

Memorandum

To: Julie Dubick
From: James Ingram
Re: Proposed language regarding appointments to outside organizations
Date: August 8, 2007

Per Subcommittee request, the staff has worked with City Attorney representatives to arrive at language regarding the issue of appointments to outside organizations. The language now meets their satisfaction in terms of format, although they are not able to address the substantive content of the recommended language.

There are a few differences between the language below and that proposed at our last Subcommittee meeting. First, the language now is placed within Article XV, rather than having its position in the City Charter unspecified. Second, the language is a better fit to that of the current Charter. Third, rather than providing that the Mayor's nominee is automatically appointed if the City Council fails to act, the improved Section 3 now requires the Council to act.

Staff altered the language to attempt to address the concerns that City Attorney representatives have raised regarding the insertion of the Mayor at the beginning stage of these appointments, rather than at the end through the Mayor's use of the veto. Because of these representatives' concerns that Council inaction would automatically make the Mayor the appointing authority, staff altered the language to require the Council to act to either approve or reject the Mayor's nominee. This means that the Council would always be the appointing authority. The Mayor could nominate, but only the Council could appoint.

The City Attorney representatives had also raised a concern as to the Council's ability to appoint individuals that they would prefer to appoint. It is important to note that the Mayor's use of the veto, which is a product of the City Attorney's interpretation of the current Charter, might also prevent the Council from appointing its preference. The language below allows the Council to suggest nominees for the Mayor's consideration. In the past, the Mayor and Council have often been able to arrive at consensus on these appointments, even where controlling law vests appointment authority in the Council. When Prop F made this issue problematic, the Mayor and Council collaborated effectively on the issue of whom to appoint. This Charter language would require this kind of collaboration as a formal matter, rather than leaving it to chance, and the personality conflicts of future elected officials. The process recommended by staff resembles the "advice and consent" process that the U.S. Constitution established for our country.

The City Attorney representatives and the staff have been researching the case law on this issue, but have not yet found any relevant cases that would enable us to predict whether the language would withstand a court challenge. The staff's position is that the courts' stated preference for a harmonization of city charters with state law would make this language permissible. The City Attorney's February 28, 2006 opinion explained the importance of harmonizing city charters and state law. The staff would merely contend that if it is legitimate to harmonize these at the end of the appointments process through a veto, then it should also be acceptable to do so at the beginning of the process, through nomination.

Proposed Charter Language

Section 265: The Mayor

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(b) In addition to exercising the authority, power, and responsibilities formally conferred upon the City Manager as described in section 260(b), the Mayor shall have the following additional rights, powers, and duties:

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(13) Sole authority to appoint City representative to boards, commissions, committees and governmental agencies, unless controlling law vests the power of appointment with the City Council or a City Official other than the Mayor.

(A) For all boards, commissions, committees, agencies, or other entities for which controlling law requires or authorizes the City Council to act as the appointing authority, the following appointment procedure shall be employed:

(i) The Mayor shall nominate each member of the board, commission, committee, agency, or other entity, subject to confirmation by the Council.

(ii) The Council may recommend individuals to be nominated, for consideration as the Mayor's nominee.

(iii) The Council shall act to appoint or reject the Mayor's nominee within forty five days after submission of the nomination to the Council.

(iv) If the Mayor fails to nominate a member within ninety days after a vacancy first exists, the Council shall appoint the member.

(v) If the Mayor submits a nomination to the Council within said ninety day period and the Council rejects the nominee, the Mayor shall make a new nomination within ninety days of the rejection.

(B) The nomination procedure set forth in section A, above, shall not apply to a redevelopment agency or housing authority established under state law where the City Council has declared itself to be the agency or authority.