such policies and measures in public agencies is likely to be effective in reducing the rate of observed ethical infractions occurring in said agencies. This evaluation is achieved by the last two hypotheses.

Third, it is expected that reported frequencies of ethical infractions will have a negative correlation with the implementation of ethics codes (H3). The idea is that by having an ethics code written into the agency’s standard operating procedures—thereby providing an ethical framework for officials, administrators, and employees—ethics codes reduce the temptation toward infractions. They might do this both by clarifying and modeling ethical practices and by delineating the consequences of unethical behavior. As such, it is an empirical question of whether or not these goals are achievable merely with codes of ethics. While written bylaws are indeed important to the operation of administrative agencies and to establishing the social norms to which employees must conform and be held accountable, they may not be sufficient to actually alter behavior and reduce the rate of observed ethical infractions in an agency. As pointed out by Gilman (2005) “any final analysis of the impact of a code must include how well it affects behavior” (p. 6).

Fourth, it is anticipated that the reported frequencies of ethical infractions will have a negative correlation with the implementation of ethics training (H4). Ethics training should encourage ethical behavior and serve to improve the ethical environment in a municipal administration. Ethics training should provoke a substantive discussion on the municipality's ethical guidelines among officials, administrators, and employees. This serves not only to highlight the permissible/impermissible fence posts and some of the most common accidental—and not so accidental—routes past them, but can also help to foster an open atmosphere that encourages ethical practices and dialogue, thus helping to avoid difficult situations in the first place. As the literature review shows, ethics training is not only much less widely utilized than ethics codes, but due to its nature can vary greatly based on circumstances and content. Despite these variations, if ethics training as a policy cannot show an overall impact (even a small one) on ethics infractions, a review of general assumptions about ethics policies and measures may be called for.

Finally, a quick word on the limited nature of the hypotheses tested. The present work begins to fill in some gaps, but is by no means a comprehensive assessment of ethics measures. First, ethics codes and training are but two of a wide variety of ethics measures that may be implemented. Second, the authors are assessing neither all of the motivations for, nor the complete impact of, ethics codes and training. Such measures may be implemented for other reasons besides directly reducing infraction rates. These motivations may include reducing an agency's legal liability by showing a reasonable effort to address ethics issues. Such measures may also be implemented in order to burnish the public perception of the agency in question. In fact, anecdotal evidence suggests that burnishing an agency's image post-scandal is one of the most common ways that ethics measures are introduced in municipal settings. Further, while ethics training and codes may serve to mitigate unethical behavior, they may also serve to support and encourage more ethical behavior, such as going the extra step to ensure that purchasing and hiring processes are done in the most transparent and objective manner possible. Finally, the survey did not ask for specific frequency, duration, and quality of the ethics training in respondent agencies. Instead, the general "emphasis" on ethics training was queried. The present work is limited to infraction reduction as a consequence of general implementation levels of ethics codes and training. Some of the space left unexplored will be addressed in the implications section.

DATA

The present study tests the proposed hypotheses by administering the 2013 Missouri Municipal Ethics Survey (MMES). The survey universe is pulled from the Missouri Municipal League's listing of Missouri municipalities. Because the target of this research is common-size municipalities and not large metropolitan cities, St. Louis and Kansas City are excluded from the survey universe. Aside from these exceptions, every member of the target population was contacted. The MMES was conducted online in a manner that placed a high premium on the respondent's sense of anonymity. Research shows that a strong sense of anonymity on behalf of the respondent can counter the social desirability bias (Randall & Fernandes, 1991), and that online surveys are particularly suited for this purpose (De Leeuw, 2005; Frippiat, Marquis, & Wiles-Portier, 2010; Joinson, Paine, Buchanan, & Reips, 2008; Kreuter, Presser, & Tourangeau, 2008). An initial decision was made to administer the survey using a widely recognized publicly available online survey service (SurveyMonkey), which the respondents might

have encountered before and with which they were perhaps familiar and more comfortable than other methods.

Contact with each municipality began with a phone call to the municipal clerk, the script for which emphasized the anonymity of the survey. If the clerk indicated a willingness to take part and/or distribute the survey to other officials and employees in the municipality, an e-mail was forwarded that again emphasized anonymity and contained a link to the survey. In order to maintain the respondent's sense of anonymity throughout the survey-taking process, the demographic data were limited to just enough to ensure that the study had a sufficiently diverse sample. For example, respondents were not queried about which region of Missouri they resided or worked in. Instead, the survey was administered in phases, beginning with the areas surrounding Kansas City and St. Louis, then expanding into the rest of the state to ensure that an appropriate mix of urban and rural municipalities was represented. The demographic data requested of respondents included only a title description, length of service in present position, length of service in public service generally, and the size of the municipal population served. Respondents were asked about their experiences with ethics infractions in their present position, which permitted statistical tests to control for how much time the person had spent in that particular position.

Of 540 contacts (all of the Missouri municipalities listed by the Missouri Municipal League in 2012), 166 valid responses were recorded. While not ideal, it is a sufficient response rate relative to online survey standards (Frippiat et al., 2010). In the MMES, most respondents (33.3%) are city managers or administrators, followed by city/county employees in nonmanagerial positions (28.3%), city clerks (13.3%), and city council members (10.8%). Thirty-four percent of respondents work in municipalities with less than 1,000 people; 23% in municipalities with 1,000–5,000 people; 16.2% in municipalities with 5,000–10,000 people; and 26.7% in municipalities with more than 10,000 people. Compared to the population from which the sample is drawn, 55% of Missouri municipalities have less than 1,000 people; 27% have 1,000–5,000 people; 7% have 5,000–10,000 people; and, 11% have more than 10,000 people.

Table 2 provides the sample distribution of respondents by current position and size of municipality in which they work. A larger proportion of city managers/administrators serve in mid-range municipality populations. With the exception of the smallest municipalities, the MMES comprises more responses from city managers/administrators than nonmanagerial staff. A majority of respondents (57.7%) who work in municipalities with 5,000–10,000 people are city managers, assistant city managers, administrators, or directors of administration. In contrast, only 39.5% of respondents with the same position work in municipalities with 10,000 people or more. In municipalities such as these, a sizable proportion of respondents are city council members or hold elected positions (30.2%). In comparison, 23.1% of respondents are city council members or hold elected positions and work in municipalities with 5,000–10,000 people.

Additionally, over half of the participants (59%) have worked in public service for more than 10 years. At the time of the survey, participants also generally have worked in the same position for a long period of time. The median response category is between 5 and 10 years, while 33% of participants have worked in their current job for more than 10 years. Twenty percent of participants have worked in their current job between 1 and 2 years.

The main concepts of interest are ethical violations and ethics codes and training. With respect to the latter, respondents were asked whether “your agency” had a code, and what level of emphasis (if any) was put on ethics training. The neutral word “agency” was used in order to not bias the reports by unnecessarily limiting the question to the respondent's own department,

TABLE 2
Sample Distribution of Respondents by Current Position and Municipality Population

<i>Position</i>	<1,000	1,000–5,000	5,000–10,000	≥10,000
Other	1.82	2.7	3.85	2.33
City council member	1.82	2.7	15.38	27.91
County elected official	0.00	0.00	0.00	2.33
City manager/administrator	18.18	45.95	46.15	30.23
City or county employee	40.00	29.73	11.54	25.58
Director of administration	0.00	0.00	7.69	2.33
Mayor	7.27	2.7	7.69	0.00
Other local office	0.00	0.00	0.00	2.33
Special district employee	0.00	0.00	3.85	0.00
Trustee/chairperson of trustees	1.82	0.00	0.00	0.00
Assistant city manager/administrator	0.00	0.00	3.85	6.98
City clerk	29.09	16.22	0.00	0.00
Total	100%	100%	100%	100%

Source: 2013 MMES.

Notes: Sample is equal to 166 respondents who provided a current employment position. Distribution of respondents is expressed as the percentage of respondents in a municipal population size category.

but also not unnecessarily expanding it beyond the respondent's range of knowledge by asking about broader terms such as "your municipality."

With regard to ethical violations, these can, of course, come in an almost endless variety. They can be single acts by an individual, or they can be comprised of a diachronic sequence of events involving any number of actors. They can be intentional, negligent, or merely accidental. They can vary in seriousness from feloniously criminal to barely worth mentioning. What counts as a violation in one context may not count as one in another context. Background information may mitigate the all-things-considered blame attached to a violation, even when the act itself is clearly *prima facie* a violation. Especially in a public institutional context where complex positional obligations, duties, and prohibitions are layered on top of (and can often conflict with) personal obligations, duties and prohibitions, attempting a broad measure of the actual levels of ethical infraction is a daunting exercise to say the least.

Given a particular context, one approach is to attempt to define some broad categories of infraction types that serve to subsume much of the variation within a typology that groups families of violation types together. It is for this reason that the work of Lasthuizen et al. (2011) is so crucial for a project like this one. The typology provides a coherent proven starting point from which to proceed when measuring ethical infractions. A significant challenge was to develop a set of intuitively clear questions for the respondents regarding different types of possible unethical behavior that would correlate with the Lasthuizen categories, allowing the study to draw some conclusions about the effect of the independent variables on the infraction rates in these various established categories.

However, the variability of descriptions of ethical infractions is not the only challenge. The social desirability bias is not just a general problem, but is itself variable. It is sensitive to the moral opprobrium attached to the particular form of ethical infraction in question. The higher the levels of moral condemnation attached to a particular infraction type, the more likely that respondents will not feel comfortable honestly reporting on the frequency with which they have observed such actions. Actions that are directly criminal, and understood as intentional

corruption (such as bribe-taking, or embezzlement and theft), are therefore theoretically much more subject to social desirability bias than actions that may be unethical, but are not intentionally criminal or corrupt (such as carelessness with confidential information, or creating a hostile work environment). Intentionally criminal or corrupt actions are also presumably more difficult to observe, since the actor will likely take precautions to avoid observation. Further, inquiring about a kind of infraction that is intentionally criminal or corrupt can not only suppress positive responses for that particular question, but also have lingering effects for other, related questions.

In addition, it is not an unreasonable assumption (though not one supported by any data) that the closer an infraction is to direct criminality, the less responsive infractions of that type will be to the implementation of ethics codes and training. Corruption, theft, and fraud presumably carry their own very powerful motivations that will probably find only a weak opponent among the motivations and knowledge instilled during an ethics training session.

As a result of these considerations, a decision was made to exclude the first two categories of direct corruption in the Lasthuizen typology from the survey. Categories (1) bribing, and (2) nepotism are therefore not addressed. However, some directly criminal questions about embezzlement and theft were included toward the end of the list of possible infractions on the survey (so as to minimize their impact on other questions). Given that the survey concerned *observed* levels of unethical behavior, the present study also considers what types of infractions in the typology might not be amenable to direct observation within the workplace. Ethical infractions that involve elements outside of the workplace are problematic in this respect; therefore the two categories of infraction that involved such elements were also not included: (5) conflicts of interest through sideline activities, and (10) misconduct in private time. This leaves the survey with questions directly addressing 6 of 10 of Lasthuizen's infraction types. The rate at which survey participants observed each ethical violation was measured using an ordinal scale consisting of five response categories: Never (0); Rarely (1); Sometimes (2); Often (3); Constantly (4).

To measure the main correlates of ethical infraction levels, several independent variables were employed. First, an ordinal-level variable was used to measure municipal population that categorized population size according to under 1,000 people, 1,001 to 5,000 people, 5,001 to 10,000 people, and more than 10,000 people. Second, participants were asked whether their agency had a written code of ethics in place. Responses were coded using a binary framework that signified that their agency either did not (0) or did (1) have a written code of ethics. Last, participants were asked about the extent to which they believed ethics training is emphasized within their agency. An ordinal-level variable was used to measure ethics training emphasis, where participants had the choice of selecting no emphasis (0), little emphasis (1), some emphasis (2), or strong emphasis (3).

METHODS

The analysis consists of comparing the proportion of survey participant subgroups that observe each of the six kinds of ethics violations. The main subgroups of interest are based on the main independent variables:

- population size of the municipality in which the participant works,
- whether the participant's agency has an ethics code, and
- level of emphasis on ethics training in the participant's agency.

The methods employed in this article identify whether there are statistically significant differences in ethics violations across population size, institutionalized ethics codes, and levels of training emphasis. Correlations are used to measure the magnitude of the association between each ethics violation category and each independent variable. As such, this study is not prepared to say anything causal; rather, it aims to highlight trends in ethical infractions across municipalities, training emphasis, and formal agency code.

RESULTS

Table 3 correlates the Lasthuizen infraction categories with specific questions asked in the MMES. Table 4 provides the variation of ethical infraction observations across the most common employment categories in the 2013 MMES. The data show that some ethical infractions are more visible or common based on one's position in public service. City council members believe that mishandling of confidential information and waste of organizational resources occur more frequently than those in other positions do. City managers and administrators believe that improper gifts and improper use of authority occur more frequently than council members and nonmanagerial staff. Observation of instances of indecent treatment is frequent among city managers/administrators, and even more frequent among staff members.

Table 5 provides correlations between ethical infractions and municipality population size. In the second column, Spearman correlations are provided to estimate a linear relationship between variables that are not assumed to be normally distributed, but are at least measured at the ordinal level. Spearman correlations also test the extent to which two ordinal variables are independent. As such, statistical significance indicates at what level the null hypothesis is rejected. In the third column, the extent to which ethical infractions significantly differ across municipality size is also assessed.

The results provide evidence for H1. Except for reporting instances of fraud and theft, ethical infractions have positive and significant correlations with increasing municipal population size. While the null hypothesis can be rejected in a majority of ethical infractions, the magnitude of association with municipality size is moderately small. Further, the results provide strong

TABLE 3
Lasthuizen Infraction Categories Surveyed in MMES and Questions Addressing Each Type of Infraction

<i>Lasthuizen infraction category</i>	<i>Specific infraction questions associated with each category: "How often have you witnessed the following kinds of ethical infractions in your present position?"</i>
Fraud and theft	<ol style="list-style-type: none"> 1. Theft and embezzlement 2. Financial gain due to misuse of confidential information
Mishandling and manipulating confidential information	<ol style="list-style-type: none"> 1. Carelessness with confidential information 2. Misuse of confidential information
Conflict of interest through personal gifts	<ol style="list-style-type: none"> 1. Acceptance of improper gifts or favors
Indecently treating colleagues, customers, or citizens	<ol style="list-style-type: none"> 1. Violation of employee privacy 2. Hostile work environment 3. Sexual harassment
Improperly using position of authority	<ol style="list-style-type: none"> 1. Vote and favor trading behind closed doors
Intent to waste and abuse organizational resources	<ol style="list-style-type: none"> 1. Falsification or improper manipulation of financial data

TABLE 4
Observation of Ethical Infractions by Most Common Position Types

<i>Position</i>	<i>Financial gain</i>	<i>Mishandling/ manipulating confidential information</i>	<i>Conflict of interest through gifts</i>	<i>Improper use of authority</i>	<i>Indecent treatment</i>	<i>Waste and abuse of organizational resources</i>	<i>Obs.</i>
City council member	0.28 (0.83)	1.44 (1.10)	0.28 (0.57)	0.17 (0.38)	0.61 (0.92)	0.44 (0.92)	18
City manager/ administrator	0.17 (0.50)	1.37 (0.81)	0.46 (0.69)	0.41 (0.79)	0.83 (0.95)	0.19 (0.52)	54
City/county employee	0.26 (0.61)	1.15 (1.08)	0.34 (0.76)	0.34 (0.92)	0.96 (1.04)	0.17 (0.48)	47
City clerk	0.24 (0.77)	0.86 (0.89)	0.09 (0.29)	0.14 (0.47)	0.68 (1.04)	0.14 (0.47)	22
All other	0.16 (0.37)	1.13 (0.80)	0.56 (0.87)	0.54 (0.83)	0.52 (0.71)	0.16 (0.48)	25
Total	0.19 (0.57)	1.19 (0.94)	0.38 (0.71)	0.34 (0.75)	0.76 (0.91)	0.18 (0.53)	166

Source: 2013 MMES.

Notes: Mean ethical infraction observations (and standard deviations) shown for most common positions in the sample. Number of respondents provided in last column. Higher mean values indicate observing infractions frequently. Based on 166 respondents who provided a current employment position.

evidence of statistically significant differences in observed mishandling or manipulation of information across municipality size ($\chi^2 = 11.94, df = 3, p = 0.01$). The results provide weaker evidence that accepting favors through gift-giving differs across municipality size ($\chi^2 = 7.04, df = 3, p = 0.07$).

The results provide no support for the second and third hypotheses, which suggests that the implementation of formal ethics codes is neither tied to municipality population size nor associated with levels of observed ethical infractions. The correlation between municipality size

TABLE 5
Relationship Between Ethical Infractions and Municipal Population Size

	<i>Spearman correlation</i>	<i>Differences across categories (χ^2)</i>
Fraud and theft	0.07	1.20
Mishandling/manipulation of confidential information	0.25***	11.96***
Conflict of interest through gifts	0.26****	7.04*
Improper use of authority	0.24***	5.54
Indecent treatment of colleagues, customers, or citizens	0.18**	5.95
Waste and abuse of organizational resources	0.21****	4.06

Source: 2013 Missouri Municipal Ethics Survey.

Notes: Spearman correlations provided in the second column. Higher scores on each ethical infraction scale signify more observed infractions. In the third column, χ^2 chi-square statistics are given, which assess differences in ethical infraction reporting across municipal population size using a Kruskal-Wallis test. Statistical significance indicates at what level of certainty the null hypothesis (i.e., that two indicators are independent) can be rejected. * $p < 0.10$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$.

and whether an agency has an ethics code is negligible ($\rho = 0.07$). Additionally, having an ethics code did not significantly differ across municipality size. Therefore, when it comes to deciding whether to incorporate a code of ethics in standard operating procedures overall, agencies are not likely to be influenced by how many citizens they serve. Furthermore, the results show no evidence that formal agency codes of ethics made significant differences in observed ethical infractions. However, agencies that do have an ethics code are more likely to put a strong emphasis on ethics training than agencies that do not have an ethics code ($\chi^2 = 27.71$, $df = 1$, $p < 0.001$).

The results provide adequate evidence for the fourth hypothesis, which states that the implementation of ethics training in an agency will be negatively associated with observed ethical infractions. However, the evidence is limited. Table 6 provides correlations between ethical infractions and the emphasis that an agency puts on ethics training. Spearman correlations are once again provided to estimate a linear relationship between ordinal-level variables and the extent to which ethical infractions significantly differ across ethics training emphasis.

A stronger emphasis on ethics training is inversely related to the majority of ethical infractions, with the exception of instances of fraud, theft, waste, and abuse of organizational resources. While the signs of all correlations are in the expected direction, the effect size is still moderately small and similar to the effect size of municipality population. However, the results do show that differences in some observed ethical infractions are statistically significant across levels of ethics training emphasis. That is, agencies that strongly emphasize ethics through training have a relatively lower percentage of observed ethical infractions. The results provide the strongest evidence that mishandling and manipulation of confidential information significantly differs across ethics training ($\chi^2 = 11.65$, $df = 3$, $p = 0.01$). Eighty percent of respondents who work in agencies that give a strong emphasis to ethics training believe that the inappropriate use of confidential information never or rarely occurs. In comparison, only 45% of respondents who work in agencies that give no emphasis to ethics training share the same sentiments.

The results thus far suggest that ethical infractions are positively related to municipality population size and negatively related to agency emphasis on ethics training. To further demonstrate that ethics training makes a difference, ethical infractions between training emphasis

TABLE 6
Relationship Between Ethical Infractions and Agency Emphasis on Ethics Training

	<i>Spearman correlation</i>	<i>Differences across categories (χ^2)</i>
Fraud and theft	-0.09	1.10
Mishandling/manipulation of confidential information	-0.24****	11.65***
Conflict of interest through gifts	-0.23****	6.48*
Improper use of authority	-0.16**	4.31
Indecent treatment of colleagues, customers, or citizens	-0.16**	6.65*
Waste and abuse of organizational resources	-0.09	0.94

Source: 2013 Missouri Municipal Ethics Survey.

Notes: Spearman correlations provided in the second column. Higher scores on each ethical infraction scale signify more observed infractions. Higher scores on ethics training indicate stronger attention to training. In the third column, χ^2 statistics are given, which assess differences in ethical infraction reporting across ethics training emphasis using a Kruskal-Wallis test. Statistical significance indicates at what level of certainty the null hypothesis (i.e., that two indicators are independent) can be rejected. * $p < 0.10$; ** $p < 0.05$; *** $p < 0.01$; **** $p < 0.001$.

levels should remain, even in agencies that serve larger populations. Figure 1 shows the impact of ethics training on different kinds of ethical infractions across municipality population size. The y-axis measures ethical infractions, where larger numbers indicate more observed infractions. Respondents who work in agencies that give no or minimal emphasis to ethics training are combined into one category (indicated by solid line), and compared to respondents who work in agencies that give some or strong emphasis to ethics training (indicated by dotted line). If ethics training makes a difference in observed ethical infractions, then the dotted line should be consistently lower than the solid line.

While the evidence is limited, training makes the clearest impact in three kinds of ethical infractions: carelessness with confidential information; conflict of interest through gifts; and indecent treatment of colleagues, customers, and citizens. Generally, as population size increases, people who work in agencies that give at least some emphasis to ethics training have lower mean ethical infraction scores than those who work in agencies that give little or no emphasis to ethics training. Yet the results suggest that ethics training makes only a marginal impact on improper gift-giving and indecent treatment in the largest municipalities. The results show that the largest impact of training seems to take place in municipalities with 5,000–10,000 people. This may be due to the sample of respondents. Differences in ethical infractions in larger populations may be an artifact of city managers and administrators who are oriented toward day-to-day operations of municipal government and are better situated to evaluate the impact of ethics training on personnel than elected officials.

Figure 1 also sheds light on the limits of ethics training. There are three cases in which mean ethical infractions among respondents who work in agencies that emphasize ethics training are not lower than among respondents who work in agencies that give no or minimal emphasis: financial gain, improper use of authority, and waste and abuse of organizational resources.

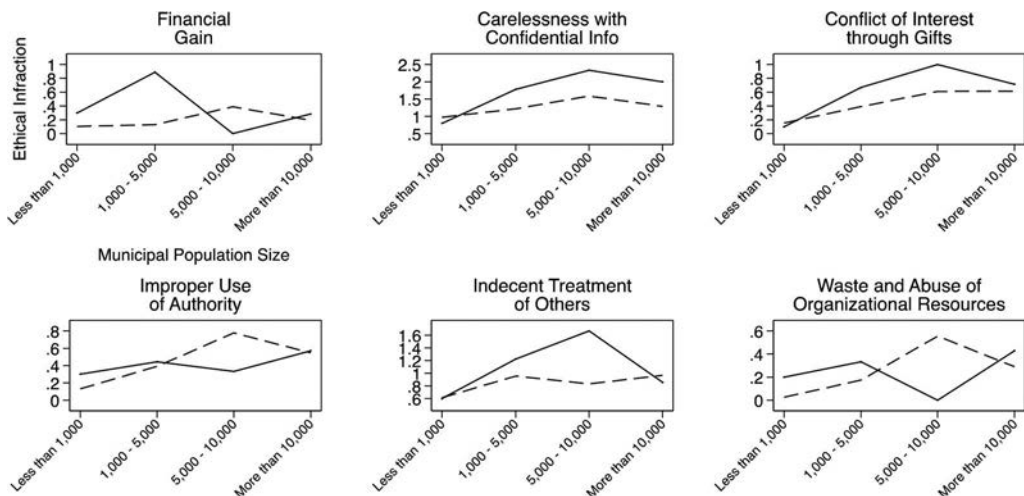


FIGURE 1 The impact of ethics training on ethical infractions. *Source:* 2013 Missouri Municipal Ethics Survey. *Notes:* A solid line indicates no to minimal emphasis on training and a dotted line indicates some to strong emphasis on training. Emphasis on training indicator originally has four categories, but are reduced to increase respondents in training categories. Higher values on y-axis reflect more observed ethical infractions.

Interestingly, these instances are observed in municipalities in the upper-middle tier that has a large proportion of city managers and administrators. Furthermore, the results also point out that ethics training makes marginal differences in observed ethical infractions in municipalities with 1,000 or fewer people.

DISCUSSION

In this study, individual responses regarding observations of ethics infractions and measures are aggregated to examine the extent to which agencies both emphasize ethics training and have lower observed ethical infraction rates. Respondents are not asked whether they themselves participated in ethics training if offered at their agency. Nor are respondents asked whether they themselves actually engaged in ethical infractions. While the findings show that the impact of ethics training is limited, sufficient evidence is offered to initially confirm the assumption that, at least in certain categories, agencies emphasizing ethics training will make their employees more conscientious regarding the possibility of ethical violations and lead to fewer violations becoming realities.

The frequency of observed violations varies greatly across the infraction categories. Some violations are clearly more rare events than others, which is reflected in the data that are skewed to the right. For example, 88.1% of participants reported that they never observed financial gains due to the improper use of confidential information. Only 6% of participants reported that they either sometimes or often observed personnel improperly using confidential information to benefit financially. Similar percentages of participants in the “never” category are obtained with other ethical violations that could either involve criminal charges or are harder to observe, such as falsification or improper manipulation of financial data (87.5%), vote trading behind closed doors (78.6%), and accepting improper gifts or favors (73.2%). Not all ethics violations exhibit a disproportionate percentage of “never” responses. There is a considerably lower percentage of participants reporting they never observed carelessness with handling confidential information (27%). Forty-seven percent of participants report they never observed misuses of confidential information, and less than half of the participants (49.1%) report they never witnessed a hostile work environment.

While it is not implausible that the more serious infractions are indeed as rare as the results indicate, it is clearly also possible that the social desirability bias influenced participants’ reporting of actual ethics violations despite our best efforts to minimize it. This suggests that the disproportionate percentage of “never” responses could bias the results and lead to an underestimate of both observed ethical infractions and the impact of ethics training. Two procedures are taken to account for this possibility.

First, correlations are measured excluding respondents who state they never observed ethical infractions. Ethics training is still significantly correlated with a reduction in mishandling confidential information (-0.21 , $n = 154$, $p = 0.01$) and indecent treatment of others (-0.20 , $n = 106$, $p = 0.04$). In this case, the correlation between ethics training and waste and abuse of organizational resources increases to -0.40 ; however, this is only based on 26 respondents.

In order to further address this issue, a grand scale was built composed of the combination of separate ethical infraction measures. An individual respondent who never observed one particular category of infraction is still unlikely to never have observed any at all. An aggregate scale

would capture more variation of responses to different questions about ethical infractions than an assessment of each ethical infraction question separately. The results of this analysis show that the ethical infraction questions form a highly reliable scale, with a Cronbach's α of 0.76. In addition, "never" responses only consist of 18.9% of total respondents. The results are consistent with previous findings presented in this article. The scale has a larger and statistically significant correlation with municipal population size ($\rho = 0.33, p < 0.001$), while differences in ethical infractions across municipal population are also statistically significant ($\chi^2 = 18.76, df = 3, p < 0.001$). The scale has a similar correlation with ethics training ($\rho = -0.26, p < 0.001$). Differences are also statistically significant across ethics training emphasis ($\chi^2 = 16.00, df = 3, p < 0.001$). Yet ethical infractions still do not significantly differ across agencies that do and do not have formal ethics codes.

Other data analysis suggests that ethical infractions are influenced by ethics training, regardless of whether an agency emphasizes ethics for incoming personnel or on a continual basis. The Spearman correlation between the two kinds of training is large and statistically significant ($\rho = 0.76, p < 0.001$), and the measures form a highly reliable scale (Cronbach's $\alpha = 0.87$). When using continual emphasis on training as an alternative indicator, the results are generally consistent with previous findings on ethical infractions and municipal population size discussed in the article. Emphasis on ethics training does not significantly differ across municipality size. Yet ethical infractions do significantly differ across how much agencies emphasize ethics training both to incoming personnel and on a continual basis. The authors also constructed an "ethics activity" scale that includes both kinds of training and whether an agency has a formal ethics code. This scale is also highly reliable (Cronbach's $\alpha = 0.76$), and again produces similar results consistent with previous findings. However, ethics measures do not differ across municipal population size; agencies with a higher level of ethics training activities have significantly lower ethical infractions in certain categories than agencies with a lower level of ethics training activities.

IMPLICATIONS

The MMES takes an important first step in filling gaps of knowledge regarding ethics measures and infractions at the municipal level. Perhaps the first lesson is how much work remains to be done on this subject. However, significant advances have been made which allow an initial set of policy suggestions for practitioners. A surprising finding, when looking at municipalities under 10,000 residents, is that, despite the fact that larger municipalities are associated with higher infraction rates, and despite the fact that the impact (where there is one) of ethics training is stronger in larger municipalities, larger municipalities are no more likely to have implemented ethics measures than smaller municipalities. This makes these municipalities the lowest-hanging fruit with respect to the impact that ethics measure might have. Leaders in such municipalities (1,000–10,000 residents) have perhaps the strongest case for reviewing and overhauling their ethics policies.

Although this research suggests that ethics codes are not sufficient by themselves to directly reduce ethical infraction rates, codes are important because they establish a basis upon which a wider ethics program can be built. First, codes, as a set of ethics rules, can illuminate a minimum standard below which no official or employee should fall. By delineating acceptable

behavior from unacceptable behavior on even small issues (such as carelessness with confidential information), they can avoid the small pitfalls. Such pitfalls, when combined with a cover-up of the initial mistake, can lead to much bigger problems.

Second, codes can set forth a set of aspirational values and goals that serve to make sense of the seemingly arbitrary guidelines in the specific rules. For example, suppose a code sets forth a goal of utmost objectivity and transparency within the purchasing process. This goal can help to explain why the code prohibits accepting that cup of coffee offered by a potential vendor. This can change how practitioners perceive rules. Rules are much more likely to inspire compliance when the reasons for the rule are clearly understood. Otherwise, such rules can appear dishearteningly arbitrary.

Third, this study shows that the presence of a code makes it much more likely that any given institution will also implement an ethics training regimen. A strong ethics training regimen makes a difference.

Perhaps the most important finding of the present work is to confirm that while stronger emphases on ethics training (as opposed to ethics codes on their own) are correlated with a drop in infraction rates, the actual breadth of that correlation is much more complicated than previous studies have indicated. A central feature of the emerging complexity of the relationship between ethics measures and actual ethics infractions is that ethics measures only seem to be effective against certain kinds of ethical violations. An encouraging finding is that the strongest effects of ethics training fall on the kinds of infractions seen most frequently. The strongest negative correlation is in the category of carelessness with confidential information, which has the lowest “never” response of all infraction types.

The two other categories of infraction that showed a statistically significant impact in response to ethics training were the acceptance of improper gifts or favors and the indecent treatment of colleagues, both of which can lead to hostile work environments. These results should inform guidelines regarding the content of ethics training. Specifically, it would seem to suggest that a strong focus on these areas of infraction could pack the most “bang for the buck” when it comes to the limited time and resources any institution can commit to ethics training. This recommendation conforms to the intuition that ethics training is less about changing people’s moral character, and more about teaching them to avoid inadvertently or negligently crossing moral boundaries.

What training may primarily do is point out the possible ethically problematic consequences of otherwise benign-seeming actions. Practitioners at all levels can come to recognize the ethical import before taking such actions. Hopefully, this leads to smarter ethical decision-making overall.

As an example of this, consider that the acceptance of improper gifts or favors is a practice easily justified to oneself (especially for those new to the political arena) if the moral hazards are not clearly delineated. The naive response to an invitation to a cup of coffee might be something you hear often in the statements of public officials under the ethics spotlight: “This cup of coffee can’t sway my opinion.” This kind of thinking can be undermined by training that points out that sitting down for a cup of coffee with a party that has potential business before the municipal government doesn’t just provide you with one more cup of coffee. In fact, it gives that party the opportunity to frame the issue at hand and make their case with a nonpublic and unchallenged line of argument, leaving potential opposing parties at a disadvantage. Further, the significance of even the appearance of impropriety of being seen having a cup of coffee with an interested

party is something that training can drive home. Similarly, indecent treatment that leads to a hostile working environment can be impacted by pointing out the legal and practical ramifications of such behavior in an independent setting, thereby hopefully countering the knee-jerk emotional responses that are causing the problem.

The present work has shown that the impact of ethics training can be significant even if it is only confined to a limited set of infraction categories. However, the impact of the correlation between ethics training and these infraction categories is potentially even bigger. Larger ethical problems often arise in response to smaller mistakes, creating difficult dilemmas. For instance, accidentally allowing word of the current lowest bid in a purchasing process to get out may be an innocent mistake (papers left where they shouldn't have been). But this tainting of the purchasing process can lead to cover-ups, accusations of favoritism, and any number of larger issues. By avoiding the first small mistake, the larger consequences are also avoided.

On the other hand, actions motivated by a clear intent to do wrong, such as misusing confidential information for financial gain, or outright theft and embezzlement, are less likely to be impacted by training that points out moral boundaries. In these cases, the violator likely already knows that the ethical lines are there, and is willing to ignore them for independent gains. However, there are still several lessons to be drawn from pointing out the limited effectiveness of ethics codes and training with respect to these more serious and less common infractions.

The first lesson is that the possibility of such violations needs to be addressed via other means. Codes and training by themselves, no matter how comprehensive, do not comprise a full regimen of ethics policies. If perpetrators of such deeds do not respond to training, then the first means of defense is to keep them out of the ranks. Ethics must be an area of emphasis, and perhaps most importantly, a consequential metric for decision-makers throughout the hiring and promotion process. This can serve to weed out bad actors whose less serious, but known, infractions hint at their willingness to infract more seriously. This is not meant to be an endorsement of any kind of strict zero-tolerance policy (such inflexible strictures can be more harmful than helpful). Instead, it is meant to address unfortunately common promotion processes that reward short-term gains in productivity over ethical considerations.

Of course, it is impossible to keep all bad actors out of the ranks. This means that co-workers must be all the more vigilant, and have a clear and unencumbered means of reporting misdeeds. Especially given the limits of training shown in the present work, the existence of well-publicized and unencumbered ethics reporting pipelines is crucial. First and foremost, those reporting a misdeed need a clear sense that they will not suffer retribution for having made the report, even if the perpetrator is a superior. Such reporting pipelines may take the form of anonymous hotlines, or simply be comprised of well-trained managers who will guard against retribution and see that the proper steps are taken in response to such reports.

This emphasis on the role of managers in the reporting process highlights another important point regarding the content of ethics training. Ethics training should not only be something that everyone (not just newcomers or certain positions) receives, but the content of the training should be tailored to the role of the audience. For example, lower-level employees and officials need to be alerted to the existence of unencumbered and reliable means of reporting misdeeds, and managers need to be trained in ensuring that such reporting pipelines work as advertised. Furthermore, ethics training cannot be a static curriculum. The ethical issues that require attention are in constant flux. Changing circumstances—including changes in demographics

and population, institutional structures, available technologies, and public perceptions of government—all impact the issues that effective ethics training should highlight. Especially, new Internet technologies provide both a vast new arena of resources for small municipalities and an equally vast new set of potential pitfalls. Is confidential information shared via open e-mail exchanges? Are social media interactions poisoning the work atmosphere? If three of five city council members are taking part in a debate surrounding local issues on Twitter, is that a meeting subject to open-records laws?

This last point about possible cyber-infractions underlines an important lesson from the present work for both practitioners and researchers. The body of knowledge available on the subject of public ethics can benefit greatly from continuous attention to the wide variety of ethical infraction types and possibilities in an increasingly complex world. This means that researchers need to continue to refine the infraction categories and the broad range of possible contributing factors, a process that necessarily includes input from practitioners who are encountering new situations and infractions all the time. On the other hand, practitioners need to refine and optimize reporting methods and make ethics investigations and verdicts available for researchers, even if only in aggregated form.

As was pointed out by an anonymous reviewer, it would have been ideal to compare perceived infraction levels as measured by the MMES survey against some objective measures of ethics investigations and their outcomes. However, not only are such data very difficult to come by (due to wide differences in reporting of ethics investigations), but the variations in descriptions of the violations themselves make them almost impossible to compare across jurisdictions. Ameliorating the roadblocks to progress will require ever more cooperation between practitioners and researchers. This is perhaps the most important lesson for both sides.

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Keeping the Faith: A Model Local Ethics Law - Content and Commentary

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Keeping the Faith: A Model Local Ethics Law - Content and Commentary

Cover Page Footnote

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KEEPING THE FAITH: A MODEL LOCAL ETHICS LAW—CONTENT AND COMMENTARY

Mark Davies†

I. Introduction

The model local ethics law and accompanying commentary set forth in this Article reflect the work of the New York State Temporary State Commission on Local Government Ethics. From 1990 through 1992, that agency was charged with enforcing the 1987 Ethics in Government Act, with aiding municipalities in addressing their ethics concerns, and with proposing new ethics legislation.¹

Dozens of investigations by the Temporary State Commission, during its three-year life, revealed a broad range of ethical problems in municipalities throughout New York State. With adequate staff and funding, the Commission could have conducted dozens if not hundreds of additional investigations—not because municipal officials often commit unethical acts, but because they are perceived to have committed unethical acts. In the Commission's experience, a great chasm exists between the actual and perceived integrity of local government officials. Virtually none of the actions of officials investigated by the Commission violated current penal or ethics laws. Yet the public, perhaps justifiably, viewed those unregulated actions as improper.

The Commission's determination that corrupt or illegal actions by officials occur with extreme infrequency at the local level is good news. The bad news is this: local government officials lack desperately needed counsel as to what behavior is *ethically* acceptable and what is not.

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1. The 1987 Ethics in Government Act, 1987 N.Y. LAWS 813, primarily regulates state officials. The provisions governing the Commission were codified in § 813 of the New York General Municipal Law. N.Y. GEN. MUN. LAW § 813 (McKinney 1986). See generally Temporary State Comm'n on Local Gov't Integrity, *Final Report*, 21 FORDHAM URB. L.J. 1 (1993).

As discussed at length in the Commission's Final Report² and in its report entitled "In Search of a Wise Law: Municipal Ethics Law Reform,"³ current New York State ethical standards for municipal officials are disgracefully inadequate. Most glaringly, they do not even contain a basic code of ethics to guide officials. As a result, neither officials nor citizens know what the rules are; the all-too-common result being that officials often face criticism for engaging in conduct that is permitted under current law. This appalling state of affairs, which exists not only in New York but in many other states as well, must be remedied with all deliberate speed.

The Commission and its Local Government Advisory Board, which was composed of representatives of the New York State Association of Counties, Association of Towns, and Conference of Mayors, proposed a state law to replace the hodgepodge of current ethics laws that govern municipal officials.⁴ That bill was introduced in the New York State legislature in 1991 as Assembly Bill 8637 and Senate Bill 6157. It was not reported out of committee.

II. The Need for Local Ethics Laws

Absent a strong state ethics law for municipal officials, local governments must employ their home rule powers to enact a comprehensive, local ethics law regulating the conduct of their officials. That a crushing need for a such a law exists is demonstrated by the Commission's investigations, which revealed the following instances of questionable activity:⁵

Appearances and representation

A town attorney appeared before the town planning board on behalf of private clients;

A town board member represented developers before the town planning board;

Compatibility of public office

A municipal official held two, allegedly incompatible municipal offices;

2. Temporary State Comm'n on Local Gov't Integrity, *supra* note 1, at 1-62.

3. The report is unpublished and is on file with the *Fordham Urban Law Journal*.

4. The current state ethics law is set forth in article 18 of the New York State General Municipal Law. N.Y. GEN. MUN. LAW §§ 801-813 (McKinney 1986 & Supp. 1993).

5. See Temporary State Comm'n on Local Gov't Ethics, Final Report 4-6 (unpublished sections of the Report, on file with the *Fordham Urban Law Journal*).

Ineffective enforcement

Town officials ignored, with impunity, the opinion of the Attorney General's office that a town planning-board member should refrain from voting on a matter in which he had an interest;

Using public office for private gain

A city housing services commission bought a city official's house at an allegedly inflated price;

Municipal officials used municipal property for private purposes;

Town planning board members engaged in real estate trade in the town;

A town assessor acted as a private realtor and developer in the town;

A village mayor voted to rezone his son-in-law's property to permit a gas station;

A town supervisor voted to award the town insurance contract to his brother-in-law;

A school board trustee voted to raise the salary of his sister, the deputy board clerk;

A town supervisor allegedly contracted with his father's bus company;

A village trustee voted to grant permits to clients of her private consulting business;

Zoning board members voted to grant variances to clients of their private businesses;

A city code-enforcement officer reviewed code compliance of his supervisor's private business;

An industrial development authority (IDA) hired bond counsel who had an interest in an IDA project;

A village board permitted a village golf superintendent to open a private pro shop on the village golf course;

A town code-enforcement officer issued a building permit to himself;

A town supervisor refused to correct a drainage problem until the affected citizen took action that benefitted the supervisor's mother;

Political solicitation

A city mayor solicited campaign contributions from city employees;

A town commissioner of public works solicited campaign contributions from vendors on the town vendor list;

A Democratic city mayor awarded city contracts to campaign contributors;

Republican county officials awarded contracts to contributors of the county Republican committee;

Improper influence of officials by private persons

A private construction firm that needed town permits sought to hire the town supervisor;

Revolving door

A former town assessor appeared before the town's tax-grievance committee on behalf of persons whose property he had assessed;

An IDA chair resigned to become the IDA's outside counsel, earning substantial fees;

Inflexibility of current law

A town board faced the dilemma of either contracting with a board member for recycling services, in violation of Article 18,⁶ or expending far more town money to contract with a vendor in another state;

A village board was prevented from placing a service awards program before the voters because board members who were volunteer firefighters felt constrained to recuse themselves.

Virtually none of the above actions are prohibited by current New York State law. Yet most citizens would regard them as improper. The state legislature having refused to enact a state ethics law for local government, each municipality must adopt its own ethics standards. Based on the bill jointly proposed by the Commission and its Local Government Advisory Board, the model local ethics law set forth below should assist municipalities in meeting that challenge.

III. A Model Local Ethics Law: Content and Commentary

Scope.

The model local law is intended for use in New York State counties, cities, towns, and villages. However, with minimal changes, it

6. N.Y. GEN. MUN. LAW §§ 801-13 (McKinney 1986 & Supp. 1993).

may be used in other municipalities, such as school districts. See, in particular, the Code of Ethics for the Buffalo Board of Education.⁷ With modification to comply with state law requirements, the model law may also be used in municipalities in other states.

Authority to Enact.

Section 806(1)(a) of the New York General Municipal Law requires all counties, cities, towns, villages, and school districts (and permits all other municipalities) to

“adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Such code shall provide standards for officers and employees with respect to disclosure of interest in legislation before the local governing body, holding of investments in conflict with official duties, private employment in conflict with official duties, future employment and such other standards relating to the conduct of officers and employees as may be deemed advisable. Such codes may regulate or prescribe conduct which is not expressly prohibited by this article [18] but may not authorize conduct otherwise prohibited. Such codes may provide for the prohibition of conduct or disclosure of information and the classification of employees or officers.”⁸

Sections 806(1)(b) and 811 of the General Municipal Law specifically authorize municipalities to adopt a form of annual statement of financial disclosure. Financial disclosure is mandatory in counties, cities, towns, and villages with a population of 50,000 or more.⁹

In light of a recent New York State Court of Appeals decision,¹⁰ municipalities should exercise caution in unilaterally imposing ethics requirements on their unionized employees, as ethics requirements may be found to be mandatory subjects of bargaining and, thus, not necessarily capable of unilateral imposition.

MODEL LOCAL ETHICS LAW

Section 1. Title.

[If desired, assign a title to the local law, e.g.: “This local law shall be known and may be cited as the “Ethics Law of the [County, City, Town, or Village] of ____.”]

7. Unpublished manuscript on file with the *Fordham Urban Law Journal*.

8. N.Y. GEN. MUN. LAW § 806(1)(a) (McKinney 1986).

9. N.Y. GEN. MUN. LAW §§ 810(1), 811(2), 812(1)(a) (McKinney Supp. 1993).

10. Board of Educ. v. New York State Pub. Employment Relations Bd., 75 N.Y.2d 660, 554 N.E.2d 1247, 555 N.Y.S.2d 659 (1990).

Section 2. Purpose.

The purposes of this local law are:

- (a) To establish high standards of ethical conduct for officers and employees of the [County, City, Town, or Village];
- (b) To afford officers and employees of the [County, City, Town, or Village] clear guidance on such standards;
- (c) To promote public confidence in the integrity of the governance and administration of the [County, City, Town, or Village] and its agencies and administrative offices;
- (d) By requiring public disclosure of financial interests that may influence or be perceived to influence the actions of [County, City, Town, or Village] officers and employees, to facilitate consideration of potential ethical problems before they arise, minimize unwarranted suspicion, and enhance the accountability of government to the people; and
- (e) To provide for the fair and effective administration of this local law.

This local law is enacted pursuant to section 806 of the General Municipal Law of the State of New York and section 10 of the Municipal Home Rule Law and is not intended to authorize any conduct prohibited by Article 18 of the General Municipal Law. This local law also supplements other provisions of law regulating ethics in local government, such as section 107 of the Civil Service Law of the State of New York.

Section 2. Comment.

While the vast majority of municipal officials are honest and zealous, being honest is not enough. Appearances and public perception play an enormously important role in the effectiveness of officials and in the well-being of their communities.

However, ethics laws are not an academic exercise. Their purpose lies not in filing forms or in prohibiting officials' activity merely for prohibition's sake. To the contrary, proposals for ethics law reform must never be divorced from their impact upon the lives and effectiveness of the officials themselves.

The point of ethics laws for municipal officials is to improve both the perception and the reality of integrity in local government and to encourage, not discourage, citizens from participating in that

government. If an ethics law fails in those goals, it fails in everything. This model local ethics law seeks to fulfill those goals. At the same time, it must comply with, and incorporate, the often confusing requirements of Article 18 of the General Municipal Law.

Apart from Article 18, other New York State statutes, such as Civil Service Law section 107, regulate ethics in local government.¹¹ New York State common law also places certain restrictions on self-dealing by public officials.¹²

This model local ethics law primarily addresses conflicts between the public and private interests of municipal officials, and does not seek to regulate the compatibility of two public offices. The Attorney General, and to a lesser extent the Comptroller's office, have developed an extensive body of opinions on compatibility of public office,¹³ based on various statutory provisions.¹⁴

**Section 3. Supersession of General Municipal Law § 808;
Repeal of Existing [County, City, Town, or
Village] Ethics Laws.**

To the extent this [chapter] is inconsistent with the provisions of section 808 of the General Municipal Law, this [chapter] shall supersede those provisions. [Provide for the repeal of any existing local laws or ordinances governing ethics in the municipality that are rendered obsolete by this local law.]

Section 3. Comment.

As discussed below, both the Attorney General's office and the Commission have taken the position that municipalities' home rule powers permit them, by local law, to vary the provisions of section 808 of the General Municipal Law relating to the establishment

11. N.Y. CIV. SER. LAW § 107 (McKinney Supp. 1993).

12. See, e.g., *Clarke v. Town of Russia*, 283 N.Y. 272, 28 N.E.2d 833 (1940); *Smith v. City of Albany*, 61 N.Y. 444 (1875); *People ex rel. Schenectady Illuminating Co. v. Board of Supervisors*, 166 A.D. 758, 151 N.Y.S. 1012 (App. Div. 1915). Cf. N.Y. TOWN LAW § 271(3) (McKinney Supp. 1994); N.Y. VILLAGE LAW § 7-718(3) (McKinney Supp. 1994).

13. See, e.g., 1943 Op. Att'y Gen. 94; 1946 Op. Att'y Gen. 111; 7 Ops. St. Compt. 15 (1951).

14. See, e.g., N.Y. VILLAGE LAW § 3-300 (McKinney Supp. 1993); N.Y. SECOND CLASS CITIES LAW § 19 (McKinney Supp. 1993); N.Y. TOWN LAW § 20 (McKinney 1990 & Supp. 1993); N.Y. COUNTY LAW § 411 (McKinney 1991); N.Y. GEN. CITY LAW § 3 (McKinney 1989); N.Y. GEN. MUN. LAW §§ 239-b, 243, 553(4), 801, 856(4) (McKinney 1986); see also *Strati v. Balancia*, N.Y. L.J., May 23, 1991, at 28, col. 2 (Sup. Ct., Westchester Co. 1991) (upholding local law prohibiting town planning board members from running for town supervisor or town board).

and membership of ethics boards. However, when adopting a local law changing or superseding any provision of a state statute or a prior local law or ordinance, the legislative body must specify the chapter or local law or ordinance (and the number and year of enactment, section, subsection, or subdivision) that the legislative body intends to change or supersede, although the failure to do so does not affect the validity of the local law.¹⁵

Section 4. Ethics Law.

The following sections, numbered [100 through 218] are added to the [Unified Code of the County, City, Town, or Village of ____]:

Section 4. Comment.

An ethics law rests upon a triad of provisions: an understandable and comprehensive Code of Ethics, sensible disclosure, and a reasonable enforcement mechanism. Removal of any of those three legs topples the entire ethics structure.

Furthermore, an unintelligible ethics law cannot be obeyed or enforced. This model law, therefore, places heavy emphasis upon easily understandable organization, contents, and word usage, particularly in those provisions that directly affect the activities of officials. An ethics law *must* be user friendly. Otherwise, it fails in its essential purpose of providing guidance to officials and confidence to citizens.

For that reason, this model law is divided into two parts. The first part (sections 100-113) contains the provisions directly concerning the conduct of municipal officials. The second part (sections 201-218) contains the provisions for administering the ethics law. Except for municipal attorneys and ethics board members, officials would not often have occasion to consult the second part; the provisions of concern to officials are therefore grouped into the first fourteen sections of the model law.

15. N.Y. MUN. HOME RULE LAW § 22 (McKinney 1969).

ETHICS LAW
PART A: SUBSTANTIVE PROVISIONS

§ 100. Code of Ethics for [County, City, Town, or Village] Officers and Employees.

1. General prohibition.

A [County, City, Town, or Village] officer or employee shall not use his or her official position or office, or take or fail to take any action, in a manner which he or she knows or has reason to know may result in a personal financial benefit for any of the following persons:

- (a) the [County, City, Town, or Village] officer or employee;
- (b) his or her outside employer or business;
- (c) a member of his or her household;
- (d) a customer or client;
- (e) a relative; or
- (f) a person from whom the officer or employee has received election campaign contributions of more than \$1000 in the aggregate during the past twelve months.

2. Recusal.

A [County, City, Town, or Village] officer or employee shall promptly recuse himself or herself from acting on a matter before the [County, City, Town, or Village] when acting on the matter, or failing to act on the matter, may financially benefit any of the persons listed in subdivision 1 of this section.

3. Gifts.

A [County, City, Town, or Village] officer or employee shall not solicit anything of value from any person who has received or sought a financial benefit from the [County, City, Town, or Village], nor accept anything of value from any person who the [County, City, Town, or Village] officer or employee knows or has reason to know has received or sought a financial benefit from the [County, City, Town, or Village] within the previous twenty-four months.

4. Representation.

A [County, City, Town, or Village] officer or employee shall not represent any other person in any matter that person has before the [County, City, Town, or Village] nor represent any other per-

son in any matter against the interests of the [County, City, Town, or Village].

5. Appearances.

A [County, City, Town, or Village] officer or employee shall not appear before any agency of the [County, City, Town, or Village], except on his or her own behalf or on behalf of the [County, City, Town, or Village].

6. Confidential information.

[County, City, Town, or Village] officers and employees and former [County, City, Town, or Village] officers and employees shall not disclose any confidential information or use it to further anyone's personal interests.

7. Political solicitation.

A [County, City, Town, or Village] officer or employee shall not knowingly request or knowingly authorize anyone else to request any subordinate of the officer or employee to participate in an election campaign or contribute to a political committee.

8. Revolving door.

A [County, City, Town, or Village] officer or employee shall not appear or practice before the [County, City, Town, or Village], except on his or her own behalf, or receive compensation for working on any matter before the [County, City, Town, or Village], for a period of one year after the termination of his or her [County, City, Town, or Village] service or employment; however, the bar shall be permanent as to particular matters on which the [County, City, Town, or Village] officer or employee personally worked while in [County, City, Town, or Village] service.

9. Avoidance of conflicts.

[County, City, Town, or Village] officers and employees shall not knowingly acquire, solicit, negotiate for, or accept any interest, employment, or other thing of value which would put them in violation of this Code of Ethics.

10. Inducement of others.

A [County, City, Town, or Village] officer or employee shall not induce or aid another officer or employee of the [County, City,

Town, or Village] to violate any of the provisions of this Code of Ethics.

§ 100.—*Comment.*

A Code of Ethics is the heart and soul of any ethics law. The Code must be easy for lay persons to understand and apply because, as noted above, its primary purpose is to provide guidance to officials and citizens.

The provisions of the Code of Ethics must be read together with the exclusions in section 102 and the definitions in section 105.

Some municipalities may wish to include in their Code of Ethics certain additional provisions, such as a ban on all, or designated, officials holding offices in a political party or committee (a so-called “two hats” provision). Such a provision might read as follows:

No [County, City, Town, or Village] officer or employee may be a member of a party committee, constituted committee, or duly constituted subcommittee of a county committee.

“Party committee,” “constituted committee,” and “duly constituted subcommittee of a county committee” are defined in section 14-100 of the Election Law and include, for example, state, county, city, town, and village political party committees.¹⁶ Some municipalities may wish to limit the two-hats provision to certain officials (e.g., policymakers) or to exclude certain officials (e.g., elected officials).¹⁷

§ 100(1).

This provision is the centerpiece of the Code of Ethics. It prohibits the official from taking any action that might financially benefit any of the listed persons. Sometimes inaction personally benefits an official or his or her close associates—for example, when a code enforcement officer fails to cite his or her brother for a zoning violation. For that reason, the provision also prohibits the official from refraining from acting. In either case, the official must recuse himself or herself pursuant to section 100(2).

A municipality may wish to add additional categories of associates or relatives to the list, such as brothers-in-law and sisters-in-

16. See N.Y. ELEC. LAW § 14-100 (McKinney Supp. 1993).

17. See, e.g., NEW YORK, N.Y., CHARTER § 2604(b)(15). The New York Court of Appeals upheld § 2604(b)(15) in *Golden v. Clark*, 76 N.Y.2d 618, 564 N.E.2d 611, 563 N.Y.S.2d 1 (1990).

law of the official, business associates of the official, employers of designated relatives of the official, partners of the official, creditors of the official, or persons from whom the official has received a substantial gift within the previous twelve months. With respect to the restriction on acting to benefit a campaign contributor (section 100(1)(f)), a municipality may wish to include contributions through a party committee or noncandidate political committee and may wish to expand the twelve month period to an election cycle. The municipality may also wish to adjust the \$1,000 threshold in section 100(1)(f) to an amount appropriate in the particular community.

§ 100(2).

This provision requires that the official entirely refrain from participating in the matter. Mere abstention from voting on the matter is not sufficient. The official may not even discuss the matter with other officials. To emphasize the official's duty to divorce himself or herself *completely* from the matter, some municipalities may wish to add the phrase "formally or informally" between "from" and "acting."

§ 100(3).

General Municipal Law § 805-a(1)(a) provides that:

No municipal officer or employee shall . . . directly or indirectly, solicit any gift, or accept or receive any gift having a value of seventy-five dollars or more, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part . . .¹⁸

At least one trial court has held that the above provision is unconstitutionally vague.¹⁹

Any conduct prohibited by section 805-a(1)(a) would also be prohibited by the gift provision in the model law, even though section 805-a(1)(a), unlike the model law, contains no exemptions for gifts from parents, spouses, and children.²⁰ Such exemptions are implicit in the "reasonably be inferred" and "reasonably be ex-

18. N.Y. GEN. MUN. LAW § 805-a(1)(a) (McKinney Supp. 1993).

19. *People v. Moore*, 85 Misc. 2d 4, 377 N.Y.S.2d 1005 (Fulton County Ct. 1975).

20. N.Y. GEN. MUN. LAW § 805-a(1)(a) (McKinney Supp. 1993).

pected" language of section 805-a(1)(a). However, currently, no court has addressed this issue.

The gifts provision in the model law prohibits acceptance of gifts only when the official "knows or has reason to know" the giver has received or sought a financial benefit from the municipality. The official is thus protected from inadvertently violating the law by accepting a gift from someone who the official could not have known did business with the municipality. Moreover, section 102 excludes awards from charitable organizations, gifts from parents, spouses, and children, gifts having an aggregate value of seventy-five dollars or less during the year, payments for performing certain wedding ceremonies, and gifts accepted on behalf of the municipality and turned over to the municipality, e.g., the mayor's acceptance of a gift on behalf of his or her city from the mayor of a sister city.

§§ 100(4) & 100(5).

Section 805-a(1)(c) of the General Municipal Law prohibits officials from receiving or agreeing to receive compensation for services to be rendered in relation to any matter before the official's own agency or before an agency over which the official has jurisdiction or to which he or she has the power to appoint someone.²¹ Section 805-a(1)(d) of the General Municipal Law prohibits officials from receiving or agreeing to receive compensation for services to be rendered in relation to any matter before *any* agency of the municipality *if* the compensation is contingent upon any action by the agency with respect to the matter.²² The prohibition on contingent payment, however, does not prohibit the fixing of a non-contingent fee, at any time, based on the reasonable value of the services rendered.

The above provisions fail to address many potential conflicts of interest. For example, although the provisions prohibit a town zoning board member from being paid to appear on behalf of a private client before the town zoning board, they do not prohibit the town attorney from appearing before the zoning board on behalf of a private client, nor would they prohibit the chair of the planning board, or even the code enforcement officer, from appearing before the zoning board for a private client. Sections 100(4) and (5) of the model law address such conflicts and completely incorpo-

21. N.Y. GEN. MUN. LAW § 805-a(1)(c) (McKinney Supp. 1993).

22. *Id.* § 805-a(1)(d).

rate the restrictions contained in sections 805-a(1)(c) and (d) of the General Municipal Law.

With respect to sections 100(4) and 100(5) of the model law, one might argue that any conduct prohibited by subdivision 5 (appearances) is also prohibited by subdivision 4 (representation). However, because the restriction on appearances is probably easier to understand and enforce than the restriction on representation, both provisions should be included in the Code of Ethics.

Some municipalities may find the municipal-wide bar on representations and appearances too broad and may, therefore, wish to restrict the bar to the official's own agency. However, such a narrow bar would, for example, permit the town code-enforcement officer or the town attorney to represent private clients before the town planning board because those officers are not employees of that agency. The broader prohibition or, at the very least, a prohibition that would prevent such abuses is therefore preferable.

In addition, some municipalities may wish to preclude not only representation but also assistance or legal assistance, with an exclusion for representation or assistance in the performance of the officer's or employee's official duties. The model law's exclusion for actions authorized by state or federal law (section 102(1)) would permit an official to represent or assist persons in an official capacity. Sections 102(6) and 102(7) specifically exclude the receipt of municipal services or benefits generally available to residents of the municipality and, in matters of public advocacy, the representation of constituents by elected officials without compensation.

The bar on representation and appearances does not prohibit an official from participating in the fee that his or her business associate receives from such appearances or representation. Furthermore, the only municipal agencies before which the official's business associate may not appear are the official's own agency and agencies over which the official exercises control (section 106).

§ 100(6).

This provision is broader than General Municipal Law section 805-a(1)(b) because it applies to *all* confidential information, however acquired, and prohibits use of confidential information to further *anyone's* personal interests.²³ Confidential information may

23. N.Y. GEN. MUN. LAW § 805-a(1)(b) (McKinney Supp. 1993) ("No municipal officer or employee shall . . . disclose confidential information acquired by him in the course of his official duties or use such information to further his personal interests.")

be disclosed as permitted by law (section 102(1)), including the state whistleblower law.²⁴

§ 100(7).

Political solicitation of subordinates by an official fosters the appearance, if not the reality, of coercion. The Code of Ethics therefore bars such solicitation, except from political appointees (see definition of “subordinate” in section 105(11)).

Inclusion of the word “knowingly” means that neither an official nor his or her campaign committee need cull the names of municipal officials from voter registration lists. However, a targeted mailing to municipal officials would be prohibited.

Some municipalities may wish to add a bar on soliciting from persons who have sought or received a financial benefit from the municipality within the previous twenty-four months. Municipalities may also wish to consider whether they should extend the bar of section 100(7) to nonincumbent candidates because appointed officials may fear reprisal if they refuse to aid the campaign of a non-incumbent who later wins the election.

Section 100(7) is *not* a little Hatch Act²⁵ and does not restrict voluntary political contributions or political activity by any official.²⁶ The section merely prohibits an official from putting the political bite on a subordinate.²⁷

§ 100(8).

Article 18 of the General Municipal Law contains no restrictions upon the activities of former municipal officials. Thus, a village planning board member may today vote to approve a major development and tomorrow go to work for the developer and even appear before the planning board on that very same project.

The revolving door provision in the model law restricts only the former official; it does not restrict his or her business associates.²⁸ Thus, for example, a former mayor could not work on matters for or before his or her municipality for one year, but all of the mayor’s colleagues in his or her new firm could. Section 100(8),

24. N.Y. CIV. SERV. LAW § 75-b (McKinney Supp. 1993).

25. 5 U.S.C. §§ 1501-1508 (1977 & Supp. 1993).

26. Cf. N.Y. LAB. LAW § 201-d (McKinney Supp. 1994); N.Y. CIV. SERV. LAW § 27 (McKinney 1987).

27. See also N.Y. CIV. SERV. LAW § 107 (McKinney Supp. 1993).

28. See generally *Forti v. New York State Ethics Comm’n*, 554 N.E.2d 876 (N.Y. 1990) (upholding restrictions in section 73 of the Public Officers Law on former state executive branch employees appearing before their former agencies).

however, does prohibit the former official from profiting from his or her associates' business with the municipality.²⁹

Moreover, section 100(8) only restricts appearances by the former official on behalf of customers or clients. The official may appear on his or her own behalf, for example, to seek a zoning variance for his or her own home. In addition, the revolving door provision does not apply to officials who performed only ministerial duties while in municipal service (section 102(8)).

Under section 100(8), a business whose owner and sole employee is a former official would be effectively barred for one year from appearing before the municipality on behalf of customers or clients. However, if that bar creates a particular hardship, the ethics board could grant a waiver under section 211.

The revolving door bar extends for only one year, a period that is sufficiently long for the vast majority of municipalities. Those municipalities that need a longer bar may adopt it, but should bear in mind that the adoption of lengthy bars tends to discourage recruitment of qualified officials. Under the model law a lifetime bar applies to matters on which the former official personally worked while in municipal service. "Personally worked" means the official actually worked on the matter, not that he or she supervised a department that worked on the matter.

This revolving door provision is a municipal-wide bar. Some municipalities may wish to limit the bar to the former official's particular agency. For the reasons set forth in the comments to section 100(4) above, such a narrow bar is not recommended.

Section 100(8) would prohibit the municipality from hiring a former official as an independent contractor. Some municipalities may, therefore, wish to include the phrase "or on behalf of the [County, City, Town, or Village]" after the phrase "except on his or her own behalf." However, such an exemption would permit sweetheart deals between the municipality and a former official, who would normally have the edge in competing with vendors lacking his or her municipal contacts.

29. To that extent, this model local ethics law restricts former officials more than current officials. That apparent anomaly, however, makes sense when one notes that former officials are subject only to the revolving door and confidential information provisions while current officials are subject to the entire panoply of restrictions in the Code of Ethics.

§ 100(9).

One might argue that this provision does not regulate any conduct not otherwise regulated by the other provisions of the Code of Ethics. However, an avoidance of conflicts provision is common to many municipal codes of ethics around the country and provides an additional arrow in the Code of Ethics quiver.

Municipalities finding the phrase “put them in violation” too colloquial could change it to read “result in a violation.”

§ 100(10).

The model law prohibits a municipal official from inducing or aiding another municipal official to violate the Code of Ethics. For example, if a town board member and a member of the town zoning board jointly own a certain piece of property, the town board member could not ask the zoning board member to vote for a variance for the property.

§ 101. Transactional Disclosure.

1. Whenever a [County, City, Town, or Village] officer or employee is required to recuse himself or herself under the Code of Ethics set forth in section 100 of this [chapter], he or she

- (i) shall immediately refrain from participating further in the matter,
- (ii) shall promptly inform his or her superior, if any, and
- (iii) shall promptly file with the [County, City, Town, or Village] clerk a signed statement disclosing the nature and extent of the prohibited action or, if a member of a board, shall state that information upon the public record of the board.

2. An officer or employee shall not be required to file a disclosure statement pursuant to this section if he or she, with respect to the same matter, has filed with the [governing body of the county, city, town, or village] a disclosure statement complying with requirements of section 104 of this [chapter].

§ 101.—*Comment.*

Far more important than blunderbuss annual financial disclosure, transactional disclosure provides pinpoint disclosure when a conflict actually arises and should thus constitute the primary focus of disclosure in any ethics scheme.

Some municipalities may wish to replace "nature and extent of the prohibited action" with "reason for recusal," a less precise phrase.

Section 803 of the General Municipal Law, which is incorporated in section 104(2) of the model law, requires disclosure of certain interests in contracts.³⁰ To eliminate an official's need to file separate disclosure statements for the same transaction under both section 104 and section 101, section 101(2) exempts an official from having to file disclosure statements for the same transaction under both section 104 and section 101.

§ 102. Exclusions from the Code of Ethics and from Transactional Disclosure.

The provisions of sections 100 and 101 of this [chapter] shall not prohibit, or require recusal or transactional disclosure as a result of:

1. An action specifically authorized by statute, rule, or regulation of the state of New York or of the United States.
2. A ministerial act.
3. Gifts
 - (a) received by the [County, City, Town, or Village] officer or employee from his or her parent, spouse, or child; or
 - (b) having an aggregate value of \$75 or less during any twelve-month period; or
 - (c) accepted on behalf of the [County, City, Town, or Village] and transferred to the [County, City, Town, or Village].
4. Gifts or benefits having a value of \$50 or less that are received by a [County, City, Town, or Village] officer or employee listed in section 11 of the Domestic Relations Law of the State of New York for the solemnization of a marriage by that officer or employee at a place other than his or her normal public place of business or at a time other than his or her normal hours of business.
5. Awards from charitable organizations.
6. Receipt of [County, City, Town, or Village] services or benefits, or use of [County, City, Town, or Village] facilities, that are generally available on the same terms and conditions to residents or a class of residents in the [County, City, Town, or Village].

30. N.Y. GEN. MUN. LAW § 803 (McKinney 1986).

7. Representation of constituents by elected officials without compensation in matters of public advocacy.

8. [County, City, Town, or Village] officers or employees appearing or practicing before the [County, City, Town, or Village] or receiving compensation for working on a matter before the [County, City, Town, or Village] after termination of their [County, City, Town, or Village] service or employment where they performed only ministerial acts while working for the [County, City, Town, or Village].

§ 102.—*Comment.*

§ 102(2).

The village clerk may, for example, issue a fishing license to her brother.

§ 102(3).

Some municipalities may also wish to exclude gifts from siblings because the model law would prohibit the sibling of an official from giving the official a wedding gift exceeding seventy-five dollars if the sibling sought or received a financial benefit from the municipality within the previous twenty-four months. However, such a situation would rarely occur. Moreover, where the situation did arise, the sibling could apply for a waiver from the ethics board.

In view of the seventy-five dollar exclusion, little need would seem to exist for excluding attendance at a public social event, or attendance at a private social event (such as a dinner party) arising from normal hospitality with a value not exceeding, for example, \$100. Such exclusions inject unnecessary ambiguity into a provision that requires a bright line rule.

§ 102(4).

This provision tracks the exclusion in General Municipal Law section 805-b, which also defines a town or village judge's "normal hours of business" as "those hours only which are officially scheduled by the court for the performing of the judicial function."³¹

§ 102(5).

Some municipalities may wish to restrict this exclusion somewhat by adding the word "public" before "awards."

31. N.Y. GEN. MUN. LAW § 805-b (McKinney Supp. 1993).

§ 102(6).

As a resident of the municipality, an official should be able to receive from the municipality the same services and benefits as any other resident, provided that the official does not receive any preferential treatment.

§ 102(7).

Elected officials are elected to serve their constituents. Thus, for example, when a resident complains to a town board member that the town highway department blocks the resident's driveway with snow, the board member must be able to pursue that complaint with the proper town authorities.

The phrase "matters of public advocacy" may be replaced by "proper discharge of official duties," a phrase that appears in Public Officers Law section 73(7)(a), which regulates the business activities of state employees.³²

§ 102(8).

The revolving door restrictions (section 100(8)) only apply to officials with some discretionary authority. Employees who perform only ministerial actions are not subject to those restrictions.

§ 103. Inducement of Violations of the Code of Ethics.

No person, whether or not a [County, City, Town, or Village] officer or employee, shall induce or attempt to induce a [County, City, Town, or Village] officer or employee to violate any of the provisions of sections 100 or 101 of this [chapter].

§ 103.—*Comment.*

Under current state law, absent outright bribery, the occasional dishonest private citizen or company that induces a municipal official to violate ethics laws runs no risk of penalty. For example, hoping to keep a village's business, a bank might give a personal loan to the village treasurer at a below-market interest rate. Quite possibly, the official will lose his or her job as a result, however, absent outright bribery, the bank will lose nothing.

The Commission has repeatedly stressed that private citizens, vendors, developers, and providers must take some responsibility for municipal officials complying with ethics laws. The failure of current Article 18 to penalize private individuals and companies

³² N.Y. PUB. OFF. LAW § 73(7)(a) (McKinney 1988).

who induce a municipal official to violate ethics laws is unacceptable. Three provisions in the bill, and in this model local ethics law, reflect this philosophy: (1) the prohibition against anyone, including a private person, inducing an official to violate the Code of Ethics (section 103); (2) the debarment provision (section 112); and (3) the applicant disclosure provision (section 108). Accordingly, section 103 applies to officials and nonofficials alike.

§ 104. Interests in Contracts with the [County, City, Town, or Village].

1. Prohibited interests.

No [County, City, Town, or Village] officer or employee shall have an interest in a contract with the [County, City, Town, or Village], or an interest in a bank or trust company, that is prohibited by section 801 of the General Municipal Law of the State of New York. Any contract willfully entered into by or with the [County, City, Town, or Village] in which there is an interest prohibited by that section shall be null, void, and wholly unenforceable, to the extent provided by section 804 of that law.

2. Discloseable interests.

Any [County, City, Town, or Village] officer or employee who has, will have, or later acquires an interest in any actual or proposed contract with the [County, City, Town, or Village] shall publicly disclose the nature and extent of that interest in accordance with section 803 of the General Municipal Law. The clerk of the [governing body of the county, city, town, or village] shall cause a copy of that disclosure to be filed promptly with the Ethics Board.

3. Violations.

Any [County, City, Town, or Village] officer or employee who willfully and knowingly violates the provisions of this section shall be guilty of a misdemeanor, to the extent provided by section 805 of the General Municipal Law.

§ 104.—Comment.

The current prohibition against an official having an interest in a contract with the municipality in sections 801 and 802 of the General Municipal Law is overly broad, difficult to enforce, and virtu-

ally unintelligible to a lay person.³³ In many small, rural communities, members of the legislative body, or other elected or appointed officials, may well own the only hardware store, gas station, or snow plowing service in the area. The municipality must then either ignore the prohibition against contracts with municipal officials or obtain the goods and services at a significantly higher price from distant vendors. (Under General Municipal Law Section 800(5), this prohibition applies to *all* municipal officials—whether paid or unpaid).

The General Municipal Law's prohibition against interested contracts in section 801 functions as follows: it prohibits municipal officers and employees from having an "interest" in a "contract" with the municipality *if* the officer or employee, individually or as a member of a municipal board, has some authority with respect to that contract—namely, the power or duty to negotiate, prepare, authorize, or approve the contract or payment under the contract or the power or duty to audit bills or claims under the contract or the power or duty to appoint someone who has any of those powers or duties.³⁴ (General Municipal Law section 801(2) establishes special requirements for fiscal officers and employees of municipalities).

"Contract" is broadly defined in General Municipal Law section 800(2) to include not only express or implied agreements with the municipality but also claims, accounts, or demands against the municipality.³⁵ Thus, for example, a law suit against the municipality would be considered a "contract."

Under General Municipal Law section 800(3), an official has an "interest" in a contract if he or she receives any "direct or indirect pecuniary or material benefit" as a result of the contract.³⁶ The official, therefore, does not need to be a party to the contract; he or she need only receive a financial benefit because of the contract. In addition, the official is deemed to have an interest in a contract of his or her family or outside business or employment.³⁷ Section 802 then sets forth fifteen exceptions to these rules.

33. See N.Y. GEN. MUN. LAW §§ 801-802 (McKinney 1986).

34. N.Y. GEN. MUN. LAW § 801 (McKinney 1986).

35. N.Y. GEN. MUN. LAW § 800(2) (McKinney Supp. 1993).

36. *Id.* § 800(3).

37. Section 800(3) states:

[A] municipal officer or employee shall be deemed to have an interest in the contract of (a) his spouse, minor children and dependents, except a contract of employment with the municipality which such officer or employee serves, (b) a firm, partnership or association of which such officer or employee is a

If the official has an interest in the contract and has the requisite power or duty with respect to that contract and if no exception applies, then that interest is prohibited. In that event, under section 804 of the General Municipal Law, the contract (if “willfully” entered into) is “null, void and wholly unenforceable”; and, under section 805, the official (if he or she “willfully and knowingly” violated the restriction) is guilty of a misdemeanor. “Wilful” does not require knowledge that the contract violated the law but only knowledge of the facts that resulted in the violation.³⁸ Where a prohibited interest in a contract exists, the official’s disclosure of the interest and his or her abstention from participating in the matter is to no avail; the contract is nonetheless void, and the official has committed a crime.

Under section 803 of the General Municipal Law, where the official “has, will have, or later acquires” an interest in an actual or proposed contract with the municipality, he or she must publicly disclose in writing to the governing body of the municipality the nature and extent of that interest as soon as he or she has knowledge of it,³⁹ unless the interest is exempted under section 802(2). Thus, the official must disclose an interest in a contract with his or her municipality even if the official lacks sufficient power or duty over the contract to render the interest prohibited and even if the interest is exempted under section 802(1). “Wilfully and knowingly” failing to disclose an interest in a contract is a misdemeanor under section 805 of the General Municipal Law.

Certain additional prohibited interest provisions apply in Nassau County under General Municipal Law section 804-a.

§ 105. Definitions.

Unless otherwise stated or unless the context otherwise requires, when used in this [chapter]:

1. “Appear” and “appear before” mean communicating in any form, including, without limitation, personally, through another person, by letter, or by telephone.

2. “Customer or client” means (a) any person to whom a [County, City, Town, or Village] officer or employee has supplied

member or employee, (c) a corporation of which such officer or employee is an officer, director or employee and (d) a corporation any stock of which is owned or controlled directly or indirectly by such officer or employee.

Id.

38. Op. St. Compt. 85-9; see also *Landau v. Percacciolo*, 66 A.D. 2d 80, 412 N.Y.S.2d 378 (App. Div. 1978).

39. See N.Y. GEN. MUN. LAW § 803 (McKinney 1986).

goods or services during the previous twenty-four months having, in the aggregate, a value greater than \$1,000 or (b) any person to whom a [County, City, Town, or Village] officer's or employee's outside employer or business has supplied goods or services during the previous twenty-four months having, in the aggregate, a value greater than \$1,000 but only if the officer or employee knows or has reason to know the outside employer or business supplied the goods or services.

3. "Ethics Board" means the Ethics Board of the [County, City, Town, or Village] of _____ established pursuant to section 203 of this [chapter].

4. "Gift" and "financial benefit" shall include any money, service, license, permit, contract, authorization, loan, travel, entertainment, hospitality, or any promise thereof, or any other gratuity or promise thereof or anything of value. A financial transaction may be a financial benefit but shall not be a gift unless it is on terms not available to the general public. "Gift" and "financial benefit" do not include campaign contributions authorized by law.

5. "Ministerial act" means an action performed in a prescribed manner without the exercise of judgment or discretion as to the propriety of the act.

6. "[County, City, Town, or Village]" means the [County, City, Town, or Village] of _____ but shall not include the [County, City, Town, or Village court].

7. "[County, City, Town, or Village] officer or employee" means any officer or employee of the [County, City, Town, or Village], whether paid or unpaid, and includes, without limitation, all members of any office, board, body, advisory board, council, commission, agency, department, district, administration, division, bureau, or committee of the [County, City, Town, or Village]. "[County, City, Town, or Village] officer or employee" shall not include:

(a) A judge, justice, officer, or employee of the unified court system;

(b) A volunteer fire fighter or civil defense volunteer, except a fire chief or assistant fire chief; or

(c) A member of an advisory board of the [County, City, Town, or Village] if, but only if, the advisory board has no authority to implement its recommendations or to act on behalf of the [County, City, Town, or Village] or to restrict the authority of the [County, City, Town, or Village] to act. No entity established pursuant to the Gen-

eral Municipal Law of the State of New York shall be deemed an advisory board for purposes of this paragraph.

8. "Outside employer or business" means:

(a) any activity, other than service to the [County, City, Town, or Village], from which the [County, City, Town, or Village] officer or employee receives compensation for services rendered or goods sold or produced;

(b) any entity, other than the [County, City, Town, or Village], of which the [County, City, Town, or Village] officer or employee is a member, officer, director, or employee and from which he or she receives compensation for services rendered or goods sold or produced; or

(c) any entity in which the [County, City, Town, or Village] officer or employee has an ownership interest, except a corporation of which the [County, City, Town, or Village] officer or employee owns less than five percent of the outstanding stock.

For purposes of this definition, "compensation" shall not include reimbursement for necessary expenses, including travel expenses.

9. "Person" shall include both individuals and entities.

10. "Relative" means a spouse, child, step-child, brother, sister, or parent of the [County, City, Town, or Village] officer or employee, or a person claimed as a dependent on the [County, City, Town, or Village] officer's or employee's latest individual state income tax return.

11. "Subordinate" of a [County, City, Town, or Village] officer or employee shall mean another [County, City, Town, or Village] officer or employee over whose activities he or she has direction, supervision, or control, except those who serve in positions that are in the exempt classification under section 41 of the Civil Service Law of the State of New York or in the unclassified service under subdivisions (a) through (f) of section 35 of that law.

§ 105.—Comment.

Although many ethics laws lead off with a section containing numerous and lengthy definitions, the Commission believed that the first section of an ethics law should be a code of ethics. Furthermore, substantive provisions should not be buried in intricately drafted definitions. In particular, words in the code of ethics must not be so defined that they trap an unsuspecting official.

The definitions in this model local law are kept to a minimum and do not add to the official's duties imposed by the plain meaning of the Code of Ethics. Rather, if anything, the definitions cut back on the official's duties as he or she would understand them to be upon reading the Code of Ethics. For example, the definition of "relative" only includes the immediate family, not cousins, uncles, or aunts. Thus, the official who reads the Code of Ethics, without consulting the definitions or exclusions, will in all likelihood view the Code of Ethics as more restrictive than it really is. This approach protects the official from inadvertently violating the Code of Ethics.

Some municipalities may wish to include additional definitions—for example, of "member of household" (section 100(1)(c)) or "political committee" (section 100(7)).⁴⁰

§ 105(2).

An employee of a large corporation may not know many of the customers or clients of his or her employer and should not be penalized for that understandable ignorance. For that reason, the "knows or has reason to know" language is included in the definition.

§ 105(4).

"A financial transaction . . . on terms not available to the general public" would include, for example, a reduced-interest loan to a municipal official. The reduction in interest would constitute a gift.

§ 105(6).

As discussed under section 105(7) below, the model law excludes court officers and employees from its coverage. The definition of the municipality (county, city, town, or village) enacting the local ethics law expressly excludes the municipal court, thereby clarifying that the local ethics law does not apply to the local court. Thus, to the extent permitted by state regulations governing attorneys, a lawyer who is a town zoning board member could appear in the town justice court on behalf of a private client. So, too, the revol-

40. "Member of household" might be defined as follows: "'Member of household shall mean any person with whom an officer or employee of the [County, City, Town, or Village] lives as a single household unit.'" *Cf. McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 488 N.E.2d 1240, 498 N.Y.S.2d 128 (N.Y. 1985). "Political committee" might be defined as follows: "'Political committee' shall have the meaning ascribed to that term in section 14-100 of the Election Law."

ing door provision would not restrict former municipal officials (e.g., assistant district attorneys or assistant county attorneys) from appearing before the local court after leaving municipal service.

§ 105(7).

Like Article 18, the model law includes unpaid as well as paid officials. Indeed, at the municipal level it is the unpaid officials, such as zoning and planning board members, who often wield the greatest power.

Except in the area of financial disclosure, Article 18 regulates not only executive and legislative officers and employees but also judicial officers and employees.⁴¹ The model law, however, excludes judges and nonjudicial employees of the Unified Court System. Accordingly, for example, the revolving door bar would not preclude a former court clerk from appearing before the municipality's zoning board immediately upon leaving municipal service. If the municipality feels that further clarification is needed in that regard, the following exclusion could be added to section 102: "Appearances by a former [County, City, Town, or Village] officer or employee in a court of the [County, City, Town, or Village]."

Members of purely advisory boards are excluded from coverage by the Code of Ethics because those members are not "officers or employees" of the municipality.⁴²

§ 105(8).

Some municipalities may wish to lower the five percent threshold for publicly traded stock. Other municipalities may wish to require disclosure of an official's interest in a corporation that exceeds a specific value, such as \$25,000, even if the official owns less than five percent of the stock in that corporation. Some mu-

41. N.Y. GEN. MUN. LAW §§ 800(5), 810(2), 810(3) (McKinney Supp. 1993).

42. Cf. *ASPCA v. Board of Trustees of State Univ. of N.Y.*, 184 A.D.2d 508, 584 N.Y.S.2d 198 (App. Div. 1992) (holding that SUNY Laboratory Animal Users' Committee was not "performing a governmental or proprietary function for the state" within the meaning of the Freedom of Information Law, N.Y. PUB. OFF. LAW §§ 84-90 (McKinney Supp. 1993)); *ASPCA v. Board of Trustees of State Univ. of N.Y.*, 165 A.D. 561, 568 N.Y.S.2d 631 (App. Div. 1991), *aff'd on other grounds*, 79 N.Y.2d 927, 591 N.E.2d 1169, 582 N.Y.S.2d 983 (1992); *Poughkeepsie Newspaper Div. of Gannet Satellite Info. Network v. Mayor's Intergov'tal Task Force on N.Y.C. Water Supply Needs*, 145 A.D.2d 65, 537 N.Y.S.2d 582 (App. Div. 1989); *Goodson Todman Enter., Ltd. v. Town Bd. of Milan*, 151 A.D.2d 642, 542 N.Y.S.2d 373 (App. Div.), *appeal denied*, 547 N.E.2d 103 (1989) (all three cases holding that an advisory board meeting certain conditions is not a "public body" for purposes of the New York State Open Meetings Law, Public Officers Law §§ 100-111).

municipalities may wish to include debt as well as equity within the definition of “outside employer or business.” Other municipalities may wish to extend the definition to noncompensated positions, such as the director of a nonprofit organization; however, municipalities should exercise caution in that regard, lest the definition capture every religious, fraternal, and social affiliation of an official.

§ 105(10).

“Relative” appears both in the general prohibition of the Code of Ethics (section 100(1)(e)) and in the annual disclosure requirement (section 107(4)(a)). The definition is limited to the immediate family. Some municipalities may wish to expand or contract that definition.

§ 105(11).

The smooth functioning of government often requires, at least in large municipalities, ideological and political compatibility between elected officials and their senior staff. To prohibit officials from soliciting from such subordinates, who are inherently part of the political process, is simply unrealistic. Thus, the model law excludes exempt employees and certain unclassified employees from the definition of subordinate.

§ 106. Appearances by Outside Employers and Businesses of [County, City, Town, or Village] Officers and Employees.

1. Except as provided in subdivision 3 of this section, the outside employer or business of a [County, City, Town, or Village] officer or employee shall not appear before the particular agency in which the [County, City, Town, or Village] officer or employee serves or by which he or she is employed.

2. Except as provided in subdivision 3 of this section, the outside employer or business of a [County, City, Town, or Village] officer or employee shall not appear before any other [County, City, Town, or Village] agency if the [County, City, Town, or Village] officer or employee has the authority to appoint any officer, employee, or member of the agency or to review, approve, audit, or authorize any budget, bill, payment, or claim of the agency.

3. Nothing in this section shall be construed to prohibit the outside employer or business of a [County, City, Town, or Village] officer or employee from

- (a) Appearing on its own behalf, or on behalf of the [County, City, Town, or Village], before a [County, City, Town, or Village] agency;
- (b) Seeking or obtaining a ministerial act; or
- (c) Receiving a [County, City, Town, or Village] service or benefit, or using a [County, City, Town, or Village] facility, which is generally available to the public.

§ 106. — *Comment.*

Article 18 contains no general prohibition on the employer or business of a municipal official appearing before the official's board or agency or before other agencies of the municipality over which the official has control. Thus, for example, a mayor's law firm could appear on behalf of a private client before the city council, so long as the mayor receives no compensation for that representation.⁴³

Section 106 of the model law would restrict such appearances. However, one must emphasize that under section 106 an official's private employer or business is only prohibited from appearing on behalf of a customer or client before the official's particular agency or before an agency over which the official exercises some control. The firm may appear before any other agency of the municipality. The firm may also appear before the official's own agency on behalf of the firm itself, for example, to obtain a zoning variance to expand its own office; however, in that event the official would still be required to recuse himself or herself under section 100(2). "Particular" is included before "agency" to clarify that "agency" includes only that unit within which the official has control. In addition, the firm may appear before the official's agency on behalf of the municipality or to seek a ministerial action or to receive the same benefits available to anyone else in the community (section 106(3)).

Some municipalities may wish to extend the ban on appearances by officials' firms to agencies with which the official is not associated. However, prohibiting an official's outside firm or business from appearing before any agency of the municipality would effectively bar many professionals from serving on municipal boards. Furthermore, citizens' concerns over appearances by officials' firms before the municipality are met by a prohibition of such ap-

43. N.Y. GEN. MUN. LAW § 805-a(1)(c) (McKinney Supp. 1993).

pearances before those agencies of the municipality over which the official has some control.

§ 107. Annual Disclosure.

1. Officers and employees required to file.

Officers and employees holding the following job titles or positions shall be required to file a signed annual disclosure statement:

[Set forth the job titles or positions of all officers and employees required to file annual disclosure statements.]

2. Time and place for filing.

Annual disclosure statements shall be filed with the Ethics Board:

- (a) Within 120 days after the effective date of this section;
- (b) Within 30 days after becoming subject to the requirements of subdivision 1 of this section; and
- (c) No later than May 15 of each year thereafter.

3. Changes in disclosed information.

Within 30 days after a change in the information contained in his or her most recently filed annual disclosure statement, an officer or employee shall file a signed amendment to the statement indicating the change.

4. Contents of annual disclosure statement.

The annual disclosure statement shall disclose:

- (a) The location of any real property within the [County, City, Town, or Village], or within one mile of the boundary of the [County, City, Town, or Village], in which the officer or employee, or his or her relative, has a financial interest.
- (b) With respect to each outside employer or business of the [County, City, Town, or Village] officer or employee:
 - (i) Its name (if any);
 - (ii) The nature of its business;
 - (iii) Whether it is self employment, a sole proprietorship, or an entity and, if an entity, what type of entity;
 - (iv) The [County, City, Town, or Village] officer's or employee's relationship to it, such as owner, part-

ner, officer, director, member, employee, or shareholder.

- (c) With respect to each outside employer or business of the [County, City, Town, or Village] officer's or employee's spouse, the information required by paragraph (b) of this subdivision.

5. Good faith efforts.

Failure to disclose the information required by subdivision 4 of this section with respect to a [County, City, Town, or Village] officer's or employee's spouse or other relative shall not constitute a violation of that subdivision if the officer or employee has made a good faith effort to obtain the information and if he or she also sets forth those efforts in his or her disclosure statement.

§ 107.—*Comment.*

NOTE: COUNTIES, CITIES, TOWNS, AND VILLAGES WITH POPULATIONS OF 50,000 OR MORE MUST COMPLY WITH THE FINANCIAL DISCLOSURE REQUIREMENTS SET FORTH IN SECTIONS 810-813 OF THE GENERAL MUNICIPAL LAW.

However appropriate lengthy annual financial disclosure statements may be for state employees, who are full time and relatively well paid, the imposition of such statements by state mandate upon local government officials is wholly inappropriate. Unlike state government, local government at the highest levels is essentially a volunteer government. Legislative bodies, zoning boards of appeal, planning boards, architectural review boards, community college boards, and the like, are composed entirely of unpaid or minimally paid members.

The grossly intrusive financial disclosure requirements in Article 18 have given annual disclosure a bad reputation. However, while far less significant than transactional disclosure, reasonable annual disclosure does fill an important, though limited, role in an ethics law. In particular, annual disclosure reveals potential conflicts of interest before they arise and thus alerts the official—and the citizenry—to those potential conflicts. Annual disclosure thereby provides a check on transactional disclosure and protects officials by

identifying potential ethical pitfalls, which the official can then take steps to avoid.⁴⁴

§ 107(1).

The local government ethics bill proposed by the Commission⁴⁵ would require disclosure by the following classes of officers and employees:

- (a) Elected officials;
- (b) Department heads and those authorized to act on their behalf (e.g., first deputies);
- (c) Officers and employees who hold policymaking positions, including members of municipal boards, such as the planning and zoning boards;
- (d) Officials whose job descriptions or whose actual duties involve the negotiation, authorization, or approval of
 - (i) Contracts, leases, franchises, revocable consents, concessions, variances, special permits, or licenses;
 - (ii) The purchase, sale, rental, or lease of real property, personal property, or services, or a contract therefor;
 - (iii) The obtaining of grants of money or loans; or

44. See generally *Bertoldi v. Wachtler*, 952 F.2d 656 (2d Cir. 1991) (per curiam) (upholding, against federal and state constitutional challenges, financial disclosure requirements of New York's Ethics in Government Act as applied to court clerks); *Igneri v. Moore*, 898 F.2d 870 (2d Cir. 1990) (holding that financial disclosure provisions of Public Officers Law § 73-a, as applied to political party chairs, do not violate constitutional right to privacy); *Levison v. County of Orange*, 186 A.D.2d 257, 588 N.Y.S.2d 330 (App. Div. 1992) (upholding county ethics board's refusal to grant employee waiver of disclosure requirement); *Watkins v. New York State Ethics Comm'n*, 554 N.Y.S.2d 955 (Sup. Ct. 1990) (holding that financial disclosure provisions of Public Officers Law § 73-a, including requirements for financial disclosure by spouses, do not violate federal or state constitutional rights to privacy, free speech and free association, fourth amendment protection, equal protection, or the privilege against self-incrimination); *Grygas v. New York State Ethics Comm'n*, 554 N.Y.S.2d 779 (Sup. Ct. 1990) (rejecting claim that New York State Legislature, in violation of separation of powers provision of article III, section 1, of New York State Constitution, delegated to state agencies, and to State Ethics Commission, authority to determine which state employees are "policy makers" for purpose of financial disclosure, without meaningful standards and guidelines); *Twelve Assistant Dist. Attorneys v. Nassau County Bd. of Ethics*, N.Y. L.J., Nov. 12, 1991, at 35 (upholding local board of ethics' denial of assistant district attorneys' request for exemptions from filing financial disclosure statements, even though filers were not policymakers).

45. See Temporary State Comm'n on Local Gov't Integrity, *supra* note 1 at 26 (Appendix L).

- (iv) The adoption or repeal of any rule or regulation having the force and effect of law.

The above categories are taken from sections 810(2), 810(3), 812(1), and 813(9)(k) of the General Municipal Law. Municipalities subject to mandatory financial disclosure under section 811 of that law must require, at a minimum, annual disclosure by those types of officials, although such municipalities may, if they desire, require disclosure by additional types of officials. Municipalities not subject to mandatory annual financial disclosure under current Article 18 may wish to expand or contract the above list. For example, some municipalities might wish to add candidates for local elected office or local political party leaders.⁴⁶

For clarity, a municipality's local ethics law should set forth the job titles or positions of the officials required to file annual disclosure statements.

§ 107(2).

Municipalities may wish to include different deadlines. The specified date of May 15 occurs a month after most officials' income tax returns are due and should provide adequate time for an official to file.

§ 107(3).

Some persons fear that this requirement may trap officials who simply forget to file an amendment when, for example, they sell real property they own. On the other hand, absent such a requirement, a disclosure statement may rapidly become outdated.

§ 107(4).

WARNING: THESE DISCLOSURE REQUIREMENTS DO NOT COMPLY WITH CURRENT STATE LAW FOR COUNTIES, CITIES, TOWNS, AND VILLAGES WITH A POPULATION OF 50,000 OR MORE. A DISCLOSURE FORM COMPLYING WITH THOSE REQUIREMENTS IS SET FORTH IN APPENDIX A

Annual disclosure requirements differ widely throughout the country. The requirements set forth in the model law will suffice in all but the largest municipalities in the state because the vast majority of conflicts of interest arise either with respect to the offi-

46. See N.Y. GEN. MUN. LAW § 812(1)(a) (McKinney Supp. 1993).

cial's real property ("May I vote to make the land adjoining my brother's home a park?") or with respect to the official's nonmunicipal business or employment.⁴⁷

Numerous discussions and public hearings during the Commission's tenure revealed virtually no opposition to disclosure of the information required by section 107(4), precisely because that information is relevant to the duties of the officials. Furthermore, all of the information requested by section 107(4) is a matter of public knowledge, although it is not otherwise collected in one place. Ethics boards have the authority to subpoena additional information from the official if necessary (section 209(1)). They also have the power under section 211 to grant waivers from filing or from disclosing certain information on the annual disclosure statement in the rare instances in which such filing or disclosure proves intrusive or dangerous (e.g., the home address of certain law enforcement officials in a large city).

Section 107(4)(a) requires disclosure of the location of the real property of the official and of his or her spouse, brothers, sisters, parents, children, and dependents. Those relatives are included because of the significant appearance of impropriety that results when actions of an official benefit his or her relative's real property. However, officials need not disclose the nonmunicipal business or employment of their parents, children, or siblings (section 107(4)(b)-(c)). Real property "within one mile of the boundary of the [municipality]" should be disclosed because an official's actions not infrequently affect property in the neighboring community. In the event an official, after a good faith effort, is unable to obtain the required information from an estranged spouse or other relative, the official need only set forth those efforts in the disclosure statement; he or she need not review land records (section 107(5)). (Some municipalities may wish to replace the good faith effort provision with a requirement that an official who lacks the requested information about his relative need only so state under oath or by affirmation subject to the penalties of perjury.)

The model law does *not* require disclosure of any financial data, such as the amount of income an official receives from nonmunicipal business or employment. As the Commission often remarked, disclosure of financial data serves little purpose because a conflict

47. A sample disclosure form complying with the requirements of section 107(4) is set forth in Mark Davies, *1987 Ethics in Government Act: Financial Disclosure Provisions for Municipal Officials and Proposals for Reform*, 11 PACE L. REV. 243, 269-272 (1990) (Appendix B: Annual Statement of Financial Disclosure).

is a conflict, whether it involves \$500 or \$5,000. Furthermore, officials strenuously object to disclosing their finances; the financial disclosure requirements of Article 18, mandatory for the municipalities with populations of 50,000 or more, have already caused the resignation of over 200 officials around the state.⁴⁸ Finally, under Article 18, financial data must be redacted before the disclosure statement can be shown to the public;⁴⁹ redaction substantially increases the administrative burden and expense of administering an ethics law.

Some municipalities may feel the need to require disclosure of additional information, such as creditors or debtors of the official, and such as persons from whom the official has received a gift in excess of a specified amount during the year covered by the filing. Some municipalities may wish to vary the type and amount of disclosure according to the nature of the official's duties or according to whether the official is paid or unpaid. However, many volunteer board members, such as members of planning and zoning appeal boards, have extensive authority at the local level and should, therefore, be required to file some form of annual disclosure statement.

The text of the disclosure form should not be included in the local law, lest every minor clarification in the form require a new local law.

§ 108. Applicant Disclosure: Generally.

1. Where a person requests the [County, City, Town, or Village] or a [County, City, Town, or Village] officer or employee to take or refrain from taking any action (other than a ministerial act) that may result in a financial benefit both to the requestor and to either any officer or employee of the [County, City, Town, or Village] or one of the other persons listed in subdivision 1 of section 100 of this [chapter], the requestor shall disclose the names of any such persons, to the extent known to the requestor at the time of the request.

2. If the request is made in writing, the disclosure shall accompany the request. If the request is oral and made at a meeting of a public body, the disclosure shall be set forth in the public record of the body. If the request is oral and not made at a meeting of a

48. See Temporary State Comm'n on Local Gov't Ethics, Final Report 9 (unpublished section of the Report, on file with the *Fordham Urban Law Journal*).

49. See N.Y. GEN. MUN. LAW § 813(18)(a)(1) (McKinney 1988 & Supp. 1993); N.Y. PUB. OFF. LAW § 89(2)(a) (McKinney 1988).

public body, the disclosure shall be set forth in a writing filed with the [County, City, Town, or Village] clerk.

3. A person shall not be required to file a disclosure statement pursuant to this section if he or she, with respect to the same matter, has filed a disclosure statement complying with requirements of section 109 of this [chapter].

§ 108.—*Comment.*

This section is the second of three provisions in this model local ethics law, reflecting the view that private citizens and companies must share responsibility for officials complying with ethics laws.

Article 18 requires applicant disclosure only in connection with land use applications; that requirement is reflected in section 109 of this model law. Section 108 broadens applicant disclosure to all instances in which the applicant is requesting the municipality to act (or refrain from acting) on a matter in which any official of the municipality, or his or her family, business, customers, or clients, may have a financial interest. For example, an applicant for a zoning variance would be required to list the names of any officer or employee of the municipality who might financially benefit from the granting of the application.

Applicant disclosure provides a check on transactional and annual disclosure; together, these three types of disclosure form the disclosure triad in this model law. Section 108 does not require the applicant to research which officials, if any, have an interest in the matter, but only requires the applicant to disclose the names of interested officials to the extent the applicant knows them. Also, the section imposes no burden on the applicant to update the disclosure if the applicant later learns that certain officials have an interest in the application.

To avoid imposing too great a burden on applicants, section 108 only requires applicant disclosure when the application financially benefits the applicant, for example, a zoning variance for the applicant's home. Thus, for example, no applicant disclosure would be required by a developer who offers to donate as parkland a lot immediately across the street from the building inspector's home. Some municipalities may, therefore, wish to delete the requirement in section 108 that the requested action result in a financial benefit to the requester.

To obviate the necessity of an applicant having to file one disclosure statement under section 108 and another one under section 109 for the same application, section 108(3) exempts an official

who files a statement under section 109 from filing one under section 108.

§ 109. Applicant Disclosure: Land Use Applications.

1. Disclosure.

Every application, petition, or request submitted for a variance, amendment, change of zoning, approval of a plat, exemption from a plat or official map, license, or permit, pursuant to the provisions of any ordinance, local law, rule, or regulation constituting the zoning and planning regulations of the [County, City, Town, or Village] shall state the information required, to the extent required, by section 809 of the General Municipal Law of the State of New York.

2. Violations.

Any person who willfully and knowingly violates the provisions of this section shall be guilty of a misdemeanor, to the extent provided by section 809 of the General Municipal Law.

§ 109.—Comment.

As noted above, this section reflects the requirements of section 809 of the General Municipal Law. It is not contained in the bill proposed by the Commission and Advisory Board because its provisions are sufficiently covered by section 108 of the bill.

§ 110. Void Contracts.

Any contract or agreement entered into by or with the [County, City, Town, or Village] which results in or from a violation of any provision of sections 100, 101, or 106 of this [chapter] shall be void unless ratified by the [governing body of the county, city, town, or village]. Such ratification shall not affect the imposition of any criminal or civil penalties pursuant to this [chapter] or any other provision of law.

§ 110.—Comment.

Some municipalities have opted for a provision making a tainted contract voidable by the municipality's ethics board. Such an approach rewards inaction. Therefore, this model law makes a contract entered into in violation of the ethics law void unless ratified by the municipality's governing body. Under the Open Meetings

Law, such ratification would have to be done in a public meeting after public notice.⁵⁰

The model local ethics law gives the governing body of the municipality, rather than the ethics board, the authority to ratify the contract, because the governing body is better able to evaluate whether the contract is in the best interests of the municipality. Ratification of the contract does not prevent the imposition of penalties upon any person whose ethical improprieties caused the contract to be tainted. Moreover, section 110 does not apply to contracts prohibited by section 801 of the General Municipal Law (incorporated into section 104 of this model local law); such contracts may not be ratified.

§ 111. Penalties.

1. Disciplinary action.

Any [County, City, Town, or Village] officer or employee who engages in any action that violates any provision of this [chapter] may be warned or reprimanded or suspended or removed from office or employment, or be subject to any other sanction authorized by law or collective bargaining agreement, by the appointing authority or person or body authorized by law to impose such sanctions. A warning, reprimand, suspension, removal, or other authorized sanction may be imposed in addition to any other penalty contained in this [chapter] or in any other provision of law.

2. Civil fine.

Any [County, City, Town, or Village] officer or employee who violates any provision of this [chapter] may be subject to a civil fine of up to \$1,500 for each violation. A civil fine may be imposed in addition to any other penalty contained in any other provision of law or in this [chapter], other than a civil forfeiture pursuant to subdivision 4 of this section. A civil fine may not be imposed for a violation of section 104 of this [chapter].

3. Damages.

Any person, whether or not a [County, City, Town, or Village] officer or employee, who violates any provision of this [chapter] shall be liable in damages to the [County, City, Town, or Village] for any losses or increased costs incurred by the [County, City,

50. N.Y. PUB. OFF. LAW §§ 103(a), 104 (McKinney 1988).

Town, or Village] as a result of the violation. Such damages may be imposed in addition to any other penalty contained in any other provision of law or in this [chapter], other than a civil forfeiture pursuant to subdivision 4 of this section.

4. Civil forfeiture.

Any person, whether or not a [County, City, Town, or Village] officer or employee, who intentionally or knowingly violates any provision of this [chapter] may be subject to a civil forfeiture to the [County, City, Town, or Village] of a sum equal to three times the value of any financial benefit he or she received as a result of the conduct that constituted the violation. A civil forfeiture may be imposed in addition to any other penalty contained in any other provision of law or in this [chapter], other than a civil fine pursuant to subdivision 2 or damages pursuant to subdivision 3 of this section. Civil forfeiture shall not be available for a violation of section 104 of this [chapter].

5. Misdemeanor.

Any person, whether or not a [County, City, Town, or Village] officer or employee, who intentionally or knowingly violates any provision of this [chapter] shall be guilty of a class A misdemeanor and, upon conviction thereof, if a [County, City, Town, or Village] officer or employee, shall forfeit his or her [County, City, Town, or Village] office or employment. This subdivision shall not apply to a violation of section 104 of this [chapter].

§ 111.—Comment.

Aside from criminal penalties—and seldom should an ethics violation be classified as criminal—few penalties exist for violation of Article 18. Indeed, except in the financial disclosure context, a violation of Article 18 is either a misdemeanor or is punishable only by disciplinary action. By contrast, the model law provides an appropriate range of penalties for ethical improprieties.

The authority for the adoption of these penalties rests upon the Municipal Home Rule Law, which empowers municipalities

[t]o provide for the enforcement of local laws by legal or equitable proceedings which are or may be provided or authorized by law, to prescribe that violations thereof shall constitute misdemeanors, offenses or infractions and to provide for the punish-

ment of violations thereof by civil penalty, fine, forfeiture or imprisonment, or by two or more of such punishments⁵¹

§ 111(1).

The appointing authority, which, as a general rule, has the power to remove appointed officials, must be given the power to impose disciplinary action. The ethics board only recommends such action.

§ 111(2).

Under sections 811(1)(c) and 813(13) of the General Municipal Law, a municipality may prescribe civil fines of up to \$10,000 for knowingly and wilfully failing to file an annual statement of financial disclosure or for knowingly and wilfully making a false statement with intent to deceive or giving information on a financial disclosure statement that the reporting official knows to be false.⁵² The model law provides for a maximum fine of \$1,500, which will normally be sufficient. However, a provision for a \$10,000 fine is required in those municipalities subject to mandatory financial disclosure under section 811(2) of the General Municipal Law.⁵³

The model law exempts violations of section 104 (prohibited interests in contracts) from the civil fine provision because such activity constitutes a misdemeanor under section 805 of the General Municipal Law and because such activity should not be prohibited but should merely require disclosure and recusal. (Such violations are not exempted from subdivision 1 (disciplinary action) because any official who commits a crime should be subject to disciplinary action.)

Finally, to avoid unfairness and possible claims of confiscation, the model law precludes imposition of both a civil fine and a civil forfeiture.

§ 111(3).

A municipality may not by local law create a new cause of action. This provision merely recognizes the municipality's right to obtain damages from an official whose unlawful acts have resulted in loss to the municipality. For that same reason, this provision does not exempt a violation of section 104.

51. N.Y. MUN. HOME RULE LAW § 10(4)(b) (McKinney 1969).

52. See N.Y. GEN. MUN. LAW §§ 811(1)(c), 813(13) (McKinney Supp. 1993).

53. See *id.* § 811(2).

§ 111(4).

For the reasons set forth under subdivision (2) above, violations of section 104 are excluded from this provision as well.

§ 111(5).

Since a violation of section 104 is subject to the separate misdemeanor provision of section 805 of the General Municipal Law, as incorporated in section 104 of this model law, such violations are excluded from this provision.

§ 112. Debarment.

1. Any person, whether or not a [County, City, Town, or Village] officer or employee, who intentionally or knowingly violates any provision of this [chapter] shall be prohibited from entering into any contract with the [County, City, Town, or Village] for a period not to exceed three years, as provided in subdivision 5 of section 210 of this [chapter]. Debarment may not be imposed for a violation of section 104 of this [chapter].

2. No person, whether or not a [County, City, Town, or Village] officer or employee, shall enter into a contract in violation of a bar imposed pursuant to subdivision 1 of this section.

3. Nothing in this section shall be construed to prohibit any person from receiving a service or benefit, or from using a facility, which is generally available to the public.

4. Under this section, a corporation, partnership, or other entity shall not be held vicariously liable for the actions of an employee. A corporation, partnership, or other entity shall not be debarred because of the actions of an employee unless the employee acted in the execution of company policy or custom. A store, region, division, or other unit of an entity shall not be debarred because of the actions of an employee of that unit unless the employee acted at the direction, or with the actual knowledge or approval, of the manager of the unit.

§ 112.—*Comment.*

This section is the third of three provisions in the bill, and in this model local ethics law, reflecting the view that private citizens and companies must share responsibility for officials complying with ethics laws. Simply stated, debarment means that anyone who intentionally or knowingly violates a provision of the model law, including a private business that induces a municipal official to

violate the Code of Ethics, may be prohibited from doing business with the municipality for a period not to exceed three years. That penalty would be imposed by the court in a proceeding initiated by the governing body of the municipality or its ethics board (section 210(5)).

Although no court has ruled on the issue, a municipality may enact this provision under the municipality's home rule powers, provided that the provision limits the debarment to doing business with the particular municipality.

Section 112 excludes from debarment violations of section 104 (prohibited interests in contracts) for the reasons set forth in the discussion of section 111 above.

Section 112(4) has been added to address a concern of the business community that debarment might be imposed against an entire corporation for the illicit and unauthorized acts of an individual employee in one division or corporate subsidiary. Under this provision, a store or division of a corporation could be debarred if the manager of that store or division directed or actually knew or approved of the ethics violation; however, the corporation itself could not be debarred unless the employee's actions reflected corporate (not store or divisional) policy or custom.⁵⁴

§ 113. Injunctive Relief.

1. Any resident, officer, or employee of the [County, City, Town, or Village] may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin an officer or employee of the [County, City, Town, or Village] from violating this [chapter] or to compel an officer or employee of the [County, City, Town, or Village] to comply with the provisions of this [chapter]. In lieu of, or in addition to, injunctive relief, the action or special proceeding, as appropriate, may seek a declaratory judgment.

2. No action or special proceeding shall be prosecuted or maintained pursuant to subdivision 1 of this section, unless (a) the plaintiff or petitioner shall have filed with the Ethics Board a sworn complaint alleging the violation by the officer or employee, (b) it shall appear by and as an allegation in the complaint or petition filed with the court that at least six months have elapsed since the

54. The phrase "policy or custom" is taken from *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 691-92 (1978) (holding that a municipality can be found liable under 42 U.S.C. § 1983 only when execution of a government policy or custom inflicts the injury and that vicarious liability does not apply under § 1983).

filing of the complaint with the Ethics Board and that the Ethics Board has failed to file a determination in the matter, and (c) the action or special proceeding shall be commenced within ten months after the alleged violation occurred.

§ 113.—*Comment.*

Allegations of unethical conduct raise sensitive questions that cannot be left unresolved. This section addresses the failure of an ethics board to act on a matter before it. If, however, an ethics board does act within the period prescribed by subdivision 2, the remedy of the aggrieved party (the official or the complainant) lies not in section 113 but in a proceeding under Article 78 of the New York State Civil Practice Law and Rules⁵⁵ to review the board's determination (see section 213). (Where the ethics board files a determination in the matter after the section 113 suit has been commenced, the matter should proceed as an Article 78 proceeding to review that determination, provided that the petitioner is aggrieved by it.)

Section 113 expressly acknowledges the right of a citizen or official to seek the aid of the court in compelling an official to comply with ethics laws or in determining what obligations those laws impose where the ethics board has failed to act on a complaint within six months.⁵⁶ Absent that six-month cap, the matter might be left unresolved for a year or more. This provision does not relieve the plaintiff or petitioner of the usual requirements that he or she have standing to sue in the particular instance and that, in an action for declaratory judgment, an actual controversy exist between the parties. Furthermore, before bringing the lawsuit, the plaintiff or petitioner must exhaust the administrative remedies set forth in subdivision two, a requirement necessitated by the excessive cost the municipality might otherwise incur as a result of repeated lawsuits.

Section 113 only applies where the *plaintiff or petitioner* has filed a sworn complaint with the ethics board. The section does not address the concern of an official against whom the complaint has been made or of whom an ethics board, on its own initiative, has undertaken an investigation. (But see discussion of section 212 below.)

Some municipalities may wish to replace "file" with "issue."

55. N.Y. CIV. PRAC. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1993).

56. Cf. N.Y. GEN. MUN. LAW § 51 (McKinney 1989).

PART B: ADMINISTRATIVE PROVISIONS*Comment.*

As noted above, this, the second part of the model law, contains the provisions for administering the law (sections 201-218). Generally, only the municipal attorney and the members of the ethics board will need to consult this part.

Duties of Municipal Clerk.

Prior to January 1, 1991, section 806(3) of the General Municipal Law required the municipal clerk to file certain documents with the state Comptroller.⁵⁷ Beginning January 1, 1991, the clerk was to file those documents with the Commission. With the termination of the Commission on December 31, 1992, the clerk must file only one of those documents with the state. However, the clerk must maintain a copy of the other documents on file for public inspection. These various documents are:

- (1) A copy of the municipality's code of ethics and amendments thereto (under section 806, codes of ethics are mandatory for counties, cities, towns, villages, and school districts);
- (2) A statement that the municipality has established an ethics board and the composition of the board (under section 808, an ethics board is optional);
- (3) A copy of the form of annual statement of financial disclosure, if any, adopted by the municipality pursuant to General Municipal Law section 811;
- (4) A copy of either:
 - (i) a statement that the municipality is not subject to mandatory annual financial disclosure under Article 18 because it is not a county, city, town, or village having a population of 50,000 or more; or
 - (ii) a statement that the municipality, though subject to annual financial disclosure, has failed to adopt an annual financial disclosure statement or to resolve to continue an existing statement and is thus subject to section 812; or
 - (iii) a statement of the date on which the governing body of the municipality either adopted a form for an annual disclosure statement or resolved to continue

57. See *id.* § 806(3) (McKinney Supp. 1993).

an existing form for an annual disclosure statement;
and

- (5) A copy of the municipal clerk's annual report to the legislature stating whether the municipality has a code of ethics in effect as of the date the report is filed.

Of those five documents, the clerk need only file item (5)—the annual report—with the state. The filing deadline is February 15. A one-sentence letter will suffice (“As of the date set forth above, the [County, City, Town, or Village] of _____ has [or does not have] in effect a code of ethics within the meaning of section 806 of the General Municipal Law”).

§ 201. Designation of Officers and Employees Required to File Annual Disclosure Statements.

Within 90 days after the effective date of this local law, and during the month of March each year thereafter, the [chief executive officer or, if none, the chair of the governing body] of the [County, City, Town, or Village] shall:

- (a) Cause to be filed with the Ethics Board a list of the names and offices or positions of all [County, City, Town, or Village] officers and employees required to file annual disclosure statements pursuant to section 107 of this [chapter]; and
- (b) Notify all such officers and employees of their obligation to file an annual disclosure statement.

§ 201.—Comment.

If the municipality does not have a chief executive officer, then the chair of the municipality's governing body should ensure that the list is compiled and the filers notified.

§ 202. Maintenance of Disclosure Statements.

1. The [County, City, Town, or Village] clerk shall transmit promptly to the Ethics Board each transactional and applicant disclosure statement filed pursuant to sections 101, 104, 108, and 109 of this [chapter].

2. The Ethics Board shall index and maintain on file for at least seven years all disclosure statements filed with the Board pursuant to sections 101, 104, 107, 108, and 109.

§ 203. Ethics Board: Establishment; Qualifications of Members; Appointment of Members; Term of Office.

1. There is hereby established an Ethics Board consisting of five members.

2. No more than one member of the Ethics Board may be an appointed officer or employee of the [County, City, Town, or Village]. Of the total membership of the Board, no more than two shall be registered in the same political party.

3. No Ethics Board member shall hold office in a political party or be employed or act as a lobbyist or hold elective office in the [County, City, Town, or Village]. An Ethics Board member may make campaign contributions but may not participate in any election campaign.

4. Within 60 days after the effective date of this local law, and no later than December 31 each year thereafter, the [elective chief executive officer, with the advice and consent of the governing body of the county, city, town, or village, or, if there is no elective chief executive officer, the chair of the governing body of the county, city, town, or village] shall appoint the members of the Ethics Board.

5. The term of office of Ethics Board members shall be three years and shall run from January 1 through December 31, except that of the members first appointed one member shall serve until December 31 of the year in which the Board is established, two shall serve until the second December 31, and two shall serve until the third December 31.

6. An Ethics Board member shall serve until his or her successor has been appointed. Consecutive service on the Ethics Board shall not exceed two full terms.

7. The members of the Ethics Board shall not receive compensation but shall be reimbursed for reasonable expenses incurred in the performance of their official duties.

§ 203.—Comment.

Section 808 of the General Municipal Law contains provisions for the establishment and membership of ethics boards.⁵⁸ However, the Attorney General's office and the Commission have taken the position that municipalities' home rule powers permit them to vary those provisions by local law.⁵⁹ Thus, for example,

58. See N.Y. GEN. MUN. LAW § 808 (McKinney 1986 & Supp. 1993).

59. See Op. Att'y Gen. 86-44; Op. Att'y Gen. 91-68.

the municipality may establish an ethics board with no members who are officers or employees of the municipality.

The local government ethics bill proposed by the Commission and its Advisory Board expressly recognized the right of municipalities to form joint or regional ethics boards or to contract out their ethics board to another municipality pursuant to Article 5-G of the General Municipal Law.⁶⁰ Municipalities lacking the resources to establish an individual ethics board may wish to consider this option, to the extent permitted by current law. Indeed, section 808(2) of the General Municipal Law authorizes county ethics boards to render advisory opinions to officers and employees of municipalities wholly or partly within the county with respect to Article 18 or local ethics laws.⁶¹ Section 808(4) authorizes local ethics boards to refer matters to the county ethics board.⁶²

Thus, some cities, towns, and villages lacking their own ethics board may either have the county ethics board act as the ethics board for the city, town, or village, or have the county ethics board take referrals from the local ethics board. For example, a provision might read: "The Ethics Board, or the [governing body of the City, Town, or Village], may request the ethics board of the County of _____ to investigate, hear, and determine a matter arising under this [chapter]."

Section 203 of the model law provides for a five-member ethics board. Some municipalities may wish to establish a three, seven, or nine-member board instead. An even number of board members is inadvisable because of the increased risk of tie votes. In addition, because a municipal board may only act by the majority vote of its total authorized membership,⁶³ municipalities should not make an ethics board so large that frequent vacancies or frequent absences will occur.

The terms of office of members should be staggered, to provide continuity in the work and philosophy of the board. Municipalities may wish to increase or decrease the length of the term of office or establish a different year of service than the calendar year. However, terms of office should be sufficiently long to ensure the members acquire expertise but not so long as to discourage persons from serving on the board. In addition, ethics board members

60. N.Y. GEN. MUN. LAW §§ 119-m to 119-o (McKinney 1986 & Supp. 1993).

61. See N.Y. GEN. MUN. LAW § 808(2) (McKinney 1986).

62. See *id.* § 808(4).

63. N.Y. GEN. CONSTR. LAW § 41 (McKinney 1951).

should not be allowed to become entrenched on the board; the model law therefore contains a term limitation.

A possible alternative provision on terms of office would be the following:

The members of the Ethics Board shall be appointed for staggered terms of five years, commencing on July 1 and expiring on June 30, provided, however, that the first Ethics Board appointed under this provision shall consist of five members appointed for terms expiring respectively on June 30 of the first, second, third, fourth, and fifth calendar years following the calendar year of appointment. Upon expiration of each term, an appointment shall be made for the following five-year term.

The restriction on municipal officials serving on the ethics board seeks to ensure that the board is as free as possible from pressure from other officials—co-workers and superiors alike. The restriction on the political make-up of the board aims to strengthen both the perception and the reality of a board that is nonpartisan. (Subdivision 2 of section 203 requires at least one member of the board to be registered in a third party or as an independent. Moreover, the restriction must be upon party registration not upon some vague criteria such as “political opinion on state and national issues.”⁶⁴) Ethics boards must not become political footballs. For that same reason, the model law restricts the political activities of ethics board members; such restrictions are quite common around the country.

§ 204. Ethics Boards: Vacancies.

When a vacancy occurs in the membership of the Ethics Board, the vacancy shall, within 60 days, be filled for the unexpired portion of the term in the same manner as the original appointment. Any person appointed to fill a vacancy on the Ethics Board shall meet the qualifications set forth in section 203 of this [chapter].

§ 205. Ethics Board: Removal of Members.

An Ethics Board member may be removed from office in the same manner in which he or she was appointed, after written notice and opportunity for reply. Grounds for removal shall be failure to meet the qualifications set forth in section 203 of this [chapter], substantial neglect of duty, gross misconduct in office,

64. *Carpinelli v. City of Kingston*, 175 A.D.2d 509, 510, 572 N.Y.S.2d 777, 779 (App. Div. 1991).

inability to discharge the powers or duties of office, or violation of this [chapter].

§ 206. Ethics Board: Meetings.

At its first meeting each year, the Ethics Board shall elect a chair from among its members. A majority of the Board shall be required for the Board to take any action. The chair or a majority of the Board may call a meeting of the Board.

§ 207. Ethics Boards: Jurisdiction, Powers, and Duties.

1. The Ethics Board may only act with respect to officers and employees of the [County, City, Town, or Village].

2. The termination of a municipal officer's or employee's term of office or employment with the [County, City, Town, or Village] shall not affect the jurisdiction of the Ethics Board with respect to the requirements imposed on him or her by this [chapter].

3. The Ethics Board shall have the following powers and duties:

(a) To prescribe and promulgate rules and regulations governing its own internal organization and procedures in a manner consistent with this [chapter];

(b) To appoint hearing officers, an executive director, if necessary, and such other staff as are necessary to carry out its duties under this [chapter], and to delegate authority to the executive director, if any, to act in the name of the Board between meetings of the Board, provided that the delegation is in writing and the specific powers to be delegated are enumerated and further provided that the Board shall not delegate the power to determine violations, recommend disciplinary action, impose any civil fine, refer any matter to a prosecutor, or render any advisory opinion. An executive director shall meet the qualifications of an ethics board member as specified in section 203 of this [chapter];

(c) To review, index, and maintain on file lists of officers and employees, and disclosure statements filed with the Board, pursuant to sections 101, 104, 107, 108, 109, 201, 202, and 208 of this [chapter];

(d) To review, index, maintain on file, and dispose of sworn complaints and to make notifications and conduct investigations pursuant to sections 208 and 209;

- (e) To conduct hearings, recommend disciplinary action, assess penalties, make referrals, and initiate appropriate actions and proceedings pursuant to section 210;
- (f) To grant waivers pursuant to section 211;
- (g) To render, index, and maintain on file advisory opinions pursuant to section 212;
- (h) To provide training and education to [County, City, Town, or Village] officers and employees pursuant to section 214;
- (i) To prepare an annual report and recommend changes to this local law pursuant to section 215;
- (j) To provide for public inspection of certain records pursuant to section 216; and
- (k) To select provisions of this [chapter] for reproduction and distribution pursuant to section 218.

§ 207.—*Comment.*

This model law has been drafted so as to minimize the administrative burden the law would impose on municipalities. For that reason, probably only the three or four largest municipalities in the state would find it necessary under this model law to hire staff for their ethics boards. All other municipalities could rely upon other municipal staff members for the occasional secretarial services or legal advice the enforcement of the law will require.

However, care must be taken that any municipal staff used by the ethics board maintain the confidentiality of board actions and remain free from conflicts of interest and political and other pressures from superiors and peers. In particular, where the municipal attorney is a political appointee or is otherwise beholden to the chief elective officer or a majority of the governing body, the ethics board must have the authority, when necessary, to obtain separate counsel. For that reason, some municipalities may wish to require, in their ethics law, funding for such counsel, perhaps with the proviso that the ethics board, if feasible, shall request outside counsel to serve without compensation and in the public interest (see Buffalo Board of Education Code of Ethics⁶⁵).

With respect to the authority of a municipality to authorize its ethics board to conduct investigations and subpoena documents and witnesses, see the comments to section 209 below.

65. Unpublished manuscript on file with the *Fordham Urban Law Journal*.

The Commission concluded that counties, cities, towns, and villages subject to the mandatory annual financial disclosure requirements of Article 18 of the General Municipal Law must give to their ethics boards the same powers and duties enjoyed by the Commission under General Municipal Law section 813 with respect to the enforcement of those requirements.⁶⁶ Specifically, such municipalities must provide for inspection and review of annual financial disclosure statements, receipt of complaints alleging ethics law violations, issuance of advisory opinions, extensions of time to file financial disclosure statements, deletion of information from copies of disclosure statements made available for public inspection, exemptions from filing disclosure statements or from requirements to report items of information, notifications that a filer has failed to file or has filed a deficient statement, a fifteen-day period in which to cure such deficiencies, notices of delinquency, notices of possible ethics law violations and a fifteen-day response time, investigatory authority (including subpoena power), adjudicatory proceedings, notices of no violation and notices of reasonable cause to believe a violation has occurred, the imposition of civil penalties up to \$10,000 (or, in lieu thereof, referral to the prosecutor as a misdemeanor) for knowingly and wilfully failing to file an annual financial disclosure statement or knowingly and wilfully filing a false statement with intent to deceive, and restrictions on disclosure of ethics board documents.⁶⁷

§ 208. Review of Lists and Disclosure Statements.

1. The Ethics Board shall review:
 - (a) The lists of officers and employees, prepared pursuant to section 201 of this [chapter], to determine whether the lists are complete and accurate. The Board shall add the name of any other officer or employee who the Board determines should appear on the list pursuant to section 107.
 - (b) All annual disclosure statements to determine whether any person required to file such a statement has failed to file it, has filed a deficient statement, or has filed a statement that reveals a possible or potential violation of this [chapter].
 - (c) All transactional disclosure statements.

66. See N.Y. GEN. MUN. LAW § 811(1)(d) (McKinney 1989).

67. See *id.* §§ 813(9)-(16), (18), 811(1)(c)-(d), 812(6).

2. If the Board determines that an annual disclosure statement or a transactional disclosure statement is deficient or reveals a possible or potential violation of this [chapter], the Board shall notify the person in writing of the deficiency or possible or potential violation and of the penalties for failure to comply with this [chapter].

§ 208.—Comment.

The only persons whom the ethics board may add to the list of filers are those persons whom the ethics law itself requires to file. Some municipalities may wish to include a requirement that the ethics board consult with the municipality's chief executive before adding a name to the list and perhaps a requirement that the chief executive notify the official that he or she is now required to file. Some municipalities may also wish to require the ethics board to provide forms for annual and transactional disclosure statements.

It is not uncommon for an ethics law to set a deadline for the ethics board to review the list of filers and the annual disclosure statements themselves. However, the imposition of such deadlines on a volunteer board should be approached with caution.

With respect to municipalities subject to mandatory annual financial disclosure, see comments to section 207.

§ 209. Investigations.

1. Upon receipt of a sworn complaint by any person alleging a violation of this [chapter], or upon determining on its own initiative that a violation of this [chapter] may exist, the Ethics Board shall have the power and duty to conduct any investigation necessary to carry out the provisions of this [chapter]. In conducting any such investigation, the Ethics Board may administer oaths or affirmations, subpoena witnesses, compel their attendance, and require the production of any books or records which it may deem relevant and material.

2. The Ethics Board shall state in writing the disposition of every sworn complaint it receives and of every investigation it conducts and shall set forth the reasons for the disposition. All such statements and all sworn complaints shall be indexed and maintained on file by the Board.

3. Any person filing a sworn complaint with the Ethics Board shall be notified in writing of the disposition of the complaint.

4. Nothing in this section shall be construed to permit the Ethics Board to conduct an investigation of itself or of any of its members or staff. If the Ethics Board receives a complaint alleging that

the Board or any of its members or staff has violated any provision of this [chapter], or any other law, the Board shall promptly transmit to the [governing body of the county, city, town, or village] a copy of the complaint.

§ 209.—*Comment.*

General Municipal Law section 808 contemplates that ethics boards will be purely advisory bodies with no investigatory or enforcement power. However, as noted above, the Attorney General's office and the Commission have taken the position that municipalities' home rule powers permit them, by local law, to vary the provisions of section section 808.⁶⁸ In particular, in the opinion of the Attorney General's office, "a local government, through enactment of a local law, may grant to its board of ethics the authority to receive complaints alleging violations of ethics regulations, to investigate those complaints, and to conduct investigations on its own initiative as to whether violations of ethics standards have occurred. Further, [the Attorney General's office] believe[s] the board may be given enforcement authority and the local law may provide for the administering of penalties."⁶⁹ In short, "a city, or any other local government, by local law may grant to its board of ethics the authority to conduct investigations, subpoena power and enforcement power."⁷⁰

The ethics board need not receive a sworn complaint before initiating an investigation. Some municipalities may wish to change "sworn complaint" to "written complaint." Some may wish to require that the official under investigation be notified of the outcome of the investigation.

Some municipalities may wish to establish a procedure for a preliminary review of written complaints and to set a deadline for that review, thereby forcing the ethics board to weed out quickly any complaints that are clearly unjustified (see Buffalo Board of Education Code of Ethics⁷¹). Although protection of the interests of the official under investigation are important, the setting of any requirements that impose undue burdens on the volunteer ethics board must be approached with caution.

With respect to municipalities subject to mandatory annual financial disclosure, see the comments to section 207.

68. See Op. Att'y Gen. 86-44.

69. Op. Att'y Gen. 91-68.

70. *Id.*

71. Unpublished manuscript on file with the *Fordham Urban Law Journal*.

§ 210. Hearings; Assessment of Penalties; Injunctive Relief.**1. Disciplinary action.**

In its discretion, after a hearing providing for due process procedural mechanisms and subject to any applicable provisions of law and collective bargaining agreements, the Ethics Board may recommend appropriate disciplinary action pursuant to subdivision 1 of section 111 of this [chapter]. The recommendation of the Ethics Board shall be made to the appointing authority or person or body authorized by law to impose such sanctions. The Board shall conduct and complete the hearing with reasonable promptness, unless in its discretion the Board refers the matter to the authority or person or body authorized by law to impose disciplinary action or unless the Board refers the matter to the appropriate prosecutor. If such a referral is made, the Board may adjourn the matter pending determination by the authority, person, body, or prosecutor.

2. Civil fine.

In its discretion and after a hearing providing for due process procedural mechanisms, the Ethics Board, pursuant to subdivision 2 of section 111 of this [chapter], may assess a civil fine, not to exceed \$1,500 for each violation, upon any municipal officer or employee found by the Board to have violated this [chapter]. The Board shall conduct and complete the hearing with reasonable promptness. The civil fine shall be payable to the [County, City, Town, or Village].

3. Damages.

The [governing body of the county, city, town, or body] may initiate an action in the court of appropriate jurisdiction to obtain damages, as provided in subdivision 3 of section 111 of this [chapter].

4. Civil forfeiture.

The [governing body of the county, city, town, or village], or the Ethics Board on behalf of the [County, City, Town, or Village], may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction to obtain civil forfeiture, as provided in subdivision 4 of section 111 of this [chapter].

5. Debarment.

The [governing body of the county, city, town, or village], or the Ethics Board on behalf of the [County, City, Town, or Village], may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for an order of debarment, as provided in section 112 of this [chapter].

6. Injunctive relief.

The [governing body of the county, city, town, or village], or the Ethics Board on behalf of the [County, City, Town, or Village], may initiate an action or special proceeding, as appropriate, in the court of appropriate jurisdiction for injunctive relief to enjoin a violation of this [chapter] or to compel compliance with this [chapter], as provided in section 113 of this [chapter].

7. Prosecutions.

The Ethics Board may refer to the appropriate prosecutor possible criminal violations of this [chapter]. Nothing contained in this [chapter] shall be construed to restrict the authority of any prosecutor to prosecute any violation of this [chapter] or of any other law.

8. Limit on Board.

Nothing in this section shall be construed to permit the Ethics Board to take any action with respect to any alleged violation of this [chapter], or of any other law, by the Board or by any member or staff member thereof.

§ 210.—Comment.

See discussion of penalties in the comments to section 111 above.

Some municipalities may wish to grant a cure period (e.g., fifteen days) to any official who has failed to file an annual disclosure statement or who has filed a deficient statement. However, such cure periods, while they provide some protection for officials who inadvertently fail to file or disclose, undermine the effectiveness of annual disclosure requirements and impose unnecessary administrative burdens on the ethics boards.

School districts that adopt an ethics code based upon this model law should set forth procedures coordinating hearings under this

section with disciplinary hearings under sections 3020 and 3020-A of the Education Law.⁷²

If a municipality desires, it may make explicit that any hearings and recommendations for disciplinary action are subject to section 75 of the New York State Civil Service Law.⁷³

With respect to municipalities subject to mandatory annual financial disclosure, see the comments to section 207.

§ 211. Waivers.

1. Upon written application and upon a showing of compelling need by the applicant, the Ethics Board may in exceptional circumstances grant the applicant a waiver of any of the provisions of subdivisions 1 through 9 of section 100, paragraph (i) of subdivision 1 of section 101, section 106, section 107, or section 108 of this [chapter], provided, however, that no such waiver shall permit conduct otherwise prohibited by Article 18 of the General Municipal Law of the State of New York.

2. Waivers shall be in writing and shall state the grounds upon which they are granted. Within 10 days after granting a waiver, the Ethics Board shall publish a notice setting forth the name of the person requesting the waiver and a general description of the nature of the waiver in the official newspaper designated by the [County, City, Town, or Village] for the publication of local laws, notices, and other matters required by law to be published. All applications, decisions, and other records and proceedings relating to waivers shall be indexed and maintained on file by the Ethics Board.

§ 211.—*Comment.*

A provision for waivers of ethics provisions is dangerous because it opens the door to the wholesale gutting of local ethics laws, encourages political pressure on the ethics board by various individuals and groups within the community, and leads to charges of partiality, all of which undercuts the perception of the ethics board as an impartial, nonpartisan body of high integrity. For those reasons, many municipalities may wish to forego a provision for waivers. Other municipalities, concerned over the need to remedy unnecessary hardship that some of the ethics provisions may im-

72. N.Y. EDUC. LAW §§ 3020, 3020-A (McKinney 1981).

73. N.Y. CIV. SERV. LAW § 75 (McKinney 1983 & Supp. 1993).

pose upon an individual official in a particular instance, will wish to run those risks.

To minimize the risks, section 211 sets a high standard for granting a waiver (“compelling need” and “exceptional circumstances”), restricts waivers to certain specified ethics provisions, and requires that the waiver be published in the municipality’s official newspaper. Moreover, the state’s Open Meetings Law may require that the meeting of the ethics board at which the waiver is considered be held in open session after public notice.⁷⁴ Some municipalities may in fact wish to specify in their ethics law that waivers may only be granted at an open session after public notice or even that they may only be granted after a public hearing.

An ethics board may not grant waivers from the requirements of Article 18 of the General Municipal Law.

§ 212. Advisory Opinions.

1. Upon the written request of any [County, City, Town, or Village] officer or employee, the Ethics Board may render a written advisory opinion with respect to the interpretation or application of this [chapter] or of Article 18 of the General Municipal Law of the State of New York. Any other person may similarly request an advisory opinion but only with respect to whether his or her own action might violate a provision of this [chapter] or Article 18.

2. Advisory opinions and requests for advisory opinions shall be indexed and maintained on file by the Ethics Board.

3. Any person aggrieved by an advisory opinion of the Ethics Board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York.

4. Any person who has submitted to the Ethics Board a written request for an advisory opinion may bring a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules for an order compelling the Ethics Board to issue the advisory opinion. In addition to, or in lieu of, such injunctive relief, the person may seek a judgment in accordance with section 3001 of the Civil Practice Law and Rules determining the question posed in the request for the advisory opinion. No action or special proceeding shall be prosecuted or maintained pursuant to this subdivision unless (a) it shall appear by and as an allegation in the petition or complaint that at least six months have elapsed since the filing of the request and that the Ethics Board has failed to file any determination in

74. See N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 1988).

the matter and (b) the action or special proceeding shall be commenced within ten months after the submission of the request for the advisory opinion.

§ 212.—*Comment.*

To avoid burdening the ethics board with requests for advisory opinions, the model law permits a private citizen to request an advisory opinion only as to the permissibility of his or her own conduct. Any official, on the other hand, may request an advisory opinion with respect to his own, a subordinate's, a superior's, or even a colleague's conduct.

This section addresses formal advisory opinions. An ethic board remains free at any time to answer questions of anyone with respect to the model law or Article 18.

Recognizing that persons requesting advisory opinions need quick answers to their ethics questions, section 212 acknowledges the right of a person to seek judicial assistance in compelling the ethics board to respond to a request for an advisory opinion or in answering the question posed, once six months have elapsed since submission of the request to the board. This provision obviates, to some extent, the limitation of section 113 injunctive relief to persons who have filed a sworn complaint. An official against whom a complaint has been made, or who is otherwise under investigation by the ethics board, may immediately request an advisory opinion as to the propriety of his or her conduct and, if that opinion is not forthcoming within six months, may proceed under section 212.

Some municipalities may wish to make advisory opinions binding upon the ethics board. For example, the municipality could include the following in its ethics code:

An advisory opinion rendered by the Ethics Board, until and unless amended or revoked, shall be binding upon the Ethics Board in any subsequent proceeding concerning the person who requested the opinion and who acted in good faith, unless he or she omitted or misstated a material fact. The opinion may also be relied upon by the person, and may be introduced and used as a defense, in any civil action brought by the Ethics Board or the [County, City, Town, or Village].

The second sentence would result in the ethics board's opinion binding not only the ethics board but also the municipality itself, for example in a disciplinary proceeding or in an action for damages, civil forfeiture, debarment, or injunctive relief. Many munici-

palities may not wish to give that extensive authority to the ethics board.

§ 213. Judicial Review.

Any person aggrieved by a decision of the Ethics Board may seek judicial review and relief pursuant to Article 78 of the Civil Practice Law and Rules of the State of New York.

§ 214. Training and Education.

The Ethics Board:

- (a) shall make information concerning this [chapter] and Article 18 of the General Municipal Law available to the officers and employees of the [County, City, Town, or Village], to the public, and to persons interested in doing business with the [County, City, Town, or Village], and
- (b) shall develop educational materials and an educational program for the officers and employees of the [County, City, Town, or Village] on the provisions of this [chapter] and on Article 18 of the General Municipal Law.

§ 214. —Comment.

Educating officials and the public on Article 18 and the local ethics laws are among the most important functions of an ethics board.

§ 215. Annual Reports; Review of Ethics Laws.

1. The Ethics Board shall prepare and submit an annual report to the [chief executive officer and governing body of the county, city, town, or village], summarizing the activities of the Board. The report may also recommend changes to the text or administration of this [chapter].

2. The Ethics Board shall periodically review this [chapter] and the Board's rules, regulations, and administrative procedures to determine to determine whether they promote integrity, public confidence, and participation in [County, City, Town, or Village] government and whether they set forth clear and enforceable, common sense standards of conduct.

§ 216. Public Inspection of Records; Public Access to Meetings.

1. The only records of the Ethics Board which shall be available for public inspection are those whose disclosure is required by Article 6 of the Public Officers Law of the State of New York or by some other State or Federal law or regulation.

2. No meeting or proceeding of the Ethics Board concerning misconduct, non-feasance, or neglect in office by a [County, City, Town, or Village] officer or employee shall be open to the public, except upon the request of the officer or employee or as required by the provisions of Article 7 of the Public Officers Law or by some other State or Federal law or regulation.

§ 216.—Comment.

Any ethics board inquiry, including inquiries into complaints that later prove meritless, may compromise an official's career. For that reason, the model law permits an ethics board to disclose only those records for which disclosure is mandated by the state Freedom of Information Law.⁷⁵ That law provides that an agency "may deny access" to certain records.⁷⁶ The model law makes that denial mandatory.

Similarly, the model law does not allow an ethics board to open its meetings to the public, except as required by the state Open Meetings Law or if requested by the target of the investigation, consistent with that law.⁷⁷ The Open Meetings Law provides that a public body "may conduct" an executive session to discuss "the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation."⁷⁸ The model law makes such executive sessions mandatory, except on request of the official under investigation.

However, in the Commission's opinion, in counties, cities, towns, and villages subject to the mandatory financial disclosure requirements of sections 810-813 of the General Municipal Law, the only records an ethics board may open to the public *with respect to such disclosure* are those records identified in section 813(18)(a) of that law. The Commission took the position that under section

75. N.Y. PUB. OFF. LAW §§ 84-90 (McKinney 1988 & Supp. 1993).

76. *Id.* § 87(2).

77. *See id.* § 105 (McKinney 1988). *Cf.* CRIM. PROC. LAW § 190.85 (McKinney 1993).

78. N.Y. PUB. OFF. LAW § 105(1)(f) (McKinney 1988).

813(18)(b), ethics boards in those communities, *with respect to such annual disclosure*, are exempt from the Open Meetings Law. The Commission concluded that section 813(18) applies to those counties, cities, towns, and villages, because of the language of section 811(1)(c) and (d). The Committee on Open Government disagreed with these conclusions and believed that the Open Meetings Law and the Freedom of Information Law govern local ethics boards in all instances.

The model law intends that disclosure statements be made available immediately upon the request of any person. Because the statements do not contain confidential information, it is unnecessary to redact any information from them before disclosing them to the public. Some municipalities may in fact wish to require that disclosure statements, whenever practicable, be made available immediately upon request.

To prevent the circulation of an officials' disclosure statements (particularly in an altered form), the Commission adopted a regulation prohibiting the photocopying of statements on file with the Commission.⁷⁹ However, the Freedom of Information Law, which expressly provides for copying as well as for public inspection, may preclude a municipality from adopting such a regulation in a local ethics law.⁸⁰

§ 217. Miscellaneous provisions.

1. No existing right or remedy shall be lost, impaired, or affected by reason of this [chapter].

2. Nothing in this [chapter] shall be deemed to bar or prevent a present or former [County, City, Town, or Village] officer or employee from timely filing any claim, account, demand, or suit against the [County, City, Town, or Village] on behalf of himself or herself or any member of his or her family arising out of personal injury or property damage or any lawful benefit authorized or permitted by law.

3. If any provision of this [chapter] is held by a court of competent jurisdiction to be invalid, that decision shall not affect the validity and effectiveness of the remaining provisions of this [chapter].

79. N.Y. COMP. CODES R. & REGS. tit. 9, § 9978.6(c) (1991); *see also* John v. New York State Ethics Comm'n, 581 N.Y.S.2d 882 (App. Div. 1992) (upholding similar regulation of State Ethics Commission).

80. *See* N.Y. PUB. OFF. LAW § 87(2) (McKinney 1988 & Supp. 1993).

§ 218. Distribution and posting.

1. Within 90 days after the effective date of this section, and thereafter as appropriate, the Ethics Board shall transmit to the [chief executive officer or, if none, the chair of the governing body] of the [County, City, Town, or Village], in a form suitable for posting, copies of those provisions of this [chapter] which the ethics board deems necessary for posting in the [County, City, Town, or Village]. Within ten days after receipt of those copies, the [chief executive officer or, if none, the chair of the governing body] shall cause the copies to be posted conspicuously in every public building under the jurisdiction of the [County, City, Town, or Village].

2. Within 90 days after the effective date of this section, and thereafter as appropriate, the Ethics Board shall transmit to the [chief executive officer or, if none, the chair of the governing body] of the [County, City, Town, or Village], in a form suitable for distribution, copies of those provisions of this [chapter] which the ethics board deems necessary for distribution to the officers and employees of the [County, City, Town, or Village]. Within ten days after receipt of those copies, the [chief executive officer or, if none, the chair of the governing body] shall cause the copies to be distributed to every officer and employee of the [County, City, Town, or Village], and made readily available to the public. Every [County, City, Town, or Village] officer or employee elected or appointed thereafter shall be furnished a copy of those provisions within ten days after entering upon the duties of his or her position.

3. Failure of the [County, City, Town, or Village] to comply with the provisions of this section or failure of any [County, City, Town, or Village] officer or employee to receive a copy of the provisions of this [chapter] shall have no effect on the duty of compliance with this [chapter] or on the enforcement of its provisions.

§ 218.—Comment.

Section 807 of the General Municipal Law requires that Article 18 be posted in its entirety. Section 806(2) requires that any ethics law adopted by a municipality be distributed to every officer and employee of the municipality. However, failure to post or distribute does not affect the enforcement of those laws or the duty of officials to comply with them.

The model law permits the ethics board to select provisions of the local law for distribution and posting. For example, the board of ethics may decide that only the Code of Ethics itself (section

100) should be posted but that sections 100 to 113 should be distributed to the municipality's officers and employees.

Section 5. Effective Date.

This local law shall take effect immediately upon filing in the office of the Secretary of State and in compliance with all applicable provisions of law.

APPENDIX A

**SAMPLE ANNUAL DISCLOSURE STATEMENT
UNDER THE LOCAL GOVERNMENT ETHICS
BILL
(S.6157/A.8637)**

ANNUAL DISCLOSURE STATEMENT
[MUNICIPALITY] OF _____
FOR 199_

Last Name	First Name	Initial
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Title	Department or Agency
-------	----------------------

Work Address	Phone No.
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If the answer to any of the following questions is "none," please so indicate.

1. **REAL ESTATE.** List the address of each piece of property that you, your spouse, or other relative own or have a financial interest in. List only real estate that is in the [municipality] of _____ or within one mile of the boundary of the [municipality] of _____. "Relative" means your spouse, child, step-child, brother, sister, parent, or a person you claimed as a dependent on your latest state income tax return.

	Name of Family Member	Relationship to You	Address of Real Estate	Type of Investment
<i>[E.g.:</i>	<i>John Jones</i>	<i>Father</i>	<i>1 Main St., Teatown</i>	<i>Owns]</i>

2. YOUR OUTSIDE EMPLOYER OR BUSINESS. List the name of any outside employer or business from which you receive compensation for services rendered or goods sold or produced or of which you are a member, officer, or employee. Also include any entity in which you have an ownership interest, except a corporation of which you own less than five percent of the outstanding stock. Identify the type of business, such as a partnership, corporation, self employment, or a sole proprietorship and list your relationship to the employer or business (i.e., owner, partner, officer, director, member, employee, or shareholder).

	Name of Employer or Business	Nature of Business	Type of Business	Your Relationship
<i>[E.g.:</i>	<i>Monument Realty</i>	<i>Real Estate Agency</i>	<i>Partnership</i>	<i>Employee]</i>

3. **YOUR SPOUSE'S EMPLOYER OR BUSINESS.** List the information in question 2. for your spouse.

	Name of Employer or Business	Nature of Business	Type of Business	Spouse's Relationship
<i>[E.g.:</i>	<i>Pottery Ltd.</i>	<i>Pottery Manufacturer</i>	<i>Corporation</i>	<i>Treasurer]</i>

Date: _____

Signed: _____

Ethics Standards and Commission

Introduction:

Ethics boards, ordinances and charter amendments can be found in municipalities across the State of Maine and across the country. They provide guidelines for city officials to execute their duties in an ethical and forthright manner. This Amendment brings Portland up to speed with other municipalities across the state that have similar provisions.

What does this Amendment do?

- Requires the Portland City Council to Form an Ethics Commission (EC)
- Requires the City Council to adopt of Code of Ethical Conduct recommended by the EC
- Instills discretionary power of the EC to render advisory opinions on a number of matters of City business.
- Requires the EC to provide training to City officials on standards of conduct.
- Allows the EC to hire an Accountability Officer to provide education and guidance and to serve as an independent ombudsperson in resolution of disputes in an advisory capacity.

Why is this Amendment needed?

Currently, Portland does not have an ethics board, a written code of ethics, nor requirements of written disclosures of conflicts. While the existence of such instruments may not in and of themselves prevent a bad actor from seeking pecuniary gain or to otherwise use or abuse their power or position; it does provide standards and a process for which such matters may be addressed. Additionally, while incidences of waste, fraud, abuse, and corruption are relatively rare in most municipal governments; the most common breaches of ethical standards include improper sharing of information, improper gifts, and indecent treatment of colleagues. (*Siewert & Udani*).

The current City of Portland ordinance does not apply to elected officials and is non-specific in terms of standards of conduct, deferring mainly to State statute on matters of personal gain:

“In addition to adhering to general standards of conduct for employees of any organization, public employees are expected to treat everyone they serve with complete impartiality and are prohibited from using their official position for personal profit or the profit of friends and family. Employees must comply with the conflict of interest standards of State law 30-A M.R.S.A. Sec. 2605.”

This Amendment is not intended to imply that City officials currently act unethically. Rather, it is a provision that ensures our city maintains a code of ethical conduct for officials that will build public trust and ensure Portland has high ethical standards. This Amendment is a product of public comment, campaign discussions and research by Commission members.

Other Purposes:

- Encourage proper use of office
- Compliance with advisory opinions
- Mitigate instances of personal gain, political favors, political solicitation, and favoritism.
- Protect against the “revolving door” of City officials, consultants, and contractors.

General Reasoning for an Ethics Commission:

- Protect whistleblowers.
- Fight and discourage corruption, waste, fraud, abuse, and favoritism from both elected and unelected individuals.
- Increase transparency and accountability in municipal government.
- Be a safe, independent place to send complaints and concerns regarding ethical conduct.
- Creates an ethics mission and code for the City of Portland.
- Cost effective, productive ethical conduct oversight that has proven to work elsewhere in Maine.
- To bring more voices to the table and the community oriented decisions on what ethical conduct is, rather than one individual.
- Build public trust in municipal government

CITY OF PORTLAND ETHICS COMMISSION & CODE OF ETHICS

1. The proper operation of the City of Portland requires that all City officials, whether elected, appointed, or city employees be impartial, equitable, and responsive to the needs of the people and each other in the performance of their respective functions and duties; that proper conduct by City officials will promote public confidence in the integrity of government and will be maintained by all City officials; that public office not be used for personal or financial gain or advantage; and that the structure of City government be used properly in decision and policy-making. In recognition of these goals and the importance of protecting public interest and City officials, an Ethics Commission shall hereby be established for all by the City Council.

1.1 PURPOSE: To provide impartial oversight as to ensure that standards of conduct are defined and upheld; and to make public the sources of income as well as other areas of personal and pecuniary interests to city officials, their family members, and major supporters for purposes of recusal.

Section 1.2 Ordinance required.

The City Council shall maintain an ordinance defining the code of ethical conduct of elected and appointed City officials, as well as all employees of the City in accordance with all applicable labor laws, contracts, and confidentiality requirements. The ordinance shall be developed and recommended by the Ethics Commission, as provided in Section 2, and be approved and later amended with the approval of 2/3 of City Councilors present and voting. The ordinance shall establish the process for filing complaints and soliciting advisory opinions by residents of Portland and city employees.

1.3 The code shall include and encompass, but not be limited to the following:

- Standards of Conduct
- Disclosure of Confidential Information
- Conflicts of Interest
- Disclosure of Conflict
- Determination of Conflict

1.3.1 Whereby the disclosures as provided in Sec. 1.3 wherein prior to being sworn into office, all elected city officials and executive and senior city staff shall complete a disclosure form. The form shall disclose all sources of income, as well as those of close

family members, in accordance with common and accepted practices consistent with state and community standards. Applicable forms shall be public documents and may be referenced by the public for purposes of recusal. The form shall be updated on an annual basis or upon change of employment or situation. These disclosures shall be made publically accessible and posted together on the city's website and on the page of that city official as applicable and in accordance with all applicable labor laws, contracts, and confidentiality requirements.

1.4 The Board shall devise, with the assistance from city staff and/or outside counsel, a code of ethics for Portland City officials and employees which shall include but be not limited to:

- Councilors
- School Board
- All other elected officials
- All appointments including but not limited to boards, commissions, and task forces
- All city employees

1.5 Anyone, whether they be a city official or member of the public, may bring a complaint to the attention of city officials for the purposes of consideration of a conflict of interest or the appearance of a conflict of interest, or for any violation of the code of ethical conduct.

Section 2. Formation of Ethics Commission.

The ordinance shall direct the formation of an Ethics Commission, consisting of seven (7) members who are residents of the City, to review the code ordinance not less than once every three (3) years. The commission shall be appointed by the City Council. Elected officials, candidates for any elected office, and their immediate family members shall not be permitted to be members of the commission. The commission shall meet as needed, but no less than once every three (3) months.

Section 2.1. Independence.

The Commission shall remain an independent body, free from interference from any City employees or elected officials. The Commission may request funding from the City Council for an independent investigation as needed.

Section 2.2. Term.

Commissioners shall serve for a term of three (3) years.

Section 2.3 Duties.

The Commission shall develop the Code of Ethics. The Commission shall provide a report to the City Council no less than annually. The Commission shall consider questions and render advisory opinions. The Commission shall oversee training for elected and appointed officials, as well as members of city staff on the code of ethics and ethical standards.

Section 2.3.1. Advisory Opinions.

The Ethics Commission or quorum of at least five (5) members, shall be convened on request for an advisory opinion by no less than two (2) members of the City Council, the Mayor, or the Chief Executive Officer of the City. The Commission may issue, at its discretion, advisory opinions upon request of any city officer, official, employee, or resident of the City of Portland at any time.

The names of complainants shall be protected by confidentiality, unless they elect to waive it. No complainant shall be retaliated against for filing a complaint.

Section 2.3.2. Advisory Interpretation of the City Charter

The Ethics Commission may, at its discretion, also render non-binding, advisory opinions on City compliance with The City Charter. The Commission may provide, at its discretion, its written interpretation of the Charter on the written request of any resident or official of the City. The Commission's interpretation is advisory only and for educational purposes and shall not be the basis for any legal action. A copy of the request and the proposed response shall be provided to the City Council, Mayor and City Manager for review prior to being issued.

The Commission may, at its discretion, issue advisory opinions on the adherence of Council and board rules and procedures. They may also request a second legal opinion on behalf of the City Council or any board or committee. The Commission may also request conduct program evaluations and recommend an evaluation be conducted in-house, contracted, or by a specialized hire.

Section 2.3.3. Delivery of Advisory Opinion

The Ethics Commission shall deliver all advisory opinions including but not limited to ethics violations, conflicts of interest, and charter opinions, to the City Attorney, Chief Executive/Administrator, Mayor and City Council in compliance with applicable law, no less than 14 days after a decision is made.

2.4 Appointment of Accountability Officer.

The Ethics Commission may appoint an Accountability Officer who shall serve as an ombudsperson to members of the public. The Accountability Officer shall provide city information to the public and officials to educate them about government accountability, integrity, and transparency. They also shall receive complaints from the public about alleged government waste, favoritism, mismanagement, and violations of the public trust. The Accountability Officer shall, at their discretion, conduct impartial investigations of such allegations, issue reports, and make recommendations to the Ethics Commission to advance government efficiency, competence, and fairness. The Accountability Officer shall refer any matter alleging corruption, fraud, or abuse to the appropriate law enforcement agency.

Section 3. Violations of the Ethics Code.

Violations apply to both elected and appointed officials and any member of city staff. If the Commission finds violations of the ethics code, the Commission may recommend, by a simple majority vote, advisory opinions to the applicable hiring authority on any appropriate disciplinary or removal proceedings and notify the city attorney that further action should be taken in accordance with state law. Opinions rendered by the Commission are not legally binding and purely advisory in nature and shall be rendered in accordance with all applicable labor laws, contracts, and confidentiality requirements.

In no circumstances shall the ethics commission have access to any personal information protected by state law.

Any City Councilor or Mayor found in violation of the ethics code may be reprimanded by the City Council. The Council may decide to do nothing, censure a member, remove a member, or set a recall election. Whichever option is selected, requires a 2/3rds majority vote of the City Council.

Suspected criminal conduct shall be reported immediately to the Portland police department.

The complainant shall receive a response to the complaint regarding the outcome.

Section 3.1 Conflict of Interest of Elected Officials, Boards, and *ad hoc* Committees

3.1.1 Determination of Conflict

If the subject is a member of an elected or appointed body, including but not limited to council, board, committee, or task force, the complaint shall be brought to the attention of the chair (or equivalent) of that body. Once the complaint of conflict of interest has been initiated against a member of a body as provided above, the body shall deliberate the matter themselves or refer deliberation to an appropriate office or entity.

If the complaint is against the chair, then the complaint shall be brought to the attention of the next most senior member who is not subject of the complaint or who is not the complainant themselves.

Once a complaint has been made, the subject shall be notified of the complaint and shall have the option to recuse themselves or to request deliberation. Public notice shall be given of the complaint unless confidentiality requirements prohibit it.

Complaints determined by the chair of the relevant body (or the next most senior member, to whom the complaint is not against) to be frivolous, scurrilous, libelous, baseless, unfounded, of nuisance, or otherwise without account need not be deliberated or referred if the complaint is publicly designated as such.

Members of the public may bring their complaint to the entire body or to other city officials including the Ethics Commission. The Commission may refer complaints to the appropriate office or body for consideration. Except as described in the preceding paragraph, all complaints shall be considered or deliberated in as timely a manner as possible and in any case shall be considered in advance of deliberation on the relevant proposal or law.

Section 3.2 Acknowledgement of Complaint

The complainant shall receive a response to the complaint regarding the outcome.

Section 3.3 Failure to Disclose or Comply with Code of Ethics

Failure to disclose or comply with the code of ethics shall result in disciplinary action that may include termination of the individual from their position with the city.

Examples of Ethics Boards/Commissions/Ordinances/Charter Amendments/Disclosure Forms:

Bangor, ME: Population: 31,753

- Ordinance: <https://ecode360.com/6889057>
- Charter Amendment (establishes board & requires creation of code):
<https://ecode360.com/14956369>

Waterville, ME: Population: 15,828

- Ordinance: <http://www.waterville-me.gov/ordinances/wp-content/uploads/sites/25/2018/02/Ethics-Ordinance-Revised-010518.pdf>
- Charter Amendment: Article VI (establishes board & requires creation of code)
<http://www.waterville-me.gov/clerk/wp-content/uploads/sites/10/2017/08/2020-Charter-with-Revision-Markups.pdf>

Windham, ME: Population: 18,434

- Ordinance (establishes both the Ethics Board & code):
<https://www.windhammaine.us/DocumentCenter/View/1017/Ethics-Policy---Board-of-Ethics?bidId=>

York, ME: Population 13,723

- Ordinance (no board established - up to chairs & department heads to regulate conduct):
<https://www.yorkmaine.org/DocumentCenter/View/1348/a-Code-of-Ethics-2021-06-14?bidId=>

Bristol, ME: Population 2,834

- Ordinance (no board established but complaints are brought straight to the selectmen to decide).
https://www.bristolmaine.org/sites/g/files/vyhlf4191/f/uploads/code_of_ethics_and_conduct.pdf

Lisbon, ME: Population 9,711

- Ordinance (establishes an ethics panel of three voters and issues advisory opinions on conflicts of interests)
https://library.municode.com/me/lisbon/codes/code_of_ordinances?nodeId=PTICOOOR_C_H12ETCOIN_S12-3ETPA

Ogunquit, ME: Population 1,577

- Ordinance (no board, ethics violations are determined internally on boards and committees)
https://www.townofogunquit.org/vertical/Sites/%7B2524508A-BBA7-433A-9EAA-E74D93FCB25D%7D/uploads/CODE_OF_ETHICS_FOR_BOARDS_AND_COMMITTEE_S.pdf

Madison, ME: Population 2,433

- Ordinance (includes ethics board with advisory opinions provided to select board)
<https://ecode360.com/9856843>

Kennebunk, ME: Population 11,536

- Internal procedures governing rules for the council.
<https://www.kennebunkmaine.us/DocumentCenter/View/218/Select-Board-Code-of-Ethics?bidId=>

Bridgton, ME: Population 5,418

- Ordinance (establishes penalty for violation and applies to all elected officials and employees) <https://bridgtonmaine.org/wp-content/uploads/2017/09/Code-of-Ethics.pdf>

New York, NY: Population: 8.5 Million

- Charter Chapter 68 (establishes the Conflicts of Interest Board, defines its powers and obligations, defines prohibited interests and conduct, establishes reporting requirements, establishes the Board's power to impose penalties, authorizes the Board to investigate and adjudicate gifts by lobbyists):
<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCcharter/0-0-0-5995>
- The Rules of the City of New York
<https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-86448>

El Paso, TX: Population: 679,813

- Charter Title 2, Chapter 2.92 (establishes board, Standard of Conduct, duties, jurisdiction, and procedures)
https://library.municode.com/tx/el_paso/codes/code_of_ordinances?nodeId=TIT2ADPE_CH2.92ET_ARTIIIETRECO_2.92.150ADOP
- Ordinance
https://library.municode.com/tx/el_paso/ordinances/code_of_ordinances?nodeId=1078214

Philadelphia, PA: Population 1.58 Million

- Charter Chapter 11 (establishes Board, powers and duties)
https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-182492

- Code (defines duties, standards, prohibited conduct, penalties, establishes standard of conduct and financial disclosure requirements)
https://codelibrary.amlegal.com/codes/philadelphia/latest/philadelphia_pa/0-0-0-217009
-

Examples of Charter Compliance Commissions:

Provincetown, MA: Population: 2,994 - Charter Compliance Commission

- Charter Amendment:
<https://www.provincetown-ma.gov/125/Charter-Compliance-Commission>
- <https://www.provincetown-ma.gov/DocumentCenter/View/202/Charter-PDF?bidId=>
(page 6)

Bourne, MA: Population: 19,872 - Charter Compliance Commission

- Charter Amendment:
https://www.townofbourne.com/sites/g/files/vyhli7346f/uploads/town_charter_2016.pdf
- <https://www.townofbourne.com/charter-compliance>

Milton, VT: Population 2,507 - Charter Compliance Commission

- Charter Amendment:
<https://legislature.vermont.gov/statutes/section/24appendix/129/00702>

Examples of Disclosure Forms from the State of Maine

<https://www.maine.gov/ethics/financial-statements/legislators>

Example of Code of Ethics

<https://www.windhammaine.us/DocumentCenter/View/1017/Ethics-Policy---Board-of-Ethics?bidId=>

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4. Siewert, Wally & Udani, Adriano, "Missouri Municipal Ethics Survey: Do Ethics Measures Work at the Municipal Level?" *Public Integrity*, vol. 18, issue 3, 2016.
 - a. <https://discovery-ebSCO-com.wv-o-ursus-proxy09.ursus.maine.edu/c/4klzeq/viewer/html/yjls2w24bn> A quantitative analysis of the types of ethical violations that can be mitigated by ethics measures.

SCHOOL BUDGET

Section 5. School budget.

Prior to the submission of a school budget, the school board and city council shall establish a Joint Committee on Budget Guidance, consisting of ~~with~~ four city councilors and four school board members, appointed by the Mayor and school board chair, respectively. The purpose of the joint committee is to develop guidance for the city and school district on budget priorities and constraints, covering a two-year period and updated annually. The joint committee shall obtain public comment on the guidance prior to submitting the guidance as a proposed non-binding joint resolution to the city council and school board for their approval.

Not later than three and one-half (3.5) months before the end of the fiscal year, the superintendent shall submit to the school board budget estimates of the various sums required for the support of public schools for the ensuing fiscal year and shall thereafter provide the school board with such information relating to such estimates as the school board shall require.

~~During the thirty (30) days following submission of the superintendent's proposed budget to the school board and the city budget to the city council, the school board and the city council, or their designated subcommittees, a Joint Budget Committee, consisting of four city councilors and four school board members, appointed by the Mayor and school board chair, respectively, shall meet jointly at least twice to review the proposed school budget, focusing on its underlying assumptions and supporting data and the ability of the city to raise the necessary funds for the support of such proposed budget develop guidance for the city and school district on budget priorities and constraints for the upcoming fiscal year. The joint committee shall obtain public comment on the guidance prior to submitting the guidance to the city council and school board for their consideration. The superintendent and the city manager shall provide budget information regarding such proposed budget as reasonably requested by the Joint Budget Committees school board and the city council, or their designated subcommittees.~~

The budget submitted by the superintendent ~~to be reviewed jointly by the school board and the city council~~ shall provide a complete financial plan of all school funds and activities for the ensuing fiscal year. In organizing the school budget for ~~joint~~ review by the school board, the superintendent shall utilize the most feasible combination of expenditure classification by fund, organization, unit, program, purpose or activity, and object. The budget shall begin with a clear general summary of its contents; shall show in detail all estimated income and all proposed expenditures, including debt service for the ensuing fiscal year; and shall be so arranged as to show comparative figures for actual and estimated income and expenditures of the current fiscal year and actual income and expenditures of the preceding fiscal year. The total of proposed expenditures shall not exceed the total of proposed income.

Not later than the last Monday in April of each fiscal year, the school board shall ~~submit to the city council~~ prepare a budget of the various sums required for the support of the public schools for the ensuing fiscal year in the format provided above, ~~and shall thereafter provide the city council with such information relating to such budget as the city council shall require.~~

The school board shall hold a ~~A~~ budget hearing on such budget estimates ~~shall be held at least seven (7) days~~ prior to ~~determining the total amount of the school budget~~ final action by the city council. The city council shall thereafter submit the school budget determined by the school board to a budget validation referendum. If the voters discontinue use of the budget validation referendum process, the city council shall instead submit the school budget to a municipal school budget referendum. The warrant calling the budget validation referendum or the school budget referendum shall include voter information containing the amount of locally raised funds and the amounts for each cost center summary budget category proposed by the school board.

The city council in its appropriation resolve for the ensuing year shall, in addition to amounts appropriated for other general city purposes, appropriate one gross amount for the

support of the public schools, which amount shall equal the greater of (i) the amount adopted by the voters at the school budget referendum and ratified at the budget validation referendum, as necessary, or (ii) not be less than the sum required to be appropriated for such purposes by the general laws of the state. ~~Such gross amount shall not be less than the sum requested by the school board except by a vote of at least six (6) members of the city council.~~ Such appropriation shall be expended under the direction and control of the school board but no such appropriation shall be exceeded except by consent of the voters ~~city council~~. (Referendum 6/13/78; 11/2/10)

MEMORANDUM

TO: Portland Charter Commission Education Committee

FROM: James N. Katsiaficas, Emily A. Arvizu

DATE: December 14, 2021

RE: Authority to Amend Charter Provisions Regarding School Budget and Bond Authority

Summary

This memorandum explores issues raised in the August 11, 2021 Memoranda to Xavier Botana, Superintendent, drafted by attorneys at Drummond Woodsum (“Drummond Memo 1”), as supplemented by statements made before the Charter Commission and its Education Committee by Drummond Woodsum attorney Aga Dixon and by Drummond Woodsum’s November 5, 2021 Memorandum to Superintendent Botana (“Drummond Memo 2”). In particular, this memorandum explores 1) the conclusion of the Drummond Memos regarding the authority of a municipality to assign to an “other municipal legislative body” the municipal council’s authority to determine the total school budget amount, 2) whether a school board by municipal charter could be made that “other municipal legislative body” as Attorney Dixon suggested, and 3) whether the Charter could be amended to direct the City Council to send school bond referenda directly to the voters for approval. This memorandum concludes: 1) the City Charter could be amended to transfer City Council budget approval authority to another legislative body such as a voter referendum, 2) but transferring such City Council (“Council”) budget approval to the Board of Public Education (“School Board”) is of questionable validity because a) the Maine Legislature intended to occupy the field, b) the Legislative intent is to create a separation of powers between the School Board and City Council, and c) the legislative history of 20-A M.R.S. § 2307 suggests that “other municipal legislative body” is not intended to refer to an alternative to the municipal council where a municipal council exists; and 3) State law authorizes the municipality, but not the school board, to issue school construction and renovation bonds for a municipal school unit.

Discussion

Home Rule Authority

Home rule authority has been granted to municipalities by both constitutional and statutory grants of power.

Under Maine’s Constitution, “[t]he inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character.” Me. Const., art. VIII, pt. 2, § 1.

In addition, the Legislature has granted broad home rule authority to municipalities pursuant to 30-A M.R.S. § 3001: “Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.”

The Maine Supreme Judicial Court (the “Law Court”) has stated that “[S]ection 3001 constitutes an independent and plenary grant of power to municipalities to legislate on matters beyond those exclusively ‘local and municipal,’ and is not limited by the Constitution’s narrower home rule provision.” *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993). Municipal legislation enacted under the statutory home rule authority “will be invalidated only where the Legislature has expressly prohibited local regulation, or where the Legislature has intended to exclusively occupy the field and the legislation would frustrate the purpose of a state law.” *Id.* In *Town of York*, over the School Board’s objections, the Law Court upheld York’s municipal charter provision under which the Town transferred budget preparation authority from the School Board to a Budget Committee. The Law Court did so because it held that the Town’s home rule charter authority was as broad as its home rule ordinance authority – that the narrower constitutional amendment creating home rule charter authority approved by the State’s voters had been widened by the existence of broader statutorily created home rule ordinance authority. Using the broader test of ordinance validity to assess the validity of a charter amendment, the Law Court upheld the York Charter provision at issue.

Authority to Prepare and Approve School Budgets

As a result of the *Town of York* decision, then, regardless whether it was correctly or incorrectly decided, the Town could lawfully amend its charter to reallocate certain school budget preparation authority between the School Board and Budget Committee. But the school budget in York still had to be approved by a legislative body, and in York, that was by a voter referendum.

Since January 1, 2008, Maine law has required that all municipal school budgets be developed following the same budget requirements and process as those of regional school units. 20-A M.R.S. § 2307. This process is described in Drummond Memo 1,¹ and the discussion here centers on this statute.

Most relevant to this memorandum is § 2307(2), which specifies that in charter municipalities in which the charter gives “a municipal council or other municipal legislative body” the authority to determine the total amount of the school budget and gives the school board the authority to direct how those funds are spent, the municipal council or other legislative body determines “the total

¹ See Drummond Memo 1, p. 3.

amount of the school budget to be submitted to a budget validation referendum” and “the school board shall determine the allocation of the approved school budget among the cost centers” of that cost center budget. Drummond Memo 1 concludes that “[t]his delegation of authority over the school budget between the school board . . . and the municipal council or other municipal body . . . is a subject matter where the Legislature appears to have ‘occupied the field’ – and, in our view, a charter provision that alters it would likely be invalid.”² We agree with this conclusion.

This conclusion is supported by the legislative history of § 2307. The original text of § 2307 included only the requirement that municipal school budgets be developed in accordance with a budget validation referendum process. *See* 20-A M.R.S. § 2307 (2007). In discussing possible amendments in 2008, the House debated whether to include a provision that would allow charter municipalities to opt out of the budget validation referendum process altogether. Proponents of the amendment argued that the imposition of the budget validation referendum on all municipalities “ignores that many cities and towns in our state have created and voted on charters that serve as a framework [for] the governance of their city or town.”³ The amendment was indefinitely postponed and the budget validation process remained law. This discussion makes clear that the Legislature was aware that the statute could conflict with municipal charter provisions and intended to occupy the field on this matter.

However, both Drummond Memos argue that there may be room for other charter revisions in this area. The Drummond Memo interprets §2307’s use of the phrase “a municipal council or *other municipal legislative body*” to mean that “the Portland Charter may lawfully assign the final authority to approve the school budget to a municipal legislative body other than the city council”, thereby eliminating the City Council’s role in the school budget approval process.⁴ This argument comes out of the arguably ambiguous use of “other municipal legislative body” in §2307(1). The phrase is not explicitly defined in the statutes, and a review of the legislative history of the laws creating and amending §2307 does not reveal any explicit definition of this phrase.

Limited information on the purpose of the law and subsequent amendments suggests that the Drummond Memos’ interpretation was not intended. Section 2307 was amended in 2008 to include the provisions in subsections (1) and (2),⁵ specifically addressing issues related to charter

² Drummond Memo 1, p. 3.

³ *See* 3 Legis. Rec. H-1689 (1st Spec. Sess. 2008).

⁴ Drummond Memo, p. 3 (emphasis added).

⁵ The provisions state:

1. **Budget meeting.** In charter municipalities the budget meeting required by section 1485, subsection 3 must be a meeting of the municipal council or other municipal legislative body established by the charter with authority to approve the budget.
2. **Municipal charter.** In charter municipalities where the municipal charter confers upon a municipal council or other municipal legislative body the authority to determine the total amount of the school budget and confers upon the school committee or school board the authority to direct the expenditure of those funds for school purposes, the municipal council or other municipal legislative body shall determine the total amount of the school budget to be submitted to a budget validation referendum and the school

municipalities. The bill summary for L.D. 2323 states that the 2008 amendment seeks to “clarif[y] the roles of the municipal officers and the school committee for municipal school units whose municipal charters give authority to approve the school budget to the municipal officers.”⁶ In an administrative letter dated May 01, 2008 to the Superintendents of Schools, the Commissioner of Education explained that L.D. 2323 “correct[s] technical errors” and clarifies that for those charter municipalities to which subsection (2) of §2307 applies, the council “will not be allowed to set or approve separately each of the 11 cost-center articles required per legislative body approval procedures” but “will instead approve the total expenditures and the school board will assign that approved total to the required 11 cost centers.”⁷ It appears that the amendments to §2307 sought to clearly delineate and balance the roles and power of the school board and the existing municipal legislative body having school budget approval authority.

Further, the phrase “other municipal legislative body” appears to serve as a catchall for municipalities that do not have a municipal council or that do not entrust budget authority to the municipal council. The Town of Windham, for example, has a municipal school district and has a “hybrid” Charter that establishes a town council to enact legislation, but allocates budget approval authority to the town meeting; in this instance, a council municipality has a school budget adopted by an “other legislative body” – the town meeting. Also, in 2007-2008, when § 2307 was enacted and amended, the City (then “Town”) of Sanford had a home rule charter, but no council – instead, a 100+ member “representative town meeting” adopted legislation and the budget (Sanford has since amended its Charter to eliminate the representative town meeting form of government).

This is further supported by materials developed by the Maine Department of Education in 2013 that depict the “Budget Approval and Validation Process” for three types of school units: (1) Regional School Unit – Regional Meeting Legislative Body; (2) Municipal School Unit – Town or City Council Legislative Body; and (3) Municipal School Unit – Town Meeting Legislative Body.⁸ In this third type, the municipal council’s role of approving the full budget to go to the voters is filled by the town school budget meeting in which a majority of registered voters present and voting must approve the proposed budget in order to submit it to the referendum vote. The understanding seems to be that “other municipal legislative body” refers to this particular form of municipal governance. It is unclear that this is the precise meaning intended by the Legislature, but that is how it has been understood and communicated to those in the field.

At most, the use of the phrase “or other legislative body” could be considered to allow Portland to amend its charter to transfer budget adoption authority from the City Council to a City-wide voter referendum. That seems counter to the example of State law, but an argument can be made for it as Attorney Dixon offers. This also would be redundant, since State law already requires a

committee or school board shall determine the allocation of the approved school budget among the cost centers of the cost center summary budget format.

⁶ L.D. 2323, Summary (123rd Legis. 2008).

⁷ Administrative Letter 038, Maine Commissioner of Education (May 1, 2008), https://www.maine.gov/tools/whatsnew/index.php?topic=edu_letters&id=55011&v=article.

⁸ Budget Approval and Validation Process, Maine Dept. of Education (Mar. 15, 2013), <https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/Budget%20Validation%20Graphics.pdf>.

school budget validation referendum (see 20-A M.R.S. § 1486(1)), so that there would be two separate City-wide voter referendum elections on each school budget – one required by the Charter to adopt the budget, and one required by State law to validate it. While Attorney Dixon correctly points out that § 1486(2) allows the voters to decide every three years whether to eliminate the validation referendum, Portland voters have had four chances to date to eliminate it and have not done so in what traditionally has been a low voter turnout election.

Finally in this regard, in a presentation to the Charter Commission’s Education Committee, Attorney Dixon stated that nothing in State law prevented the Charter from making the School Board the “other legislative body,” which would allow it to both prepare and adopt the school budget. While nothing in State law explicitly says this cannot be done, no Maine municipality has amended its charter to do so. More importantly, as Attorney Dixon writes in Drummond Memo 1 at page 3, “The school board is not subordinate to the City Council *but derives its duties and authority directly from the Legislature.*” (emphasis added). Those duties and authority in large part are set out in Title 20-A M.R.S. which includes § 2307, a provision that we have noted places budget preparation authority in the hands of the school board and budget adoption authority in the hands of the municipal council or other legislative body. Section 2307 thus establishes a separation of powers between a school board and a municipal council on budgeting that would prohibit a municipality from granting budget adoption authority to a school board. Therefore, we believe the better argument is that the School Board is prohibited by law from both preparing the school budget and also being the “other legislative body” adopting that budget, and that the Legislature has “occupied the field” so as to prevent a School Board from playing such a dual role. There is at the very least a legal risk that a court could strike down a municipality’s home rule charter amendment that purported to allocate budget approval power to a school board, which could affect the validity of any budget adopted by that school board and of any expenditures made in reliance on that budget.

Authority to Over School Bond Issuance

Lastly, as to school bond issuance, State law authorizes municipalities to issue general obligation bonds (30-A M.R.S. § 5772). We agree we agree with the Drummond Memo 2 at page 4 that therefore, in a municipal school district, State law authorizes the municipality, but not the school board, to issue school construction and renovation bonds for a municipal school unit, and that this appears to constitute a comprehensive statutory scheme which prohibits transfer of bonding authority from the City Council to the School Board by Charter revision. As to directing the placement of school construction and renovation bonds before the voters by referendum, the City Charter currently requires proposed bond issues that exceed certain percentages of the City’s State valuation be approved by the voters at referendum rather than by the City Council, except for certain categories of bonding that are exempted (refunding obligations; general obligation bonds for streets, sidewalk, and sanitary and storm sewers; and construction or financing of improvements or equipment needed for fire, flood, natural disaster or other emergency). See City Charter, Article VIII, Sections 10, 11 and 16. The City Charter may be revised as a policy matter to alter the percentages or to specify categories of borrowing (such as school construction and renovation bonds) that must be approved by direct vote at referendum. However, it would

be the City Council, and not the School Board, that would direct the bond measures to be placed before the voters.

MEMORANDUM

<p>TO: Xavier Botana, Superintendent Portland Public Schools</p> <p>FROM: Melissa Hewey, Agnieszka Dixon, and Elek Miller Drummond Woodsum</p> <p>DATE: August 11, 2021</p> <p>RE: Portland Charter—School Governance, Policy, and Management Matters</p>

As the newly elected City of Portland Charter Commission (the “Commission”) begins its work to evaluate and recommend modifications to the City of Portland Charter (the “Portland Charter”), you have asked us to provide an overview of the law governing the powers and duties of the Commission to address matters of school governance, policy, and management.

In Part I of this memorandum, we provide a legal overview of the Constitutional and statutory limits on the authority to amend the Portland Charter with respect to matters of school governance, policy, and management. In Part II, we identify and discuss the existing provisions in the Portland Charter which concern the school board, and we compare those provisions with the charter language of other populous Maine charter cities.

Finally, in Part III, we conclude that, while the Commission has broad authority to recommend modifications to the provisions of the Portland Charter for consideration by the voters, that authority is constrained with respect to matters of education. We therefore recommend that the school board continue to evaluate the Commission’s work through the lens of the legal framework presented next, and to seek legal review of any proposals affecting school governance, policy, or management.

I. AUTHORITY OF THE COMMISSION WITH RESPECT TO EDUCATIONAL MATTERS— A LEGAL OVERVIEW

At the outset, it should be understood that the scope of the Commission’s authority is constrained by the Maine Constitution and state law, which extensively regulates public education in the state and thereby limits the scope of any charter commission’s authority over matters of education.

A. The Legislature has plenary control over public education.

In Maine, the Legislature has plenary authority over public education. *School Committee of the Town of Winslow v. Inhabitants of the Town of Winslow*, 404 A.2d 988, 991-992 (Me. 1979). Exercising this authority, the Legislature has created a system of local school administrative units to provide free public education to Maine children. A “school administrative unit” is defined by statute as “the state-approved unit of school administration and includes a municipal school unit.” 20-A M.R.S. § 1(26). A “municipal school unit” is defined as a state-approved unit of school administration composed of a single municipality. 20-A M.R.S. § 1(19). Public education in Portland is provided by the Portland municipal school unit, which is a creature of the Legislature and not a subdivision or department of city government.

The Maine Supreme Judicial Court, acting as the Law Court, has made it clear that municipal school boards “are agents of the state and are legally distinguished from municipalities.” *Pickering v. Town of Sedgwick*,

628 A.2d 149, 150 (Me. 1993). The separate roles of the municipal school unit and the municipal government are well-defined and do not overlap.

The school board is the governing body of a municipal school unit. *See* 20-A M.R.S. § 1(28). State law provides that “the control and management of the public schools shall be vested in the legislative and governing bodies of local school administrative units, as long as those units are in compliance with appropriate state statutes.” *See* 20-A M.R.S. § 2(2). Thus, the school board has sole authority to oversee the affairs of a municipal school unit, including adoption of policies, management of the schools (including custody, care, and repair of school buildings), selection of the superintendent (who is the chief administrative officer of the municipal school unit), employment of administrators, and employment of teachers. *See* 20-A M.R.S. §§ 1001, 1051, 13201, and 13302. As discussed in greater detail in Part I.C, below, a city council has no statutory duties or authority with respect to public education, with the exception of approving the total amount of the school budget to be submitted to the voters in a budget validation referendum provided that a municipal charter confers that authority upon the council. *See* 20-A M.R.S. § 2307(2). The authority to allocate funds within the total budget and expend those funds is reserved to the school board. *Id.*

The school board is not subordinate to the city council but derives its duties and authority directly from the Legislature. “Its members,” the Law Court has observed, “are chosen by the voters of the town, but after election they are public officers deriving their authority for the law and responsible to the State for the good faith and rectitude of their acts.” *Shaw v. Small*, 124 Me. 36, 41 (1924).

B. The Commission’s authority over public education is circumscribed by the Maine Constitution and state law.

While the Legislature has plenary authority over public education and has delegated local control over education to school administrative units and their elected school boards, the home rule provisions of the Maine Constitution and state law authorize the voters of a municipality, by charter, to impose local regulation of public education only if Legislature has not expressly prohibited local regulation or where the Legislature “has intended to occupy the field and the legislation would frustrate the purpose of a state law.” *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993).¹

The Law Court reaffirmed this home rule limitation last year, stating that the Maine Constitution grants municipalities the power to amend their charters “on all matters, not prohibited by Constitution or general law, which are local and municipal in character” and further stating that the Constitution “commits the general power to promote education to the Legislature” *MSAD 6 Bd. of Dir’s v. Town of Frye Island*, 2020 ME 45, ¶¶ 17, 19, 229 A.3d. 514, 520-21 (internal quotations omitted). In the *Frye Island* case, the Court held that a town could not attempt to withdraw from its school administrative unit by amending its charter because such a charter provision implicated public school funding—“an issue falling squarely within the Legislature’s purview”—and was therefore not a valid exercise of the municipality’s home rule authority. *Id.* ¶¶ 19, 22 & n.7.

¹ In the *York* case, the Law Court upheld a charter provision that created a municipal budget committee, separate from the school board and the select board, with the power to approve the school budget before it was submitted to voters for approval. “The Legislature,” the Court wrote, “is free to delegate to municipalities all of its authority over education so long as the delegation is not unconstitutional.” *Town of York*, at 940. Since the charter provision did not conflict with the Constitution or state law regulating school budget approval, the Court said that the creation of the budget committee with authority over the school budget was within the authority of the charter commission. Subsequent to the *York* decision, the Legislature enacted a detailed statutory process for school budget approval assigning specific roles to the school board and the municipal legislative body, which presumably overruled the *York* decision to the extent that the York charter provision conflicts with that detailed process. That process is summarized in the next section.

C. A charter may modify the school budget approval process, but not the power of the school board to direct expenditures of education funds or the responsibility of the municipal legislative body to determine the total school budget.

Maine law now provides that municipal school budgets “must follow the same school budget requirements as regional school units.” 20-A M.R.S. § 2307. We are all now familiar with the school budget procedures that have been followed for over a decade, including school board formulation and approval of a budget organized by specific cost centers and warrant articles prescribed by law. The approved school board budget is then submitted to the “budget meeting.” In charter municipalities such as Portland, the budget meeting is a “meeting of the municipal council or other municipal legislative body established by the charter with authority to approve the budget.” 20-A M.R.S. § 2307(1). The final step in budget approval is the budget validation referendum decided by the voters (although the voters may eliminate that step by referendum).

State law specifically provides:

In charter municipalities where the municipal charter confers upon a municipal council or other municipal legislative body the authority to determine the total amount of the school budget and confers upon the school committee or school board the authority to direct the expenditure of those funds for school purposes, the municipal council or other municipal legislative body shall determine the total amount of the school budget to be submitted to a budget validation referendum and the school committee or school board shall determine the allocation of the approved school budget among the cost centers of the cost center summary budget format.

20-A M.R.S. § 2307(2). In short, in a charter municipality like Portland, the municipal council or other municipal legislative body acts only on the total amount of the school budget, and the school board determines the budget allocation among cost centers. This delegation of authority over the school budget between the school board, on the one hand, and the municipal council or other municipal legislative body, on the other hand, is a subject matter where the Legislature appears to have “occupied the field”—and, in our view, a charter provision that alters it would likely be invalid.

Although, in our view, a charter provision may not modify the school board’s power to direct the expenditure of funds for school purposes, other charter provisions concerning the budget approval process may likely be modified or altogether eliminated. In that regard, it has been asked whether the Portland Charter may be revised to eliminate the city council’s responsibility to determine the total school budget. As noted above, state law provides that the budget meeting to approve a municipal school budget must be a meeting of either “the municipal council *or other municipal legislative body.*” 20-A M.R.S. § 2307(1) (emphasis added). Accordingly, we believe the Portland Charter may lawfully assign the final authority to approve the school budget to a municipal legislative body other than the city council.

We note that we know of no precedent within a city charter² regarding the form that such an alternative legislative body may take, however. In Maine, legislative bodies typically consist of (i) a town meeting

² We do know of at least one town charter which provides a municipal legislative body that is not a town council. The Town of York, which has a rather unique “Town Manager—Town Meeting by Secret Ballot Vote” form of local government, provides in its charter that its municipal legislative body is the town meeting consisting of the voters. *See* York Charter, Art. II, § 1 (*available at www.yorkmaine.org/DocumentCenter/View/691/Home-Rule-Charter-PDF*). There, an elected budget committee prepares the town budget and the school committee prepares the school budget, but final authority for approving a composite town and school budget, in line-item format, rests with the voters at a secret ballot budget referendum after public hearing. *See id.*, Art. II, §§ 4, 5, 10, 12. If the voters vote down a given line-item, the charter calls on the Town’s Board of Selectmen—that is, its governing body—to appropriate an amount equal to the budgeted appropriation for that line-item during the previous fiscal year. *See id.*, Art. II, § 14.C.

composed of all voters of a town, (ii) the school budget meeting composed of all voters of the member municipalities of a school administrative unit, or (iii) a representative council established by charter. Any proposal to establish a municipal legislative body, separate and distinct from a representative council, to approve the school budget would need to be thoroughly vetted against the statutory role of the school board, the continuing requirement for a budget validation referendum, and the statutory meaning of the phrase “municipal legislative body” in 20-A M.R.S.A. § 2307, among other legal considerations.

II. OTHER PROVISIONS IN THE PORTLAND CHARTER CONCERNING THE SCHOOL BOARD—A DISCUSSION AND A COMPARISON

The Portland Charter includes other provisions affecting the duties and powers of the school board, which we discuss next. For your reference, we have prepared, in [Appendix A](#), a table that identifies the key Portland Charter provisions affecting school boards and compares them with the charter provisions of other populous charter cities in Maine—namely, Auburn, Bangor, Biddeford, Lewiston, and Sanford. In [Appendix B](#), we have attached a copy of the Portland Charter showing the provisions affecting the school board highlighted in yellow.

A. In general, control over public schools is expressly delegated to the school board.

The Portland Charter, like all of the charters that we reviewed, contains a general provision excepting from the city council’s authority all duties and powers concerning the management, care, and control of the city’s public schools, and vesting that power and duty in the school board:

The administration of all the fiscal, prudential, and municipal affairs of the City of Portland, with the government thereof, except the general management, care, conduct, and control of the schools of such city which shall be vested in a board of public education as hereinafter provided (also referred to herein as the “school board”), and also except as otherwise provided by this charter, shall be and are vested in one body of nine members, which shall constitute and be called the city council, all of whom shall be inhabitants of the city, and shall be sworn in the manner hereinafter prescribed.

Portland Charter, Art. I, § 2 (emphasis added); *see also* Biddeford Charter, Art. I, § 2 (same), Lewiston Charter, § 1.02(a) (same). Importantly, the Portland Charter does not purport to address educational policy or operation of the schools, and this approach is consistent with the Legislature’s scheme which assigns local responsibility for public education to the elected school board. Indeed, the Portland Charter explicitly acknowledges the broad responsibilities of the school board with regard to public education:

The board of public education shall have all the powers, and perform all the duties in regard to the care and management, including sound fiscal management, conduct, and control of the public schools of the city, which are now conferred and imposed upon school committees and school boards by the laws of this state, except as otherwise provided in this charter.

Portland Charter, Art. III, § 4; *see also* Bangor Charter, Art. III, § 1 (same), Biddeford Charter, § 3(a) (same), Lewiston Charter, § 5.03(a). As discussed in Part I, any departure from the principle that a school board controls the public schools would likely run afoul of the Constitutional and statutory scheme regarding governance of municipal school units and the limits on home rule authority.

B. The school board controls the preparation and expenditure of the school budget, while the city council approves and appropriates the total school budget.

The Portland Charter provides that the school board must submit to the city council an annual school budget, and any information relating to the budget, to the council. *See* Portland Charter, Art. III, § 5. The city council approves the total budget after holding a hearing and makes one gross appropriation for the

support of the public schools. *Id.* This separation of powers between the school board and city council rests in state law, as discussed, and is a common feature of other city charters. *See, e.g.,* Bangor Charter, Art. III, § 1; Lewiston Charter, §§ 5.03, 6.07(f); Biddeford Charter, Art V, § 4. Unique to the Portland Charter is a provision that the city council may not reduce the school board’s proposed budget except by vote of at least six of its nine members. *See* Portland Charter, Art. III, § 5.

C. The Portland Charter contains specific school budget reporting, consultation, and audit requirements, as well as provisions concerning borrowing and bonding, procurement, and capital improvements.

In addition to this general delegation of responsibility over the school budget, city charters sometimes include school budget reporting, consultation, and audit requirements which may affect how and when a school budget is prepared. For example, the last Portland charter revision in 2010 added specific provisions to the Portland Charter requiring the school board and the city council, or their designated subcommittees (the finance committees), to share information about, review, and consult on the school budget within certain timeframes. *See* Portland Charter, Art. III, § 5. The Portland Charter also requires detailed monthly reporting to the city’s finance director. *See id.*; *see also* Art. VII, §§ 1, 3. The Portland Charter also delegates responsibility to the mayor to “facilitate among the city manager, city council, [school board] and the public to secure passage by the city council of the annual city and school budgets” Portland Charter, Art. II, § 5(h).

Most of the city charters that we reviewed likewise contain some school budget-related consultation, reporting, and audit requirements—although the scope and detail of such requirements vary to a great degree, and some charters are largely silent on these details. *See, e.g.,* Bangor Charter. When charters do speak on these issues, they may:

- Include instructions on the transfer of funds among departments or functions. *See, e.g.,* Sanford Charter, § 613. (Note that we question whether the funds transfer limitation in the Biddeford Charter, Art. IX, § 3, is valid, as it appears to conflict with the school board’s cost center transfer authority under 20-A M.R.S. § 1485(2).)
- Impose deadlines for submitting the school budget to the council or budget committees and prohibitions on the expenditure of funds that exceed appropriation resolves. *See, e.g.,* Lewiston Charter, § 5.03.
- Contain contingency procedures for budget shortfalls. *See, e.g.,* Sanford Charter, § 619.3.
- Include detailed procedures for selecting auditors and conducting annual audits. *See, e.g.,* Auburn Charter, § 8.11.

These types of school budget consultation, reporting, and auditing provisions usually do not conflict with the ultimate authority of the school board to direct expenditures or that of the council to approve only the total school budget. Provided they also do not conflict with other provisions of state law, they likely fall within a charter’s home rule authority to modify or eliminate.

In addition, like most other charters, the Portland Charter houses other finance-related provisions—including requirements for the procurement of goods and services, borrowing and bonding, and capital improvement planning—that may affect school management decisions. For example, the Portland Charter encourages the city and school department to share staff and resources and cooperate to provide better services in a cost-effective manner. *See* Portland Charter, Art. VII, § 2.

The Portland Charter also imposes limits and procedures on the sale of bonds or notes pledged on the credit of the city. *Id.* Art. VII, § 11. The Charter is silent with respect to the issuance of bonds specifically for school construction or renovation projects; however, state law provides that in a municipal school unit

“where the responsibility for final adoption of the school budget is vested in the municipal council by municipal charter, a locally funded project may be approved without a referendum vote if the charter does not require a referendum.” 20-A M.R.S. § 15905-A. Care must be taken to adhere to legal requirements when modifying any bond issuance provisions in a charter, as they could affect the city’s ability to issue bonds. Review by bond counsel of any such modifications is strongly recommended.

Notably absent from the Portland Charter is the role of the school board in the capital improvement program (CIP) planning process. Other charters provide a clear roles for the superintendent and school board in preparing and authorizing CIPs, usually jointly with the city manager and council, which can thereby qualify school capital project for capital reserve funding. *See, e.g.*, Bangor Charter, §§ 8.9, 8.10; Sanford Charter, § 610.

D. The Portland Charter contains specific provisions affecting school board governance, including provisions concerning school board elections and conflicts of interest

The Portland Charter contains governance provisions affecting school boards, including the composition of the school board, election and recall procedures, how vacancies are filled, and compensation provisions. While most charters include such provisions, the specifics vary greatly. For example, the Portland Charter is the only charter we reviewed where school boards are elected using ranked choice voting. *See* Portland Charter, Art. II, § 3. In addition, unlike most charters, the Portland Charter contains detailed provisions concerning conflicts of interest and incompatibility of office. In contrast, most other charters are silent on these topics, presumably because there is already a rich framework of state law and case law on these two topics. Please refer to the table in [Appendix A](#) for a side-by-side comparison of how each of these provisions appear in the Portland Charter and in the other city charters that we reviewed.

III. CONCLUSION

This memorandum is intended to provide a general overview of the legal landscape affecting charter revision and public education. We encourage the school board to monitor the Portland Charter revision process and to provide input to the Commission on any school-related issues or proposals. The school board may also wish to make proposals to the Commission to change existing charter language, particularly with regard to the school budget process, consistent with the legal principles and recommendations discussed in this memorandum. We are available to assist the school board in evaluating or preparing any such proposals.

Enclosures:

- Appendix A: A Comparison of Select Charter Provisions of the Most Populous Maine Charter Cities
- Appendix B: Portland Charter, with School-Related Provisions Highlighted

APPENDIX A
A COMPARISON OF SELECT CHARTER PROVISIONS OF THE MOST POPULOUS MAINE CHARTER CITIES

	PORTLAND	AUBURN	BANGOR	BIDDEFORD	LEWISTON	SANFORD
General—Delegation of Authority over Schools	<p>The council is vested with administering all fiscal, prudential, and municipal affairs of the city, “except the general management, care, conduct, and control of the schools.” (Art. I, § 2)</p> <p>The school board is vested with “the care and management, including sound fiscal management, conduct, and control of the public schools” as conferred on school boards by state law. (Art. III, § 4)</p>	<p>The council is vested with all powers granted by charter and state law, except the care and management of the public schools, which is vested in the school committee. (§§ 2.1, 4.1)</p>	<p>The council is vested with all powers granted by charter and state law, except the care and management of the public schools, which is vested in the school committee. (Art. II, § 1)</p> <p>The school committee is vested with “the care and management of the public schools” as conferred on school boards by state law. (Art. III, § 1)</p>	<p>The mayor and council are vested with administering all fiscal, prudential and municipal affairs of the city, except the general management, care, conduct, and control of schools, which is vested in the school committee. (Art. I, § 2)</p> <p>The school committee is vested with “the care and management of the City’s public schools” pursuant to state law. (Art. V, § 3(a))</p>	<p>The mayor and council are vested with administering all fiscal, prudential and municipal affairs of the city, except the general management, care, conduct, and control of schools, which is vested in the school committee. (§ 1.02(a))</p> <p>The school committee is vested with the “care and management of the city’s public schools” pursuant to state law. (§ 5.03(a))</p>	<p>The school committee is vested with all the “care and management of the public schools” of the city as conferred on municipal school committees by state law. (§ 505.1). The Department of Education is governed and administered the school committee and superintendent, in accordance with state law. (§ 501)</p>
School Budget—Approval, Appropriation, Expenditure	<p>The school board must submit an annual school budget to the council, including any information relating to the budget that the council requires.</p> <p>The council approves the school budget after holding a hearing, and makes one gross appropriation for the support of the public schools. The appropriation may not be less than the school board budget, except by a vote of at least six councilors. (Art. III, § 5)</p> <p>The council adopts an annual appropriation resolve, which contains one gross amount for school purposes. The total appropriation must not exceed the city’s estimated revenues. (Art. VII, § 7)</p> <p>The mayor may veto the annual city appropriation but any such veto of the appropriation may not affect the school budget appropriation. (Art. II, §§ 2, 5(i); Art. VII, § 8)</p> <p>The school board has authority to expend the appropriation but may not exceed it except with the council’s consent. (Art. III, § 5)</p>	<p>Refer to § 8.9 for budget creation process, which is collaborative between city and school department. Authority rests with council to finally approve the budget. (§§ 2.6; 8.7; 8.9)</p> <p>The school committee must expend funds within the limits of the council’s appropriation resolves, together with any other revenues the school committee may receive. (§ 4.1)</p>	<p>The school committee must submit an annual estimated school budget to the council. On the basis of the estimated school budget, the council makes one gross appropriation for the support of the public schools. (Art. III, § 1)</p> <p>Expenditures are under the direction and control of the school committee. The council’s appropriation may not be exceeded except by consent of the council and certification of availability of unanticipated funds. (Art. III, § 1, 10)</p>	<p>The school committee must submit the school budget to a budget committee, which submits it to the council after review. The council decision is final, subject to budget validation referendum. (Art. V, § 4)</p> <p>The council adopts an annual appropriation resolve, which contains amounts necessary for general city purposes and for a contingency fund. (Art. XI, § 3)</p> <p>The school committee may not transfer funds from one function to another without a two-thirds vote of both the school committee and council. (Art. V § 4)</p>	<p>The school committee must submit the school budget to the council at least three months prior to the end of the fiscal year. (§ 5.03(a))</p> <p>The council adopts the city budget, including the school budget, by resolution. If the council fails to do so at least 20 days prior to the end of the fiscal year, the school committee’s final budget is deemed to be automatically adopted. Adoption of the city budget by the council constitutes appropriations of the amounts specified as expenditures from the funds specified. (§ 6.07(f))</p>	<p>The school committee must submit to the budget committee a line-item balanced school budget containing a complete and detailed financial plan for all school funds and activities. The budget committee must hold public hearings to review the expenditures of each municipal agency or department proposed by the city manager, and of each school agency or department proposed by the superintendent. The council authorizes the school budget, which is then presented to the budget validation referendum. The budget committee’s budget may be changed only by a majority vote of the council. (§§ 505.2, 604, 607)</p> <p>Adoption of the municipal and school budgets by the council constitutes appropriations. The council may authorize the transfer of any unencumbered appropriations between the municipal budget articles, and the school committee may authorize the transfer of any unencumbered appropriations between the school budget articles. (§ 613)</p> <p>If it appears probable to the city manager or superintendent that revenues are insufficient to cover appropriations, the council may take action to prevent or minimize any deficit, including by reducing appropriations to the extent not inconsistent with 20-A M.R.S.A. §§ 15004 and 15613(8). (§ 619.3)</p>

	PORTLAND	AUBURN	BANGOR	BIDDEFORD	LEWISTON	SANFORD
School Budget—Consultation, Reporting, and Auditing Requirements	<p>The mayor is responsible for facilitating among the city manager, council, school board, and the public to secure passage by the city council of the annual city and school budgets. (Art. II, § 5(h))</p> <p>The superintendent must submit a balanced budget estimate, which provides a “complete financial plan of all school funds and activities,” to the school board no later than 3½ months before the end of the fiscal year. During the 30 days following submission, the school board and council, or their designated subcommittees, must meet jointly at least twice to review the budget estimate. (Art. III, § 5)</p> <p>Accounts must be kept by the finance director of finance, showing the transactions of all departments of the city and the school department. The finance director must publish a monthly financial statement and furnish a monthly detailed report to the city manager of revenues, expenses, and expenditures on all accounts and, for each appropriation item, the expenditures made and the obligations incurred during the preceding calendar month and the total unencumbered balance. All city and school accounts are audited annually by an auditor selected by the council. (Art. VII, §§ 1,3)</p>	<p>An audit committee, composed of two councilors and two school committee members, select and direct the work of an independent auditor, and report back to a joint meeting of the council and school committee. The council selects the accountant upon recommendation of the committee. The committee also reviews the procurement policy and report to the council and school committee as to the strengths and weaknesses of the policy. (§ 8.11)</p>	<p>The city audits must be audited annually by a CPA chosen by the council. (Art VIII, § 2)</p>	<p>The council must provide an annual independent audit of all City accounts and may provide more frequent audits. (Art. III § 9)</p>	<p>The city administrator establishes a system of bookkeeping, auditing, purchasing and records pertaining to all financial transactions of the school committee, and may establish rules governing such procedure consistent with local and state law. (§ 5.04)</p>	<p>The school committee must present an "audit action plan" with remedies as appropriate to the council for review and approval. (§ 505.3)</p>
Procurement	<p>To the extent practicable and lawful, the city and the school department shall endeavor to share staff and resources and otherwise cooperate with one another in order to provide better city and school services in a cost effective manner (Art. VII, § 2)</p>	<p>The council must adopt a procurement policy for the city’s purchase of materials and services for all city departments, including the Department of Education. A procurement policy committee composed of two councilors, two school committee members, and a mutually selected fifth member develop the procurement policy, and report back to the council and school board. (§ 8.16)</p>	<p>The city’s purchasing agent purchase all supplies for the city, but educational supplies for the city schools are excepted and may be purchased by the purchasing agent upon requisition by the school committee (Art. VIII, § 5)</p>		<p>The city administrator establishes a system of bookkeeping, auditing, purchasing and records pertaining to all financial transactions of the school committee, and may establish rules governing such procedure consistent with local and state law. (§ 5.04)</p>	<p>The city manager will act as purchasing agent for all departments, except the school department. Whenever possible, the city manager must work with the superintendent to negotiate contracts for supplies, materials and equipment commonly purchased by both the city and school. (§ 402.13)</p>
Capital Improvement Program (CIP)	<p>The mayor must consult with and provide guidance to the city manager in the preparation of an annual CIP. (Art. II, § 5(g))</p> <p>The city manager must prepare a 5-year rolling CIP for annual presentation to the council. (Art. IV, § 5(i))</p>	<p>The city manager and superintendent must jointly prepare and submit to a joint meeting of the council and school committee a multi-year CIP before submission of the budget, and must publish a general summary of the CIP. The CIP must be revised and extended each year with regard to capital improvements pending or in process of construction or acquisition. (§§ 8.9, 8.10)</p> <p>The council must adopt the CIP by resolution, with or without amendment, after a public hearing (§ 8.10(B))</p>	<p>The charter contains no specific CIP provision.</p>	<p>The charter contains no specific CIP provision.</p>	<p>The administrator prepares and submits to the council a 5-year CIP, including the CIP proposed for the school department. The planning board review the proposed CIP each year, and following public hearing, forward its recommendations to the council. After notice and hearing, the council by resolution adopts the CIP with or without amendment. Adoption does not constitute the appropriation of funds. (§§ 6.05, 6.06)</p>	<p>The city manager and the superintendent annually prepare and submit to the budget committee a 5-year CIP. The budget committee reviews the CIP and makes recommendations to the council for approval. The city creates annual reserves for the CIP by raising and appropriating at least 4% of the budget each year. Projects funded by the CIP include road maintenance, vehicular replacements, roofing projects, major building renovations, major equipment purchase, airport projects, new buildings and the like. (§ 610).</p>

	PORTLAND	AUBURN	BANGOR	BIDDEFORD	LEWISTON	SANFORD
Borrowing and Bonding	<p>Money may be borrowed, within the limits fixed by the Constitution and state law, by the issue and sale of bonds or notes pledged on the credit of the city, or on the revenues or assets of the projects financed with the proceeds of such borrowings. The council issues an order providing for the issue of bonds after notice and hearing. A council order authorizing the issuance of bonds must be approved by at least 7 councilors. With some exceptions, the issuance of general obligation bonds greater than 0.05% of the city's last state valuation or any obligation to expend tax funds over multiple years greater than 0.075% of the city's last state valuation for a single capital improvement or piece of equipment and the issuance of must be submitted to voter referendum. (Art. VII, §§ 11, 16)</p>	<p>The city may issue bonds pledging the credit of the city in the manner prescribed by state law. The council votes to issue the bonds after notice and hearing. (§ 8.13)</p>	<p>Money may be borrowed by order of the council, within the limits fixed by the Constitution and state law, by the issue and sale of bonds or notes pledged on the credit of the city, or on other enumerated revenues. (Art. VII, § 13)</p> <p>With some exceptions, the issuance of general obligation bonds greater than 0.05% of the city's last state valuation or any obligation to expend tax funds over multiple years greater than 0.075% of the city's last state valuation for a single capital improvement or piece of equipment and the issuance of must be submitted to voter referendum. (Art. VIII, § 19)</p>	<p>Money may be borrowed, within the limits fixed by the Constitution state law, by the issue and sale of bonds or notes pledged on the credit of the city. (Art. XI, § 6)</p>	<p>Money may be borrowed temporarily in anticipation of taxes or of the issuance of bonds, in accordance with the provisions of 30-A M.R.S.A. § 5771 (§ 6.13)</p>	<p>The budget committee must review all bond requests presented by the council and school committee, and shall make recommendations for bonding to the city manager and superintendent when appropriate during the budget review process. (§ 604.4).</p> <p>Capital projects of the municipal and school departments to be financed through the issuance of bonds for \$250,000 or less may be approved by the council. (§ 705.1)</p> <p>See amended § 705 for more information on bonding, including for bonds over \$250,000.</p>
School Board Composition and Election Procedures	<p>The school board is composed of nine members, four at large and one from each of the five districts who hold office for a term of three years and until their successors are elected and qualified. All candidates must be residents of the city for a period of at least three months prior to the date on or before which nomination papers are to be filed. The candidate from each of the 5 districts must be a resident of such district. (Art. III, § 1) For the positions of mayor, city councilor, and school board member, the city uses a ranked choice voting protocol. (Art. II, § 3; Art. IV, § 10)</p> <p>Nominations are by petition, with minimum signature requirements. (Art. IV, § 4)</p> <p>For vacancy provisions, refer to Art. II, § 7; Art. III, § 6. Recall procedures are set forth in Art. V, § 2.</p>	<p>The school committee is composed of the mayor, or a city councilor selected by the mayor and 7 other members. Five members are elected, one from each ward by and from its registered voters. Two members are elected at-large. Members hold office for a term of two years. (§ 4.2).</p> <p>For vacancy provisions, refer to § 4. Recall procedures are set forth in § 9.1(C).</p>	<p>The school committee is composed of seven members elected at large who hold office for a term of 3 years with a term limit of 3 consecutive terms. (Art. III, § 2) The members of the school committee annually by majority vote designate one of its members to serve as Chair.(Art. III, Sec.3)</p>	<p>The school committee is composed of seven members at large who hold office for a term of 2 years, but no more than two members from any one ward, who shall hold office for a term of two years. The mayor is the ex officio chair with no veto power, who may not make a motion and may only vote to break a tie. (Art. V, §§ 1,2)</p> <p>For vacancy provisions, refer to Art. V, § 5. Recall procedures are set forth in Art. IX, § 2.</p>	<p>The school committee is composed of nine members, one elected from each ward, one at-large, and one council member nominated by the mayor and appointed by the council from any ward. Members hold office for a term of 2 years. (§ 5.01(a))</p> <p>For vacancy provisions, refer to § 5.01. The charter contains no specific recall procedures.</p>	<p>The school committee is composed of five members, who are elected at-large and who hold office for a term of 3 years. Nominations are by petition, with minimum signature requirements. (§§ 501, 1103)</p> <p>For vacancy provisions, refer to § 503. Recall procedures are set forth in § 1201.</p>
School Board Compensation	<p>The council establishes the amount each member of the school board is entitled to receive as compensation, which must be the same as that received by members of the city council, other than the mayor. The council must provide additional compensation to the chair of the school board. (Art. III, § 1)</p>	<p>Compensation is set by the council through ordinance, upon recommendation from school committee. (§ 4.2)</p>	<p>The charter contains no specific school board compensation provision.</p>	<p>School committee members receive compensation at the rate of \$10 for every regularly scheduled meeting attended, not to exceed \$500 per year. (Art. V, § 1)</p>	<p>Compensation is set by the council through ordinance. (Sec. 5.01(b)).</p>	<p>Compensation is fixed each year by the school committee. (§ 507)</p>

	PORTLAND	AUBURN	BANGOR	BIDDEFORD	LEWISTON	SANFORD
School Board Conflicts of Interest	<p>No member of the council or school board or board or commission thereof and no officer or employee of the city or school department shall:</p> <p>(a) Have a substantial financial interest, direct or indirect, in any contract entered into by or on behalf of the City of Portland or the school board, except his or her employment contract, or in the sale to or by the city or school department of any land, materials, supplies or services when such officer, employee or member exercises on behalf of the city or school department any function or responsibility with respect to such contract or sale. All contracts or sales made in violation hereof are void, and the city treasurer is expressly forbidden to pay any money out of the city treasury on account of any such transaction.</p> <p>(b) Purchase or accept anything from the city or school department, other than those items or services which are offered to the public generally, and then only upon the same terms and under the same procedures offered to and used for the general public. This shall not include those items or services which are received as compensation, or as a part of such person's employment contract, or which are necessary for the performance of such person's duties.</p> <p>(c) Accept or receive from any person, firm, or corporation acting under a franchise, contract, or license from the city or school department, any frank, free pass, free ticket, or free service, or accept, directly or indirectly, from any such person, firm, or corporation any service upon terms more favorable than those granted to the public generally. (Art. VIII, § 1)</p>	The charter contains no specific conflict of interest provision.	The charter contains no specific conflict of interest provision.	The charter contains no specific conflict of interest provision.	The charter contains no specific conflict of interest provision.	No school committee member shall hold any other compensated city office or city employment, except as on-call emergency personnel, during their term of office. No school committee member shall hold any paid office or position of employment with the school department. If a member of the school committee ceases to possess any of these qualifications or is convicted of a crime punishable by imprisonment for more than six months, the office shall immediately become vacant. (§ 502)
Incompatibility of Office	No member shall hold any office or employment the compensation of which is payable by the city or school department during the term for which he or she was elected. (Art. II, § 4)	Except where authorized by law, no member shall hold any other elected public office during the term for which the member was elected. No member shall hold any other city office or employment during the term for which the member was elected. No former member shall hold any compensated appointive city office or city employment until at least one year after expiration of the member's elective term.	The charter contains no specific incompatibility of office provision for school board members.	The charter contains no specific incompatibility of office provision for school board members.	The charter contains no specific incompatibility of office provision for school board members.	The charter contains no specific incompatibility of office provision. See above section for more information on prohibited positions.

	PORTLAND	AUBURN	BANGOR	BIDDEFORD	LEWISTON	SANFORD
Web Link	https://www.portlandmaine.gov/DocumentCenter/View/1102/City-Charter---Revised-332020?bidId	https://www.auburnmaine.gov/CMSContent/City_Clerk/charter.pdf (See also https://www.auburnmaine.gov/pages/government/city-charter-ordinances).	https://ecode360.com/14036615	City of Biddeford, ME City Charter (ecode360.com)	https://www.lewistonmaine.gov/DocumentCenter/View/181/City-Charter?bidId= (See also https://www.lewistonmaine.gov/151/City-Charter).	https://www.sanfordmaine.org/index.asp?SEC=B7910104-37A4-4F19-8A4E-58A42A843356&DE=FE82D1BD-194C-4DA6-856D-13123C3BD050&Type=B_BASIC (See also https://www.sanfordmaine.org/vertical/sites/%7B9A3D3C8D-76EE-4CC5-B86E-C19FDBF5E473%7D/uploads/Final_Report_Corrected_Website.pdf

APPENDIX B
PORTLAND CHARTER, WITH SCHOOL-RELATED PROVISIONS HIGHLIGHTED

PART I CHARTER*

***Editor's note**--Historical references are cited in parentheses at the end of each section. Such references cite only the various amendments adopted by referenda conducted pursuant to home rule powers granted by P.L. 1970, c. 563 (30 M.R.S.A. § 1911 et seq.). Prior to 1970 and home rule the charter and its various amendments were enacted by the Maine Legislature and such are not cited in said parentheses. A history of the charter and amendments is attached as Appendix A.

State law reference(s)--Home rule, 30 M.R.S.A. § 2101 et seq.

Preamble

- Art. I. Grant of Powers to the City, §§ 1, 2**
- Art. II. City Council; Mayor, Ranked Choice Voting §§ 1--11**
- Art. III. Board of Public Education, §§ 1--6**
- Art. IV. Elections, §§ 1--11**
- Art. V. Recall, §§ 1--7**
- Art. VI. Administrative Officers, §§ 1--8**
- Art. VII. Business and Financial Provisions, §§ 1--16**
- Art. VIII. Miscellaneous Provisions, §§ 1--5**

PREAMBLE

We, the People of Portland, Maine, establish this Charter to secure the benefits of local governance and to provide for the general health, safety and welfare of our community. In so doing, we build a government that meets the needs of the people it serves and whose character it reflects. Our government shall further cooperation, encourage leadership, solicit our input and support the active participation of our residents in their governance. Our government shall be effective and accountable and shall promote equal rights and representative democracy.

Our government shall provide public education that enables all residents to acquire the knowledge and skills necessary to participate fully in Portland's civic, intellectual, cultural and economic life, in order to enrich and strengthen our community and our common future.

(Referendum 11/2/10)

ARTICLE I. GRANT OF POWERS TO THE CITY

Section 1. Corporate existence retained.

The inhabitants of the City of Portland shall continue to be a body politic and corporate by the name of the City of Portland, and shall have, exercise, and enjoy all the rights, immunities, powers, privileges, and franchises and shall be subject to all the duties, liabilities and obligations provided for herein, or otherwise, pertaining to or incumbent upon such city as a municipal corporation or to the inhabitants or municipal authorities thereof; and may enact reasonable by-laws, regulations, and ordinances for municipal purposes, not inconsistent with the Constitution and laws of the State of Maine, and impose penalties for the breach thereof as such by-laws, regulations, or ordinances shall provide. Such penalties shall not limit nor diminish in any way the city's authority to seek and obtain higher or different penalties provided by state or other law. (Referenda 12/4/72; 11/2/10)

Section 2. Powers and duties.

The administration of all the fiscal, prudential, and municipal affairs of the City of Portland, with the government thereof, except the general management, care, conduct, and control of the schools of such city which shall be vested in a board of public education as hereinafter provided (also referred to herein as the "school board"), and also except as otherwise provided by this charter, shall be and are vested in one body of nine members, which shall constitute and be called the city council, all of whom shall be inhabitants of the city, and shall be sworn in the manner hereinafter prescribed.

The members of the city council shall be and constitute the municipal officers of the City of Portland for all purposes required by statute, and, except as otherwise herein specifically provided, shall have all powers and authority given to, and perform all duties required of, municipal officers and mayors of cities under the laws of this state.

All other powers now or hereafter vested in the inhabitants of such city, and all powers granted by this charter, except as herein otherwise provided, shall be vested in the city council.

(Referendum 11/2/10)

ARTICLE II. CITY COUNCIL

Section 1. City to be divided into election districts.

For the purpose of all elections the city, including its islands, shall be divided into five (5) districts to establish compact and contiguous districts of approximately equal population.

The city council for voting purposes may by ordinance divide the election districts into voting districts. (Referenda 11/2/76; 6/13/78; 11/4/86; 11/2/11)

Section 2. Composition, election, tenure of office.

The city council shall be composed of nine (9) members, including the mayor who shall be one of the nine (9) members of the city council, and shall hold office for a term of three (3) years and until their successors are elected and qualified, except as provided below for the term of mayor and for one at large seat in the election of 2013 only. Four (4) members, including the mayor, shall be elected at large from and by the registered voters of the entire city, and one (1) shall be elected from each of the five (5) districts heretofore provided for, from and by the registered voters of each district. References in this charter to the city council, councilors, council, its members or membership, shall be deemed to include the mayor, unless otherwise specifically provided.

For the municipal election in November of 2013, one of the two at large seats up for election shall have a one-time four year term ending in 2017. Thereafter, the council term shall return to be three (3) years for this seat. The city clerk shall designate which seat shall be for the four (4) year term prior to the availability of nomination papers for the 2013 election, and nomination papers shall be separately issued for each of the two at large seats. Each at large candidate may take out and file nomination papers for only one of the at large seats. The municipal ballot will list the 4-year and 3-year council seats as separate questions.

All candidates must be residents of the city for a period of at least three (3) months prior to the date on or before which nomination papers are to be filed. The candidate from each of the five (5) districts must be a resident of such district

for a period of at least three (3) months prior to the date on or before which the nomination papers are to be filed.

Beginning with the regular municipal election in November, 2011, the at large position then up for election shall be designated as the mayor's position and shall continue as the mayor's position thereafter. The position of mayor only shall be elected by majority vote as provided in section 3 of this article. The candidate(s) for mayor shall be nominated in the same manner as other at large members of the council. The term of mayor shall be four (4) years, with a maximum limit of two (2) consecutive terms. The election and position of mayor shall be a non-partisan, full-time position. (Referenda 12/1/75; 6/13/78; 11/4/86; 11/3/87; 11/2/10; 11/6/12)

Section 3. Ranked choice voting; instant runoff tabulation.

For the positions of mayor, city councilor, and school board member, the city clerk shall implement a ranked choice voting protocol according to these guidelines:

- (a) The ballot shall give voters the option of ranking candidates in order of choice.
- (b) If a candidate receives a majority, i.e. at least one more than fifty percent (50%) of the first choice votes cast, that candidate is elected.
- (c) If no candidate receives a majority of first choice votes, an instant runoff re-tabulation shall be promptly conducted by the city clerk and completed within five (5) business days of the election. The instant runoff re-tabulation shall be conducted in successive rounds, with the majority determined for each successive round by the number of votes cast in that round. The candidate with the fewest votes after each successive round in which no candidate receives a majority of the votes cast in that round shall be eliminated, and the votes in the successive rounds shall be re-tabulated among the remaining candidates until one candidate receives a majority of the votes cast in that round. In each successive round, each voter's ballot shall count as a single vote for whichever candidate the voter has ranked highest who has not been eliminated in a prior round, if any.

- (d) After the first round, a majority is determined as at least one (1) more than fifty percent (50%) of the votes cast for a remaining candidate in a particular round.
- (e) The city clerk may adopt additional regulations consistent with this subsection to implement these provisions. The ballot shall contain instructions on how to vote for each office.

(Referenda 11/2/2010; 3/3/2020)

Section 4. Compensation of councilors and mayor.

Except as otherwise provided in the paragraph below for the mayor's compensation, the city council shall by order establish the amount each member shall be entitled to receive as compensation for all services rendered, and specify when any compensation shall be payable, but no such order increasing their compensation, including that of the mayor, shall take effect during the then current municipal year, and no such payment of compensation shall be made in advance.

Prior to the date nomination papers are available for the first mayoral election, the city council shall set the mayor's compensation and shall re-set it prior to the date nomination papers are available for each mayoral election thereafter. During the mayor's term, the city council may adjust the mayor's compensation. At minimum, the mayor shall be paid compensation consisting of a salary which is no less than one and one-half (1.5) times the median household income for Portland as most recently published by the U.S. Census Bureau, American Community Survey, or successor index thereto, at the time such compensation is set or adjusted, plus customary city benefits.

No member shall hold any office or employment the compensation of which is payable by the city or school department during the term for which he or she was elected.

(Referenda 12/1/75; 6/13/78; 11/4/86; 11/3/87; 11/2/10)

Section 5. Mayor's powers and duties.

The mayor shall be the official head of the city, responsible for providing leadership, and shall have the following powers and duties:

- (a) To articulate the city's vision and goals and build coalitions to further such vision and goals. The mayor shall give an annual state of the city address during a special meeting of the city council called for that purpose;
- (b) To convene and lead an annual workshop session of the city council to discuss and identify the city's goals and priorities in order to provide guidance for the city manager and to inform the public. The city manager shall attend this workshop session, and a summary of the session shall be made available to the public;
- (c) To represent the city with other municipalities, levels of government, community and neighborhood groups, and the business community;
- (d) To preside as chair of the city council, and vote upon all matters in the same manner as other members of the city council, except as provided in article VII, section 8. The mayor shall direct the city manager in the preparation of council meeting agendas;
- (e) To facilitate the implementation of city policies through the office of the city manager;
- (f) To consult with and provide guidance to the city manager in the preparation of all city budgets and to provide comments on such budgets at the time they are presented by the city manager to the city council for approval;
- (g) To consult with and provide guidance to the city manager in the preparation of the annual capital improvement program plan described in article VI, section 5, paragraph (i), and to provide comments on such program plan at the time it is presented by the city manager to the city council;
- (h) To facilitate among the city manager, city council, board of public education and the public to secure passage by the city council of the annual city and school budgets;

- (i) To exercise veto power over the annual city appropriation as provided in article VII, section 8;
- (j) To establish performance guidelines in conjunction with the other members of the city council for regular evaluations, no less than annually, by the city council of the performance of the city manager, corporation counsel and city clerk, such evaluations to be based upon those guidelines. Such performance guidelines shall have measurable goals and objectives, taking into consideration, as applicable, the achievement of city policies and priorities;
- (k) To chair any subcommittee with at least two (2) other city councilors to recommend the appointment or removal of the city manager, corporation counsel or the city clerk, but the full city council shall have the final decision in regard to such appointment or removal by a vote of at least five (5) members of the council; and
- (l) To appoint the members and chairs of the city council committees and various ad hoc committees and communicate such appointments to the city council, which may override such appointments by a vote of at least six (6) council members.

Notwithstanding the foregoing, the city manager shall be in charge of the day to day operations of the city and administration of the city budgets approved by the council.

(Referendum 11/2/10)

Section 6. Absence or disability of mayor; acting mayor.

In the temporary absence or disability of the mayor, the mayor may select an acting mayor from among the other council members and such person shall perform the duties of the mayor during such temporary absence or disability for a maximum of sixty consecutive (60) days or return of the mayor, whichever comes first. If through physical or mental incapacity the mayor is unable to select an acting mayor, or if the mayor's absence or disability exceeds sixty (60) consecutive days, the council shall select an acting mayor from among its membership until such time as the mayor is able to resume his or her duties or a vacancy is declared pursuant to section 7 below and a new mayor elected. (Referendum 6/13/78; 11/7/00; 11/2/10)

Section 7. Vacancies.

A vacancy in the membership of the city council shall occur upon the happening of the following: (1) the death of a member; (2) the effective date of the resignation of a member; (3) the removal of a member from the district from which he or she was elected; (4) the removal of a member from the city; (5) the conviction of a member of a felony while in office; or 6) the recall of a member pursuant to the provisions of article V. The council shall declare a vacancy in its membership to exist upon the failure of a member to attend any six (6) consecutive regular meetings of the city council, or at least sixty (60) percent of the regular meetings of the city council held in any one calendar year unless such member shall be excused (by vote of at least four (4) other members) for health reasons or other good cause.

The council shall declare a vacancy in its membership to exist upon the qualification of any member for any city or school department office, or the acceptance of any employment with the city or school department, the compensation for which is payable by the city or school department.

A member may in writing addressed to the council resign his or her office effective at a future date specified in such written resignation. Once submitted to the council, such resignation may not be withdrawn, and such member's office shall become vacant on such specified future date.

If a vacancy in the membership of the city council occurs or is declared prior to the next regular municipal election, the vacancy shall be filled at a special election to take place on the same date as the next scheduled municipal or state election which is no less than 127 days after the date the vacancy occurs or is declared, unless the council, by a vote of at least six (6) of its members, calls a special election on an earlier date. Such election shall be called and held and nominations made as in other elections. (Referenda 11/2/76; 11/4/86; 11/2/99; 11/2/10)

Section 8. Meetings of the council.

The city council shall meet at the usual place for holding meetings on the first Monday in December following the regular municipal election, or as soon thereafter as possible, and at such meeting the mayor and councilors-elect shall be sworn to

the faithful discharge of their duties by a justice of the peace, or by the city clerk. The city council shall at such meeting establish by resolution or rule a regular place and time for holding its meetings, and shall meet regularly at least twice each month. (Referenda 6/13/78; 11/4/86; 11/7/00; 11/2/10)

Section 9. Special meetings.

Special meetings may be called by the mayor, and in case of his or her absence, disability, or refusal, may be called by five (5) or more members of the city council. At least twenty-four (24) hours notice of the time and place of holding such special meeting shall be given to all members of the city council. (Referendum 11/2/10)

Section 10. Quorum.

Five (5) members of the city council shall constitute a quorum for the transaction of business, but a smaller number may adjourn from time to time. At least twenty-four (24) hours notice of the time and place of holding such adjourned meeting shall be given to all members who were not present at the meeting from which adjournment was taken. (Referendum 11/2/10)

Section 11. Procedure.

The city council shall keep a record of its proceedings and shall determine its own rules of procedure and make lawful regulations for enforcing the same. The meetings of the city council shall be open to the public in accordance with state law. The city council shall act only by ordinance, order, or resolve. All ordinances, orders, and resolves, except orders or resolves making appropriations of money, shall be confined to one subject which shall be clearly expressed in the title. An appropriation order or resolve shall be confined to the subject of appropriations only.

No ordinance and no appropriation order or resolve shall be passed until it has been read on two separate days, except when the requirement of a second reading on a separate day has been dispensed with by the vote of at least seven (7) members of the city council. The yeas and nays shall be taken upon the passage of all ordinances and entered on the record of the proceedings of the city council by the clerk. The yeas and nays shall be taken on the passage of any order or resolve when called for by any member of the city council. Every ordinance, order, and

resolve shall require on final passage the affirmative vote of at least five (5) members of the city council. No ordinance shall take effect until thirty (30) days after its passage and no order or resolve shall take effect until ten (10) days after its passage, except as herein otherwise provided for emergency ordinances, orders and resolves.

The city council may, by vote of at least seven (7) of its members, pass emergency ordinances, orders, or resolves to take effect at the time indicated therein, but such emergency ordinances, orders, or resolves shall contain a section in which the emergency is set forth and defined, provided, however, that the declaration of such emergency by the city council shall be conclusive. (Referendum 11/2/10)

ARTICLE III. BOARD OF PUBLIC EDUCATION

Section 1. Composition, election, tenure of office, compensation.

The board of public education shall be composed of nine (9) members who shall hold office, except as hereinafter provided, for a term of three (3) years and until their successors are elected and qualified. Four (4) shall be elected at large from and by the registered voters of the entire city, and one (1) shall be elected from each of the five (5) districts heretofore provided for in section 1 of article II, from and by the registered voters of each such district.

All candidates must be residents of the city for a period of at least three (3) months prior to the date on or before which nomination papers are to be filed. The candidate from each of the five (5) districts must be a resident of such district for a period of at least three (3) months prior to the date on or before which the nomination papers are to be filed.

The city council shall by order establish the amount each member of the school board shall be entitled to receive as compensation for all services rendered, which compensation shall be the same as that received by members of the city council, other than the mayor. The city council shall provide additional compensation to the chair of the school board appropriate to reflect his or her additional responsibilities as chair.

(Referenda 11/2/76; 6/13/78; 11/4/86; 11/3/87; 11/2/10)

Section 2. Chair.

On the first Monday in December following the regular municipal election, or as soon thereafter as possible, the board of public education shall elect one of its members as chair for the ensuing year and until a successor is elected and qualified, and may fill for the unexpired term any vacancy as chair that may occur.

At a date and time to be mutually agreed upon by the chair of the school board and the mayor, the chair shall deliver an annual address on the "state of the public education system in Portland" to the city council and the public. (Referenda 11/2/76; 6/13/78; 11/7/00; 11/2/10)

Section 3. Organization.

The school board shall meet for organization on the first Monday in December following the regular municipal election, or as soon thereafter as possible. The members-elect shall be sworn to the faithful discharge of their duties by a justice of the peace or by the city clerk, and a record made thereof. The members shall at such meeting, or as soon thereafter as possible, establish a regular place and time for holding meetings and shall meet regularly at such place and time. Five (5) members of the school board shall constitute a quorum for the transaction of business, but a smaller number may adjourn from time to time. At least twenty-four (24) hours notice of the time and place of holding such adjourned meeting shall be given to all members who were not present at the meeting from which adjournment was taken. (Referenda 6/13/78; 11/7/00; 11/2/10)

Section 4. Powers and duties.

The board of public education shall have all the powers, and perform all the duties in regard to the care and management, including sound fiscal management, conduct, and control of the public schools of the city, which are now conferred and imposed upon school committees and school boards by the laws of this state, except as otherwise provided in this charter. (Referendum 11/2/10)

Section 5. School budget.

Not later than three and one-half (3.5) months before the end of the fiscal year, the superintendent shall submit to the school board budget estimates of the various sums required for the support of public schools for the ensuing fiscal year and shall thereafter provide the school board with such information relating to such estimates as the school board shall require.

During the thirty (30) days following submission of the superintendent's proposed budget to the school board, the school board and the city council, or their designated subcommittees, shall meet jointly at least twice to review the proposed school budget, focusing on its underlying assumptions and supporting data and the ability of the city to raise the necessary funds for the support of such proposed budget. The superintendent and the city manager shall provide information regarding such proposed budget as reasonably requested by the school board and the city council, or their designated subcommittees.

The budget submitted by the superintendent to be reviewed jointly by the school board and the city council shall provide a complete financial plan of all school funds and activities for the ensuing fiscal year. In organizing the school budget for joint review, the superintendent shall utilize the most feasible combination of expenditure classification by fund, organization, unit, program, purpose or activity, and object. The budget shall begin with a clear general summary of its contents; shall show in detail all estimated income and all proposed expenditures, including debt service for the ensuing fiscal year; and shall be so arranged as to show comparative figures for actual and estimated income and expenditures of the current fiscal year and actual income and expenditures of the preceding fiscal year. The total of proposed expenditures shall not exceed the total of proposed income.

Not later than the last Monday in April of each fiscal year, the school board shall submit to the city council a budget of the various sums required for the support of the public schools for the ensuing fiscal year in the format provided above, and shall thereafter provide the city council with such information relating to such budget as the city council shall require.

A budget hearing on such budget estimates shall be held prior to final action by the city council. The city council in its appropriation resolve for the ensuing year shall, in addition to amounts appropriated for other general city

purposes, appropriate one gross amount for the support of the public schools, which amount shall not be less than the sum required to be appropriated for such purposes by the general laws of the state. Such gross amount shall not be less than the sum requested by the school board except by a vote of at least six (6) members of the city council. Such appropriation shall be expended under the direction and control of the school board but no such appropriation shall be exceeded except by consent of the city council. (Referendum 6/13/78; 11/2/10)

Section 6. Vacancies.

A vacancy in the membership of the board of public education shall occur upon the happening of the following: (1) the death of a member; (2) the effective date of the resignation of a member; (3) the removal of a member from the district from which he or she was elected; (4) the removal of a member from the city; (5) the conviction of a member of a felony while in office; or (6) the recall of a member pursuant to the provision of Article V. The school board shall declare a vacancy in its membership to exist upon the failure of a member to attend any six (6) consecutive regular meetings of the school board or at least sixty (60) percent of the regular meetings of the school board held in any one calendar year unless such member shall be excused (by a vote of at least four (4) of the members) for health reasons or other good cause. A member may in writing addressed to the school board resign his or her office effective at a future date specified in the written resignation. Once submitted to the school board, such resignation may not be withdrawn and such member's office shall become vacant on the specified future date.

If a vacancy in the membership of the school board occurs or is declared prior to the next regular municipal election, the vacancy shall be filled at a special election to take place on the same date as the next scheduled municipal or state election which is no less than 127 days after the date the vacancy occurs or is declared, unless the council, by a vote of at least six (6) of its members, calls a special election on an earlier date and shortens the time for obtaining and filing nomination petitions established in article IV, section 6. Such election shall be called and held and nominations made as in other elections. (Referenda 11/2/76; 11/4/86; 11/2/99; 11/2/10)

ARTICLE IV. ELECTIONS

Section 1. Continuity in office.

In the event redistricting of the city shall cause a then council member or school board member to reside in a district other than that from which such person was elected, the office of such member shall not thereby be considered vacated but such member shall continue in office until a successor is duly elected and qualified. Each district councilor and district school board member in office on the effective date of any such redistricting shall be deemed to represent the newly constituted district of the same numerical designation as that formerly represented and shall continue to serve in that capacity until expiration of his or her term. (Referenda 6/13/78; 11/4/86; 11/2/10)

Section 2. Regular municipal election.

On the first Tuesday after the first Monday in November of each year, the regular municipal election shall be held and the registered voters of the city or district, as the case may be, shall ballot for such councilors and for such members of the school board as may be necessary to fill the offices of those whose terms would then normally expire and fill any existing vacancy in an unexpired term of office. (Referenda 12/1/75; 11/2/76; 6/13/78; 11/4/86; 11/7/00; 11/6/01; 11/2/10)

Section 3. Wardens and ward clerks.

The wardens and ward clerks shall be nominated by the city clerk and appointed by order of the city council. They shall be and remain residents of the city and all other qualifications for appointment shall be as provided in Title 21-A of the Maine Revised Statutes. They shall hold their office for one year from the date of appointment, unless a shorter term is specified by the order of appointment, and until others have been chosen and qualified in their stead. The warden and the ward clerk shall be sworn to the faithful performance of their duties by a person qualified under the statutes of the state to administer oaths, and a certificate of such oath shall be entered by the clerk on the records of such ward. (Referenda 11/2/76; 6/13/78; 11/4/86, 11/4/08; 11/2/10)

Section 4. Nominations.

The nominations of all candidates for elective offices provided for by this charter shall be by petition. The petition of a candidate for an at large council seat or at large school board seat shall be signed by not less than three hundred (300) nor more than five hundred (500) registered voters of the city. The petition of a candidate for a district council seat or a candidate for a district school board seat shall be signed by not less than seventy-five (75) nor more than one hundred fifty (150) registered voters of the respective district. Voters may sign petitions for more than one (1) candidate for each office to be filled at the election. (Referenda 12/1/75; 11/2/76; 11/4/86; 11/4/08; 11/2/10)

Section 5. Form of nomination petition.

The signatures to nomination petitions need not all be affixed to one nomination petition, but to each separate petition there shall be attached an affidavit of the circulator thereof stating the number of signers of each petition, and that each signature appended thereto was made in his or her presence and is the genuine signature of the person whose name it purports to be. With each signature shall be stated the place of residence of the signer giving the street and number of the street, or other description sufficient to identify the same. The form of the nomination petition shall be substantially as follows:

To the city clerk of the City of Portland

We, the undersigned voters of the City of Portland, hereby

nominate, _____ whose residence is _____ for the office of _____ to be voted for at the election to be held in the City of Portland on the _____ day of _____, _____, and we individually certify that we are qualified to vote for a candidate for the above office.

Name _____ Street and Number _____, being duly sworn, deposes and says, that he (she) is the circulator of the foregoing nomination petition containing _____ signatures, and that the signatures appended thereto were made in his or her presence and are the signatures of the persons whose names they purport to be.

(Signed) _____ .

Subscribed and sworn to before me this _____ day of _____,

Attorney, State of Maine Bar # _____
Notary Public

If this petition is deemed insufficient by the city clerk, he or she shall forthwith notify by mail _____ at _____.
(Referendum 11/2/10)

Section 6. Filing of nomination petitions, and acceptance of nomination.

The city clerk shall make nomination petitions available to the candidates one hundred and twenty-seven (127) days prior to the election. The nomination petitions for any one (1) candidate must be assembled and united into one (1) petition and filed with the city clerk during normal business hours not earlier than eighty-five (85) nor later than seventy-one (71) days before the date of election. No nomination shall be valid unless the candidate shall file with the city clerk in writing at the time of filing of such nomination petitions his or her consent accepting nomination, agreeing not to withdraw and, if elected, to qualify. Such nomination petitions and consent, once filed may not be withdrawn. Any challenge to a nomination petition must be submitted to the city clerk in writing, setting forth the specific reasons for the objection, no later than five (5) days, excluding Saturdays, Sundays, and legal holidays, from its date of filing, or it is barred. No person shall take out nomination papers for more than one position at the same election, nor be nominated, nor shall any person consent to being nominated, at the same election for any other elective office provided for by this charter, and no person shall simultaneously hold more than one (1) elective office provided for by this charter. (Referenda 11/2/76; 6/13/78; 11/4/86; 11/6/01; 11/4/08; 11/2/10)

Section 7. Form of ballot.

All official ballots for use in all municipal elections shall be prepared by the city clerk and furnished by the city, consistent with the voting machines used and the form of any state ballot(s), and the use of ranked choice voting. Ballots for use in elections under this charter shall contain the names of the various candidates, with their residence, and the office

for which they are candidates, and instructions on how to mark the ballot. The candidates for each office shall be grouped under the title of each office, plainly and distinctly marked. There shall be as many blank spaces under the name of each office as there are vacancies to be filled. The procedure for counting write-in votes shall be governed by Title 21-A, Maine Revised Statutes, unless inconsistent with article II, section 3, in which case the charter provisions shall govern. Notwithstanding the foregoing, in the event of an emergency such as the illness, death or disqualification of a nominee for municipal office prior to the general election, the time frame for accepting a declared write-in candidate may be shortened by the city clerk. Such ballots may also contain such measures as may be submitted to the voters of the city by the legislature or by the city council and shall be without party mark or designation.

In preparing all ballots for election under this charter, the city clerk shall arrange the names of all qualified candidates for each office in alphabetical order according to surnames. (Referenda 11/2/2010; 3/3/2020)

Section 8. Specimen ballots.

The city clerk shall cause specimen or sample ballots to be prepared and to be posted in public places in each ward and voting precinct and advertised in the newspapers not later than ten (10) days prior to the municipal election. Such specimen ballots shall be printed on colored paper and marked "Specimen Ballot," and shall contain the names of the certified candidates with the residence of each, instructions to voters, and such measures as may be submitted to the voters by the legislature or by the city council. Such specimen ballots shall also be without party mark or designation. (Referendum 11/6/01; 11/2/10)

Section 9. Count of ballots.

Upon closing of the polls, ballots shall be counted in accordance with Title 21-A, Maine Revised Statutes, unless inconsistent with article II, section 3, in which case the charter provisions shall govern, and the results thereof delivered to the city clerk by the wardens. (Referendum 11/2/10)

Section 10. Canvass of returns.

The city clerk shall examine the records of the several voting places and within forty-eight (48) hours after such election shall determine and declare the successful candidates as follows: The person or persons, not exceeding the number to be voted for at any one time for any office, having the majority of votes cast at such election, shall be determined and declared to be elected. If no candidate for mayor, city council, or school board has a majority of the votes cast as provided in article II, section 3, the city clerk shall conduct an instant runoff tabulation as provided in such section until the candidate with the majority of votes cast is determined. The city clerk shall provide written notice of the election results to all candidates. (Referenda 11/6/01; 11/2/10; 3/3/2020)

Section 11. State election laws applicable.

The laws of the state in Title 21-A of the Revised Statutes relating to the qualifications of electors, registration, the manner of voting, the duties of election officials, and all other particulars in respect to preparation for conducting and managing elections, so far as they may be applicable, shall govern all municipal elections in the City of Portland, except as provided below regarding 42-day pre-election reports and as otherwise provided herein.

In addition to the reports required for municipal candidates by Title 21-A of the Maine Revised Statutes, 42-day pre-election reports must be filed by municipal candidates no later than 11:59 p.m. on the 42nd day before the date on which a general election is held and must be complete as of the 49th day before that date.

Nothing in this charter shall prohibit the use of electronic or revised voting methods and procedures to the extent authorized by state and/or federal law. (Referenda 11/4/08; 11/6/2018)

ARTICLE V. RECALL

Section 1. Applicability.

Any member of either the city council or the school board may be recalled and removed from office by the registered voters of the City of Portland, as hereinafter provided, except that this provision shall not apply to a member of either body who has one (1) year or less to serve in his or her term, i.e., any petition to recall a member must be certified by the clerk no later than November 30 of the year prior to that member's next scheduled November re-election date. (Referenda 11/4/86; 11/2/10)

Section 2. Petition for recall.

In the case of either an at large member of the city council or of the school board, any five hundred (500) registered voters of the city may affirm and file with the city clerk an affidavit containing the name of the member of the city council or of the school board whose removal is sought, together with a statement of the reasons why such removal is desired. In the case of a district member of the city council or of the school board, any two hundred and fifty (250) registered voters of the member's district may affirm and file with the city clerk an affidavit containing the name of the district member whose removal is sought, together with a statement of the reasons why such removal is desired. Members of the city council and of the school board shall not be included on the same affidavit and only one member's name shall be on an affidavit.

Within seven (7) calendar days of receipt of such an affidavit, the city clerk shall prepare a sufficient number of petitions which shall contain the signature of the city clerk, his or her official seal, the date, and the name of the person whose removal is sought. In addition, the statement of reasons for removal referred to above shall either be printed on such petitions or attached thereto. Such petitions shall be on paper of uniform size with as many individual sheets as reasonably necessary.

The city clerk shall file the completed petitions in his or her office. During the thirty (30) days following their filing, the city clerk shall arrange to have petitions, noting that removal is being sought as well as the reasons therefor, available for signature both at city hall and also at public places as indicated below. Notice of the location of the public places where petitions may be signed shall be given by publication at least forty-eight (48) hours in advance and such notice shall contain the specific location of such public place or places, the dates it or they will be open, and the times

during which petitions may be signed. In the case of either a district councilor or a district school board member, the city clerk shall select one (1) site outside of city hall, but within the district of the member whose removal is sought, and such location shall be open for four (4) days between the hours of noon and 8:00 p.m. In the case of at large councilors or members of the school board, the city clerk shall select four (4) sites outside of city hall and such locations shall be open for four (4) days each between the hours of noon and 8:00 p.m.

The city clerk shall designate election clerks to supervise each such site. Election clerks shall be residents of Portland and at least eighteen (18) years of age. They shall be sworn to the faithful performance of their duties by the city clerk. Each qualified voter who signs a petition shall include his or her place of residence, providing either the street and number or a description sufficient to identify the place.

To mandate a vote in the case of an at large councilor or an at large member of the school board, the recall petition must be signed by at least three thousand (3,000) registered voters of the city, or in the case of a district councilor or district member of the school board, by at least fifteen hundred (1,500) registered voters of that member's district. (Referenda 12/1/75, 11/4/86; 11/2/10)

Section 3. Verification of recall petition.

At the expiration of the thirty (30) day period for signing petitions described in section 2, the city clerk shall declare the petition closed and, within ten (10) days thereafter, shall ascertain whether or not the petitions have been signed by the requisite number of registered voters. The city clerk shall attach his or her certificate, showing the results of such examination, to the petitions.

If the clerk's certificate should show that the petitions are insufficient, he or she shall advise both the city council and also the person or persons whose removal was sought of that fact. A finding of insufficiency shall not prejudice the filing of a new petition for the same purpose, except that such new petition shall not be filed within twelve (12) months from the date of the receipt of the clerk's certificate by the city council. (Referenda 11/4/86; 11/2/10)

Section 4. Calling of recall election.

If the clerk's certificate should show that the petitions are sufficient, he or she shall submit them, together with the clerk's certification, to the city council at its next regular meeting following certification, and shall also notify the person or persons whose removal is sought. The city council shall, within ten (10) days of receipt of the clerk's certificate, order an election to be held not less than forty-five (45) nor more than ninety (90) days thereafter; except that, if a regular municipal election should occur within ninety (90) days after receipt of the certificate, the city council may, in its discretion, schedule the recall election for the same date as the regular municipal election. The recall election shall be called and held as other elections under this charter, except for the specific limitations imposed by this article.

All registered voters in the city may vote on the recall of an at large member of the council or school board; only the registered voters of the applicable district may vote on the recall of a district member of the council or school board.

(Referenda 11/4/86; 11/2/10)

Section 5. Form of ballot.

Unless the member or members whose removal is sought shall have resigned within ten (10) days after the receipt by the city council of the clerk's certificate, the form of the question to be submitted to the voters shall, as nearly as possible, be: "Shall (name of official and his or her title) be recalled?"

(Referendum 11/4/86)

Section 6. Count of ballots.

In case a majority of those voting for and against the recall of any official shall vote in favor of recalling such official, he or she shall be thereby removed, and, in that event, the candidate to succeed such person for the balance of the unexpired term shall be determined as provided for in the case of a vacancy in the office.

If a majority of those voting should decline to recall a particular official, then no proceedings, seeking the recall of that same official, shall be initiated under this article within

twelve (12) months from the date of the election in which his or her recall was sought. (Referendum 11/4/86)

Section 7. Election may be ordered.

If a member of either the city council or school board who is recalled should either request a recount or dispute the election as permitted by law, then that member shall remain in office until the recount or dispute has been finally determined; and the provisions of article II, section 7 and article III, section 6, relating to vacancies in the city council or school board, shall be stayed. (Referendum 11/4/86; 11/2/10)

ARTICLE VI. ADMINISTRATIVE OFFICERS

Section 1. Appointments.

(a) The following officers shall be appointed by vote of at least five (5) members of the city council: city manager, city clerk, and corporation counsel, and they may appoint constables at large.

(b) All department heads shall be appointed by the city manager, subject to confirmation by the city council.

(c) All attorneys employed in the corporation counsel's office shall be appointed by the corporation counsel, subject to confirmation by the city council.

(d) All other employees shall be appointed by the city manager upon recommendation of the heads of their departments.
(Referendum 11/4/86; 11/2/10)

Section 2. Organizational powers.

The city council shall have power to provide by ordinance for the organization, conduct, and operation of the departments, agencies, offices, and boards of the city, for the creation of additional departments, agencies, offices, and boards and for the division of any such departments, agencies, offices, and boards; and for the alteration, abolition, assignment, or reassignment of all such departments, divisions, agencies, offices and boards; provided, however, there shall be a director of finance to perform the functions specified in article VII of this Charter. The city council shall, by ordinance, designate

those department heads responsible for performing duties required by state law. (Referendum 11/4/86)

Section 3. Civil service rules.

The city council shall provide by ordinance for a system of civil service rules for the appointment, promotion, demotion, lay-off, reinstatement, suspension, and removal of the members of the police department and of the fire department, other than the chiefs of such departments, and for a civil service commission to administer the same.

Section 4. Compensation and tenure of offices.

The city council shall fix by order the salaries of the appointees of the city council. Salaries of the appointees of the city manager shall be fixed by the city manager, subject to the approval of the city council. All appointive officers shall hold office during the pleasure of the appointing power.

Section 5. Appointment; qualifications; powers and duties of the city manager.

The city manager shall be chosen by the city council solely on the basis of character and executive administrative qualifications, and may or may not be a resident of the City of Portland or of the State of Maine at the time of appointment. Such person shall give bond for the faithful discharge of his or her duties to the City of Portland and in such sum as the city council shall determine and direct, and with surety or sureties to be approved by the city council. The premium on such bond shall be paid by the city. Such person shall be the administrative head of the city and shall be responsible to the city council for the administration of all departments. Neither the mayor nor members of the city council shall direct, request or interfere with the appointment or removal of any of the officers or employees of the city for whom the city manager is responsible, nor shall any of them give an order, publicly or privately, to any such city officer or employee relating to any matter in the line of that officer's or employee's city employment. Notwithstanding the foregoing, nothing herein is intended to prevent the city manager from assigning staff to work and communicate directly with councilors, boards

and commissions, council committees, neighborhood and other groups and organizations, on city work.

The city manager's powers and duties shall be as follows:

- (a) To see that the laws and ordinances are enforced, but shall delegate to the chief of the police department the active duties connected therewith regarding criminal conduct.
- (b) To exercise control over all departments, divisions, agencies, and offices created herein or that may be hereafter created.
- (c) To implement the policy decisions of the city council.
- (d) To coordinate city programs and operations and recommend improvements in such programs and operations to the council.
- (e) To prepare city budgets, in consultation with and incorporating policy guidance of the mayor, and to present such budgets to the council.
- (f) To make appointments as provided in this charter.
- (g) To attend meetings of the city council, except when his or her removal is being considered, and recommend for adoption such measures as he or she may deem expedient.
- (h) To keep the city council fully advised as to the business and financial condition and future needs of the city and to furnish the city council with all available facts, figures, and data connected therewith when requested.
- (i) To prepare a five (5) year rolling capital improvement plan for annual presentation to the city council, which plan includes the following:
 - 1. A one (1) year plan of specific projects and their cost;

2. A two (2) through five (5) year plan of specific projects and general categories, and amounts of proposed spending and funding sources; and
 3. A discussion of the basis for the plan and the factors which went into its development or amendments.
- (j) To prepare and submit to the city council such reports as are requested or he or she deems advisable; and
- (k) To perform such other duties as may be prescribed by this charter or required by ordinance of the city council. (Referenda 11/4/86; 11/2/10)

Section 6. Vacancy in office of city manager.

During any vacancy in the office of city manager, and during any absence or disability of the city manager of more than sixty (60) days, the city council shall designate a properly qualified person to perform the duties of manager and fix such person's compensation. During a temporary absence of sixty (60) days or less, the city manager may designate a qualified person to perform the duties of manager during such absence. While so acting, such person shall have the same powers and duties as those given to and imposed on the city manager. Before entering his or her duties, he or she shall give bond to the City of Portland in a sum and with surety or sureties to be approved by the city council. The premium on such bond is to be paid by the city. (Referendum 11/2/10)

Section 7. Duties of administrative officers.

Duties of administrative officers shall be prescribed by the appointive power, but such duties shall not be inconsistent with this charter or any ordinance enacted by the city council as provided herein. (Referendum 11/4/86; 11/2/10)

Section 8. Continuity in office.

Any and all officers, department heads, and employees of the City of Portland on the effective date of this charter shall continue in such capacity until a successor is appointed and qualified as provided herein, unless sooner removed by the appointive power designated herein. (Referendum 11/4/86; 11/2/10)

ARTICLE VII. BUSINESS AND FINANCIAL PROVISIONS

Section 1. Accounts and records.

Accounts shall be kept by the director of finance, showing the financial transactions of all departments of the city, and the school department. Accounts shall be kept in such a manner as to show fully at all times the financial condition of the city. The director of finance shall furnish to the city manager each month a report containing in detail the revenues, expenses and expenditures of the city on all accounts, and for each appropriation item the expenditures made and the obligations incurred during the preceding calendar month and the total unencumbered balance. All the accounts of the city and the school department shall be audited annually by a qualified certified public accountant to be chosen by the city council.
(Referendum 12/1/75; 11/2/10)

Section 2. Collaboration between city and schools.

To the extent practicable and lawful, the city and the school department shall endeavor to share staff and resources and otherwise cooperate with one another in order to provide better city and school services in a cost effective manner.
(Referendum 11/2/10)

Section 3. Reports.

The director of finance shall publish each month a set of financial statements reflecting the financial condition of the city and the school department, and such other financial information as may be required by the city council.

The director of finance shall produce a comprehensive financial report on an annual basis which conforms to "Generally Accepted Accounting Principles." (Referendum 11/2/10)

Section 4. Fiscal year.

The fiscal year of the city shall be July 1 through June 30, or such other fiscal year as the city council shall determine.
(Referenda 6/13/78; 11/4/86; 11/2/10)

Section 5. Annual budget.

Not later than two (2) months before the end of the fiscal year, the city manager shall submit to the city council a proposed city budget prepared by the city manager for the ensuing fiscal year. The mayor shall submit comments on the proposed city budget, along with any proposed modifications, concurrently with the manager's submission.

The city council shall fix a time and place for holding a public hearing upon the proposed city budget prepared by the manager, and shall give not less than ten (10) days prior public notice of such hearing, which hearing shall be at least ten (10) days before the final passage of the appropriation resolve.
(Referenda 6/13/78; 11/4/86; 11/2/10)

Section 6. Budget content.

The proposed city budget prepared by the manager shall provide a complete financial plan of city general and enterprise funds and activities for the ensuing fiscal year. In organizing the budget, the city manager shall utilize the most feasible combination of expenditure classification by fund, organization unit, program, purpose or activity, and object. It shall begin with a clear general summary of its contents; shall show in detail all estimated income, indicating proposed tax levies, and all proposed expenditures, including debt service for the ensuing fiscal year; and shall be so arranged as to show comparative figures for actual and estimated income and expenditures of the current fiscal year and actual income and expenditures of the preceding fiscal year.

The total of proposed expenditures shall not exceed the total of proposed income. (Referenda 6/13/78; 11/2/10)

Section 7. Appropriation resolve.

The city council shall adopt the annual appropriation resolve for the next fiscal year on or before the last day of the twelfth month of the fiscal year currently ending. Such resolve shall appropriate those amounts deemed necessary for general city purposes and additionally one gross amount for school purposes as required by section 5 of article III. The total amount appropriated shall not exceed the estimated revenue of the city.

If it fails to adopt such resolve by this date, the city council may make appropriation for current departmental expenses, chargeable to the appropriation for the year, when passed, to an amount sufficient to cover the necessary expenses of the various departments until the annual appropriation resolve is in force. These continuing appropriations shall not be subject to the mayor's veto in section 8 below.

The city council may by resolution appropriate to any purpose or object for which there shall have been no appropriation for the current year, or for which the appropriation for the current year has proved insufficient, any accruing revenue of the city not appropriated as hereinbefore provided and any unencumbered appropriation balance, or portion thereof, remaining after the purpose of the appropriation shall have been satisfied or abandoned. Such appropriations shall not be subject to the mayor's veto in section 8 below. (Referenda 6/13/78; 11/2/10)

Section 8. Mayoral veto of general city purposes appropriations in the appropriation resolve.

Within five (5) business days of the meeting at which the city council adopts the annual appropriation resolve, the mayor may veto the appropriation for general city purposes in such resolve by written communication to the other members of the city council. Such communication shall specify the reasons for such veto and shall, at minimum, be posted upon the city's website or similar location and sent to the councilors by electronic mail and by the same means that agendas are delivered to councilors.

Any such veto of the appropriation for general city purposes shall not affect city payment of debt service obligations on previously authorized bonds, nor shall it affect the school budget appropriation.

An order to override the veto shall be placed on the next city council agenda which is at least five (5) calendar days after the date of the mayor's veto communication, and such veto may be overridden by a vote of at least six (6) members of the city council. The mayor shall not vote on such override item.

If a veto is overridden, the general city purposes appropriation will take effect on the first day of the fiscal

year, or on the day immediately following the override vote, if such vote is after the first day of the fiscal year.

If a veto is not overridden, then at the same meeting the override vote is taken, the general city purposes appropriation which was vetoed shall become an item for further consideration by the city council, without the need for a motion for reconsideration, and the city appropriation may be modified, amended, or otherwise acted upon to secure passage at that meeting or a subsequent meeting without the need for two readings prior to passage.

In the event the city council does not override the veto or does not secure passage of the annual appropriation for general city purposes prior to the start of the fiscal year, or has not otherwise acted to provide continuing appropriations under the second paragraph of section 7 above, then the appropriations for general city purposes in effect for the prior fiscal year shall go into effect as of the first day of the fiscal year, with expenditures chargeable to the appropriation for the year, until the appropriation for general city purposes is approved.

(Referendum 11/2/10)

Section 9. Unexpended appropriations.

All appropriations in the annual budget shall lapse at the close of the fiscal year unless specifically continued by order of the city council, and the unexpended appropriations shall be transferred to the appropriate fund balance account. (Referendum 11/2/10)

Section 10. Borrowing.

The borrowing of money by and for the city shall be limited as to form and purpose by section 11 and section 12 of this article. The credit of the city shall in no manner be loaned to any individual, association or corporation. (Referendum 11/2/10)

Section 11. Bond issues.

Money may be borrowed, within the limits fixed by the constitution and statutes of the state, now or hereafter applying to Portland, by the issue and sale of bonds or notes pledged on the credit of the city, or on the revenues or assets of the projects financed with the proceeds of such borrowings, the proceeds to be used for the acquisition of land, the

construction, reconstruction, major alteration, extraordinary repairs, and equipment of buildings and other permanent public improvements, the purchase of departmental equipment, for economic development to the extent determined by the City Council to serve a valid public purpose, to create reserves to settle workers' compensation obligations, to fund, refund, pay or to create reserves for the payment of the city's unfunded pension fund liabilities and for the payment of refunding bonds, notes and other evidences of indebtedness previously issued, or for any other purpose permitted by state law.

No order providing for the issue of bonds shall be passed without public notice given by posting notice of the same in two (2) public places in the City of Portland and publishing such notice at least twice in a newspaper of general circulation in Portland at least two (2) weeks before final action of the city council. In addition, the city council may, in its discretion, provide that such notice shall be published on the city's website and in such other additional media as the city council determines are appropriate to notify the general public of the public hearing.

Any order authorizing the issue of bonds must be approved by vote of at least seven (7) members of the city council.
(Referenda 11/4/86; 11/5/91; 11/8/94; 11/2/99; 11/2/10)

Section 12. Temporary loans.

Money may be borrowed in anticipation of receipts from taxes during any fiscal year but the aggregate amount of such loans outstanding at any one (1) time shall not exceed eighty (80) percent of the revenue received from taxes during the preceding fiscal year. All such loans shall be paid within the year out of the receipts from taxes for the fiscal year in which the loans are made. Money may be borrowed in anticipation of money to be received from the sale of bonds to be issued, in case such bond issue has been authorized; all such loans shall be subject to the provisions of the laws of the State of Maine in relation thereto. This section shall not limit in any way the power granted to towns and cities to borrow money as contained in the Revised Statutes of the State of Maine and acts amendatory thereof and additional thereto. (Referendum 11/4/86; 11/2/10)

Section 13. Payments.

The director of finance shall establish adequate financial controls to reasonably ensure that all payrolls, bills and other claims and demands against the city are in proper form, correctly computed, duly certified and legally due and payable.

The director of finance may require any claimant to make oath to the validity of his or her claim, may investigate any claim and for such purpose or purposes may examine witnesses under oath.
(Referendum 11/2/10)

Section 14. Bonds of officers.

The city council shall require a bond with sufficient surety or sureties, satisfactory to the city council, from all persons trusted with the collection, custody or disbursement of any of the public moneys; and may require such bond from such other officials as it may deem advisable; the premium charges for such bonds to be paid by the city. (Referendum 11/2/10)

Section 15. Collection and custody of city moneys.

All moneys received by any officer, employee or agent of the city belonging to the city, or for or in connection with the business of the city, shall forthwith be paid by the officer, employee or agent receiving the same into the city treasury, and shall then be deposited by the director of finance with a federally insured banking institution or institutions or insured credit union or unions. All interest from all deposits of money belonging to the city shall accrue to the benefit of the city.
(Referendum 11/2/10)

Section 16. Voter referendum required for certain city council actions.

(a) The city council shall submit the following to voter referendum:

- (1) Orders or resolves authorizing the issuance of general obligation securities of the city in a principal amount greater than five one-hundredths of one (1) percent of the last certified state valuation of the city for a single capital improvement or item of capital equipment;
or
- (2) Orders or resolves directly or indirectly obligating the city to expend, over a term greater than one (1)

municipal year, municipal tax funds in excess of an amount greater than seven and one-half one-hundredths of one (1) percent of the last certified state valuation of the city for a single capital improvement or item of capital equipment.

(b) The provisions of this section shall not be applicable to any order or resolve authorizing (i) the refunding of any securities or other obligations of the city; (ii) the issuance of general obligation securities, or other direct or indirect obligations, of the city for streets, sidewalks, or storm or sanitary sewers; or (iii) any construction or financing of improvements or equipment needed as a result of fire, flood, disaster or other declared emergency. For purposes of this section, the city council may by vote of at least seven (7) of its members adopt emergency orders or resolves authorizing construction or financing of improvements or equipment needed as a result of fire, flood, disaster or other emergency and such orders or resolves shall contain a section in which the emergency is set forth and defined; provided, however, that the declaration of such emergency by the city council shall be conclusive.

(c) Any order or resolve described in subsection (a) of this section shall be approved by separate action of the city council.

(d) No order or resolve described in subparagraph (a) of this section, not excepted by subparagraph (b), shall become effective until approved by a majority of voters voting at a regular or special municipal election. In the event that the total number of votes cast for and against the question for the referred order or resolve should be less than ten (10) percent of the registered voters of the city, then such order or resolve shall be deemed to be approved and effective.

(e) The form of the ballot question for the referred order or resolve shall be substantially as follows:

Shall the order or resolve entitled " _____
_____ " , be approved?
(Referendum 11/4/86; 11/2/10)

ARTICLE VIII. MISCELLANEOUS PROVISIONS

Section 1. No personal interest.

No member of the city council or school board or board or commission thereof and no officer or employee of the city or school department shall:

- (a) Have a substantial financial interest, direct or indirect, in any contract entered into by or on behalf of the City of Portland or the school board, except his or her employment contract, or in the sale to or by the city or school department of any land, materials, supplies or services when such officer, employee or member exercises on behalf of the city or school department any function or responsibility with respect to such contract or sale. All contracts or sales made in violation hereof are void, and the city treasurer is expressly forbidden to pay any money out of the city treasury on account of any such transaction.
- (b) Purchase or accept anything from the city or school department, other than those items or services which are offered to the public generally, and then only upon the same terms and under the same procedures offered to and used for the general public. This shall not include those items or services which are received as compensation, or as a part of such person's employment contract, or which are necessary for the performance of such person's duties.
- (c) Accept or receive from any person, firm, or corporation acting under a franchise, contract, or license from the city or school department, any frank, free pass, free ticket, or free service, or accept, directly or indirectly, from any such person, firm, or corporation any service upon terms more favorable than those granted to the public generally. (Referenda 11/4/86; 11/2/10)

Section 2. Ordinances, rules and regulations continued.

All ordinances in force at the time that this charter takes effect, not inconsistent with this charter, shall continue in

force until amended or repealed. All rules and regulations of the municipal officers or of any office of the City of Portland in force at the time that this charter takes effect, not inconsistent with the provisions hereof, shall continue in force until amended or repealed.

Section 3. Continuity of actions.

All rights, actions, proceedings, prosecutions and contracts of the city or any of its departments, pending or unexecuted when this charter goes into effect and not inconsistent therewith shall be enforced, continued or completed in all respects as though begun or executed hereunder.

Section 4. Summons before city council and civil service commission.

The clerks of the supreme judicial and superior courts may issue summonses or subpoenas for witnesses to attend and to produce books, documents and papers at any meeting of the city council or of the civil service commission of the City of Portland at which a hearing is had in any matter regarding any alleged dereliction, which summonses shall be served as summonses are required to be served in matters before the supreme judicial or superior courts. Failure to obey a summons or subpoena shall be punished by the appropriate court in the same manner as contempt is punished under the general law.

(Referendum 11/4/86)

Section 5. Effect of private and special laws.

Private and special laws which apply to the City of Portland in effect on November 4, 1986 shall continue in force until amended or repealed. (Referendum 11/4/86)

APPENDIX A

Charter Legislative History

1. Town of Portland incorporated by Act of Commonwealth of Massachusetts on July 4, 1786; Town of Portland Records, p. 1

2. City of Portland incorporated by adoption of charter on March 26, 1832; original charter can be found in Chapter 248, Special Laws of Maine 1832, p. 380; amendments as follows:

c. 325, S.L. 1833, p. 501

c. 500, S.L. 1834, p. 749

c. 402, S.L. 1838, p. 511

c. 541, S.L. 1839, p. 648

- c. 33, P & SL 1842, p. 25
 - c. 200, P & SL 1845, p. 258
 - c. 266, P & SL 1845, p. 310
 - c. 233, P & SL 1849, p. 333
 - c. 330, P & SL 1850, p. 458
 - c. 167, P & SL 1853, p. 158
 - c. 35, P & SL 1857, p. 48
3. A total revision of the charter was accomplished in 1863; c. 275, P & SL 1863, p. 257; amendments as follows:
- c. 348, P & SL 1870, p. 316
 - c. 647, P & SL 1871, p. 624
 - c. 21, P & SL 1875, p. 16
 - c. 8, P & SL 1881, p. 9
 - c. 86, P & SL 1881, p. 86
 - (c. 450, P & SL 1897, p. 707--Revision of charter rejected by voters in 1897)
 - c. 384, P & SL 1901, p. 569
 - c. 68, P & SL 1903, p. 116
 - (c. 287, P & SL 1905, p. 328--abolishing common council rejected by voters April 24, 1905)
 - c. 344, P & SL 1907, p. 638
 - c. 427, P & SL 1907, p. 758
 - (c. 148, P & SL 1921, p. 513--"Murray Bill" charter revision rejected by voters September 13, 1921)
 - (c. 149, P & SL 1921, p. 532--"Brewster Bill" charter revision rejected by voters September 13, 1921)
0. A total revision of the charter was accomplished in 1923 by adoption by voters of "Brewster Bill" on September 11, 1923; c. 109, P & SL 1923, p. 596; ("Nichols Bill" c.104, P & SL 1923, p. 557 was rejected same date); amendments as follows:
- c. 56, P & SL 1929, p. 484
 - (c. 112, P & SL 1929, p. 604--Mayor--Alderman form rejected by voters on September 10, 1929)
 - c. 31, P & SL 1931, p. 353
 - c. 50, P & SL 1945, p. 629
 - c. 113, P & SL 1945, p. 736
 - c. 144, P & SL 1945, p. 71
 - c. 72, P & SL 1947, p. 722
 - c. 72, P & SL 1949, p. 765
 - c. 103, P & SL 1949, p. 803
 - c. 28, P & SL 1953, p. 528
 - c. 108, P & SL 1955, p. 756
 - c. 88, P & SL 1957, p. 707
 - c. 143, P & SL 1959, p. 873
4. A total revision of the charter was accomplished in 1961; c. 194, P & SL 1961, p 1125; amendments as follows:
- c. 64, P & SL 1963, p. 966
 - c. 65, P & SL 1963, p. 967
 - c. 157, P & SL 1963, p. 1187
 - c. 177, P & SL 1963, § 1, p. 1291
 - (c. 6, P & SL 1965, p. 649 rejected by voters on December 6, 1965)
 - c. 7, P & SL 1965, p. 650
 - c. 81, P & SL 1965, p. 760

(c. 127, P & SL 1965, p. 849 rejected by voters on December 6, 1965)
c. 221, P & SL 1967, p. 136
c. 83, P & SL 1969, p. 1628
c. 136, P & SL 1969, p. 1792
c. 146, P & SL 1969, p. 1820
(c. 185, P & SL 1969, p. 1958 rejected by voters on November 3, 1970)

State constitutional law reference--Municipal home rule, Const. of
Maine, Art. VIII, Pt. 2.

Referenda 12/4/72	Art. I, 1
Referenda 12/1/75	Art. II, 2 Art. IV, 2 Art. IV, 4 Art. V, 2 Art. VII, 1
Referenda 11/2/76**	Art. II, 1 Art. II, 4 Art. III, 1,2,5 Art. IV, 2,3,4,6 Art. V, 2
Referenda 6/13/78	Art. II, 1,2,3,5 Art. III, 1,2,3,4 Art. IV, 1,2,3,6 Art. VII,3,4,5,6
Referenda 11/4/86***	Art. II, 1,2,4,5 Art. III, 1,5 Art. IV, 1,2,3,4,6,7,9 Art. V, 1,2,3,4,5,6,7 Art. VI, 1,2,5 Art. VII 7-10 (Rpld) Art. VI, 11-12 (Rnbd as Art. VI, 7-8) Art. VII, 3,4,9,10,16 Art. VIII, 1,4,5 Art. VIII, 6 (Rpld)
Referenda 11/3/87	Art. II, 2 Art. III, 1
Referenda 11/5/91	Art. VII, 9
Referenda 11/8/94	Art. VII, 9
Referenda 11/2/99	Art. II, 4 Art. III, 5 Art. VII, 9
Referenda 11/7/00	Art. II, 3,5 Art. III, 2,3 Art. IV, 2
Referenda 11/6/01	Art, IV, 2,6,8,10
Referenda 11/4/08	Art. IV, 3,4,5, 6,7,11
Referenda 11/2/10****	Charter Revisions recommended by the Portland Charter Commission established on November 4, 2008, and passed by the voters on November 2,2010

****Editor's note**--The amendment establishing district councilor elections became effective January 1, 1976, except that for the purpose of nomination and election of district councilors such amendment shall apply as the

presently occupied district seats become available thereafter by normal expiration of term or by vacancy and to every district election thereafter.

*****Editor's note--**A referendum passed Nov. 4, 1986 and effective July 1, 1987, repealed former sections 7 through 10 of article VI to eliminate references to obsolete offices (assistant assessors, director of public welfare) and renumbered former sections 11 and 12 as 7 and 8 respectively. Former sections 7 through 10 derived from the legislation enumerated in the first editor's note to this Charter.

*****Editor's note--**A referendum passed Nov. 4, 1986, effective July 1, 1987, amended section 4 of article VIII to clarify the summons-subpoena power and to provide that failure to obey either a summons or a subpoena will subject offenders to contempt. Former section 5 of this article was deleted as a result of the amendment to section 4 and a new section 5 added to preserve certain rights granted to the city by special acts of the legislature. Former section 6 was deleted to conform to 30 M.R.S.A. § 1915(4) which establishes the effective date of Charter revisions. See the editor's note to the Charter for derivations of deleted sections.

*****Editor's note--**Portland voters approved a referendum passed on November 4, 2008 to establish a Portland Charter Commission to make recommendations to revise the Portland City Charter. Those recommendations were subsequently passed by the voters on November 2, 2010, and incorporated the provisions on the popularly elected mayor in Article 2, as well as making changes to the School and Elections articles and technical amendments throughout the document.

MEMORANDUM

TO: Portland Public Schools School Board
and Xavier Botana, Superintendent of Schools

FROM: Agnieszka A. Dixon and E. William Stockmeyer
Drummond Woodsum

DATE: January 24, 2022

RE: Proposals for Charter Provisions Regarding School Budget Approval Procedures and School Bonding Authority

At your request, we write in response to a memorandum prepared by Attorneys Jim Katsiaficas and Emily Arvizu to the Portland Charter Commission Education Committee, dated December 14, 2021 (which we refer to here as the “Perkins Thompson Memo”). In that memo, Attorneys Katsiaficas and Arvizu questioned (1) the scope of the City’s charter authority to assign the role of determining the total school budget to a municipal legislative body other than the City Council including, specifically, the School Board, and (2) the proper roles of the City Council and School Board in issuing school construction and renovation bonds. We respond to both of these issues in turn.

I. AUTHORITY TO REPLACE THE CITY COUNCIL WITH ANOTHER MUNICIPAL LEGISLATIVE BODY TO DETERMINE THE TOTAL SCHOOL BUDGET

As you know, in our memo dated August 11, 2021, we provided an overview of the law governing the powers and duties of the Charter Commission to address matters of school governance, policy, and management (the “August 2021 Memo”). You then asked us whether the Portland charter could be revised to task the School Board with determining the total amount of the school budget, and we responded that there appears to exist a strong legal basis to do so (the “November 2021 Memo”). Specifically, we stated in our November 2021 Memo that a charter provision that assigns the responsibility to determine the total school budget to a municipal legislative body other than the City Council while leaving the decision for final budget authority with the voters would likely be within the City’s charter authority.

In reviewing the Perkins Thompson Memo, it appears to agree with us on this point. Where our opinions seem to diverge is on the scope of the City’s home rule authority to identify *who* can serve as the municipal legislative body for this limited purpose.

In considering this question, we think it noteworthy that the Maine Law Court has not only held that the school statute did not implicitly preempt municipal charters from designating an entity responsible for preparing the school budget, but emphasized that the budget figures prepared by such an entity are “advisory” and that, perhaps, what mattered most was that “[r]esponsibility for the adoption of a final school budget . . . is vested in the voters, not the School Committee.” *School Committee of Town of York v. Town of York*, 626 A.2d 935, 940 (Me. 1993). Indeed, the Law Court unequivocally rejected the contention that interposing a budget committee between the school committee and the town meeting frustrated the legislative scheme set out in the school statute on grounds that it undercut state policy dividing school authority between the school board and the municipal legislative body. *Id.*

We think the *York* decision could lend credence to a variety of ways that the Portland charter could be revised to remove the City Council’s current role from the school budget approval process while respecting the plain language of Section 2307. We next discuss two of the various possible alternatives, and we respond to the objections to these two alternatives raised in the Perkins Thompson Memo.

- **Alternative #1: The voters determine the total school budget.**

The Perkins Thompson Memo states (correctly, we believe) that “the use of the phrase ‘or other [municipal] legislative body’ could be considered to allow Portland to amend its charter to transfer budget adoption authority from the City Council to a City-wide voter referendum.” (Perkins Thompson Memo at p. 4.) One alternative approach to the status quo, then, would be to have the charter direct the City Council to call a City-wide municipal school budget referendum for the purpose of determining the total school budget, followed by the statutory budget validation referendum (BVR). While the Perkins Thompson Memo objects to this approach, it does not appear to be on legal grounds but rather on the policy ground that holding two referendums (the first to set the total budget, and the second to ratify that budget) is a waste of effort. Yet there may well be sound policy reason for such a two-vote process.¹ Moreover, the Legislature established a two-vote process for nearly all school administrative units as a matter of state policy, and it also established a process by which voters can vote to discontinue the BVR should they find it to be an unnecessary duplication. In other words, the Portland voters could vote to eliminate the statutory BVR in short order, leaving a single referendum vote by charter to determine the total school budget.

- **Alternative #2: The School Board determines the total school budget, and the voters ultimately approve the budget.**

As we discussed in our November 2021 Memo, we can also envision a school budget approval process that removes the City Council from the budget process but does not require two referendums. Such a process stems from my suggestion during the Education Committee’s panel discussion that there appears to be no statutory prohibition on the School Board serving as the “municipal legislative body” for purposes of Section 2307. The Perkins Thompson memo objects to this alternative process primarily on grounds that Section 2307 was amended to “clearly delineate and balance the roles and power of the school board and the existing municipal legislative body having school budget approval authority.” (Perkins Thompson Memo at p. 4.)

This objection, however, contradicts the plain reading of Section 2307 and requires the inference that the phrase “or other municipal legislative body” confines charter municipalities to a single form of legislative body—the town meeting. Yet while it is true that in charter municipalities the council and the town meeting are the two traditional forms for the municipal legislative body, nothing about the language of Section 2307 indicates that other forms are excluded. Indeed, Sanford (as the Perkins Thompson Memo noted) and, arguably, York (as we’ve noted) have at one time or another established an “other municipal legislative body” that in each case was something quite different than a town meeting. Additionally, as we discuss in our November 2021 Memo, the definition of “municipal legislative body” in the municipal statute does not support such an inference. Finally, although a statute otherwise clear on its face might require a narrower interpretation in the face of a constitutional objection, the constitutional separation of powers doctrine does not generally apply to municipal bodies or school budget approval procedures. It strikes us that reading such an intent into the language or legislative history of Section 2307 goes too far when the constitutional ground does not exist. Rather, Section 2307 addresses the role of the

¹ For example, the initial referendum to determine the total budget could be an opportunity for the School Board to inform voters on the details of the budget through the presentation of the eleven cost centers and to get an early indicator of the voters’ proclivity; and the BVR would then serve to ratify the approved budget—which is, in fact, the role the BVR serves in school budget approval procedures for regional school units and school administrative districts throughout the state.

municipal legislative body, not its identity, and just as importantly, does so by affording greater deference to charters, not less.²

For these reasons, we think Section 2307 leaves room for the Portland charter to assign the School Board the advisory role of determining the total budget before it is finally adopted by the voters. We also think that such an approach would be consistent with the holding in *York*. And, while there are arguments favoring different legal views on this matter and a charter revision that assigns the role of determining the total school budget to a school board is not without legal risk, such a charter revision would be entitled to a presumption of validity by Maine courts under home rule principles the Court articulated in *York* and many other cases.

- **The school statute and case law leave ample room to explore alternatives to the current school budget approval process.**

Should the Charter Commission entertain the idea of removing the City Council from its current role in the school budget approval process, both the school statute and case law leave ample room to explore these or other alternatives. To that end (because more often than not it is helpful to read proposals rather than legal memos), we have enclosed examples of the two charter revisions discussed above. We also would be happy to discuss other possible school budget approval processes that we believe fall within the legal limits of municipal home rule authority and address the parity issues raised by the existing charter process.

II. BONDING AUTHORITY

There is clear agreement between us and Attorneys Katsiaficas and Arvizu that there is insufficient legal basis to reassign the authority to issue school construction and renovation bonds from the City Council to the School Board. Our suggestion in the November 2021 Memo, however, does not concern who issues such bonds; rather, we propose that, whenever such a bond exceeds a charter-established threshold so that it must be submitted to a referendum, the voters should have an opportunity to vote on the bonding amount and purpose proposed by the School Board, rather than the proposal of the City Council. Accordingly, we suggest a charter revision that would have the City Council continue to issue such bonds and to call and oversee the referendum, but require the City Council to place the *School Board's* proposed question before the voters. To further clarify our intent, we have attached a suggested charter revision for your review and consideration.

We trust this memo is responsive to your request. We are available should you have further questions.

² Notably, Section 2307(1) and (2) are exceptions to the mandate that municipal schools must follow the same school budget procedures as regional school units: First, Section 2307(1) clarifies that, notwithstanding the statutory mandate, charter municipalities are not restricted to the town meeting for the first part of the school budget approval, but may use their own legislative body—namely, the “municipal council or other municipal legislative body established by the charter.” Second, Section 2307(2) clarifies that municipal charters may circumscribe the role of a municipal council or other municipal legislative body to determining the total amount of the school budget. Section 2307 indeed “delineates and balances” roles, but only by giving charter municipalities substantially more room than other school administrative units to apply the details of the two-step school budget approval process.

MEMORANDUM

TO: Portland Public Schools School Board and Xavier Botana, Superintendent of Schools
FROM: Agnieszka A. Dixon and E. William Stockmeyer
Drummond Woodsum
DATE: April 4, 2022
RE: Charter Revisions Regarding School Budget Approval Procedures
—Review of Charter Commission Education Committee Proposal

At your request, we have reviewed the proposal of the Portland Charter Commission Education Committee to revise the school budget approval process, which was presented to the Charter Commission for a first reading last Wednesday, March 23, 2022 (the “Proposal”).

If accepted by the Charter Commission and adopted by the City voters, the Proposal would make two material changes to the school budget approval process:

1. Joint Budget Guidance Committee: The Proposal would establish a joint budget guidance committee composed of an equal number of City Council and School Board members to develop, prior to the preparation of the city and school budgets, non-binding guidance to the City Council and the School Board on budget priorities and constraints.
2. School Board Determines Total School Budget, Followed By Voter Approval: The Proposal would remove the City Council’s role from the school budget approval process and direct the School Board to determine the total budget, which would then be submitted to the voters for approval at a budget validation referendum (BVR) or, if the BVR is eliminated, at a municipal school budget referendum. This portion of the Proposal essentially incorporates the second of two alternatives that we identified and discussed in our memo dated January 24, 2022.

The establishment of an advisory joint budget guidance committee does not appear to us to run afoul of any limits on municipal home rule authority. Likewise, as we discussed in our January 24 memo, we think state law leaves room for the Portland charter to assign the School Board the role of determining the total school budget while leaving the decision for final budget authority with the voters, as set forth in the Proposal,¹ for the following reasons:

¹ Should the Charter Commission adopt the Proposal, we recommend a slight adjustment to the first and last sentence of the last paragraph of Article III, Section 5 of the charter to (1) clarify the process for appropriating funds for the school budget, and (2) provide some flexibility in how appropriated budget amounts may be exceeded (we make this latter recommendation because the process to secure voter consent can be lengthy whereas the need to do so may arise in emergency situations or otherwise when time is of the essence), so that the charter amendment would read:

The city council in its appropriation resolve for the ensuing year shall, in addition to amounts appropriated for other general city purposes, appropriate one gross amount for the support of the public school which amount shall equal the greater of (i) the amount adopted by the voters at the budget validation referendum or, if discontinued, at the school budget referendum, or (ii) not be less than the sum required to be appropriated for such purposes by the general laws of the state. ~~Such gross amount shall not be less than the sum requested by the school board except by a vote of at least six (6) members of the city council.~~ Such appropriation shall be expended under the direction and control of the school board but no such appropriation shall be exceeded except by consent of the city council or the voters.

- The school statute, and specifically the plain language of Section 2307 of Title 20-A, does not prescribe who can serve as the municipal legislative body for purposes of determining the total school budget.
- The school statute does not confine charter municipalities to the two “classic” forms of the municipal legislative body—*i.e.*, the town meeting or the council. Indeed, several municipalities in Maine have at one time or another established municipal legislative bodies that were something other than these classic forms.
- The state law definition of “municipal legislative body” in Section 2001 of Title 30-A (the statute governing municipalities) plainly provides that a municipal legislative body can be a town meeting, a city council, or something else—namely, “[t]hat part of a municipal government that exercises legislative powers under a law or charter.”
- Section 2307 specifies the *role* of the municipal legislative body, not its *identity*, and does so by affording greater deference to charter communities, not less. Indeed, Section 2307 is an exception to the general state law mandate that municipal school units must follow the same school budget procedures as regional school units.
- Finally, while there are arguments favoring different legal views on this matter and, consequently, the Proposal is not without legal risk, charters are entitled to a presumption of validity by Maine courts under home rule principles articulated in the *York* decision and many other cases. Accordingly, the burden rests on the person attacking a charter provision to prove that it exceeds municipal home rule authority, and not on the municipality to prove that it does not.

We trust this memo is responsive to your request. We are available should you have any additional questions.

At the appropriate location(s) in the Charter, specify that the city manager and superintendent must jointly prepare and submit to a joint meeting of the council and school board a multi-year capital improvement CIP before submission of the budget, and must publish a general summary of the CIP. The CIP must be revised and extended each year with regard to capital improvements pending or in process of construction or acquisition.

The Education Committee recognizes that changes in the city's governance structure may affect the roles of city officials in the CIP process. If no changes are made to the governance structure, the following amendments to the Charter appear to capture the intent of this proposal:

ARTICLE VI. ADMINISTRATIVE OFFICERS

...

Section 5. Appointment; qualifications; powers and duties of the city manager.

...

The city manager's powers and duties shall be as follows:

...

(i) To jointly prepare with the ~~Portland Public Schools~~ superintendent a five (5) year rolling capital improvement plan for annual presentation to a joint meeting of the city council and school board, which plan includes the following:

1. A one (1) year plan of specific projects and their cost;
2. A two (2) through five (5) year plan of specific projects and general categories, and amounts of proposed spending and funding sources; and
3. A discussion of the basis for the plan and the factors which went into its development or amendments.

School Board Vacancy Proposal amended to read:

SCHOOL BOARD VACANCIES

Section 6. Vacancies.

A vacancy in the membership of the board of public education shall occur upon the happening of the following: (1) the death of a member; (2) the effective date of the resignation of a member; (3) the removal of a member from the district from which he or she was elected; (4) the removal of a member from the city; (5) the conviction of a member of a felony while in office; or (6) the recall of a member pursuant to the provision of Article V. The school board shall declare a vacancy in its membership to exist upon the failure of a member to attend any six (6) consecutive regular meetings of the school board or at least sixty (60) percent of the regular meetings of the school board held in any one calendar year unless such member shall be excused (by a vote of at least four (4) of the members) for health reasons or other good cause. A member may in writing addressed to the school board resign his or her office effective at a future date specified in the written resignation.

Once submitted to the school board, such resignation may not be withdrawn and such member's office shall become vacant on the specified future date. If a vacancy in the membership of the school board occurs or is declared prior to the next regular municipal election, the vacancy shall be filled at a special election to take place on the same date as the next scheduled municipal or state election which is no less than 127 days after the date the vacancy occurs or is declared, unless the council, by a vote of at least six (6) of its members, calls a special election on an earlier date and shortens the time for obtaining and filing nomination petitions established in article IV, section 6. Such election shall be called and held and nominations made as in other elections. ~~If a candidate wins an election for vacancy in the membership of the school board in an election year for which the term expires that November, the candidate does not need to run for re election again that November but would serve for both the remainder of the existing term and the new three year term. If a vacancy in the membership of the school board will exceed sixty (60) days, the school board may make an interim appointment until the next election.~~ If vacancy occurs more

than 6 months prior to the next regular election, unexpired term is filled by special election, citywide or for a district. If vacancy occurs within 6 months prior to the next regular election, school board appoints a qualified person from the same district or at-large, as appropriate, to serve until the next municipal election.

(Referenda 11/2/76; 11/4/86; 11/2/99; 11/2/10)