

Comments on June 14, 2012 Charter Update Attachments

from: Jim Mosher (jimmosher@yahoo.com), 2210 Private Road, Newport Beach 92660 (949-548-6229)

Attachment A (Amended Draft Minutes for June 7, 2012):

- On page 2,
 - The nature of Committee Member Savary's concerns regarding Section 1114 do not seem to be adequately recorded. As I recall, they were in part that a major policy change was being recommended on the basis of vague references to "a case in LA," and she wanted more detail on what that case was about and how it related to us.
 - George Schroeder's name is misspelled as "Shroeder."
- On page 3:
 - Novell Hendrickson's name is misspelled as "Novel."
 - In the discussion of Section 503, some clarity might be provided regarding what was said about the coverage provided by the current bond. I believe the draft minutes correctly say "*Assistant to the City Manager Houston added that the bond **covers all City staff**,*" however I believe Acting Assistant City Attorney Torres later said the premium was so low because ***it did*** not cover all employees and that it would be unwise to include a requirement for wide coverage in the Charter. That seems an important comment affecting the Committee's decision regarding Sections 503 and 611, and I don't find it memorialized in the minutes.
 - The unspoken implication of the discussion seems to have been that for a number of years taxpayers have been paying the cost of the City Manager's bond despite the clear requirement in Section 503 that he personally provide the bond as a condition of employment. The benefit to anyone other than the City Manager for changing the Charter to conform to the practice, rather than the practice to conform to the Charter is unclear.
- On page ??: Member Glowienke's detection of a gender-specific reference in Section 409, and its suggested correction, is not noted in the minutes even though the change is incorporated into Attachment B. Incidentally, there is at least one gender-specific reference in a Section that is not being proposed for revision (Section 1102), and there may well be others.
- The fact that a new, and extensively rewritten, version of staff's recommended changes to Section 402 was distributed at the June 7 meeting is also not noted in the draft minutes.

Although not a correction to the minutes, several of the above observations indicate to me that the Committee continues to recommend that important policy changes be placed on the November ballot without adequate thought and discussion being given to alternatives (including, but not limited to, the “do nothing” alternative), and based on vague, unverified oral testimony rather than on thorough written documentation (“white papers”) laying out a problem and analyzing the pros and cons of possible solutions to it – written documentation whose completeness and veracity could be more adequately scrutinized and challenged.

A City charter is an extremely important document that should, in my opinion, be modified only with extreme care. While I appreciate and respect the integrity of the participants, I do not think the present process is a good process leading to good results.

I also appreciate that the City Clerk is working under a very tight deadline to disseminate minutes, which goes a long way to explaining the occasional shortcomings of ones such as those referred to above. However, the fundamental reason for the tight deadlines is that the process is being rushed for reasons I don’t comprehend. I completely fail to see any urgent need to get any of the proposed changes on the November ballot; and if there were such a need, it would seem staff should have started the process much earlier.

Attachment B (Revised Partial Redline):

Unlike previous handouts, this redline does not seem to provide a reliably accurate rendering of the existing Charter language.

- Staff has already discovered, and issued an amendment correcting Section 1106, from which the word “*centralized*” (in the current Charter) had been omitted.
- It has apparently not yet been noticed that “Section 408 Special Meetings” displays the words “*and publicly noticed according to the Ralph M. Brown Act*” as if they were part of the current Charter. They are not.

I do not know if there are other errors.

-- Jim Mosher

Comments on June 14, 2012 Charter Update Agenda Items

from: Jim Mosher (jimmosher@yahoo.com), 2210 Private Road, Newport Beach 92660 (949-548-6229)

The following comments are on the Charter sections called out for possible review in the agenda.

Section 1106 Centralized Purchasing.

- I think background on the history of the Fiscal Administration provisions in Article XI would be helpful before altering them.
- For example, in response to a question at Monday's meeting of the Council's three-member Finance Committee, Deputy Finance Director Dan Matusiewicz indicated that the provisions of Section 1112 (Cash Basis Fund) are not used, and it is unclear to what extent the restrictions in Section 1113 (Capital Improvement Fund) are honored.

Section 1116 Independent Audit

- Regarding posting on "*the City's website*," the concept of "website" is a rather new one possibly subject to obsolescence. The term "internet presence" has been suggested as a more generic term that could better embrace changing technology.
- It is not entirely clear if Government Code Section 40804 is to be followed in its entirety, or only as it relates to the selection of a newspaper.
 - Government Code Section 40804 calls, among other things, for use of "*a form prescribed by the State Controller*" and for what is published to be a summary of "*the city's financial report required by Section 53891.*"
- As to a timeline, Government Code Section 40805 calls for publication "*not later than 120 days after the close of the fiscal year,*" but it would seem instructive to review the requirements other charter cities impose on their officials.
- If I understood correctly, the new auditor interviewed at the recent Finance Committee meeting said they would be reviewing documents in September and not (if I heard correctly) likely have their report out until December – well beyond the Section 40805 limit.

Section 407 Regular Meeting

- I submitted written comments on Section 407 to the May 31, 2012 meeting, at which I thought the Committee was going to be going through the proposed changes in sequence.
- In essence, City staff honored for many years the Charter requirement to schedule a minimum of two regular meetings per month (including December), and there is no evidence the Council members, or the public, found them burdensome to attend.

- There is no evidence of anyone being away for a “holiday” in the second half of August.
- The public benefit of going from two meetings per month to no definite requirement has not been explained.
- If the Council should, under the new language, chooses to schedule no regular or special meetings during a calendar month, then the interaction of that decision with the compensation language in Section 402 does not seem well defined: since they would not be “absent” are they still paid?
- The reasons for inserting the Brown Act, and how its requirements differ from the current language have not been well explained.

Section 408 Special Meetings

- Again, the reasons for inserting the Brown Act, and how its requirements differ from the current language have not been well vetted.

Section 409 Place of Meetings

- This may, at first sight, seem an innocuous change, but it is not at all.
- Whether we have been following the Charter precepts, or not, the change from an open meeting policy at a well defined location to the less restrictive requirements of the Brown Act is a major shift in the public’s expectations of what our government should do.
- Its only purpose seems to be to legitimize present practices that do not honor the wise precepts of the Charter.

Section 421 Contracts. Execution

- Again, this is a very major change in the public’s expectations of what its government should do, being requested to legitimize a new contracting policy instituted in contradiction to the Charter in January 2011.
- The present language insures accountability by allowing the City’s citizens to be bound to a contract *only* if it has been publicly approved by the City Council, or by the City Manager in the limited circumstances where it is below a certain dollar amount and is to implement an item publicly approved by the City Council as part of the budget.
- In my opinion, giving up that accountability and duty to oversee expenditures is very unwise.

Section 425 City Hall

- It appears this item is being recommended to cover up staff and Council's having not read carefully enough a ballot measure passed by Newport Beach voters in 2008, and as result having built a civic center that does not, in all respects, match what the measure called for.
- At the least, if this problem needs to be corrected by revising the measure as it appears in the Charter, the problem should be clearly explained to the voters and presented to them as a stand-alone item.

Section 402/402-A/402-B/404 Council Compensation

- I submitted written comments on Section 407 to the May 31, 2012 meeting.
- The real question here is the "employment benefit" package that taxpayers have been funding for the Council members for the last 15 years or so – something completely unanticipated in the Charter, and arguably illegal.
- The current Charter calls for "reimbursement for expenses".
 - Changing that to "salary for services" (thereby justifying the "employment" perks) is a major change.
 - If the perks are to be sanctioned by the Charter, then an additional question arises of whether they should be kept below the existing compensation limit (or some new one).

Section 608 Illegal Contracts. Financial Interest

- The current language commits the City to not having contracts in which the top officers (including the Council) have a financial interest, whether or not they participated in the decision.
- Whether we have been honoring this commitment, or not, giving up that protection does not seem wise.

Sections 707, 708, 709 and 801

I do not think any of the proposed changes to these sections are in the public interest, but do not have time to submit written comment's ahead of the June 14, 2012 meeting.

Law Offices of Robert C. Hawkins

110 Newport Center Drive, Suite 200
Newport Beach, California 92660
(949) 650-5550
Fax: (949) 650-1181

FAX COVER SHEET**TRANSMITTED TO:**

NAME	FAX NUMBER	PHONE NUMBER
Leilani Brown, City Clerk	(949) 644-3039	
David Kiff, City Manager	(949) 644-3020	

From: Robert C. Hawkins

Client/Matter: Firm

Date: June 14, 2012

Documents: Comments on Charter Update

Pages: 6*

COMMENTS: Original will follow as indicated.

The information contained in this facsimile message is information protected by attorney-client and/or the attorney/work product privilege. It is intended only for the use of the individual named above and the privileges are not waived by virtue of this having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

*** NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE TELEPHONE US IMMEDIATELY AT (949) 650-5550.**

LAW OFFICES OF ROBERT C. HAWKINS

June 14, 2012

Via Facsimile

Paul Watkins, Chair
Members of the Charter Commission aka Charter Committee
City of Newport Beach
3300 Newport Blvd.
Newport Beach, California 92663

Re: Comments on the Draft Charter Redline and City Manager Weighted Suggestions
Draft of the Revised Charter

Dear Mr. Watkins and Members of the Charter Commission aka Charter Committee:

Thank you for the opportunity to comment on the captioned matter. As you know, this firm represents businesses, groups and individuals who work and live in the City of Newport Beach. We offer the comments below on their behalf.

I. Why Are We Doing This Update?

First, it is unclear why the Charter requires update especially since the City just updated the Charter in 2010. Resolution No. 2012-32 states:

"WHEREAS, the City's Charter was amended by the residents of the City of Newport Beach at the 2010 General Municipal Election. Since the last amendment, additional Charter sections have been identified for possible amendment;

"WHEREAS, since the last Charter amendment, additional Charter sections have been identified for possible amendment; (sic)

"WHEREAS, it is appropriate to appoint a citizens committee to review the City Charter for update and modernization issues in order to maximize the benefit to the City and its citizens and to move the work program for such an update and modernization forward in a limited period of time;"

However, it is unclear who or why additional Charter sections have been identified for possible amendment. Indeed, many of the Charters sections proposed for possible amendment **were amended by the 2010 Charter Commission, the City Council and the voters in 2010.** Indeed, Paul Watkins, Mike Torres and David Kiff all participated in the 2010 Update; apparently, there is some need to get a "do over." But it is unclear why we need to spend precious staff resources and limited City funds to make this "do over."

Second, Staff has maintained that this effort is simply a Charter cleanup. That was the purpose of the last Charter Update two years ago. Why weren't these cleanup issues done then? Moreover, many of the proposed changes are not clean-up. Notable among these new and important changes is the proposed exclusion from Charter Section 801 which states that the City Service System includes all City

110 Newport Center Drive, Suite 200
Newport Beach, California 92660
(949) 650-5550
Fax: (949) 650-1181

Paul Watkins, Chair
Members of the Charter Update Commission aka Committee

- 2 -

June 14, 2012

employees except listed employees. New subsection (f) proposes to exclude a whole host of new employees and categories:

“New positions and/or employees not previously included within the civil service system that are excluded by a vote of the City Council.”

(Emphasis supplied.) Some have referred to this as the “Costa Mesa sion” of the Civil Service System in the City. As discussed below, this goes far beyond “cleanup” and is bad public policy.

II. What About the Minutes and the City Attorney’s Advice?

The minutes for the meetings of May 31, 2012 and June 7, 2012 are too cute by half regarding various conflicts issues. First, at the May 31, 2012 meeting, Mr. Robert Rush raised a conflicts issue regarding Mr. Watkins earlier client in a land use matter. The Deputy City Attorney Mike Torrez said that under the Political Reform Act, Government Code section 81000 et seq., members of the Committee such as Mr. Watkins were not public officials under the Act and therefore the conflict provisions did not apply. This advice is incorrect and conflicts with the City’s newly circulated Handbook for City of Newport Beach Boards, Commissions, and Committees (the Handbook) and the code sections and regulations cited therein. The Handbook provides that a person is a public official if they are a member of a Board, Commission or Committee in the City of Newport Beach. Handbook, page 10 citing 2 Cal. Code Regs. Section 18701.

At that same meeting, Mr. Kiff discussed the proposed changes to the City Manager provisions of the captioned draft of the Charter. As you know, I raised the issue that Mr. Kiff was a covered public official under the Act and should not participate in the discussion. He did not participate in much of the discussion thereafter and did not leave the room. However, he did improperly participate in the discussion on Section 507 which discusses his duties relating to the appointment of the Manager Pro Tem.

Again, this conduct conflicts with the Handbook and the cited code sections. The Handbook says that the public official “must publicly announce the specific financial interest that is the source of the disqualification” and “must leave the room during any discussion. . . .” Handbook, page 12 citing Government Code section 87105; 2 Cal. Code Regs. Section 18702.5. Again, Mr. Kiff did not announce the apparent conflict which concerned his compensation and did not leave the room as required by the Handbook.

Then in discussion on Article VI, Mr. Kiff lead the discussion, and Mr. Torrez and Ms. Brown did not participate. Staff realized that an impermissible conflict existed by members of the City Attorney’s and the City Clerk’s offices discussing and arguing for changes to Section 602 (City Attorney) and Section 603 (City Clerk).

The May 31, 2012 meeting minutes cutely attempts to handle these conflicts by the following ambiguous language:

“City Manager Kiff or Acting Assistant City Attorney Torres discussed the proposed changes to the following Charter Sections:”

110 Newport Center Drive, Suite 200
Newport Beach, California 92660
(949) 650-5550
Fax: (949) 650-1181

Paul Watkins, Chair
Members of the Charter Update Commission aka Committee

- 3 -

June 14, 2012

This fails to satisfy the obligations of the minutes or the Political Reform Act. The minutes must be revised.

The minutes for the meeting of June 7, 2012 continues this ambiguity. In the discussion of Section 503, the minutes listed Mr. Huston, Assistant City Manager, as leading the discussion. We understand that Mr. Kiff also participated in this discussion. If this is mistaken, it should be clarified in the minute that Mr. Kiff left the room and did not participate in the discussion. If this is correct, then the minutes should reflect his participation.

As for the conflicts discussion by the City Attorney's office, the proposed revisions to Section 608 renders this Commission aka Committee a potential covered public official under the City's conflicts provisions and under the Political Reform Act. Although we do not believe that the conflict identified by Mr. Rush is disqualifying, this Commission aka Committee should discuss these changes. If the Commission aka Committee endorses the proposed changes to Section 608, it should make the appropriate disclosures.

Further, the City's recently circulated Handbook has not been presented to this Commission aka Committee. Further, as required by the Handbook, this Commission aka Committee has not signed Confirmation Sheet which is required by the Handbook. Also, the Handbook advises that members of such bodies that they are public officials and should disclose any potential conflicts of interest.

Given these issues, the Commission aka Committee should review and correct its minutes and further discuss these issues.

III. Section 1114 aka 1116 Requires Additional Changes.

These Sections concern the Charter's requirement for an Independent Audit. The proposed amendments concern the publication requirements. Currently, the Charter requires that the Audit be published in the official newspaper. The recommended change is to make it available on the website and publish a summary in the official newspaper. This weakens the public circulation of the Audit. Although publishing the entire Audit may create a significant cost to the City, Staff has not provided this information. The Commission aka the Committee should request this information before making this change.

Also, given that the proposed change weakens circulation, the Commission aka Committee should recommend that the Audit be generally available at all City libraries.

IV. Why Is Staff Proposing Changes to Section 402?

Currently, the Charter provides for no compensation for City Council members and only reimbursement for expenses. Staff proposes to fix compensation at \$1,227.35 for Council members and an additional \$513.96 for the Mayor. Staff has provided no basis or rationale for these figures. Presumably, there is a reason for such compensation rates, but the Commission aka Committee has no information at all for such rates. In order to make a reasoned recommendation, the Commission aka Committee should request some explanation, some staff report and some comparison with other Orange County cities.

Paul Watkins, Chair
Members of the Charter Update Commission aka Committee

-4-

June 14, 2012

In line with this lack of information, Staff proposes a cost of living adjustment. Again, the question is why? Staff provides no answers.

In order to make a reasoned recommendation, the Commission aka Committee must have some rationale or reasonable basis for the rates and the adjustment.

V. Sections 407, 408, and 409 Should Remain Without Change Absent Explanation and Rationale for Change.

Section 407 concerns "Regular [Council] Meetings," Section 408 concerns "Special [Council] Meetings; Section 409 concerns "Place of [Council] Meetings. The proposed changes to these sections weaken the Charter requirements and allows such meetings to be set by ordinance or regulation; Section 409 proposes to eliminate the home rule advantage of the Charter and simply rely on State law. This is improper, and the Commission aka Committee should not recommend it to anyone.

The Charter of the City is unique: it is its Constitution which limits the power of the City and limits the State's ability to direct the City over municipal affairs. As the Court of Appeal said long ago,

"The charter of a municipality is its constitution. [Citations deleted.] Any ordinance passed by a municipal corporation within the scope of the authority expressly conferred on it has the same force within its corporate limits as a statute passed by the legislature has throughout the state. [Citations deleted.] To be valid, an ordinance must harmonize with the charter.[Citations deleted.] An ordinance can no more change or limit the effect of the charter than a statute can modify or supersede a provision of the state Constitution. [Citations deleted.] The board of supervisors in establishing a procedure could not deprive a property owner of a right given by the charter. [Citations deleted.]

Marculescu v. City Planning Com. (1935) 7 Cal. App. 2d 371, 373-374. That is, the Charter limits the power of the City. In Marculescu, the only way the supervisors could establish a procedure to deprive a property owner of a right given by the Charter is to change the Charter.

Here, the City proposes to do this; deprive residents of certain rights that its City Council will meet as required by the Charter. Changing these sections to allow for setting meetings based on ordinances and resolutions deprives the residents of the certainty of when City Council meetings occur. Changing the location of Council meetings to locations allowed by the Ralph M. Brown Act, Government Code section 54950 et seq., is absurd. The only limitation on the location of public meetings in the Ralph M. Brown Act is contained in Government Code section 54961 which prohibits public meetings

"... in any facility that prohibits the admittance of any person, or persons, on the basis of ancestry or any characteristic listed or defined in Section 11135, or which is inaccessible to disabled persons, or where members of the public may not be present without making a payment or purchase."

Given that City and its residents are spending \$150,000,000 on the new City Hall, the residents have a right to expect the Council to meet in the new facility. This is exactly what the current Charter

Paul Watkins, Chair
Members of the Charter Update Commission aka Committee

- 5 -

June 14, 2012

provides. The Commission aka Committee cannot change Section 409 with ample reason. Staff has provided none.

VI. Section 421 Should Not be Changed Without Reason and the Contracting Abilities of Employees Should Not be Expanded.

Currently, the Charter limits the contracting power for the City to the Council and City Manager. Staff's proposed changes expand this significantly: it allows the City Manager, City Clerk or the City Attorney to designate any employee to sign any contracts without any authorization by the City Council. Further, given the proposed change to Section 1400(b) concerning "public officers," it is unclear how far the proposed Section 421 would allow members of the City Manager's office, the City Clerk's office, or the City Attorney's office to delegate contracting powers.

Staff has provided no justification to expand the contracting powers. In the past, the City has suffered from unscrupulous employees. Fortunately, our current staff generally conducts itself within the bounds of the law. But the Charter should not be designed for a good or the best City staff; it must provide brakes on the worst possible City staff. The proposed changes to section 421 do the reverse.

The Commission aka Committee should not recommend such expansions.

VII. Section 801(f) Must be Rejected.

As indicated above, Staff proposes to amend Section 801's employees who are exempt from the Civil Service System to include:

"(f) New positions and/or employees not previously included within the civil service system that are excluded by a vote of the City Council. This exclusion shall not apply to any employees within the civil system at the time of the City Council vote."

This change could serve to eliminate the Civil Service System over a lifetime. The Council could exclude every new employee or category from coverage in the System. The changes in 2010 concerned specific employees; the proposed changes in new section (f) could affect the entire System.

Staff has provided no justification for this proposed change. Without substantial justification for this change, the Commission aka Committee should reject it with little discussion.

VIII. Conclusion and Additional Comments.

We have simply run out of time to provide other written comments on these and other proposed changes. We will make future written comments and make oral comments at any meetings we attend.

However, it is clear that the Commission aka Committee has no reason to recommend any changes because Staff has provided no written documentation to support these 2012 changes. Oral discussion by staff is insufficient especially because the minutes do not reflect the full discussion.

Paul Watkins, Chair
Members of the Charter Update Commission aka Committee

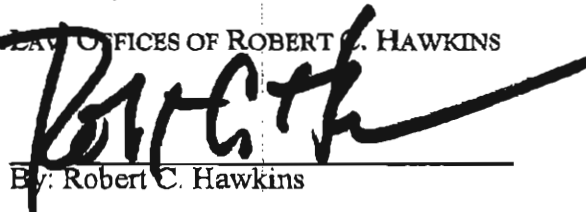
- 6 -

June 14, 2012

Thank you for your attention. We reserve all rights in making these comments and urge the Commission aka Committee to obtain adequate and substantial information before making any recommendations to anyone.

Sincerely,

LAW OFFICES OF ROBERT C. HAWKINS

A handwritten signature in black ink, appearing to read "Robert C. Hawkins", written over a horizontal line.

By: Robert C. Hawkins

RCH/kw

cc: David Kiff, City Manager
Leilani Brown, City Clerk