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ally applicable to city under its home-rule charter and plan of government).

Ohio. State v. Phillips, 168 Ohio St 191, 151 NE2d 722; Spencer v. Dayton, 44 Ohio App 2d 236, 337 NE2d 646; Choura v. Cleveland, 44 Ohio Misc 39, 336 NE2d 467.

[13] **Arizona.** Phoenix v. Elias, 64 Ariz 1, 166 P2d 589, following Trigg v. Yuma, 59 Ariz 480, 130 P2d 59, 61; Maxwell v. Fleming, 64 Ariz 125, 166 P2d 831; Tucson v. Walker, 60 Ariz 232, 135 P2d 223; Gardenhire v. State, 26 Ariz 14, 221 P 228, 231.

Texas. Sierra Club v. Austin Independent School Dist. (Tex Civ App), 489 SW2d 325; Crownhill Homes, Inc. v. San Antonio (Tex Civ App), 433 SW2d 448.

See also § 4.29.

III. MUNICIPAL ORGANIZATION

§ 9.09. Development.

As mentioned, our first municipal charters were modeled on the English borough system. The modifications, first in the colonies and afterwards in the states, have been outlined.[1] From the time of the Revolution and during the entire course of our national life frequent change has occurred in municipal structure and function, but the closing years of the last and the opening years of this century present the most active period of never-ceasing experimentation in city and town government. Much doubt still prevails concerning the most effective form of municipal organization. It cannot be said that any particular type of municipal structure obtains throughout Continental United States, nor indeed within any given state. At the beginning, local affairs were generally directed exclusively by an elective council, and the chief executive, or mayor, was usually a member of this body, and, in some instances, as in England, elected by it. His chief function was to preside over the council. Sometimes the mayor was elected by popular vote, and in such case the office assumed more importance in the municipal system. Council supremacy marks this period. In the main, the council controlled the policy of the local government, and appointed the principal local officers. Even the details of administration were directed by the council committees. This is largely the system of English municipal government today which has prevailed for many years. As political offices were utilized frequently for partisan political purposes, as is common in this country, and as frequent changes occurred in the

membership of the council—the terms of the councilmen being of short duration—stability and continuity of municipal policy were wanting. Change in organization was deemed advisable. The separation of the powers of government into executive, legislative and judicial, in accordance with the doctrine of the French revolutionary philosophers formulated by Montesquieu,[2] with its accompanying scheme of so-called checks and balances, and which had been incorporated in the structure of government of nation and state, was observed in part for many years, but in a measure it is disappearing from our municipal system.[3] This division and distribution of sovereign power in which each officer or department may act in its full exercise within the orbit prescribed is the basis of the check and balance theory of our government. The framers of our governmental system deemed such division essential to liberty,[4] and believed that to prevent abuse of power, power should be a check on power, and consequently the exercise of sovereign authority must be broken in pieces.[5]

In the beginning the division was not absolute in any state constitution, but it is true the principle was adopted. At first in the colonies and in the states legislative supremacy prevailed, with some exceptions and a few restrictions thereon. In the United States Constitution the principle of checks and balances was fully developed, and later state constitutions sought to incorporate the principle in its completeness. Although the doctrine was finally accepted in toto in this country, and the separation was set out with precision in the state constitutions and uniformly upheld by the courts, in recent years the original doctrine has undergone modification. Thus it has been held inapplicable to municipal and local officers, notwithstanding it adheres in state government.[6] In Minnesota the separation is recognized only in so far as fixed by the state constitution. Hence in that state it is competent to determine by legislation, within the express and implied provisions of the organic law, what officers and departments shall perform specified functions.[7] Principles regarding separation of governmental departments do not provide that administrative or executive departments may not act in conjunction with the legislative depart-

ment if it so expressly stated in the constitution or charter of the political unit.[8]

If the city is to be regarded at all times as a mere creature and agent of the state in government—the settled doctrine—to carry out the fundamental of our political system, namely, the separation of powers into executive, legislative and judicial, it would seem to follow logically that the functions of the officer should be restricted to the powers of the department in which he serves. The powers of the state officer are limited to those matters which it is constitutional to confide to that officer within the legitimate range of one of the three divisions, but not so as to the local officer notwithstanding every act performed by the local officer as such officer is the act of the state. The separation and prohibition is applied to the principal, but not to the agent. No logical basis can be found for the distinction. It rests rather on what is conceived to be practical convenience in administering the community government. In this respect, as in municipal liability to private action for civil wrongs, and in other matters also, municipal corporation law has had a development quite apart from the usual legal method of reasoning. Many believe that the legalistic method of thinking should be rejected as technical whenever it appears to run counter to so-called common sense and practical convenience in getting beneficial results when no possible harm can ensue to public interest.

After the attempted separation of governmental powers the council, often consisting of two houses, became chiefly a legislative body, and most of the executive and administrative functions were vested in the mayor (who near the middle of the last century was everywhere elected by popular vote) and chief officials, which prior to that time had devolved upon the council committees, and which constituted the main instrumentality of municipal government. This period marks the distribution of powers chiefly between the mayor and heads of departments elected by the people, and the mayor's appointees, representing the executive and administrative authority, and the council, elected by popular vote, representing the legislative power; however, in many instances, the separation of powers was not complete, since the council performed many duties not of a

legislative character. Sometimes the mayor possessed the power of veto, and in such case the office assumed more dignity and importance.

As municipal conditions did not improve, the idea of a pure democracy possessed the people in many sections of the country, and as a result generally the election of nearly all municipal officers was placed in the hands of the local electors. Generally, everywhere the chief administrative officers of the state, including the governor, are elected by the people. This plan was followed uniformly, if sometimes unwisely, in municipal organization. At first, as mentioned, nearly all officers were elected and their terms were short. In course of time, in the more important centers, officers and departments grew to be numerous. With the separation and diffusion of powers in a sort of haphazard fashion it was impossible to fix responsibility. Commencing near the middle of the last century local administrative powers began to be scattered about without much order or system among various officers and departments created from time to time.

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[1] See § 1.10 et seq.

[2] Montesquieu, Spirit of Laws, Book XI, ch VI; Arthur Twining Hadley, Undercurrents in American Politics, p 197 et seq.

See Sutherland Stat Const § 3.03 (4th Ed).

[3] **Maryland.** Pressman v. D'Alesandro, 193 Md 672, 69 A2d 453 (constitutional requirement of separation of powers as not applicable to local government).

Separation of Powers—Modern View, see Sutherland Stat Const § 3.06 (4th Ed).

[4] **United States.** Springer v. Government of Philipine Islands, 275 US 519, 72 L Ed 404, 48 S Ct 122 (dissent setting out many instances of disregard of rule).

Pennsylvania. The limitations so established "have their origin in a distrust of the infirmity of men. That distrust is fully justified by the history of the rise and fall of nations." Mott v. Pennsylvania R. Co., 30 Pa 9, 27, 28.

Texas. Gulf Refining Co. v. Dallas (Tex Civ App), 10 SW2d 151, 158.

Virginia. Allen v. Byrd, 151 Va 21, 144 SE 469.

Wisconsin. In such division "there may be some encroachment of one department upon another or there may result an impasse; action is slow, efficiency is not great, but there is liberty." Per Timlin, J., in State v. Thompson, 149 Wis 448, 501, 502, 137 NW 20.

"The spirit of encroachment (of one department upon another) tends to consolidate the powers of all departments in one, and thus to create, whatever the form of government, a

real despotism. A just estimate of that love of power and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position." Washington's Farewell Address, September 17, 1796.

[5] **United States.** Kilbourn v. Thompson, 103 US 168, 26 L Ed 377 (public servants as limited to matters confided to them by written constitution).

See Sutherland Stat Const §3.03 et seq. (4th Ed).

[6] **Alabama.** State v. Lane, 181 Ala 646, 62 So 31.

Delaware. Poynter v. Walling, 54 Del 409, 177 A2d 641.

Florida. Florida Motor Lines v. Railroad Com'rs, 100 Fla 538, 129 So 876.

Georgia. Ford v. Brunswick, 134 Ga 820, 68 SE 733.

Indiana. Sarlls v. State, 201 Ind 88, 166 NE 270.

Louisiana. New Orleans v. Borey (La App), 52 So 2d 728.**Washington.**

Walker v. Spokane, 62 Wash 312, 113 P 775.

See Sutherland Stat Const §3.30 (4th Ed).

[7] **Minnesota.** State v. Bates, 96 Minn 110, 104 NW 709.

[8] **Hawaii.** City Council of City & County of Honolulu v. Fasi, 52 Haw 3, 467 P2d 576 (under charter legislative branch city and county government as coordinate with executive branch and neither to exercise power of other).

Michigan. Local 321, State, County & Municipal Workers of America, C.I.O. v. Dearborn, 311 Mich 674, 19 NW2d 140.

§9.10. —Decline of council and increase of executive power.

For years there has been a distrust of legislative bodies, national, state and municipal. This distrust has grown with the generations. It is shown beyond question in the more recent state constitutions. The earlier constitutions were short, terse and contained but the general outlines of government. The late constitutions are verbose and filled with restrictions on legislative powers. This distrust is more marked in local than in state or national government. The people seem to prefer the placing of trust and power in the hands of executive officers, and are therefore inclined to support a form of organization that will strip the council or legislative body of its more important functions, or of any real authority.

By 1850 urban expansion[1] had rendered municipal government of considerable consequence. Many cities, towns and even villages had been incorporated and a number of cities had become dense in population and important as commercial,

industrial and manufacturing centers. Moreover, in the two decades following there was much changing of municipal charters and organization; special state legislation relating to municipal corporations; the appearance of fresh municipal functions as police and fire service, the construction and maintenance of sewers and drains, water supply and parks; and the rapid development of older ones, as street paving, caring for the poor, schools, etc., and as a consequence local expenditures, taxes, and municipal indebtedness greatly increased. Gas plants and street railways also entered at this period as marked features of urban life.

The changes in municipal organization somewhat curtailed the powers of the council, and the special state legislation by which it was effected tended to place the municipalities more and more under state legislative control, thus virtually taking from them the power of determining local policies. In addition, these changes created independent officers and departments for the administration of certain municipal functions theretofore in charge of the council as a body or by its committees. The steady growth of municipal activities increased enormously so that the management of details of local work and business by the council became rather heavy if not impracticable. These independent officers and departments in time wrought confusion, destroyed to a great extent unity of purpose in municipal service, scattered official responsibility, and resulted in poor service.

As to independent officers and departments, it may be mentioned that both New York and Cleveland went to extremes in this respect. The legislative charter of New York of 1849 created some twelve administrative departments whose chiefs were elected by popular suffrage. In Cleveland, in addition to the mayor, some fifteen administrative officers were elected by popular vote. This method was followed in other large cities as Boston, Philadelphia, Chicago and Detroit. Later in Chicago, New York and Baltimore power was conferred upon the mayor to select designated chiefs of departments, subject to confirmation by the legislative department or one branch of it.

The decline of the legislative body as the dominating influence in municipal government and the movement stripping it of much of its power was due partly to the vigorous growth of

democracy and the consequent desire of the voters to make their own choice in the election of their servants who were to manage the several municipal functions, then loosely classified; partly to dissatisfaction with government by the council (which is certain to occur at any time under any form of municipal organization where partisan politics is suffered to dominate); and partly to lack of faith in the integrity and competency of the members of the legislative body and its committees, especially in the awarding of contracts for public work and the granting of franchises for street railways and gas lighting, conditions that were beginning to arise with great frequency.

At that period the value of street franchises was imperfectly understood. Ideas as to duration and compensation to be paid for the use of streets and the method of implementation were rather nebulous. Street railways and street lighting were believed to be required in any populous community composed of active citizens with advance ideas and vision of the future. Those who were to provide these needs, it is true, must be able to see their reward for the capital, skill and energy required. But many were not at all influenced by a mere just reward; unrestrained by conscience they sought exorbitant profits at the expense of the city and its people. As a result often the public interest was put out of view, and complaints of bribery, corruption and jobbery were heard on every hand.

In mediaeval times the cities of Italy, Germany and the boroughs of England were regarded as in the nature of private institutions, existing chiefly to promote the trade, commerce and industry and resultant profits of those engaged in these various business enterprises, and who were the "electors," "freeholders" and "freemen" dominating all activities of the local community and its officers. To some extent this view prevailed in the colonial period and in the early days of our nationhood, almost up to the time that the suffrage was given to all urban residents. The practice of managing the affairs of the borough in England by its officers and "members" as a "close corporation," largely for their own advantage until 1835, was in some measure observed in this country at the beginning when "freeholders," taxpayers and the so-called best people only—those engaged in the paying private enterprises—voted and took

part in community affairs.[2] In addition we must remember that individual interest dominated, and it appears to have been assumed that public and individual interests were in essence the same. Hence arose the widespread idea that a city was merely a business enterprise or corporation and consequently those dealing with it in securing contracts, favors, privileges and franchises were justified in employing the prevailing standards of commercial morality. Failing to see the city as a guarantor and protector of the public interest, but regarding it as an ordinary business concern, they felt themselves free to take advantage of the city officers and get as good bargains as they could. In these transactions they thought of their own interests only, without regard for any rights of the public. The officers put out of view the commonplace facts that "the true end at which American institutions aim is to consult the rights and interests of all conditions of men,"[3] that "public officers are the trustees and servants of the people,"[4] and that municipal officers "in the discharge of their duties do not act for themselves, but for the public."[5]

Those who conceive a city or town as a business corporation and its functions as administrative, as contrasted with governmental, usually are the most insistent in attempting to strip the council of any real authority. If the analogy should be accepted even to the extent of regarding the city as a corporate business organization to be managed as such organization is conducted, why not permit the council that corresponds to the board of directors in the business corporation to decide general questions of municipal policy? The directors decide such questions for the executives of the private corporation. Why not apply the same principle to the public corporation, if the view is sound that the same methods of management should prevail in both kinds? The answer would likely be loss of confidence in legislative bodies, especially city councils, and disposition to pin faith in executives because by so doing individual responsibility can be fixed more readily. Again, it may be urged that this conforms to the political thought and practice of the day to concentrate power in as few hands as possible, and if it should be abused the new popular instruments available for instant use, namely, the recall and the initiative and referendum, could be

invoked. But these means of thwarting the continuance of the exercise of autocratic power trench upon a traditional fundamental principle and run counter to settled practice.

[1] Growth of urban life, see §1.46 et seq.

[2] Voter restrictions in colonial period, see §1.12.

[3] **Ohio.** Rosebaugh v. Saffin, 10 Ohio St 31, 36.

Bishop, History of Elections in the American Colonies, p 218 (1893).

See Frug, The City as a Legal Concept, 93 Harvard L Rev 1059 (1980).

By the late 18th century, Philadelphia was characterized as "a club of wealthy merchants, without much purse, power or popularity." See §1.11.60.

[4] Const Ga, 1877, art I, §1, part 1; Const Vermont, adopted in 1793, ch 1, arts 6 and 7.

"A public office is a public trust," see Cooley, Const Law, 303.

See John W. Burgess, Recent Changes in American Constitutional Theory (1923), pp 6, 7.

[5] **Missouri.** Hitchcock v. St. Louis, 49 Mo 484, 488.

"The master motive of human nature is self-interest, and so far as political institutions are subject to self-interest, power will be abused and government will be corrupted." Henry J. Ford, Representative Government (1924), p 131.

See Arthur N. Holcombe, The Political Parties of Today (1924), especially chs III, V and VII.

§9.11. —Legislative interference.

Just prior to 1860 state commission government of municipalities appeared. Legislative control was greatly extended in the creation by state authority of boards and commissioners to manage specified municipal functions and which were placed under state control, e.g., park, police, fire, health and licensing boards or commissioners. The movement began in New York state (1857, the metropolitan police district) and rapidly spread to Maryland (Baltimore police 1860), Kentucky (Louisville police), Missouri (St. Louis police 1861), Illinois (Chicago police), Michigan (Detroit police), Ohio and other states.[1] In Pennsylvania the famous state commission to construct a new city hall in Philadelphia was created by legislative act. These legislative acts deprived the cities to which they applied of determining the policy of the boards or departments so created and controlled by the state, and as a consequence the legislation in effect largely controlled municipal finances and expenditures. The assumption by the state legislatures of the direct control of

local affairs "is no doubt a departure from the principle of local popular control and responsibility on which state government and rural local government has been based."[2]

Local maladministration and inefficiency were plausibly advanced as the reason for state interference. That is, the state interposed for the benefit of the local communities. However, this is always the excuse for new departures in governmental usurpation. It may be said that this was the identical reason given by the Roman emperors when they began first to interfere with the municipalities in the later days of the Roman Empire which eventually resulted in their utter destruction as autonomous communities. In fact most of this legislative interference in the several states was due to partisan politics supported by selfish economic interests, and the desire to control party spoils, but in some cases it was invoked in good faith to improve local administration. Between 1851 and 1868 seven state constitutions—Ohio and Virginia (1851), Iowa (1857), Kansas (1859), Florida (1865), Nebraska (1867) and Arkansas (1868)—sought to forbid special legislation for municipalities and provided for their classification. But judicial decisions disclose that in many instances these restrictions were skillfully evaded. In 1870 there began a decided movement against state boards and commissions and special legislation for cities and towns. Many constitutions in express terms forbade special municipal legislation, as those of Illinois (1870), West Virginia (1872), Pennsylvania and Texas (1873), New Jersey and Missouri (1875), Louisiana (1879, excepting New Orleans) and California (1879). In addition the constitution of Missouri (1875) and of California (1879), as a means of checking legislative interference with affairs of cities sought to give them a large measure of local self-government by granting the right to certain large cities to create boards of freeholders to frame their own charters to be adopted by their electors.

As part of the plan to check legislative interference with municipalities classification of cities was required, and general laws, instead of special, were directed to be enacted so that their provisions would apply to all cities of a class. Classification was carried to the extreme limits and its purpose in a great measure finally defeated. Moreover, variant judicial decisions construing

these several acts abounded in excessive refinements, distinctions upon distinctions, without differences, which resulted in more and more confusion.[3]

[1] Constitutionality of delegation of powers to commissions, boards, etc., see §4.11.

[2] **New York.** As late as 1815 it was the "almost invariable course of proceedings for the legislature (state) not to interfere with the internal concerns of a corporation without its consent, signified under its common seal." New York v. Ordrenan, 12 Johns (NY) 122.

Frug, The City as a Legal Concept, 93 Harv L Rev 1059.

Bryce, American Commonwealth (3rd ed), ch LI, pp 641, 642.

[3] See §§4.30–4.76.

§9.12. Forms of municipal government.

In the various jurisdictions there are multitudinous forms of municipal organization, and the structure and function of cities and towns greatly vary in the same state. This is due in part to the difference in population requiring different community needs, conveniences and comforts; in part to lack of uniformity of opinion as to what service the local organ should furnish its inhabitants; and in part to the grants of power by the legislature from time to time in issuing and amending charters, and to the variety of forms and powers of constitutional, legislative and optional charters. The consequence is that there is no systematic arrangement of functions and classification of powers or controlling principles of municipal organization.[1]

A rough classification of form of organization (each class presenting characteristic features) would include (1) the mayor-and-council, or what is commonly called the aldermanic or councilmanic; (2) the autocratic mayor as the chief power in city government with the council having little real authority; (3) the commission plan; (4) (a slight modification of the last) the city or commission-manager plan; (5) division of powers into executive, legislative and judicial, incorporating the system of so-called checks and balances in like manner as the national and state governments and creating independent departments, often mentioned as "the federal plan"; and (6) when executive or administrative powers are exercised by various departments or boards it is sometimes called "the board system."[2]

Apart from the commission, and its modification, the city or commission-manager plan, the mayor and council are the

chief factors in American municipal organization. The aldermanic type, widely varying, dominates. In a few of the larger cities the autocratic mayor prevails. In some of the late charters the board of public works or service and the board of estimate and apportionment are important factors in municipal administration. Sometimes the mayor, aldermen and common council exercise virtually all powers of the city as a municipal corporation, except those specially reserved by charter to be exercised by the people; and sometimes the administration of all fiscal, prudential and municipal affairs of the city and the government of that city are vested in the council.

In the commission form the commissioners or members constitute a municipal board and exercise all municipal powers, legislative, executive or administrative and judicial. When a city manager is employed he or she exercises administrative and executive functions under the control and supervision of the commissioners as their agent and servant and is directly responsible to them. The policies of the municipal government are with the commissioners alone and the manager is a mere instrumentality to carry them out as commanded; however, in some instances the manager occupies a quasi-independent position, and a few charters subject the manager to recall by the electors.

Earlier municipal structures had elaborate sets of restrictions on official and departmental action while later ones have few or none. In the experimentation of the years the extremes have been reached. For a laid-out path upon which the public servant was required to travel and often with chain and ball, there has been substituted concentration of power with fixed official responsibility and accountability to the electors. To the present time beginning with the first colonial borough charters all types of municipal organization have been tried, and features of various types have been combined in one charter. In this experimentation the several states have far exceeded the like efforts of all other nations combined, and the quest for municipal structure to produce satisfactory local rule proceeds with slight abatement.

[1] **California.** Mintzer v. Schilling, 117 Cal 361, 49 P 209.

Colorado. Valverde v. Shattuck, 19 Colo 104, 34 P 947.

Illinois. Kankakee v. Kankakee & I.R. Co., 115 Ill 88, 90, 3 NE 741.

Massachusetts. In re Opinion of the Justices, 229 Mass 601, 119 NE 778; Central Bridge Corp. v. Lowell, 15 Gray 106, 116.

Missouri. State v. Haynes, 72 Mo 377, 379.

New Hampshire. Kelley v. Kennard, 60 NH 1, 3; Perry v. Keene, 58 NH 40.

Texas. Under liberal provisions of law relating to home rule cities, there can be wide variations in charter provisions, and the city government may be a so-called city manager, commission or aldermanic form of government. Turner v. Lewie (Tex Civ App), 201 SW2d 86.

Vermont. Langdon v. Castelton, 30 Vt 285.

In the towns of New England the legislative body is usually composed of selectmen, and in the New England cities, of aldermen. McFarland v. Gordon, 70 Vt 455, 456, 41 A 507.

Virginia. Kirkham v. Russell, 76 Va 956, 958.

West Virginia. Richards v. Clarksburg, 30 W Va 491, 4 SE 774.

[2] **Alabama.** The policy of a particular form of municipal government has been said to be a legislative not a judicial question. State v. Herzberg, 224 Ala 636, 141 So 553.

Application of the federal idea as applied to relations between the city and the state and freeholders or constitutional charters, see McBain, The Law and Practice of Municipal Home Rule (1916), ch 4, p 108 et seq.

§9.13. —Experimentation among American municipalities.

When the plan of popular election of the chief officers proved unsatisfactory, loss of confidence in the wisdom of the people naturally asserted itself among many. Then the pendulum of municipal government swung to the other extreme, and a sort of monarchial model became the basis. The chief executive or mayor, was given wider powers. In many cases that officer's power of appointment of municipal officers was made quite independent and the tendency everywhere was to magnify the importance of that position. The greater number of the chief officers were appointed by the mayor instead of being elected by the people.

Between 1870 and 1880 many new municipal charters were promulgated for the larger cities. In these instruments the department heads were generally required to be appointed by the mayor with the approval of the council. In St. Louis (charter 1876) the mayor made mayoral appointments at the middle of

the mayoral term, the purpose being to prevent partisan political influence. In some instances the mayor's power of removal was broadened. In some charters the council was also given the power of removal. In these new charters it was usual to invest in the mayor veto power over legislation. Some provided for a single chamber and others adopted the bicameral type. The general result was diffusion of power and responsibility so that neither the mayor nor any other officer could be held accountable for efficient municipal government.

The plan of a board of estimate and apportionment first appeared in the charter of the city of New York in 1873. This plan in substance has been incorporated in many charters, as the charter of St. Louis (1914). This department usually consists of the mayor, comptroller, and president of the legislative body, all of whom are elected by popular vote. This board has control of the municipal budget and expenditure.

As to the removal of officers, charter changes restricted the exercise of the power to removal for cause on charges and hearing. At first these changes were made applicable only to the fire and police departments, but afterwards they were extended to other departments and officers.

The Brooklyn charter (1882) was the first to give the mayor full power to appoint heads of departments without consent or confirmation of the legislative body. This is a feature of the 1914 St. Louis charter. The same power was conferred on the mayor of New York city in 1890 and the principle spread rapidly to other cities in New York state, Ohio and Massachusetts. However, many new charters of this period retained the old method of council consent or confirmation of mayor's appointees. This was true of the charters of both Philadelphia (1887) and of Baltimore (1897).

The mayor's power of removal was also extended considerably in some of the new charters, but others made no extension. By this time the veto power of the mayor had become almost universal which gave the mayor much control of municipal legislation.

At the opening of this century, the commission form of municipal charter appeared and developed rapidly. It was followed by the city manager plan. By the close of the first

decade of the 20th century most of the charters of the larger cities provided for the merit or civil service plan of appointment of subordinates to the municipal service and their retention during good behavior, with power of removal for cause only, and in some instances, requiring charges, opportunity to explain, or hearing and trial. This movement began in 1890. The plan of recall of officers and also of initiative and referendum as to legislation were established and developed rather generally and were commonly provided for by city charters during the first and second decades of this century.

To sum up, in seeking to free the city from certain handicaps that have appeared in local administration in the course of years that it might be ruled by its citizens in fact as well as in theory and thus be enabled to develop a genuine urban democracy constantly working, there have emerged the home rule charter, simplification of municipal machinery, concentration of authority, abandonment of the separation of powers, fixing official responsibility and accountability to the electorate, the autocratic mayor, the commission form, the commission-manager plan, the direct primaries, the short ballot, nonpartisan elections, the preferential and the proportional methods of voting, direct legislation by the voters by the initiative and referendum and the recall of officers. While most of these devices when first used here were fresh in their application to our community conditions, the essence of the principles of many of them had been tried centuries before by other peoples under different and varying political, economic and social conditions, as in the Greek polis or city-state and the mediaeval republics, communes and free cities. As more than once said, the commission idea is as old at least as the Roman Empire. And in the famous Confederation of the Iroquois the initiative, referendum, and recall existed as essential principles in that organization.[1]

Unless restrained by the constitution, apart from constitutional charters, the form of the municipal organization and the manner in which the municipal powers shall be distributed and what departments and officers shall execute and administer them and the manner of their administration are matters wholly within the discretion of the state legislature. What officers,

departments, boards, commissions, etc., exist in any particular city or town and what may be created and what may be abolished and what authority may created and abolish, must depend on the charter, whether constitutional or legislative, and the applicable state laws.[2]

[1] Alfred M. Tozzer, Social Origins and Social Continuities (1925), ch VI, pp 201–207.

[2] Progress in city government, see § 1.81.

Modern municipal problems, see § 1.62.

§ 9.14. —Optional charter plan.

Some states have adopted laws that permit the legislature to offer to the voters of each municipality a number of different charters from which the voters take their choice; the so-called "Optional City Government Law" in such states permits cities by popular vote to adopt any one of several forms of municipal government prescribed in the statute.[1]

The rule has been declared that the legislature, where not so authorized by the constitution, may not delegate to the electors of a city, town or village the power to make its own charter, but may itself enact a complete charter and permit the electors to determine whether they will adopt it, and if adopted such charter may become of like force and effect as though the legislature had, by formal act, created it for that particular municipality, or for the class of municipalities to which it may have been legally assigned. Such legislative acts may contain one form or several forms of municipal government, and any existing chartered city or town may be given the option to abolish its old form and adopt any one of the forms so prescribed by observing the legislative method provided for this purpose. Thus an act that allows a city to adopt its provisions and thus change its present form of government to another form, and then by ordinance to transfer and distribute its powers to and among the officials of the new government as may be necessary for the proper management of the city's affairs, was adjudged constitutional. Its adoption by the method laid down is effectively the surrender of the old form of government and the acceptance of a new charter; it merely substitutes another charter for the one it had; a new form of municipal government supplants an old, that is all.[2]

The doctrine is well supported by the decisions that the legislature may by an act complete in itself establish several models for the government of cities and towns, and provide that one or another of these may become operative in any city or town already chartered by the voters of the municipality at an election held in due form without further legislative intervention. This method, as remarked by the Supreme Judicial Court of Massachusetts, is something of a reversion to the earlier freedom and flexibility of local self-government that obtained when the town meeting was at its highest development.[3] Therefore, a legislative act that offered different types of a city charter, leaving it optional with the city to select by its voters the best adapted to its needs, was adjudged valid and constitutional against the contention that making a law to take effect only when accepted by a community constituted a delegation of legislative power.[4]

A law conferring on designated cities the privilege of adopting any or all of its provisions may be treated as an option law, and such law must be a complete enactment in itself when it leaves the legislature. The feature of such law that gives it the character of an option law is the right conferred to allow adoption of all or a part of it, and not an option on the administration of the law after adoption. Thus where a city adopts particular provisions it is bound by them and cannot abrogate them or any part of them. When it exercises its option it exhausts its power.[5] The procedure to be followed to obtain a change in form of city government must be followed.[6] Whenever any one of the plans set forth in the statute is adopted by the voters of a city, it becomes effective as a new charter for municipal administration.[7] But option laws do not authorize cities changing their forms of government to enlarge their corporate powers beyond the limitation prescribed by law.[8] When a local vote has changed the form of municipal government as provided, the law or charter becomes self operating, according to its terms, and such government is automatically established.[9]

Some laws leave it optional with municipalities to elect whether or not they shall be governed by statutes providing uniform municipal codes.[10]

[1] **Indiana.** Keane v. Remy, 201 Ind 286, 168 NE 10 (application of act providing for alternative forms of municipal government as judicial question).

Massachusetts. Mayor of Gloucester v. City Clerk of Gloucester, 327 Mass 460, 99 NE2d 452 (any city except Boston to adopt any one of several plans prescribed).

New Jersey. Bucino v. Malone, 12 NJ 330, 96 A2d 669; Chasis v. Tumulty, 8 NJ 147, 84 A2d 445.

See Epstein v. Long, 133 NJ Super 590, 338 A2d 28 (optional county charter law as constitutional).

Optional municipal charter law of New Jersey offers 14 optional plans grouped into three general local government divisions, mayor-council, council-manager and small municipality, and provides for two alternative procedures for adopting any of the optional plans, either by election of charter commission which makes recommendations to be submitted to voters at subsequent election, or by petition of referendum of voters without a charter commission. Bucino v. Malone, 12 NJ 330, 96 A2d 669.

Ohio. Switzer v. State, 103 Ohio 306, 133 NE 552 (optional forms as inapplicable to Ohio municipalities adopting charter by virtue of §§7 and 8, art XVIII constitution).

Constitutionality of statute to become effective only when adopted by municipality under the delegation of powers doctrine, see §4.10.

[2] **New Jersey.** Vollmer v. Wachlin, 80 NJL 440, 99 A 394.

New Jersey constitution has no home rule provision permitting municipality acting on its own initiative to adopt charter provisions, but the optional municipal charter law or Faulkner Act adopted in 1950, permitting each municipality to select on its own initiative and without subsequent legislative approval any one of several forms of municipal government previously approved by legislature, is constitutional. Bucino v. Malone, 12 NJ 330, 96 A2d 669.

New York. Cleveland v. Watertown, 222 NY 159, 167, 118 NE 500; People v. Cahill, 119 Misc 471, 196 NYS 368.

[3] **Massachusetts.** Cunningham v. Rockwood, 222 Mass 574, 111 NE 409.

A city which did not adopt one of the charter plans prescribed by statute was governed by its preexisting charter and not by the statute. Everett v. Curnane, 329 Mass 490, 109 NE2d 135.

Changes in form of municipal government, see §4.03a.

[4] **Massachusetts.** Safford v. Lowell, 255 Mass 220, 151 NE 111; Cunningham v. Rockwood, 222 Mass 409, 111 NE 409.

New Jersey. Bucino v. Malone, 12 NJ 330, 96 A2d 669.

New York. Train v. Sisti, 146 Misc 362, 262 NYS 167, 179.

See §4.10.

[5] **Massachusetts.** Brucato v. Lawrence, 338 Mass 612, 156 NE2d 676, citing McQuillin.

New Jersey. Bucino v. Malone, 12 NJ 330, 96 A2d 669 (question of adopting different form of government subsequently not to be voted on until after three years in municipalities of certain class and five years in

case of all other municipalities as not unconstitutional).

Wisconsin. Holt Lumber Co. v. Oconto, 145 Wis 500, 507, 130 NW 709; Northern Trust Co. v. Snyder, 113 Wis 516, 89 NW 460.

[6] **Kansas.** State v. Bentley, 100 Kan 399, 164 P 290.

Kentucky. Goin v. Smith, 202 Ky 486, 260 SW 10; Wathen v. Benton, 265 SW 1108.

New York. Train v. Sisti, 146 Misc 362, 262 NYS 167.

[7] **Massachusetts.** Safford v. Lowell, 255 Mass 220, 151 NE 111.

[8] **Florida.** Pursley v. Fort Myers, 87 Fla 428, 100 So 366.

New York. Train v. Sisti, 146 Misc 362, 262 NYS 167.

[9] **Kentucky.** Allen v. Hollingsworth, 246 Ky 812, 56 SW2d 530.

[10] **Mississippi.** Richards v. Magnolia, 100 Miss 249, 56 So 386.

New Jersey. Schwartz v. Wachlin, 89 NJL 39, 98 A 252 ("city" used in law as meaning "town").

§9.15. Importance of form.

No formula for municipal structure can be announced that will guarantee satisfactory local rule. There are certain definite things, that can be provided in a city or town charter as is shown by the trials, efforts, successes and failures of the past, which if studied with intelligence and understanding, will enable the citizens of the community to secure an approximation of good public service, if they will become interested, choose honest and competent officers and cooperate in the service of their government. It is plain that the way of betterment to some extent lies in the direction of simplification, but in any event, government is not easy, and at all times it requires interest, attention, intelligence and experience to be contributed not only by the public servants, but by the body of citizens as well. Some of the leading provisions of sufficient structure may be mentioned.

The form of organization should not only definitely prescribe the powers and the manner of their exercise, establish order and system in the conduct of the public business, and fix official responsibility and thus accountability to the inhabitants, with sufficient restriction on abuse or misuse of power in accordance with the lessons of human experience, but it is essential also that, by the structure, the corporate entity should be made a distinct representative organ of the people. The public authorities—officers and agents in charge of the local government—should at all times be responsible and responsive

to the reasonable will of the inhabitants insofar as such will is within the law and sound municipal policy.

The inhabitants should be free to unfold themselves in the expression of their ideas and ideals in the political community service. When the corporation ceases to be an instrumentality to advance the community aspirations—the public welfare as it may appear to the inhabitants from time to time—its usefulness is at an end. Municipal abuses cannot be remedied alone by mere change in governmental organization. Even if it were possible to establish a perfect system of laws and ideal municipal organization we would greatly err if we should pin our faith to and stop at mere mechanism. As said by Buckle long ago "it is not by the wax or parchment of lawyers that the independence of man can be preserved." Such things are the mere externals; they set off liberty to advantage—they are its dress and paraphernalia, its holiday suit in time of peace and quiet.[1]

In the first place the citizen must know that his or her government is a process, not a machine, that it has been evolved, not created, and that panaceas alone cannot remedy its defects. This erroneous notion leads to the avid acceptance of piecemeal, superficial, single-track reforms and to following the demagogue and advertising mountebank with credulity in their reckless and plausible cure in some insignificant change of form that may be speedily had. Study and observation will reveal to the citizen that the functions of government vary with the wants of the inhabitants which are constantly changing, as their occupations and modes of life change, and that public service should proceed from practical experience and be a natural development. Often, the impractical idealist is impressed by fascinating theories thought to be capable of workable demonstration by the technique of the doctrinaire, apart from the human factor. Much time and effort are thus needlessly squandered on impracticable devices to help the people rule with ease and effectiveness when they at the same time persistently neglect to go about it in a sensible way to help themselves. Political "society is a complex thing, the result of a slow organic growth and no mere artificial machine. In a living thing such as the state growth must be continuous, like the growth of a plant . . . A new machine-made thing is simple, but the organic is

always subtle and complex. Now half the mischief in politics comes from a foolish simplification."[2]

There is no greater error than to suppose that a municipal charter, as a commission form or a city-manager plan, or one with the nonpartisan feature, has some inherent quality to ensure its efficient honest working. In urban democracy the vitality and purity of community service must be in the belief and effort of the people. Assuredly efficiency and progress must proceed from the faith, ideals, spirit and energy of the people who work the governmental organisms they set up. It is self-evident that law has no independent existence, whether organic or statutory, national, state or local, whatever its purpose, form or name. Its strength, vigor and justice depend alone upon the strength, vigor and justice of those who administer it in community, state and nation. Its value is never due to its own merit, but always to the sense of justice, concepts, prowess and ideals of those into whose hands it is committed to be enforced. No law can do more than express the aspirations of the people who give it form. Its spirit, potentiality, and value as an active force can only operate by and through the human agencies set up by society. The old Greek believed, and so have all intelligent peoples, that the success of any laws must depend upon the understanding and enlightenment of the people who use them.

But sufficient municipal organization is of vital importance. The election by voters at large, of heads of departments or mere executive and administrative officers whose functions do not embrace the obligation to direct the policy of the local administration, does not tend to give effective public control. This is accomplished by the election of those only who determine the policy of the municipal government; for example, members of the legislative body, the mayor, the comptroller or head of department of public works or improvement or service. Other executive and administrative officers—for instance, the treasurer, collector of the revenue of all kinds, the marshal, corporation counsel, city attorney, auditor and other like subordinates—should be appointed. Moreover, public service should be a profession in those situations where technical knowledge, wide experience and thorough preparation are demanded. Real efficiency in local government can be accomplished only by intelligent and experienced servants. Successful municipal administration also requires stability and continuity of policy.[3]

[1] Buckle, A History of Civilization (Ed by James M. Robertson), ch 9, p 354.

[2] John Buchan, General Introduction, Great Britain, The Nations of Today, Vol 2, p VII.

[3] For elemental discussions as to forms of municipal government, see Charles M. Fassett, Handbook of Municipal Government (1922), ch II, pp 22–47; William Parr Capes, The Modern City and Its Government, chs VIII–XI.

§9.16. Essential elements of municipal structure.

In relation to the particular form of municipal organization, it is clear that there should be (1) a short election ballot with as few names thereon as possible; (2) the abolition of party nominations whenever possible; (3) a simple municipal organization as distinguished from complex; (4) one legislative body elected at large, not necessarily small in number, but sufficiently numerous to be distinctively representative of the community, and its functions should be restricted to purely legislative work and the voting of supplies; (5) establishing the term of the mayor or head officer and other chief officers at not less than four years and fixing definitely official responsibility and accountability to the electorate, whether executive power is concentrated in the mayor or chiefs of departments, as contrasted with the system of checks and balances and the diffusion of power and the consequent scattering of responsibility that has so long prevailed in the old municipal organization; (6) method of getting competent persons with special qualifications and training to administer all municipal departments which would include the merit or civil service system with simple practical tests to determine fitness and competency to serve, fixing permanent tenure in office or situation and eliminating selections for personal, partisan or religious reasons; (7) uniform system of accounting and the budget plan of accounts and expenditures;[1] and (8) complete publicity in all municipal affairs.[2]

Any city or town of course may have any sort of charter or municipal organization allowed by the constitution and laws of

the state. Where, under the laws a choice is available to them, the citizens should select that form, whatever its name, best adapted to the traditions, experience, present needs, tone, temper, ideas and ideals of the people.

[1] **New Jersey.** In re City Affairs Committee of Jersey City, 129 NJL 589, 30 A2d 581 (a municipal budget as very important matter).

Utah. Fjeldsted v. Ogden City, 83 Utah 278, 28 P2d 144, 152 (revenue and expenditures as subject to budget law).

Cost analysis of government services respecting modern municipal decision making, see Kelley, Costing Government Services: A Guide to Decision Making, Government Finance Research Center, Washington, DC (2nd printing, 1986).

[2] A.E. Buck, Public Budgeting (1929).

The budget as a means of securing coordination and control of revenue and expenditure. H.L. Lutz, Public Finance (1924), ch XXIX, pp 615–648.

§9.17. Aldermanic.

As mentioned, the present tendency is to reduce the number of elective officers. In the mayor-and-council, or aldermanic or council-manic pattern, late charters generally give the appointment of all principal officers (except the few that are elected) to the mayor, and often without confirmation on the part of the legislative body. Some charters require the officers to be elected on a nonpartisan ballot, and in a few places the preferential ballot and the proportional system of representation have been adopted.[1]

Frequently charters incorporate direct action by the electors, as the initiative and referendum, and the recall, and also the merit or civil service system applicable to subordinates and employers. Many of the more important cities have adopted charters in which are incorporated most or many of the above features.[2]

The executive and administrative affairs are generally in the hands of a chief executive, commonly called a mayor, and other chief officers elected by the people at large or appointed, while the legislative power is usually vested in one body whose members are elected at large or by municipal subdivisions. In the larger cities usually specified functions, as public work, or service, regulation of public utilities, streets, sewers, public

welfare, public safety, fire, harbor, wharves, docks, supplies, financial matters, health and sanitation, public charities and correction, education, etc., are committed to administrative and executive officers, boards and departments. Occasionally some of these, or many of them are made departments of the state government and the officers and agents thereof state officers or agents, performing state functions within the local geographical area.

[1] "Proportional Representation" by Clarence G. Hoag and George H. Hallett (1926); T.H. Reed, Municipal Government in the United States (1926), ch XV, pp 258–286.

[2] Structure of governments of the greater cities of the United States, see Cyclopedia of American Government (McLaughlin & Hart), 1914, 3 volumes; Wilcox, Great Cities in America (1910); The Government of American Cities (3rd Ed 1920), p 432.

California. San Francisco is a consolidated city and county and is governed by a Freeholders' charter framed in accordance with the provisions of art XI, §8, of a former constitution of the state of California. The charter was framed by a Board of Freeholders and ratified by the voters on May 26, 1898, was approved by the legislature January 26, 1899, and took effect January 8, 1900. It presents distinctive features not found in other municipal charters. Seven amendments were added to this charter in December, 1902, which were approved by the legislature in 1903. Copy of charter appears in California Statutes for 1899, p 241 et seq. Copy of amendments appears in Statutes of California for 1903, p 583 et seq.

"San Francisco as a charter city which has brought itself within the condition of the 'municipal affairs' amendments of 1914 to the California Constitution (art XI, secs 6 and 8) has the power of 'municipal home rule' with respect to all matters of local or internal concern." Lindell Co. v. Board of Permit Appeals of City and County of San Francisco, 23 Cal 2d 303, 144 P2d 4, 8.

San Francisco's charter, §125, relating to status of public utility, is applied in Handlon v. Wolff, 72 Cal App 2d 53, 164 P2d 46.

Missouri. Mr. Justice Brewer characterizes the city of St. Louis as an "imperium in imperio." According to the decisions of the supreme court of Missouri this is not a very apt designation, for the city is more in the nature of a subject province or dependency, subservient at all times to the will of the general assembly of the state. St. Louis v. Western Union Tel. Co., 149 US 465, 467, 468, 37 L Ed 810, 13 S Ct 990, 148 US 92, 37 L Ed 380, 13 S Ct 485.

St. Louis has been separated from St. Louis County, and is in a class by itself constituting a municipal government independent of the county. By the separation, the city was placed in a dual relation to the state government. It became invested with certain powers which, in other parts of Missouri, are performed by

county officers, as well as with the usual municipal powers for internal government. Mo Const 1875, art 9, §23; St. Louis v. Dorr, 145 Mo 466, 479, 41 SW 1094, 46 SW 976; Cunningham v. St. Louis, 96 Mo 53, 8 SW 787; State v. Mason, 155 Mo 486, 501, 55 SW 636; Kansas City v. Stegmiller, 151 Mo 189, 204, 52 SW 723; State v. Bus, 135 Mo 325, 337, 36 SW 636; State v. Chicago, B.&Q.R. Co., 195 Mo 228, 241, 93 SW 784.

§9.18. Autocratic mayor.

The disposition to increase the powers of the mayor and thus center the responsibility in that office has been somewhat prevalent in this country in the development of municipal organization. The fundamental principle is that the mayor should have ample power to control fully the administration of all municipal affairs. In addition to the veto power, which is the mayor's chief agency in legislation, many charters give the mayor the sole right to appoint and virtually unrestricted power to suspend or remove subordinate officials or heads of departments.[1] The tendency seems to be, not so much to increase the legislative power of the mayor, but to separate the legislative power from administrative functions, vesting the legislative power in a legislative department and the administrative functions in the executive branch composed of the mayor and such boards or departments as may be deemed advisable.

Experience covering a series of years has clearly demonstrated that the practice of placing most of the municipal offices in the hands of the electors tends to the confusion of the voter, because the voter is unable to discriminate wisely and determine what candidate possesses the requisite qualifications to perform efficiently the duties of the office. Moreover, in the larger cities the average citizen in the nature of things cannot obtain the necessary information touching the characters and qualifications of the candidates during the brief period of a municipal campaign. Again, the system of checks and balances—a marked feature of most municipal charters until the last decades—results in much diffusion of power, hence, also, of responsibility. In most of our cities there were numerous grievances under every administration and the difficulty was ever present of being able at all times to fix accurately the blame, and consequently the people of many cities became profoundly displeased with that form of municipal organization.

The idea of the autocratic mayor that contemplates giving that office all executive and administrative power and restricting the council or legislative body to the exercise of legislative powers only, while objectionable in some respects, and in contravention of the restrictive scheme of both the national and state governments, appears in the opinion of many to offer the best solution of the municipal problem relating to the selection of officers and the centering of responsibility.[2] Accordingly in the cities of New York, Philadelphia, Boston, St. Louis and others the mayor is given unrestricted power of appointment and more or less unrestricted power of removal of heads of administrative departments. Under the St. Louis charter he cannot remove any officer, department or division head appointed by him or her except for cause; however the mayor is the sole judge of the cause. With a few exceptions the mayor of New York City may remove from office any public officer holding office by appointment from a mayor of the city.[3]

The Boston charter requires the mayor in filling important offices to appoint "recognized experts in such work as may devolve upon the incumbents . . ., or persons especially fitted by education, training and experience to perform the same." Such officers are to be "appointed without regard to party affiliation or residence at the time of appointment." But such appointments do not become effective unless and until at least a majority of the state's civil service commission certify, within thirty days, that a careful inquiry into the qualifications of each appointee satisfies them that such person "is qualified by education, training and experience" for the office or position to which he has been appointed. This charter provision, it will be seen, confers administrative control upon the state of the exercise of the power of appointment by the mayor.[4]

This plan of giving the mayor unrestricted power in the respects stated indubitably is a creation of a firmer administrative unity by concentrating all the executive power of the city in him, making him a genuine autocrat. In truth, it is much like the step taken by the Roman Empire in the days of Diocletian (284–305) and of Constantine (323–337) in placing all military and administrative power in the hands of the emperor to ward off the barbarian hosts. It was an endowment of the head of the

government with sacred attributes.[5] The consolidation of all executive and administrative power in the mayor, it is argued, gives more efficiency to government. If efficiency is the sole test of city government, all that is needed is to elect one individual because centralized government with a dictator is the most efficient and thorough.

The disposition to increase the power of the executive branch of government at the expense of the legislative is universal. For years there has been a growing distrust of legislative bodies, that is to say, of the politicians who usually compose such bodies. The legislative department has lost influence to some extent by the adoption of the initiative and referendum. In our cities, council members and aldermen or alderwomen have been largely superseded by the commission charter. The latter devices have been favored because it was thought they would destroy the power of the "bosses," "rings" and professional politicians. But it seems plain enough that the change is due more to the real needs of modern complex urban communities, the bulk and heterogeneousness of city populations, not to speak of the apathy and indifference of the citizens.

Following the assumption that the city's government is business to its logical conclusion, the autocratic mayor is the natural consequence. In the modern business world the captain of industry has come to be the chief figure. With the perfection of organization, concentration of power, and fixing responsibility there has developed one-man rule in big business. These examples have had an influence on development of municipal structure, organization and methods, and as a result the autocratic mayor has been evolved. It is often conceded that efficiency of the public service is of more importance than the haphazard working of democracy in the old way. The voters are free to choose the mayor in the first instance whose term is limited and if, in their opinion, the mayor proves incompetent or unsatisfactory for any reason before the expiration of that office term they may recall the mayor at any time, and get another. Thus in modern days autocracy and democracy may, without depriving the people of the right and power to govern, work side by side.

The autocratic mayor may, if he or she chooses and has the essential qualities, become the leader of the whole people of the city in all civic affairs, and the people will welcome that leadership. When the people have confidence in their mayor they will show it by their moral influence, opinion and vote against any other city officer; especially the local legislative body when their views and actions run counter to those of the mayor. Like the president or the governor of the state, the mayor is one person, commissioned to speak and act for the people, and the congress or state or local legislative body is a crowd. They know that one of a crowd is not so likely to feel responsibility to the people, but is more inclined to serve personal interests or that of the crowd, neglecting the larger and more important interest of the public. This attitude of mind towards, and confidence in, a single executive has been shown frequently in nation, state and city always with good results under the right sort of executive. At times it has suffered demagoguery, oligarchy, even autocracy, to prevail temporarily, but that cannot always be avoided in democracy, or indeed in any other form of government, where executive power is becoming more and more to be virtually unrestricted, the responsibility being direct to the people. Some people have neither wisdom nor discretion, others lack generous impulses, have little or no regard for the public welfare, and others are dominated or greatly influenced by their own selfish ambition. Among executive and all sorts of officers these various types necessarily exist, and of course nothing different could be expected since they must be taken from the citizen body where all these human propensities abide in ample proportions.

The autocratic mayor is constantly stimulated to satisfy the people and be responsive to their desires and expectations. In all the mayor says and does officially he or she is controlled, or in great measure influenced, by his or her anticipation of their praise and blame. At least this would be the mental attitude of the normal individual. Both the mayor and the people know that the mayor's reputation rests upon the people's approval or condemnation. Thus in the mayor-council pattern, the autocratic mayor is one of the devices through which city government responsible and responsive to the electorate may be secured.

[1] See comments on this subject in Dillon, Mun Corp (5th ed), §20; Goodnow, Municipal Home Rule, ch I; Rowe, Problems of City Government, chs VIII and IX; Seth Low in 1 Bryce, Am Com, ch 52.

[2] **North Dakota.** State v. Frazier, 39 ND 430, 167 NW 510, dissent quoting McQuillin.

Texas. Brown v. Uhr (Tex Civ App), 187 SW 381, 385, citing McQuillin text.

[3] **New York.** People v. Nixon, 158 NY 221, 52 NE 1117; People v. Van Wyck, 157 NY 495, 52 NE 559.

[4] See Comments on this provision by Seth Low in 1 Bryce, The American Commonwealth (1914 ed) ch 52, pp 665, 666.

[5] The plan confers upon the mayor "a plenitude of power (although for a limited period) which is unexampled in the aristocratic society and monarchial governments of Europe." Goodnow, Municipal Home Rule, ch 1, p 5. This was written before the First World War. See Wilcox, The Study of City Government, §§124, 125, pp 227–233.

"As an independent organ of local government the mayoralty is a distinctly American development . . . The development of the office of mayor to independence, and in the natural course of events to power, has been the outstanding feature of the nineteenth century in the evolution of American municipal institutions, and is one of the most striking results of the emphasis laid upon the doctrine of divided powers." W.B. Munro, The Government of American Cities (3rd ed, 1920) ch IX, p 207.

§9.19. Greater New York.

The New York City Charter,[1] adopted in 1936, and effective January 1, 1938, is fashioned more in the nature of a constitution than a detailed codification of local laws. Its provisions are general, and disclose a definite determination to separate legislative power from administrative functions. The legislative power is vested in the council, while the administrative functions are to be exercised by the mayor, the board of estimate, and various designated departments. It provides for the election of the mayor, comptroller, and president of the council by city-wide vote, and of the five borough presidents by a borough-wide vote. It creates a council composed of councilmembers elected by borough-wide election.[2]

The mayor, elected for a term of four years, appoints and removes all heads of departments and all appointive city officers not otherwise provided for. The mayor has power to veto local laws subject, however, to the right of the council to override the mayoral veto by a two-thirds vote. The mayor cannot exceed

that office's executive powers by mandating the award of construction contracts to a particular group of business enterprises without specific delegation of that power to the mayor by the city council.[3] A deputy mayor who is appointed by the mayor exercises such powers as may be expressed in writing signed by the mayor, subject to certain limitations.

The council, much smaller than the former board of aldermembers, is vested with sole legislative power to adopt local laws, subject to the veto power of the mayor, and excepting amendments to the charter, and certain local laws pertaining to organization and administration, which require the approval of the board of estimate. Certain specified local laws are subject to referendum. All of the legislative action of the council is by local laws.

The board of estimate is composed of the mayor, comptroller, and the presidents of each of the five boroughs. It is in charge of the business affairs of the city, and is given broad general powers designed to place it in control of the financial policy of the city.[4]

Greater New York is divided into five boroughs, namely, Manhattan, The Bronx, Brooklyn, Queens and Richmond. Each borough president has control of the construction and maintenance of the streets and sewers within his or her borough.

A city planning commission is created with power to propose changes in zoning, but such proposed changes are subject to the approval of the board of estimate.[5]

The comptroller audits the city's books, and possesses very little administrative power. The latter duties formerly exercised by the office were transferred to the department of finance.

The charter provides for numerous administrative departments, and indicates the essentials of the organization of each department and, in general language, its essential powers. But the details pertaining to the administration of the various departments are prescribed by the voluminous Administrative Code of the City of New York, which is a restatement and codification of the administrative laws pertaining to that city, supplementing the charter.

[1] A discussion of the history and analysis of the new charter of 1938, together with a copy of the charter and the report of the commission which prepared it are available in Tanzer, New York City Charter.

The New York City Charter of 1938 was designed to give effect to the historic principle that any tax measure ought to have its origin in the public will. Broderick v. New York, 295 NY 363, 67 NE2d 737, affg 268 App Div 856, 50 NYS2d 844.

[2] **New York.** Johnson v. New York, 274 NY 411, 9 NE2d 30.

Under its charter the city of New York has two branches of government—executive and legislative—the functions of which are not always independent of each other, and records in the office of the mayor, which are pertinent to an official investigation by the city council as to matters relating to affairs of a city department, are not immune from the council's power of subpoena. La Guardia v. Smith, 288 NY 1, 41 NE2d 153.

Council does not act as a departmental agency of city when it exercises its legislative power by way of an investigation conducted pursuant to provision of its charter; and its legislative functions are not defeasible by means of a mere failure of the board of estimate to make an appropriation for the necessary expenses thereof. Smith v. New York, 289 NY 517, 47 NE2d 35, affg 263 App Div 975, 34 NYS2d 136.

[3] **New York.** Subcontractors Trade Ass'n v. Koch, 62 NY2d 422, 477 NYS2d 120, 465 NE2d 840.

[4] Board of estimate of city was neither a legislative nor a general governing body of city, nor was it a political unit vested with general governmental powers, so that "One-man-one-vote" rule enunciated by the Supreme Court of the United States was not applicable to the voting process of board on city budget matters. Bergerman v. Lindsay, 58 Misc 2d 1013, 297 NYS2d 421.

[5] City Planning Commission is an advisory agency; it cannot execute city powers or expend city funds without approval or acquiescence of the Board of Estimate. Childs v. Moses, 265 App Div 353, 38 NYS2d 704, affg 178 Misc 828, 36 NYS2d 574.

§ 9.19.50. District of Columbia.

Under the District of Columbia Self-Government and Governmental Reorganization Act,[1] the District of Columbia (City of Washington) operates under a municipal charter with a mayor and council form of government. The council members are elected by the registered qualified electors of the district. Generally, the council has the authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the district and to define the powers, duties, and responsibilities of any such office, agency, department, or

instrumentality. The council is further empowered to use acts for all legislative purposes.

The executive power of the district is vested in the mayor. The mayor may delegate any of his or her functions except the function of approving or disapproving acts passed by the council or the function of approving contracts between the district and the federal government. The mayor is authorized to issue and enforce administrative orders that are necessary to carry out mayoral functions and duties, so long as such administrative orders are not inconsistent with the Act or any other act of Congress or any act of the council. The mayor is also responsible for municipal planning except that such planning does not extend to federal and international projects and developments in the district as determined by the National Planning Commission. The mayor's planning also does not extend to the United States Capitol buildings and backgrounds as defined under federal statute.[2]

The mayor also appoints a city administrator who serves at the pleasure of the mayor. The city administrator functions as the chief administrative officer of the mayor, assisting the mayor in carrying out the mayoral functions under the Act.

Like the 13 members of the council, the mayor is also elected by the registered qualified electors of the district.

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[1] Public Law 93-198; 87 Stat 774.

[2] Federal capitol buildings and grounds are defined in 40 USC §§ 193a, 193m.

§ 9.20. Commission form.

The method of governing towns and cities by a small board of commissioners (ranging usually in number from three to seven), constituting the municipal government, has been widely adopted. Many of the states have one or more urban centers under commission government, and almost all of the states authorize by general statute its adoption by cities and towns under prescribed conditions.[1] With occasional exceptions,[2] legislative acts and charters providing for such form have been sustained by the courts as valid and constitutional.[3] Thus, without delegating legislative power, the legislature may authorize any chartered city or town to adopt by a vote of the electors

the commission form of municipal government,[4] or to increase the number of council members under commission form,[5] or to substitute a commission charter for a home rule or constitutional charter,[6] or a commission form for an aldermanic[7] or other form,[8] or an existing form for the city manager plan, or the Dayton plan of administration.[9] A municipality under such system is not in any sense a sovereignty,[10] and hence does not fall within the provision of the constitution that apportions the powers of the state into legislative, executive and judicial. Such requirement, the courts hold, has no applicability to town or city government or to town or city officers. There can be no constitutional objection, therefore, to combining and vesting all municipal powers—legislative, executive and judicial—in the commissioners, to be exercised by them as the representatives of the inhabitants and the corporate authorities of the community.[11] This constitutional guarantee of a republican form of government[12] applies to the state department only and not to incorporated cities and towns.[13] A constitutional requirement that a home rule charter shall provide for a "mayor, or other chief magistrate, and a legislative body," has been held not to preclude the adoption of the commission form, and a charter so providing may vest executive as well as legislative power in the legislative body, and constitute the mayor a member of that body.[14]

By combining legislation and administration, the fundamental characteristic of the national and state governments in their separation of the legislative, executive and judicial functions, is not observed. On account of this separation we constantly speak of legislation and administration as distinct, but on attentive consideration we recognize that it is not quite easy to separate completely these two functions whether the attempt is sought to be made, in theory by analysis, or concretely in practice.[15] Generally whatever things are to be done under the powers of the city, and the manner of doing them are prescribed by municipal legislation unless laid down by the state constitution, charter or statute; and the doing of these things as well as those enjoined by the state constitution, charter or statute, is administrative, the work of the executive officers. Thus the rule obtains that the local corporation in the

performance of its manifold duties, to validate its acts, must resort to legislation unless the thing to be done, or the thing to refrain from doing, or the method of doing it, is sufficiently prescribed in some grant of the city's powers. In case of doubt appropriate legislation is a condition to proceed.[16]

In municipal corporations, the executive or administrative officers must observe the valid legislation enacted by the local legislative body, but frequently they have a wide discretion. Oftentimes the administrative agents do not cooperate with the legislative body and this results in no action. Each department is disposed to extend its province, and sometimes the legislative seeks to subject the executive officers to its will. Hence, by trying to separate these powers and placing them in independent bodies in order that one may be a check upon the other, and thus prevent abuse of public power, complication and blocking of public service frequently result. In Greece the primary assembly was both executive and legislative. In England the legislature governs through the executive which is dependent on it. In the commission form the men who legislate also carry out their legislation and they are not dependent on another set of officers. They know what rules are needed, and they themselves provide them.

Commission government of cities or towns with the two classes of powers combined in the commissioners resembles the early method when the council exclusively controlled the municipal government by its committees. The plan is not unlike that of England, which has prevailed for centuries, where the council through its committees dominates the local government. In the commission form, the commissioners in effect have been substituted for the council committees. In the former the responsibility of the commissioner is to the voters direct, while in the latter it is direct to the council whose creation each committee is, and only indirectly to the electors. In addition, the act of the committee to be effective (with legal exceptions sometimes in force) must receive the approval of the council and thus become its act, whereas each commissioner occupies a somewhat independent position concerning the department in his or her charge, especially in administrative matters, and when he or she acts, that act becomes the act of the municipal

government, but this is not always true. Moreover, in specified functions, for example, those affecting municipal policy, and passage of ordinances or bylaws, the commissioners act together, whereas council committees act separately, unless the law otherwise provides, as is true relating to certain committees of the English borough council.[17]

In theory, if not always in practice the evolution of free popular government avoids so far as possible the concentration of power; in the usual municipal organization, this has been the trend until late years. Notwithstanding, the commission form is generally regarded a representative democratic or republican form that rests upon the consent of a majority of the governed, in that such majority by their votes choose the commissioner.[18]

The commission plan has been in operation in some of the cities of the United States over a long period of time.[19] After the great inundation of 1900, the method was established (in 1901 with some modifications) in Galveston, Texas, due partly to the inefficient and corrupt municipal government suffered by that community and others throughout the country prior to that time, and partly to the necessity of rapid action in the work of rehabilitation.[20] There are different types of the commission form, each somewhat distinct, as in Des Moines, Iowa, and Galveston and Houston, Texas.[21]

In many cities the electors by vote name the commissioner to take charge of a specified department; in others the commissioners as a body assign the commissioners to departments.[22] The work of administration is apportioned among the commissioners, each being the head of a department for which he or she is responsible.[23] In some cities the mayor exercises general supervision only, while in others the mayor has charge of one or more particular departments.[24] The making of divisions and apportionments of powers and functions among the several commissioners and among the various departments in accordance with general policies outlined in the governing laws ordinarily is deemed a legislative function within the discretion of the commission;[25] and courts will not interfere with the exercise of this discretionary power unless it is clearly beyond the scope of lawful authority,[26] i.e., unless it is an abuse of discretion.[27] The essential feature of the commission form is

towards a more compact organization which, in centering responsibility and having few chief officers, seeks to render the officers directly accountable to the electors. Its simplification of municipal administration is also an important factor. While not peculiar to this form of municipal organization, it usually incorporates the merit or civil service plan applicable to subordinates, and direct action by the electors by the initiative, referendum and recall. In addition, the names of candidates for office, who are few, are arranged alphabetically on the ballot; emblems or devices and party names are forbidden; and the officers are elected at large and do not represent wards or districts, but the entire local community. These features, to be sure, may be incorporated in any form.[28]

Doubtless the commission form is in some measure a direct result of the conception that municipal government is merely a business operation, and therefore, it should be conducted in substantially the same manner as a large business corporation, that is, the conduct of the affairs of the local government should be made identical as far as practicable to the most efficiently managed private business.[29] It may also be observed that it accords with certain political ideas of concentration of political and economic institutions.[30]

While there are some differences in the degree of independent control given to the administrative officers by the various statutes providing for the commission form of government, such form essentially contemplates the operation of the municipality by a board or commission vested with both legislative and administrative authority.[31] While new and little tried it attracted much attention among students of municipal problems. At the beginning it served as a powerful stimulus in awakening civic pride, and in the development of a so-called healthy communal conscience. Representative municipal government of the old type was constantly characterized by its supporters as a device to enable the inhabitants of local communities to evade their civic obligations. Its constant reiteration in writing and speech, in the absence of nothing more than occasional denial without examination and attempted analysis, caused the statement to become an article of faith of the enthusiasts of and believers in the new plan. But its operation for a series of years

has proved that civic obligations can be and are persistently evaded by citizens under it as they were under other forms. Behind structure, charter, legal form and regulation lies the force in the people that vitalizes the municipal organ and makes it work to execute their will and purpose.

That the commission form may work well, the city or town must have a commission (a unified city government), not merely commissioners conducting the several departments as distinct and separate entities.[32] This is true because any form of government must depend upon personnel, and all its parts must function in harmony, and not operate independently.[33] No form can effectually provide against misuse of power at the hands of incapable, perverse or corrupt humans. This is a defect inherent in all schemes of human government. The success of the commission plan, like every other plan, depends upon the sort of commissioners chosen to work it. The character of the commissioners is a matter resting alone on the interest, intelligence and standards of the electors; and, after election, vigilance and sufficient co-operation on the part of the citizens is the best safeguard against abuse or misuse of power. When the voters are indifferent, neglectful of community affairs, and suffer partisan or group interest to take charge of the election, it may happen that one or more, or even a majority of the commissioners may be disposed to do the bidding of professional politicians, a political machine, ring or boss, and thus serve political interests or special interests through politicians. No mere plan can insure against such unfortunate condition. Again, a small body is easier controlled than a large one. A commission is as good as the commissioners composing it, working together in good faith, and no better. With a commission working understandingly, disinterestedly and harmoniously for the entire community welfare, instead of each commissioner striving for his or her own interest and prestige, good municipal rule may prevail.[34]

The effect of adoption of a commission form of government is generally prescribed by statute,[35] including the abolishment of former city offices[36] and the continuance of existing ordinances.[37] The classification of a city ordinarily is not changed by adopting the commission form of government which only

affects governmental powers and functions of a city for the purpose of administration.[38]

[1] **Alabama.** Miller v. State, 249 Ala 14, 29 So 2d 411; State v. Gullatt, 218 Ala 371, 118 So 746; Thompson, 193 Ala 561, 69 So 461 (scope of plan).

Illinois. People v. Campbell, 285 Ill 557, 121 NE 183.

Louisiana. Foti v. Montero, 243 La 734, 146 So 2d 789.

New Jersey. Grogan v. De Sapio, 11 NJ 308, 94 A2d 316; McKann v. Town of Irvington, 133 NJL 63, 42 A2d 391, affd 133 NJL 575, 45 A2d 494; Taaffe v. Neill, 132 NJL 289, 40 A2d 286 (Town of West Orange); Taggart v. Altman, 130 NJL 563, 33 A2d 910, cert dismd 129 NJL 286, 29 A2d 384; Cusack v. Edge, 6 NJ Misc 13, 139 A 727.

Oklahoma. Lackey v. State, 29 Okla 255, 116 P 913.

Texas. Taylor v. Hodges (Tex Civ App), 183 SW2d 664, affd 143 Tex 441, 186 SW2d 61.

Utah. Larsen v. Salt Lake City, 44 Utah 437, 141 P 98.

West Virginia. Booten v. Pinson, 77 W Va 412, 89 SE 985.

Wyoming. Stewart v. Cheyenne, 60 Wyo 497, 154 P2d 355, 360 (history of Cheyenne's charter).

[2] **Indiana.** See Keane v. Remy, 201 Ind 286, 168 NE 10 (act as unconstitutional).

[3] **Kansas.** State v. Bentley, 100 Kan 399, 164 P 290.

Kentucky. Allen v. Hollingsworth, 246 Ky 812, 56 SW2d 530; Bryan v. Voss, 143 Ky 422, 136 SW 884.

Massachusetts. Cunningham v. Rockwood, 225 Mass 574, 111 NE 409.

Missouri. Barnes v. Kirksville, 266 Mo 270, 180 SW 545.

New York. Cleveland v. Watertown, 222 NY 159, 118 NE 500, Ann Cas 1918E 574; Cort v. Smith, 249 App Div 1, 291 NYS 54, affd 273 NY 481, 6 NE2d 414.

Washington. State v. Tausick, 64 Wash 69, 116 P 651.

[4] **Alabama.** Hughes v. State, 252 Ala 202, 40 So 2d 325 (act interpreted as applying to towns of certain class); Gordon v. State, 237 Ala 113, 185 So 889 (using statutory construction doctrine of pari materia); State v. Gullatt, 218 Ala 371, 118 So 746 (petition).

Idaho. Swain v. Fritchman, 21 Idaho 783, 125 P 319.

Kentucky. Jones v. Cassidy, 154 Ky 748, 159 SW 562.

Mississippi. Rankin County Com'rs v. Davis, 102 Miss 497, 59 So 811; Jackson v. State, 102 Miss 663, 59 So 873.

New Jersey. Grogan v. De Sapio, 11 NJ 308, 94 A2d 316.

Washington. State v. Tausick, 64 Wash 69, 116 P 651 (act should be complete in itself).

[5] **Wisconsin.** State v. Baxter, 195 Wis 437, 219 NW 858.

[6] **Minnesota.** State v. St. Paul, 128 Minn 82, 150 NW 389.

[7] **Alabama.** Talladega v. Jackson-Tinney Lumber Co., 209 Ala 106, 95 So 455; State v. Lanier, 197 Ala 1, 72 So 320.

New York. People v. Cahill, 119 Misc 471, 196 NYS 368.

South Dakota. State v. Nisbet, 38 SD 347, 161 NW 351.

[8] **New Jersey.** Voters seeking election for abandonment of city manager form of municipal government and adoption of commission form should proceed under RS 40:70–1 et seq., NJSA, and not under RS 40:85–1 et seq., NJSA. Application of Vaccaro, 1 NJ Super 591, 61 A2d 905.

Montana. The question of abandoning the existing organization of a city government and reorganizing under the commission-manager form of government should be submitted to the voters at a special election. The statutory provisions relating to changing the form of government from the commission to the aldermanic form were inapplicable. Hackman v. Helena, 127 Mont 5, 256 P2d 692.

[9] **New York.** Train v. Sisti, 146 Misc 362, 262 NYS 167.

[10] **United States.** Independent Paving Co. v. Bay St. Louis, Miss., 74 F2d 961 (commission municipality as having same powers as other municipalities).

Illinois. People v. Huston, 267 Ill App 395 (election of officers to conform to requirements of general election laws).

Missouri. Barnes v. Kirksville, 266 Mo 270, 282, 180 SW 545.

[11] **Alabama.** State v. Lane, 181 Ala 646, 62 So 31.

Indiana. Sarlls v. State, 201 Ind 88, 166 NE 270; Baltimore & Ohio R. Co. v. Whiting, 161 Ind 228, 68 NE 266.

Iowa. Eckerson v. Des Moines, 137 Iowa 452, 115 NW 177.

Kentucky. Bryan v. Voss, 143 Ky 422, 136 SW 884.

Massachusetts. Graham v. Roberts, 200 Mass 152, 85 NE 1009.

New Jersey. Grogan v. De Sapio, 11 NJ 308, 94 A2d 316; McDevitt v. Shore Yellow Cab Co., 131 NJL 397, 36 A2d 880 (statute directing distribution of judicial as well as of executive, administrative and legislative powers among several departments).

South Carolina. Greenville v. Pridmore, 86 SC 442, 68 SE 636; Spartanburg v. Parris, 85 SC 227, 67 SE 246.

[12] **United States.** The question of US Const art IV, §4, is of a political character exclusively committed to the Congress, not a judicial matter for the courts. Pacific States Tel. & Tel. Co. v. Oregon, 223 US 118, 56 L Ed 377, 32 S Ct 224.

[13] **Iowa.** Eckerson v. Des Moines, 137 Iowa 452, 115 NW 177.

Minnesota. State v. Mankatu, 117 Minn 458.

"The test of republican or democratic government is the will of the people, expressed in majorities, under proper form of law . . . So long as the ultimate decision is left to the will of the people at the ballot box it is essentially republican." Hopkins v. Duluth, 81 Minn 189, 83 NW 536.

Washington. Walker v. Spokane, 62 Wash 312, 113 P 775.

[14] **Minnesota.** State v. Mankato, 117 Minn 458, 136 NW 264.

[15] Tests for determining validity of laws conferring power or authority upon boards or commissions, see §4.11.

[16] See §15.03.

[17] **New Jersey.** Although statute providing commission form of city government requires that legislative, executive and judicial powers be distributed among the commissioners, there are some powers reserved to the board as a whole, such as passage of resolutions and ordinances. De Muro v. Martini, 137 NJL 640, 61 A2d 230.

Municipal administration generally, see §1.46 et seq.

[18] **Texas.** "While the commission form of government does not to the extent usual in city charters follow the tendency heretofore shown in the evolution of free popular government to avoid as far as possible the concentration of power in any one governmental officer, it is nevertheless a democratic form of government which rests at last upon the consent of a majority of the governed." Perrett v. Wegner (Tex Civ App), 139 SW 984, 989.

[19] **Florida.** Alsop v. Pierce, 155 Fla 185, 19 So 2d 799 (Jacksonville).

New Jersey. McDevitt v. Shore Yellow Cab Co., 131 NJL 397, 36 A2d 880 (Atlantic City), citing NJSA 40:72–1.

The commission idea "is as old at least as the Roman Empire, but its adaptation to the government of American cities is new." Charles M. Fassett, Handbook on Municipal Government (1922) p 37.

[20] See Special Laws of Texas, 1901, p 104 and 1905, p 253.

Texas. Brown v. Galveston, 97 Tex 1, 75 SW 488 (sustaining constitutionality of act as legislative power presumed unless constitutionally restricted).

But see Ex parte Lewis, 45 Tex Crim 1.

[21] Adopted by Des Moines at a special election held June 20, 1907. See Des Moines plan as set out in first edition of this work, Vol 1, pp 758–760, §341, also original Galveston plan, §340, pp 756–758.

Texas. See Germany v. Pope, 222 SW2d 172 (Tex Civ App) (city as not losing identity by adopting commission form of government); Phillips v. City of Abilene, 195 SW2d 147 (Tex Civ App) (involving law requiring city to act only through board of commissioners).

[22] **New Jersey.** McKann v. Town of Irvington, 133 NJL 63, 42 A2d 391, affd 133 NJL 575, 45 A2d 494; 1 Taggart v. Altman, 130 NJL 563, 33 A2d 910, cert dismg 129 NJL 286, 29 A2d 384.

Assignment and transfer of commissioners, see Oliver v. Daly, 4 NJ Misc 80, 131 A 678, modified 103 NJL 52, 134 A 870; Hendee v. Wildwood, 96 NJL 286, 114 A 749; Woolley v. Flock, 92 NJL 65, 105 A 489.

Under commission form of municipal government, the authority of board of commissioners is a statutory power conferred upon it by the legislature, and in turn the powers of the several commissioners as heads of the departments stem from the resolution of assignment adopted by the board. Pashman v. Friedbauer, 4 NJ Super 123, 66 A2d 568, affg 1 NJ Super 616, 63 A2d 838.

[23] **Illinois.** People v. Connors, 333 Ill App 383, 77 NE2d 420 (East St. Louis; abstract).

Louisiana. Powell v. Hart, 132 La 287, 61 So 233 (plan consisting mainly of council composed of mayor and two members, each also called "commissioner," and to each of whom is assigned certain governmental department).

New Jersey. Bogle v. Woods, 10 NJ Misc 858, 161 A 357 (laws governing township commissioners in New Jersey as contemplating assignment of each commissioner to single department).

Under the commission form of government law, the board of commissioners itself determines the frame of the municipal government by the creation of offices and defining the duties attached to those offices; it prescribes rules for the conduct of business. And then it allocates the different branches of the machine, for actual operation among the five department directors. The board of commissioners also retains direct authority in those matters that the legislature has deemed of such importance as to require action by ordinance. But except where an ordinance is necessary, executive or administrative action in each specific case devolves upon one or other of the five directors. New Jersey Bell Tel. Co. v. Newark, 131 NJ Eq 581, 37 A2d 103.

"It is mandatory that the various powers be distributed among the several departments. It has also been long since judicially settled that after the powers have been distributed, they no longer reside in the commission as a whole but are possessed by the director of the department within whose province the particular power logically belongs." McKann v. Town of Irvington, 133 NJL 63, 42 A2d 391, affd 133 NJL 575, 45 A2d 494, citing Foley v. Orange, 91 NJL 554, 103 A 743.

West Virginia. State v. Hinton, 77 W Va 266, 87 SE 358 (bipartisan commission consisting of four members styled "Board of Affairs of the City of Hinton," and commission council consisting of two members to be elected from each ward).

[24] **South Dakota.** Sioux Falls v. Sona, 72 SD 414, 35 NW2d 296 (conclusion of city commissioners that dwelling units within housing project were buildings within purview of resolution stating that all matters relating to public buildings are assigned to mayor as not unreasonable).

See §§ 12.41–12.44.

[25] **New Jersey.** "The board has power to assign powers, duties and departments from time to time among the various commissioners which it may conclude in the exercise of sound discretion to be for the public good." Taggart v. Altman, 130 NJL 563, 33 A2d 910, cert dismg 129 NJL 286, 29 A2d 384.

Although city board of commissioners under New Jersey Act exercises delegated legislative power in making departmental distributions and assignments of governmental powers and duties, courts may set aside resolutions of board purporting to effect initial distribution or designation of departmental assignments for excess of statutory authority or

abuse of discretion. Grogan v. De Sapio, 11 NJ 308, 94 A2d 316.

[26] **New Jersey.** Grogan v. De Sapio, 11 NJ 308, 94 A2d 316, affg 19 NJ Super 469, 88 A2d 666 (commissioners resolutions assigning and distributing powers and duties to respective departments that arbitrarily allocated mere skeletal powers and duties to departments headed by two plaintiff commissioners as constituting clear disregard of purposes and policy of statute and abuse of discretion); O'Connell v. Bayonne, 102 NJL 511, 134 A 549; Moore v. Haddonfield, 62 NJL 386, 41 A 946 (courts not to interfere as this matter legislative and not judicial except to keep action within intent of statute).

[27] **New Jersey.** Grogan v. De Sapio, 11 NJ 308, 94 A2d 316 (clearly exhibiting disregard of statutory purposes).

[28] **Indiana.** Sarlls v. State, 201 Ind 88, 166 NE 270, 279, citing McQuillin text.

North Dakota. State v. Frazier, 39 ND 430, 167 NW 510, quoting McQuillin text.

Texas. Brown v. Uhr (Tex Civ App), 187 SW 381, 385 quoting McQuillin text.

See § 12.39.

[29] **Tennessee.** Kaufman v. Tallahassee, 84 Fla 634, 94 So 697 (necessity for some such method for administering city affairs as growing out of obvious wastefulness and corruption of aldermanic system of divided responsibility).

Kansas. State v. Bentley, 100 Kan 399, 164 P 290.

Missouri. Barnes v. Kirksville, 266 Mo 270, 282, 180 SW 545.

[30] Merriam, American Political Ideas (1920) ch XV, p 450.

[31] **Louisiana.** Foti v. Montero, 243 La 734, 146 So 2d 789, citing McQuillin.

[32] **Louisiana.** Foti v. Montero, 243 La 734, 146 So 2d 789, quoting McQuillin.

[33] **Louisiana.** Foti v. Montero, 243 La 734, 146 So 2d 789, quoting McQuillin.

[34] C.M. Fassett, Handbook of Municipal Government (1922) pp 37–40; The Weakness of the Commission Plan, National Municipal Review (October, 1920) Vol IX, pp 642–647; W.B. Munro, Ten Years of Commission Government, National Municipal Review (1912) Vol I, pp 562–568; Arguments for and Against, see Goodnow and Bates, Municipal Government, ch IX, pp 191–196.

[35] **Alabama.** State v. Lane, 181 Ala 646, 62 So 31, 35.

Idaho. Swain v. Fritchman, 21 Idaho 783, 125 P 319 (all obligations stand and remedies not to be altered substantially).

Iowa. Van Horn v. Des Moines, 195 Iowa 840, 191 NW 144 (meaning of "inconsistent" as contrasted with repugnant or irreconcilable as between statutes and charters).

Kentucky. Statute provides that all laws applicable to and governing certain class cities and not inconsistent with the provisions relating to a commission form of government, remain in force within a city of one of these classes when it is organized under commission form. Hazard v. Collins, 304 Ky 379, 200 SW2d 933.

New Jersey. New Jersey Bell Tel. Co. v. Newark, 131 NJ Eq 581,

37 A2d 103 (control of municipal finances).

North Dakota. Waslien v. Hillsboro, 48 ND 1113, 188 NW 738 (change of form as by adoption of commission plan as superseding former charter provisions).

[36] **Alabama.** Jackson v. Hubbard, 256 Ala 114, 53 So 2d 723 (but not waterworks board).

Kentucky. Black v. Sutton, 301 Ky 247, 191 SW2d 407 (except city attorney); Jones v. Cassidy, 154 Ky 748, 159 SW 562; Maddox v. Middlesboro, 199 Ky 425, 251 SW 201 (except prosecuting attorney); Calhoun v. Jett, 192 Ky 383, 233 SW 794.

Missouri. Wrightsman v. Gideon, 296 Mo 214, 247 SW 135.

New Jersey. Beirne v. Gangemi, 74 NJ Super 557, 181 A2d 800 (but not collector of taxes).

South Carolina. See Richardson v. Blalock, 118 SC 438, 110 SE 678.

[37] **Kentucky.** Jones v. Cassidy, 154 Ky 748, 159 SW 562.

New Jersey. Martini v. De Muro, 26 NJ Misc 182, 58 A2d 597.

Washington. Spokane v. Lemon, 73 Wash 248, 131 P 853 (not to repeal certain ordinances regulating the construction and use of buildings).

[38] **Missouri.** State v. Roberts (Mo App), 269 SW2d 148.

§ 9.21. City-manager plan.

The city-manager plan of municipal government has in modern decades attained considerable popularity throughout the United States, and many cities and towns are now being governed under this plan.[1] And under some laws the manager plan of government is made adaptable also to counties.[2] The procedure for the adoption, alteration, or abandonment of a manager plan of government is generally prescribed by statute.[3]

Different types of the city-manager plan, or "commission-manager plan," have been developed. The plan adopted in Dayton, Ohio, effective January 1, 1914, concentrates administrative authority in a chief called a city manager, appointed by the commission to hold at their pleasure and subject to recall by the electors at any time. The manager's duty is to supervise and control the conduct and operation of all officers and employees of the city, and the manager is expected to manage the municipal affairs efficiently and economically. The several functions are divided into five departments—safety, welfare, service, law and finance—which are all under the jurisdiction of the city manager. The manager is enjoined to see that the laws and ordinances are enforced, appoints and removes all directors

of departments and all subordinates and employees, with the exception of the city clerk and the three members of the civil service board who are appointed by the commission, attends commission meetings, with the right to debate, without vote, recommends to the commission necessary and expedient measures, keeps the commission advised of the needs of the city and its financial condition, and performs such other duties as the charter provides, or the commission prescribes by ordinance or resolution. The commission constitutes the governing body, has power to pass ordinances, adopt regulations, make annual appropriations, determine questions of municipal policy and, as mentioned above, appoint a city manager. The merit system and the initiative and referendum in legislation are provided in the charter.

Details of another type of the plan may be taken from the Kansas Act which provides for a governing board consisting of a number of commissioners, and declares that "no distinction shall be made in titles or duties among the commissioners except as the board shall organize itself for business." A chairperson is chosen by the board and takes the title of "mayor" during the year and becomes the head of the city "on formal occasions." Each commissioner draws a nominal salary, in no case to exceed $100 a year. The commission is empowered to pass all ordinances and to provide for such offices as are necessary to carry out the provisions of the act and to fix the salaries of those offices. The commission is required to appoint a city manager, in whose hands the administration of the business is placed. The manager holds office "at the pleasure of the board," is chosen "solely on the basis of administrative ability," without reference to residence qualifications, and is responsible to the board for the administration of city affairs. Departments of law, service, public welfare, safety and finance are created. All appointments "except department heads" are made by the manager, and "department heads" are to report to him or her. The "budget system" of accounts and expenditures is also included.[4]

The charter of Kansas City, Missouri, adopted in 1925, presents a type where, as in Cleveland, Ohio, both a mayor and city manager are provided for. The mayor presides over the city

council and performs social functions, like the mayor of the English city. The mayor of Kansas City is elected by the voters at large, and is a member and president of the council, which is composed of the mayor and eight elected members. Four of these are elected at large and the rest from four established election districts. Their term of office is four years. Apart from the mayor's legislative and ceremonial or representative functions, the mayor appoints only the park, the city plan, and art commission. The city manager who is appointed by the council solely on the basis of his or her executive and administrative qualifications, is the chief administrative officer of the city. The mayor serves "during the pleasure of the council. The mayor's removal shall be by charges and public hearings, but pending and during the hearing the council may suspend the mayor from office. Both judgment of suspension and removal is final, not subject to review. The city manager is made responsible to the council for the proper administration of all affairs of the city placed in the city manager's charge, and to that end shall appoint and may remove all directors of departments and officers except as the charter otherwise provides. Appointments by the city manager must be made on the basis of executive and administrative ability and of the training and experience of such appointees for the work which they are to administer. The members of the council are forbidden from interfering with the city manager. The city manager in supervising the affairs of the city has a seat in the council, with right to participate in discussion of all matters coming before the council, but has no vote. The municipal service is classified into nine departments, namely, law, public works, fire, health, welfare, water, park, finance, and personnel (service of the city). The council may by an affirmative vote of six members establish such other departments as it may deem necessary.

The civil service idea is not dominant in the Kansas City charter. While the charter provides for a nonpartisan ballot, the first election under it was entirely and vigorously partisan, and frankly acknowledged to be so. The manager may be removed by the council at any time, the manager in turn may remove any one of the directors or heads of departments whom he or she appoints without assigning any reason, and each director may

remove any of his or her employees or subordinates without cause or hearing.

Apart from the Kansas City type, it appears that the essence of the city-manager plan is the board of commissioners elected by popular vote which determines the municipal policy, and the exercise of the administrative powers by a functionary who is called a city manager chosen by the commissioners. The legislative and executive functions are separated more completely in most types of this plan than in the commission or other forms. The elected commissioners determine policies and pass legislation pursuant to those policies, when necessary, and the manager, designed to be selected because of his or her supposed superior qualifications (who may or may not be a local resident), administers the government, more or less under the supervision of the commissioners acting as an entity, the degree of the city manager's independence depending on the local laws.[5] The need of competency, training and experience in municipal management is the basis upon which the plan rests.[6]

The experience with the commission-appointed manager so far is not sufficient to show whether the elective or appointive executive head is the most satisfactory. The success of this, as all other plans, in the hands of the electors must depend upon their interest and attitude of mind in supporting the local governments. Indifferent citizenship may seriously hamper if not destroy the high purpose of a capable energetic administration. Without good faith and intelligent cooperation by the citizens the best public servants will lose spirit and fail in providing needed public service.[7]

Both the city manager plan[8] and the county manager plan[9] are constitutional. Interference of the council with the exclusive functions of the city manager has been declared a violation of the very essence of this statutory system of government.[10] Indeed, it is said that insofar as ordinances invade or duplicate duties of a city manager and that manager's employees, they should be invalidated as tending to undermine the harmony of the council/manager system of municipal government.[11] Thus, where the city charter requires that all administrative functions be under the supervision of the city manager, the city council is not empowered to establish by ordinance a department of

legislative analyst that reports directly to the council and performs administrative functions independent of the city manager.[12]

However, the power to hire vested in a city manager is of necessity limited by the budget as passed by the city council. Consequently, an employment contract extended by a city manager that purports to offer a salary greater than that authorized by the budget, or which offers a salary for fiscal years for which no budget has yet been passed, is void ab initio.[13]

The reason for the privilege given to choose a nonresident manager is the same as that prevailing in Germany where cities may take a burgomaster from another city. They thus have a wider field to secure a competent administrator. Apart from the manner of appointment, the modern idea of a nonresident manager, in some respects is not unlike the office of podesta said to have been originated by Frederick Barbarossa, the German Emperor for the Italian cities in the 12th century when his sway covered that peninsula. In some mediaeval cities, however, this officer appears before the Peace of Constance. By use of the office the Emperor's purpose was to establish strong central institutions. The podesta was appointed by the Emperor and acted as his representative, and in his name. This magistrate exercised in Barbarossa's time both judicial and executive functions. In the 12th century in the Lombard communes and in other cities of Italy the selection of a podesta became the general practice. In Milan and Florence and, in fact, in all cities where he served, he was a general criminal judge and preserver of the peace which, on account of the violence of the period, was an exceedingly important function, but in many cities, in addition, he had wide administrative powers. That he might be entirely impartial and free from local or undue influence he could neither marry a native of the city where he exercised power, nor have any relation resident within the area, nor hold property there, nor even, so great was their jealousy, eat or drink in the house of any citizen.[14]

[1] **California.** Welch v. Long Beach, 109 Cal App 2d 561, 241 P2d 26; People v. Finkelstin, 98 Cal App 2d 545, 220 P2d 934 (ordinance establishing city manager as chief executive and administrative officer); Higgins v. Lynch, 72 Cal App 2d 526, 164 P2d 943 (discussing some of the powers of manager with respect to the civil service laws in city of San Jose); Stohl v. Horstmann, 64 Cal App 2d 316, 148 P2d 697 (Oakland).

Kansas. Piper v. Wichita, 174 Kan 590, 258 P2d 253 (Kansas City).

Kentucky. Seaton v. Lackey, 298 Ky 188, 182 SW2d 336 (Paducah).

Massachusetts. Williams v. City Manager of Haverhill, 330 Mass 14, 110 NE2d 851; Mayor of Gloucester v. City Clerk of Gloucester, 327 Mass 460, 99 NE2d 452.

Michigan. Babcock v. Foley, 308 Mich 412, 14 NW2d 48 (under home rule charter of Grand Rapids).

Ohio. State v. Toledo, 142 Ohio St 123, 50 NE2d 338 (Toledo); State v. Sherrill, 142 Ohio St 574, 53 NE2d 501 (Cincinnati); Morrow v. Cleveland, 73 Ohio App 460, 56 NE2d 333 (discussing Cleveland plan).

Texas. Taylor v. Hodges (Tex Civ App), 183 SW2d 664, affd 143 Tex 441, 186 SW2d 61.

[2] **Georgia.** Marbut v. Hollingshead, 172 Ga 531, 158 SE 28.

[3] **Florida.** Jones v. Slick (Fla), 56 So 2d 459 (special act authorizing city council to create office of city manager, elect manager and prescribe manager's powers and duties as valid).

Illinois. Pechous v. Slawko, 64 Ill 2d 576, 357 NE2d 1144 (board of trustees as having no powers with respect to administration); People v. East Moline, 23 Ill App 2d 334, 163 NE2d 109 (city manager form of municipal government to be effective under statute on day when vote occurred in favor of such form of government).

Indiana. Sarlls v. State, 201 Ind 88, 166 NE 270.

Missouri. State v. Roberts (Mo App), 269 SW2d 148 (city with population entitling it to become city of third class as having authority to adopt managerial form of government, though it had never taken formal steps to declare itself of third class).

New Jersey. Statute providing method of adopting city manager form of government by submitting petition signed by fifteen per cent of number voting at last election for general assembly as prerequisite to calling special election on adoption of city manager form of government, construed to refer to election of members of state legislature generally, and not to special election to fill legislative vacancy, though held at time of other general election. Hambright v. Martini, 5 NJ Super 609, 68 A2d 661.

Town clerk was not warranted in refusing to call election to vote on city manager form of government pursuant to valid petition therefor, on ground that election would be invalid because legislature failed to provide for absentee voting by members of armed services in special elections, where statute providing for absentee voting by servicemen was not limited to general elections. Binetti v. Swenson, 3 NJ Super 227, 66 A2d 42.

South Carolina. Garey v. Myrtle Beach, 263 SC 247, 209 SE2d 893.

Tennessee. State v. Wilkes, 222 Tenn 384, 436 SW2d 425 (statutes for adoption of modified city manager council charter as applicable only to unincorporated territories).

Texas. State v. Orange (Tex Civ App), 300 SW2d 705 (change to city-manager form of government as effected by amendment of home rule charter).

[4] **Arkansas.** See McClendon v. City of Hot Springs Board of Health, 141 Ark 114, 216 SW 289.

Florida. Bryant v. Lakeland, 158 Fla 151, 28 So 2d 106 (city manager as administrative head of municipal government under direction and supervision of city commission).

Indiana. Sarlls v. State, 201 Ind 88, 166 NE 270, quoting McQuillin text.

Kansas. Piper v. Wichita, 174 Kan 590, 258 P2d 253 (court not to deprive a city manager of any power or relieve office from any responsibility that state places on office in absence of direct legislative mandate); State v. McCombs, 125 Kan 92, 262 P 579; Metsker v. Neally, 41 Kan 122, 21 P 206 (mayor's control over departments as no sense superior to that of commissioners); State v. Bentley, 100 Kan 399, 164 P 290.

Michigan. Babcock v. Foley, 308 Mich 412, 14 NW2d 48 (Grand Rapids).

[5] **California.** Brown v. Berkeley, 57 Cal App 3d 223, 129 Cal Rptr 1 (ordinance usurping powers granted city manager by city charter).

[6] **Florida.** Bryant v. Lakeland, 158 Fla 151, 28 So 2d 106 (city manager as head of each department provided for under charter and responsible for successful and business-like operation).

Kentucky. Frankfort v. Triplett (Ky), 365 SW2d 328 (city manager form of government as designed to achieve greater efficiency in operation of city's executive and legislative departments); Shepherd v. McElwee, 304 Ky 695, 202 SW2d 166 (statute providing city manager to be executive agent of mayor and board of commissioners in management of city's affairs).

[7] Early observations on the city-manager plan, what it is, what it is claimed it had accomplished, and so forth, by Lindsay Rogers (1922) and James W. Routh, are set out in "Selected Readings in Municipal Problems" by Joseph Wright (1925) pp 386–407.

[8] **Indiana.** Sarlls v. State, 201 Ind 88, 166 NE 270 (involving many objections urged as to constitutionality).

Kentucky. Owensboro v. Hazel, 229 Ky 752, 17 SW2d 1031.

[9] **New York.** Cort v. Smith, 249 App Div 1, 291 NYS 54, affd 273 NY 481, 6 NE2d 414.

[10] **New Jersey.** Ware v. Board of Com'rs of Cape May, 120 NJL 48, 197 A 726.

[11] **California.** Hubbard v. San Diego, 55 Cal App 3d 380, 127 Cal Rptr 587.

[12] **California.** Hubbard v. San Diego, 55 Cal App 3d 380, 127 Cal Rptr 587.

[13] **Illinois.** Hogan v. Centralia, 71 Ill App 3d 1004, 390 NE2d 595.

[14] James W. Thompson, Economic and Social History of Europe in the Later Middle Ages (1931) ch IX, p 226.

IV. CONSTRUCTION AND PROOF

§ 9.22. Construction of charter.

The rules here stated should be considered with those discussed in the next chapter relating to the construction of corporate powers in general,[1] since the term charter in this relation comprehends all powers possessed by the municipal corporation, no matter the source. But the distinction between construing a municipal charter or a legislative act granting power to a municipal corporation should be observed. "To construe a constitution for the purpose of ascertaining whether under it a power can be granted is not the same thing as construing a charter when it is conceded a power can be constitutionally conferred, and the only inquiry is whether it has in fact been granted."[2] As already has been observed, the charter or statute by virtue of which a municipal corporation is organized and created is its organic law and the corporation can do no act nor make any contract not authorized by that charter or statute.[3] All acts beyond the scope of the powers granted are invalid.[4] In brief, except in some cases with respect to home rule charters,[5] a municipal charter is generally construed as a grant and not a limitation of power, and therefore, power to pass an ordinance must be found in the charter in express language or arise by necessary implication. If the charter "does not explicitly or inferentially contain such grant," the ordinance is not authorized.[6]

The judicial decisions recognize certain general rules of construction.[7] One is that the charter of a corporation is the measure of its powers, and the enumeration of those powers implies the exclusion of all others.[8] As sometimes stated when the charter authorizes something to be done, and an ordinance undertakes to carry out such power, courts will lean to a construction of the ordinance that will uphold it, but such rule has no application where the question is as to the power granted in the charter to pass the ordinance.[9]

Another recognized general rule is that all laws bearing on a subject must be read together, in construing the charter.[10] Statutes relating to the subject matter will be read into the municipal charter, so as to become a part of it;[11] and all parts of

LINDA CROCKETT LINGLE
Mayor
TELEPHONE 243-7855

91-29

OFFICE OF THE MAYOR
COUNTY OF MAUI
WAILUKU, MAUI, HAWAII 96793

November 5, 1991

Mr. Robert Nakasone, Chairman
Charter Commission
P. O. Box 307
Kahului, Maui, Hawaii 96732

Dear Bob:

I would appreciate receiving copies of the minutes of your Commission meetings and Sub-committee meetings. I believe reviewing the minutes will help me to keep abreast of your work and ongoing process.

Thank you for your ongoing contribution to the community.

Sincerely,

LINDA CROCKETT LINGLE
Mayor, County of Maui

SL:jso
c:\letter\minutes

91-30

COUNTY COUNCIL
COUNTY OF MAUI
200 S. HIGH STREET
WAILUKU, MAUI, HAWAII 96793

November 8, 1991

Honorable Linda Crockett Lingle
Mayor, County of Maui
Wailuku, HI 96793

For transmittal to:

Mr. Robert Nakasone, Chairman
and Members
Charter Review Commission
County of Maui
Wailuku, HI 96793

APPROVED FOR TRANSMITTAL
Linda Crockett Lingle 11/13/91
Mayor Date

Dear Chairman and Members:

I request for your review and amendment to Section 10.4.c, at the end of the paragraph, to read:

"wages earned for work performed and not having decision making authority of a private business or interest shall not constitute a violation of this paragraph."

I have just received an opinion from the State Supreme Court on this subject matter. The Board of Ethics had rendered an advisory opinion to Sally Raisbeck on my conflict of interest under this Section which decision of the Board was ruled null and void by the Supreme Court. If the Board of Ethics' ruling was held to be valid because of the Charter language, many of our citizenry who work for subsidiaries of large corporations will not be able to fully serve on many of our appointed or elected positions.

I would further request of your Commission to consider language in Article 10 to provide for the legislative body to govern the conduct of its members like the Congress of the United States and the State Legislature. I do not feel an administrative agency should govern the legislative body.

I appreciate your consideration, and if there are any questions, I would be happy to try and answer the questions.

Very truly yours,

Goro Hokama

GORO HOKAMA
Councilmember

52:GH:jmo

~~Finance~~ bbb

91-31

ORDINANCE NO. 1945

BILL NO. 78 (1990)

A BILL FOR AN ORDINANCE AMENDING
TITLE 2 OF THE MAUI COUNTY CODE, ESTABLISHING
A NEW CHAPTER, PERTAINING TO THE SALARY COMMISSION

BE IT ORDAINED BY THE PEOPLE OF THE COUNTY OF MAUI:

SECTION 1. Title 2, Maui County Code, is amended by adding thereto a new chapter to be designated and to read as follows:

"Chapter 2.42

SALARY COMMISSION

Section:

2.42.010 Other powers, duties, and functions.

2.42.010 Other powers, duties, and functions. In addition to the powers, duties, and functions established by chapter 5 of article 3 of the revised charter of the county of Maui, the salary commission shall, unless otherwise provided by law, determine the compensation of the department head and first deputy or first assistant of all county departments enumerated in said charter, in accordance with such principles, conditions and procedures as prescribed by law."

SECTION 2. Chapter 2.40, Maui County Code, is amended by adding thereto a new section to be designated and to read as follows:

"2.40.210 Salary commission. There is established a salary commission as provided by law. (See article 3, chapter 5, charter and chapter 2.42 of this code.)"

SECTION 3. New material is underscored. In printing this bill, the County Clerk need not include the underscoring.

SECTION 4. This ordinance shall take effect upon its approval.

APPROVED AS TO FORM AND LEGALITY:

HAUNANI S. Y. LEMN
Deputy Corporation Counsel
County of Maui
salary/ords/c(cs)

WE HEREBY CERTIFY that the foregoing BILL NO. 78 (1990)

1. Passed FINAL READING at the meeting of the Council of the County of Maui, State of Hawaii, held on the 21st day of September , 1990 , by the following votes:

Linda CROCKETT LINGLE	Goro HOKAMA Chairman	Patrick S. KAWANO	Howard S. KIHUNE Vice-Chairman	Alice L. LEE	Ricardo MEDINA	Wayne K. NISHIKI	Velma M. SANTOS	Joe S. TANAKA
Aye	Aye	Aye	Aye	Aye	Aye	Aye	Aye	Aye

2. Was transmitted to the Mayor of the County of Maui, State of Hawaii, on the 21st day of September , 1990 .

DATED AT WAILUKU, MAUI, HAWAII, this 21st day of September , 1990 .

RECEIVED
1990 SEP 21 PM 3:20
OFFICE OF THE MAYOR

Goro Hokama

GORO HOKAMA, CHAIRMAN
Council of the County of Maui

Daryl T. Yamamoto

DARYL T. YAMAMOTO, COUNTY CLERK,
County of Maui

THE FOREGOING BILL IS HEREBY APPROVED THIS 26th DAY OF September , 1990.

Hannibal Tavares

HANNIBAL TAVARES, MAYOR,
County of Maui

I HEREBY CERTIFY that upon approval of the foregoing BILL by the Mayor of the County of Maui, the said BILL was designated as ORDINANCE NO. 1945 of the County of Maui, State of Hawaii.

Daryl T. Yamamoto

DARYL T. YAMAMOTO, COUNTY CLERK,
County of Maui

Passed First Reading on September 7, 1990.
Effective date of Ordinance September 26, 1990.

RECEIVED

I HEREBY CERTIFY that the foregoing is a true and correct copy of Ordinance No. 1945 , the original of which is on file in the Office of the County Clerk, County of Maui, State of Hawaii.

Dated at Wailuku, Hawaii, on

County Clerk, County of Maui

91-32

SPECIAL CHARTER COMMISSION REPORT

BACKGROUND

The Special Charter Commission for the evaluation of the Department of Water Supply, County of Maui, was established by the appointment by the Mayor of the County of Maui and the confirmation by the County Council of its eleven members on the 20th day of February, 1987.

The Commission's initial meeting was held on the 15th day of April, 1987, at which meeting, John Hirashima was appointed the Chairman of the Commission. The Commission adopted Roberts Rules of Order for the conduct of its business and adopted a work schedule for the conduct of its business.

COMMISSION RECORD

The record of the Commission is as follows:

1. Minutes of Commissions Meetings. Meetings were held on the following dates and the minutes are reflected in the Commission Record as follows:

   a. April 15, 1987,
   b. May 20, 1987,
   c. July 15, 1987,
   d. July 29, 1987,
   e. August 12, 1987,
   f. August 27, 1987,
   g. September 4, 1987,
   h. September 23, 1987,
   i. September 30, 1987,
   j. October 14, 1987,
   k. October 28, 1987,
   l. November 18, 1987,
   m. December 16, 1987,
   n. December 30, 1987,
   o. February 10, 1988,

2. Committee Report from the sub-committee of the Commission concerning the investigation of water systems from other counties, comprised of Milton Howell and Pancho Alcon. This report is found in Commission Record,.(Appendix A).

3. Record from public hearings of the Commission held in Molokai on the 2nd day of December, 1987 Commission Record (Appendix B), and Wailuku on the 3rd day of December, 1987, Commission Record, (Appendix C). A public hearing was conducted in Hana on the 2nd day of December, 1987, but no testimony was offered.

4. Letters received by the Commission (independent of public hearing testimony or testimony at the Commission's meetings) Commission Record, (Appendix D) includes the following:

a. Allan R. Sparks, letter dated July 8, 1987,
b. Colin C. Cameron, Chairman and President, Maui Land & Pineapple Company, Inc., letter dated September 3, 1987,
c. Arden G. Henderson, President, Maui Electric Company, letter dated September 9, 1987,
d. Bernard W. Despins, President, Maui Contractors Association, letter dated September 28, 1987,
e. Bert L. Hatton, Vice President, Land Administration and Planning, Amfac, letter dated October 9, 1987,
f. Randolph G. Moore, President, Molokai Ranch Limited, letter dated September 15, 1987,
g. Hannibal Tavares, Maui, letter dated December 16, 1987,
h. Rick Medina (undated) submitted in mid December, 1987.

5. The Commission's report of its activities and recommendations.

COMMISSION WORK PLAN

The Commission adopted a work plan by which it pursued an investigation of the opinions of County officials concerning the Department of Water Supply and the need, if any, for organizational and structural changes for the department, an investigation of the opinion of community organizations, including professional organizations and major land owners, with regard to the same. The work plan of the Commission also included interviews with parties experienced in water systems, as well as data from other Hawaii Counties concerning their experiences with their own system of water administration. A copy of the work plan is included in the Commission Record as Commission Record, (Appendix E).

ANALYSIS OF PAST ADMINISTRATION

The Commission developed an analysis of the various activities of the Department of Water Supply and correlated the same to the different administrative heads of the Department and the structural organization at each time period. The analysis (as shown in Figure 1) reflects the following:

1. Since the 1950's the department has experienced five organizational changes as follows:

a. Prior to 1955 - semi-autonomous,
b. From 1955 to 1960 - county department,
c. From 1960 to 1977 - semi-autonomous,
d. From 1977 to 1983 - county department with the board of water supply retaining some power,
e. Since 1983 it has been a county department with the board of water supply retaining no power.

2. Major agreements were enacted during the semi-autonomous organization, including the Central Maui source development and transmission joint ventures and the East Maui Irrigation Wailoa ditch agreement. These agreements have had a profound impact on the development of all Central Maui and have improved the reliability of upcountry water service.

3. Most of the significant development oriented rules were adopted by the Board of Water Supply with the Mayor's signature during the period 1977-1982 when the Board retained power to initiate rules. Such rules include source development fees, short-lived emergency rules limiting development in Central and West Maui and Kula special rules governing the issuance of water meters. Although highly unpopular at the time of enactment, these rules are now seen as generally beneficial to the people of the County of Maui.

4. All of the federal-mandated Safe Drinking Water Act projects were initiated by the Tavares administration. Although the legislation was enacted by Congress in 1974, it was not until August, 1977, that the state adopted its drinking water standards which mirrored the federal standards.

5. Various well projects outside of the Central Maui source development joint venture were completed since 1977.

6. The department has had a relatively high turnover in its directors. The two longest terms were held by Mr. Yoshiharu Tsuji, seven years, spanning a semi-autonomous and county departmental structure and Mr. Koichi Hamada, nearly eight years, all under a semi-autonomous structure.

OVERVIEW OF WATER MANAGEMENT SYSTEMS[1]

Presently there are approximately 50,000 water systems serving the population of the U.S. Forty-four are publically owned and serve 80 percent of the population and the remaining 56 percent of the systems are investor owned and serve 20 percent of the population. Although investor owned water utilities are in the minority, their record of accomplishment are models in operations, service and management, according to the Amercian Water Works Association, a 42,000 member organization.

---

1 American Water Works Association, Water Utility Management

Among publically owned systems, the vast majority among medium and larger communities are managed successfully under an "authority" system whereby a board or commission assumes management responsibilities. It appears to be an accepted fact that the more separated the control of the utility from the affairs of general government and politics, the greater probability of achieving maximum efficiency.

Compelling testimony was offered by Mr. Robert Chuck, immediate past president of the American Water Works Association and long-experienced in water resource development and management in Hawaii. In four years as an executive with the organization, he visted all 41 sections of the association, and because of a personal interest in water utility management, he took that opportunity to study the management systems of the communities he visited. He found many small communities having their systems managed by the city administration. These systems are characterized as being small, simple and generally without great capital needs. On the other hand, most larger water systems are managed by authorities. His opinion was that these systems were best served by long-term managers under an "authority" system.

ISSUES AND DECISION MAKING CRITERIA

The Commission adopted certain questions and issues upon which it would focus during its deliberations. The questions are contained in the Commission's work plan and can be summarized as follows:

1. Accountability to the general public for actions of the Department. Is direct accountability by election necessary or even appropriate in operating the water utility?

2. Long Range Planning. What system of management would most likely ensure the adequacy of long range planning?

3. The Position of the Water Director is Viewed as Critical in the Affairs of the Department. What system is likely to foster a continuity in management for the department?

4. Responsiveness and Efficiency. What system would enhance the qualities (responsiveness and efficiency) which mark successful utilities?

5. Financing of Current and Future Needs Require Sound Planning and a Commitment to Long-term Goals. What system would consistently provide for departmental financial needs?

The Commission deliberated on the question of the mandate on it posed by the 1982 Charter Commission. Page 24 of the Report of the Charter Commission of the County of Maui, October 18, 1982, states as follows:

> As indicated earlier, the Charter Commission spent a great deal of time on this extremely important issue and concluded that a radical change to the present structure of the Department of Water Supply would best serve the interest of the people of the County of Maui. At the same time, however, the Commission was forced to accept the proposition that it might indeed be an error in proposing a shift from a stronger water board to a weak one. Therefore, it has proposed that a special charter commission be appointed to review the finances, operations, and rule making power of the Water Department and determine whether or not further changes are necessary.

The stated mandate appears to be the determination as to whether or not further changes in the financial, operational and rule making power of the department are justified. The mandate also appears to ask whether the 1982 charter commission erred in shifting to a weak water board.

The Commission concluded that the standard for their decision making process should focus upon whether the existing organization structure or alternative organizational structures were in the best interest for the efficient administration of the public water systems of the County of Maui.

DECISION OF SPECIAL CHARTER COMMISSION

The Commission has concluded that the 1988 county ballot should include a provision as to whether Chapter 11 of the Revised Charter of the County of Maui should be amended to provide for a semi-autonomous board of water supply. The proposed Chapter 11 would read as follows:

CHAPTER 11
DEPARTMENT OF WATER SUPPLY

Section 8-11.1. Organization. There shall be a department of water supply consisting of a board of water supply, a director, a deputy director and the necessary staff.

Section 8-11.2. Functions of the Department.

1. All water systems owned and operated by the county, including all county water rights and water sources, together with all materials, supplies and equipment and all real and personal property used in connection with such water systems shall be under the control of the department.

2. The department shall have full and complete authority to manage, control and operate water systems and properties used in connection with such water systems.

3. The department shall implement the county's general plan and community plans in the administration of its affairs. There shall be a long-range plan of the department which shall be subject to the approval of the county council, as provided by law.

4. The county council shall have the authority to issue general obligation bonds for the benefit of the department and may provide capital appropriations for the department.

Section 8.11.3. Board of Water Supply. The board of water supply shall consist of nine members who shall be appointed by the mayor with the approval of the council. The planning director and the director of the department of public works shall be non-voting ex-officio members of the board.

Section 8.11.4. Powers, Duties and Functions.The board of water supply shall:

1. Appoint, evaluate and remove the director of the department of water supply and fix the director's salary.

2. Have the authority to create and abolish positions;

3. Adopt rules and regulations which shall have the force and effect of law relating to the management, control, operation, preservation and protection of the water works of the county, as well as the establishment and adjustment of rates and charges for furnishing water; such rules and regulations shall be adopted as provided under § 8.11.8 below;

4. Adopt an annual operating and capital budget;

5. Have the authority to issue revenue bonds under the name of the board of water supply;

6. Have the authority to acquire by eminent domain, purchase, lease or otherwise, and to sell, lease, or otherwise convey real property in the name of the board of water supply;

7. Perform such other duties and functions as shall be prescribed by law.

Section 8.11.5. Director of Water Supply. The director of the department of water supply shall be appointed and evaluated by the board of water supply, and may be removed by the board of water supply. The director shall have a minimum of three years of experience in an administrative capacity, either in public service or private business, or both. The director or his deputy shall be a registered engineer.

Section 8.11.6. Powers, Duties and Functions. The director shall:

1. Recommend rules and regulations for the adoption of the board;

2. Administer the affairs of the department, including the rules and regulations adopted by the board and be responsible for the day-to-day management and control of all water systems of the county;

3. Prepare and implement long range capital improvement plans which have been adopted by the board;

4. Appoint a deputy director;

5. Prepare an annual operating and capital budget for the board's review and adoption;

6. Coordinate the affairs of the department with the mayor and the county council and submit an annual report concerning the department to the mayor and the council.

7. Perform such other duties and functions as shall be prescribed by law.

Section 8.11.7. Revenues. The revenues of the department shall be kept in a separate fund and shall be such as to make the department self-supporting.

Section 8.11.8. Approval of Rules. The adoption, amendment and repeal of all rules adopted pursuant to Subsection 8.11.4(3) shall be subject to the approval of the mayor. Upon approval by the mayor the proposed rule shall be submitted to the council. Within forty-five (45) days of receipt of a proposed rule, the council may by a two-thirds (2/3) vote of its entire membership disapprove the rule by resolution; in which case the rule shall have no force or effect.

TRANSITION PROVISIONS FOR AMENDED CHAPTER 11

1. If the voters of the County of Maui approve the proposed charter amendment, the charter amendment shall take full effect on January 1, 1989.

2. Existing Laws and Conflicting Laws. All laws, ordinances, resolutions and rules enforced at the time the amended chapter 11 takes full effect, and not in conflict or inconsistent with the amended chapter 11, are hereby continued in force until repealed, amended or superceded by proper authority. All laws which are inconsistent with the amended chapter 11 shall be superceded by the provisions of the amended chapter 11 at its effective date. All laws relating to or affecting the county or its departments, officials or employees, and all county ordinances, resolutions, orders and regulations which are in force when the amended chapter 11 takes full effect are repealed to the extent that they are inconsistent with or interfere with the effective operation of the amended chapter 11.

The significant changes proposed by this commission include:

1. The appointment and supervision of the director of the Department of Water Supply by the Board of Water Supply rather than the Mayor of the County of Maui;

2. The adoption of rules and regulations relating to the management and control of the waterworks of the county, as well as the establishment and adjustment of water rates by the board of water supply, through the mayor, with a veto power over such rules in the county council (currently the Board of Water Supply has no role in the adoption of rules and regulations);

3. The adoption of annual operating and capital budgets by the Board of Water Supply rather than the council of the County of Maui.

The mandate given to this commission by the 1982 charter commission leads ultimately to the question as to who should make what decisions concerning the operations of the Department of Water Supply of the County of Maui. The matrix is not necessarily complex and can be articulated in a series of four questions:

1. Appointment and Supervision Responsibilities. Who shall appoint, supervise and evaluate the director of the Department of Water Supply?

2. Policy Setting Responsibilities. Who should have the ultimate authority to adopt rules and regulations which have the force and effect of law for the operations of the department and the setting and adjustment of water rates?

3. Adoption of Budget. Who shall have the responsibility in adopting and overseeing operating and capital budgets for the department?

4. Long Range Planning. Who shall have the responsibility to develop, implement and monitor the long range plans of the department?

There was never any question as to who should manage the department. The director of the department must have full powers of management. The real question was: what system of organization is more beneficial for a director of the department to manage the department? The question of operational and financial policy formulation (formulation of rules and regulations and adoption of the budget) was obviously the central focus of the commission's inquiry. Clearly, the

party who creates operational and financial policy should be the party who appoints and oversees the management of the department. No executive should serve more than one master.

The information before the commission became pursuasive that operational efficiency is fostered by a separation of the department from the affairs of general government. The commission believes that such a system leads to greater efficiency in decision-making, encourages continuity of management, and fosters the institution and monitoring of long range planning.

The commission has been troubled by questions of accountability. Elected officials logically advocate that the electorate should maintain the final decision with regard to accountability and responsibility. Their position is that a system providing for an independent entity, not responsible to the electorate, lacks the requisite checks and balances which are the corner stone of our government. Much of the private sector spokesmen advocated an independent system -- one step removed from the larger body of governmental affairs. This view point stresses the increased attention and specialization that an independent body can receive if not made a component of the larger web of a bureaucracy. Obviously, each view point has merit and no one system ensures efficiency or operational success.

The commission believes that a system can be developed with adequate independence and with the requisite accountability to serve the best interest of the public. The commission has attempted to maintain features of accountability that exist under the present system and, at the same time, create an independence it believes is productive for the efficiency of the system. The following matrix of the functions shows the shared level of responsibility and the resultant accountability under the commission's proposal:

		COMMISSION'S PROPOSAL	
Functions	Current System	Levels of Shared Responsibility	Singular Responsibility
Appointment and supervision of Director	Mayor		Board of Water Supply
Adoption of Rules and Regulations	Mayor - Council veto	Board of Water Supply, Mayor, Council veto	

Adoption of Budget	Mayor - Council	Board of Water Supply - Council supplemental capital appropriations, general obligation bonds
Long-Range Planning	Mayor - Council	Board of Water Supply, Mayor, Council

The commission was impressed with regard to the accountability in other Hawaii counties. Officers from other Hawaii county water systems expressed their opinions that adequate accountability was provided through the appointment and removal process of board members, the power of pursuasion of the mayors and council members, and the correlation between water operations and infrastructure development and each of the county's general plans. The commission found that accountability and responsibility were not issues of concern in the jurisdictions contacted by the commission.

The recommendations of this commission provide a substantial degree of accountability as follows:

1. The department must implement the county's general plan and community plans in the administration of its affairs. It may not proceed on its own agenda, while ignoring the county's land use plans for water source development and distribution.

2. The department must prepare a long range plan which must be approved by the county council, as provided in the state water code.

3. The adoption of rules governing the operations of the department, as well as those setting rates and charges for furnishing water, are subject to the approval of the mayor. The county council has the opportunity to veto such rules within a forty-five (45) day period from the presentation of the rules to the council.

4. The water director must coordinate the affairs of the department with the mayor and the council and submit an annual report concerning the department to the mayor and the council. Such coordination would be especially critical in determining land use policies by the administration and the council.

The commission believes that these features provide the necessary accountability and responsibility and would prevent a "government outside of government," as some have feared.

There is no question that the continuity of management and the quality of the person who will take the position of water director are primary factors in providing an efficient department. The commission has concluded that it is more likely that a semi-autonomous department would attract a greater pool of qualified candidates from both the private and public employment sectors for the position of director. It appeared clear to the commission that a limited appointment (co-terminus with the mayor) would not be an advantage in attracting candidates who seek professional careers in water service administration. Also, because of the importance of continuity of management and its influence in long term planning and the implementation of such plans, it appeared significant to the commission that a system where an executive position would transcend one administration to another would best serve these objectives. The commission was impressed that in other Hawaii counties there have been greater longevity in their executive positions than within the County of Maui. Kazu Hayashida is the fifth manager in the past 58 years of the Honolulu Board of Water Supply. William Sewake is the fourth manager in the past 37 years of the Hawaii County Water Department, and Roy Sato is the 2nd manager in the past 33 years of the Kauai Board of Water Supply. The evidence is impressive that the semi-autonomous nature of the entity results in greater continuity of management and enhances the opportunity for long term professional careers in the field.

It is worthy to note that the commission appointed a special committee, consisting of Dr. Milton Howell and Pancho Alcon, to travel to other counties (Honolulu, Kauai and Hawaii) to determine the attitudes of the mayors and council chairmen concerning a semi-autonomous management of their water systems. Mayor Fasi, Mayor Kunimura and Mayor Carpenter, as well as Council Chairmen Morgado, Kouchi, and Yamashiro, unanimously endorsed the semi-autonomous system of management and were not in favor of any changes to the existing organizational structure concerning the water departments for their counties. It is interesting to note that prior to becoming the chief executives of their counties, Mayors Kunimura and Carpenter had maintained the position that the water department should become a part of county administration. After taking the position as chief executive of their respective counties, both changed their views and now strongly support the semi-autonomous system.

RECOMMENDATIONS

The Special Charter Commission clearly believes that a semi-autonomous water department would best serve the County of Maui over a lōng period of time. Actual performance at any point in time would depend on the situation at hand, as well as the individuals involved. The commission did not take lightly testimony supporting the present system, especially testimony relating to accountability to the general public. Democracy is the foundation of American government; however, this does not mean that every individual segment of government is best served by direct management of elected officials.

The commission was concerned by the very close proximity of the next county-wide charter commission which will be appointed in 1991. That commission's work will be performed primarily in 1991 with its ballot measure voted on in the 1992 elections. Whatever is then decided would take effect on January 1, 1993. The commission's concerns deal with the short time between the 1988 ballot measure and the time the 1991 commission initiates its deliberations. Only two and one-half years will have passed between new measure taking effect in 1989, if any, and the start of the new commission's work; clearly an inadequate amount of time to judge the effectiveness of changes proposed by this commission.

There was considerable discussion on whether or not this Special Charter Commission should indeed recommend changes at this time, in light of the close proximaity of the next charter commission.

If the measure of the Special Charter Commission is accepted by the voters and takes effect in 1989, the commission strongly recommends that the 1991 commission allow its work to stand. The department has undergone many organizational changes in its history and has not been able to stabilize and operate on a long-term organizational basis for the benefit of the county. The commission did not want to participate in the lack of any stability, yet the commission felt it must recommend those changes which would best serve the people of the County of Maui in the long run.

The Special Charter Commission believes that the 1982 charter commission was justified in its concern that "it might indeed be in error in proposing a shift from a stronger water board to a weak one." The Special Charter Commission recommends a change of the present departmental system to a semi-autonomous system with specific features to ensure sufficient public accountability. We have concluded that this is in the best interest of the people of the County of Maui.

Respectfully submitted,

GARRET S. ABE
Dated:

Domingo Alboro Sr.
DOMINGO ALBORO, SR.
Dated: 2/18/88

Irene Bodden
IRENE BODDEN
Dated: Feb. 18, 1988

J. G. Franco
JOSEPH G. FRANCO JR.
Dated: Feb. 19. 1988.

John Hirashima
JOHN HIRASHIMA
Dated: 2/19/88

Milton M. Howell M.D.
MILTON M. HOWELL, M.D.
Dated: 12 Feb. 1988

Shinso Kato
SHINSO KATO
Dated: Feb. 17, 1988

Lokelani Lindsey
LOKELANI LINDSEY
Dated: 2-19-88

L. Douglas MacCluer
L. DOUGLAS MacCLUER
Dated: Feb 18, 1988

Shigeto Murayama
SHIGETO MURAYAMA
Dated: 17 FEB 88

Pancho Alcon

PANCHO ALCON
Dated: 2-17-77

Special Charter Commission Report
0036j

91-33

Section 8-5.4 Board of Variances and Appeals. The board of variances and appeals shall consist of nine members appointed by the mayor with the approval of the council.

In accordance with such principles, conditions and procedures prescribed by the council, the board of variances and appeals shall:

1. Hear and determine applications for variances from the strict application of [any general plan,] the provisions contained within any zoning, subdivision or [building ordinances] sign ordinance. The board shall hold a public hearing prior to ruling on a variance application and shall issue findings of fact and conclusions of law on decisions granting or denying variance applications.

2. Hear and determine appeals alleging error from any person aggrieved by a decision or order of any department charged with the enforcement of zoning, subdivision and building ordinances; provided, that the council may by ordinance confer to another county agency the authority to hear and determine appeals from the decisions of the building official in the administration of the county of Maui building code, plumbing code, electrical code and housing code, and from any order made by the county fire chief in the administration of applicable state law and the county of Maui fire code, and the director of water supply in the administration of the rules and regulations of the department of water supply, relating to matters involving any denial of the use of new or alternate materials, types of construction, equipment, devices or appliances. (Amended 1988)

3. Hear and determine all other matters which the board may be required to pass on pursuant to ordinances.

4. Adopt rules of procedure for the conduct of the board's business.

91-34

COMMITTEE A
CHARTER COMMISSION
MEETING MINUTES
NOVEMBER 2, 1991
COUNCIL COMMITTEE ROOM

Present
James Cockett
Dolores Fabrao
Robert Nakasone (Charter Commission Chair)
Allan Sparks (Committee Chair)
Susan Nakano-Ruidas (Staff)

Guest
David DeLeon

I. CALL TO ORDER
Committee Chair Sparks called the meeting to order at 9:15 a.m.

II. PUBLIC TESTIMONY
None.

III. OVERVIEW/DISCUSSION OF COMMUNICATION 91-0 - ARTICLES I - VII
Committee Chair Sparks noted that this meeting was to be a "study session" to come up with ideas and options for the first seven Articles.

A. Articles I and II
No changes anticipated.

B. Article III

1. Section 3-1 - Number of County Council Members
Election At-Large or By District seems to be the biggest issue. According to local government comparative studies done on the mainland, district representation works where the population distribution is pretty even. However, none of the wisdom of these studies prove very helpful with geographically unique communities, which may prove hard to take care of under the one-man, one-vote rule.

The studies did indicate that there is not a big distinction in actual practice between the AT LARGE and DISTRICT representation. A city/county-wide view is maintained by representatives no matter which election system is used.

Advantages and disadvantages of the two systems are:

a. At-Large -

ADVANTAGES	DISADVANTAGES
-County-wide view	-Campaign costly
-Residency Requirement	
-Offers citizens more people to go to with their problems	
-Larger pool of candidates	

b. District -

ADVANTAGES	DISADVANTAGES
-Elections are cheaper and easier to run	-Possibly narrower view
-Increases the variety of ethnic groups	-Problem of splitting into equal districts
-More democracy vs less efficiency	-More likely to provide more individual services to constituents vs whole county
-Dollars taken to run MAY be less influential	-May give money interest opportunity to buy election

B. Article III (Continued)

c. Mixed District/At-Large System

A majority of the Council would be elected by district with the rest elected At-Large. Divisions could be any numbers feasible:

8 District/1 At-Large
7 District/2 At-Large
6 District/3 At-Large
5 District/4 At-Large

A major problem with this system would be the "fairness" to all candidates. Although candidates choose the race they run in, it would be more costly to run At-Large than to run by District.

d. Council City Manager Concept

Advantages to this system are that the City Manager/ Chief Executive Officer is hired by the Council; the Mayor would be the 9th decision-making member of the Council; there would be a professional administrator to run the County; and the potential for infighting/squabbling between the Council and Administration would be eliminated.

e. RECAP

There are no major problems with the system as it exists now except that there is no need for a no-residency requirement seat since all Council is currently elected At-Large. Also, given the increase in population in other parts of the island, there could be one less seat in Central district. By maintaining three seats in Central, it discourages direct "record comparison" competition, and brings up the question of community representation (ie. Wailuku/Kahului).

e. RECAP (Continued)
It was suggested that the following options be prepared and presented at public informational meetings:
1. Keep the At-Large System we have now but adjust it so there is not a no-residency seat and all candidates must run with residency requirement.
2. Mixed Option – District/At-Large (Committee Chair Sparks will work out feasible numbers).
3. True Districts (Committee Chair Sparks will work up maps with possible divisions).

NOTE: Along with the explanations of each type of system, Committee Chair Sparks is to develop pros and cons of each.

2. Section 3-2 – Terms of Office
Committee may want to look into going from 2-year term to 4-year term, or into staggered terms.

3. All committee members were asked to think about the various options available and to be ready to brainstorm at the next meeting.

IV. OTHER BUSINESS
None.

V. NEXT MEETING DATE
The next meeting of this committee will be on November 14, 1991 at 2:00 p.m. in the Council Committee Room.

VI. ADJOURNMENT
There being no further business, the meeting was adjourned at 11:52 a.m.

APPROVED:

Allan Sparks, Comm. Chair 11/14/91
Allan Sparks, Committee Chair Date

91-35

COMMITTEE A
CHARTER COMMISSION
MEETING MINUTES
NOVEMBER 14, 1991
COUNCIL COMMITTEE ROOM

Present
James Cockett
Dolores Fabrao
Annette Mondoy
Allan Sparks (Committee Chair)
Sue Nakano-Ruidas (Staff)

I. CALL TO ORDER

Committee Chair Sparks called the meeting to order at 2:08 p.m.

II. APPROVAL OF MINUTES

The minutes of the November 2 Committee meeting were approved with revisions and the provision that they be retyped before submission.

III. PUBLIC TESTIMONY

None.

IV. OVERVIEW/DISCUSSION

A. COMMUNICATION 91-0, ARTICLE 3

1. District Scheme - using census data, the numbers worked out to pretty reasonable districts. Of course, Lanai and Molokai do not fit this district scheme at all. It may be that councilmen could be too narrowly focused and that there is only one person to go to if problems exist. Population per councilman would be around 14,300 in this scheme, and it would necessitate combining Lanai and Molokai with portions of Central Maui (areas closer in characteristic with them).

1. District Scheme (Continued)
Pool of candidates for Lanai and Molokai would expand if combined with another area of Maui, and the weight each island carries would be increased in direct proportion to the percentage of their population to the14,300+. One problem might be the "attractiveness" of these districts to potential candidates. (With our present system, all nine council members (in theory) should be responding to Lanai and Molokai right now.)

NOTE: Preference of Lanai member is to leave Lanai the way it is now. Preference of Molokai member is to link up with a part of Maui.

To date, precinct information has not been received from Clerk's office, but Committee Chair Sparks will look at those numbers as well when "assigning districts."

2. Mixed District/At-Large - Could be the answer with either 7/2 or 6/3 split, although some of the districts could be even more "weird" that the straight district scheme.

A major problem with this system would be the "fairness" to all candidates. Although candidates choose the race they run in, it would be more costly to run At-Large than to run by District.

3. Council City Manager Concept - Although the City Manager should be an unbiased "non-political" person, one concern with this system is that the CEO/manager is accountable directly to the Council, opening the possiblity to "faction control." And, there are less checks and balances with this system.

3. Council City Manager Concept (Continued)
Another disadvantage to this system would be the major need to re-educate the voters–a BIG educational challenge.

4. RECAP - Current system we have now is not "that bad." There may be something we can do about conflicts between mayor and council, which seem to be the result of an over check and balance system.

It was agreed by all committee members that it would not recommend "leaping" into the City Manager concept.

All three of the options above will be worked up on maps and explained at the Lanai meeting on December 2.

B. COMMUNICATION 91-0, ARTICLE 3-2
It was agreed to recommend the term of council members be changed to 4 years. It is not only costly to run elections every two years, but the second year of the term is generally not as productive due to elections coming up.

Discussion on limiting number of terms of office for council members resulted in the following suggestions:

a. two 4-year terms (matching the mayor's)
b. three 4-year terms
c. no limit on terms (let the voter decide)

NOTE: Big Island changed their terms of office for council to two years because it was tied to a combined package which they thought would not pass.

C. COMMUNICATION 91-0, ARTICLE 7
The committee agreed that it supports the "strong Mayor" concept and favors giving the Mayor the responsibility to put the team together, and let them run the Departments.

V. OTHER BUSINESS
None.

VI. NEXT MEETING DATE
The next meeting of this committee will be on November 21, 1991 at 2:00 p.m. in the Council Committee Room.

VII. ADJOURNMENT
There being no further business, the meeting was adjourned at 3:53 p.m.

APPROVED:

Allan Sparks, Chairman 11/21/91
Allan Sparks, Committee Chair Date

PAUL MANCINI
SUE RUIDAS
11.21.91

LINDA CROCKETT LINGLE
Mayor

GUY A. HAYWOOD
Corporation Counsel

91-36

DEPARTMENT OF THE CORPORATION COUNSEL

COUNTY OF MAUI
200 SOUTH HIGH STREET
WAILUKU, MAUI, HAWAII 96793
TELEPHONE: (808) 243-7740

RECEIVED
NOV 20 1991
WRIGHT & KIRSCHBRAUN

November 18, 1991

Debra K. Wright, Esq.
6 Central Avenue
Wailuku, HI 96793

Dear Ms. Wright:

RE: CORPORATION COUNSEL OPINIONS

Per your request, enclosed are Corporation Counsel Opinions ("Opinions").

Specifically, you requested Opinions issued by this office in the last five years pertaining to the Charter Commission. I reviewed the files up to the 70's, and these are the only Opinions that refer to the Charter Commission.

If you have any questions, feel free to contact me.

Sincerely,

MAILE A. LU'UWAI
Deputy Corporation Counsel

MAL:epg
b:\memos\opinions

HANNIBAL TAVARES
Mayor

H. RODGER BETTS
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
County of Maui
WAILUKU, MAUI, HAWAII 96793
TELEPHONE 244-7740

August 3, 1984

Honorable Abraham Aiona, Chairman
Special Committee on Charter Review
County Council
County of Maui
Wailuku, Hawaii 96793

SUBJECT: DISTRICT REPRESENTATION

Dear Mr. Aiona:

This is in response to your request for an answer to the following hypothetical question regarding makeup and election to the Maui County Council:

> "Whether, under the Charter amendments proposed by the Charter Reapportionment Commission, representation from a district is denied when no candidate from the district runs for a council seat?"

Our answer is in the affirmative, e.g., the geographical district concerned would be without an elected councilman representing the geographical area concerned.

While not expressly provided for in the said commission's proposed amendment to Sec 3-1 of the Charter, such a result would be consistent with the intent of the commission in expressly providing that should "no candidate possess the necessary requirements of residence and domicile in any one of the geographical areas" then that district shall be "unrepresented" by a specified councilman.

The underlying philosophy is apparent that unless the candidate is very clearly connected with the geographical area by at least a year's residence/domicile, the purpose for having district representation is not achieved. In such event, the members elected at large will be relied upon to see to the needs of that geographical

district. Putting it another way: Under the commission's scheme, a council candidate who was domiciled in a particular district for 364 days would still not be eligible to be designated as the representative of such district*--accordingly, if no one files for the district seat, there is even less reason to give the people of that district a specifically designated representative, assuming the commission's philosophical approach is applied.

Very truly yours,

DEPARTMENT OF THE
CORPORATION COUNSEL

FRED W. ROHLFING
Deputy Corporation Counsel

FWR:cm

APPROVED:

H. RODGER BETTS
Corporation Counsel

* Note, however, that under the commission's scheme while not specifically designated as the representative of a geographical district a successful at large candidate who is, in fact a resident in such a district, though for less than a year, is in effect a de-facto representative of the area.

HANNIBAL TAVARES
Mayor

PAUL R. MANCINI
Corporation Counsel

DEPARTMENT OF THE CORPORATION COUNSEL
COUNTY OF MAUI
WAILUKU, MAUI, HAWAII 96793
TELEPHONE 244-7740

July 14, 1980

Mr. Goro Hokama, Councilman
Council of the County of Maui
200 South High Street
Wailuku, Maui, Hawaii 96793

Dear Councilman Hokama:

This is in response to your request for an opinion as to the legality of the seventeen amendments proposed to be made to the Charter of the County of Maui.

In reviewing the proposed amendments, we have identified three areas of particular concern: (1) the durational residency requirement for elected officials; (2) certain proposed changes respecting the office of the managing director; and (3) the amendment which would require that rules and regulations promulgated by County agencies be enacted as ordinances.

Durational Residency Requirements

The proposed amendments to Charter Sections 3.3 and 7.2 would establish ninety-day durational residency requirements for persons seeking election to the offices of councilman and mayor.

Although the Supreme Court of Hawaii struck down a durational residency requirement for persons seeking public employment generally in York v. State, 53 H. 557, 498 P.2d 644 (1972), it upheld a three-year durational residency requirement for election to the State House of Representatives

in the case of Hayes v. Gill, 52 H. 251 (1970), holding that such a residency requirement had a rational basis. The Court also indicated that, in its view, the requirement would pass the stricter "compelling interest" test.

Based upon the foregoing, we are of the opinion that these proposed amendments to the Charter would pass muster and be held valid. (See Opinion No. 80-2 which is attached.)

Amendments Respecting the Managing Director

One of these amendments would have the effect of requiring Council approval of the mayor's appointment of the managing director. This particular aspect of the amendment, in our view, merely raises policy questions and would not be violative of law.

However, other portions of the proposed amendment to the section respecting the managing director do pose legal problems. The language which expressly exempts the managing director from civil service is deleted; the position of managing director is placed in the office of the mayor.

The effect of placing the position in the office of the mayor is to continue the exemption of the position from civil service, but the exemption of the managing director from civil service now becomes a function of Section 76-77(1), HRS, which excludes such a position, but states:

> "(1) Positions in the office of the mayor, but the positions shall be included in the position classification plan."

The position classification plan is the logical arrangement by civil service authorities of classes of positions. Salary ranges are assigned to positions in the plan and they are compensated accordingly.

While it is a question of fact which I cannot answer at this time as to how the managing director's position would

be classified and what salary range would be assigned to it and whether such a position would fit at all within the existing position plan, it is clear that the function of setting the amount of salary of the managing director would no longer be a function of the Council but would be a function of position compensation pursuant to Chapter 77, HRS. This would have the legal effect of rendering that portion of proposed Section 6.5 of the Charter respecting the managing director which states, "The salary of the managing director shall be established by ordinance," illegal.

While the funding of the position would be by ordinance, the fixing of the amount of compensation to be paid the position would be done as part of the establishment of the position compensation plan under Chapter 77, HRS. However, the approval of the establishment of a supergrade for the position could be by ordinance. Section 77-13, HRS.

The Amendments Which Would Require Rules and Regulations to be Enacted as Ordinances

This amendment appears in the proposed amendment to Charter Section 13-10.

The proposal in relevant part, states:

> "All rules and regulations having the force and effect of law . . . shall be approved by the mayor and enacted by ordinance prior to going into effect." (Emphasis added.)

The Charter of Maui County which became effective on January 2, 1969, provided, in relevant part at Section 13-10:

> "All rules and regulations having the force and effect of law adopted by any board, commission or administrative head of a department must first be approved by the council and the mayor prior to going into effect . . . ."

On February 5, 1976, Attorney Paul Devens advised the then existing Charter Commission as follows:

> "It does not appear that the Administrative Procedure Act in any way interferes with the county's executive, legislative and administrative structure and organization and therefore is not violative of the constitutional provision governing county charters. On the other hand, it does set forth a scheme governing administrative procedures with such completeness so as to preempt this area of concern, leaving nothing to the counties to act on. In short, the APA is a statute of general application to both state and county agencies and does not interfere with the protection given to county charters with respect to their administrative, executive and legislative structure and organization." (Emphasis added.)

Apparently, as a result of Mr. Deven's advice, the requirement for Council approval of rules and regulations was omitted from the language of the present Charter.

In the proposed amendment, we again find the requirement, although in the proposal, Council approval would take the effect of enactment of the rules by ordinance.

There are serious legal problems with this amendment.

Under Chapter 91, HRS, agency rules become effective when they are approved by the mayor and filed with the Clerk. The proposed amendment would add to the above requirement, that prior to becoming effective, such rules and regulations must also be enacted as ordinances by the Council. This is an inconsistency which would invalidate the proposed Charter amendment if the Administrative Procedure Act is regarded as dealing with a matter of statewide concern.

Although counties in Hawaii have been given the power to adopt charters delineating therein the structure of county government and enumerating the powers and functions

of each county agency, the Legislature has expressly reserved under Section 50-15, HRS, the power to enact all laws of general application throughout the state on matters of statewide concern and interest. HGEA v. County of Maui, 59 H. 65 (1978).

The issue to be resolved in the instant inquiry is whether the Hawaii Administrative Procedure Act is a law on a matter of statewide concern and interest.

Clearly it is.

At Vol. I, Proceedings of the Constitutional Convention of Hawaii of 1968, at page 229, which was cited at length in the HGEA decision and relied upon by the Court in reaching its result, it is made unmistakeably clear that the Administrative Procedure Act was a law which could not be eroded by Charter. The report states, in relevant part:

> "In prescribing the area within which a charter shall be of superior authority to a statute the proposal is similar to the model provision recommended by The American Municipal Association. This model provision was adopted by South Dakota in 1962. It was the basis of Proposal No. 241, introduced at the request of the Hawaii State Association of Counties.
>
> "Your Committee omitted from the draft presented by Proposal 241 the words 'personnel' and 'procedure.' The word 'personnel' was omitted because your Committee was convinced that the legislature should not be deprived of the power to enact, and maintain in effect, laws such as Act 188, S.L.H. 1961. Under the committee proposal, no charter provision could supersede Act 188, S.L.H. 1961, unless the legislature so provided. Moreover, any delegation by the legislature of power as to personnel matters will not be irrevocable.
>
> "The word 'procedure' was omitted in order to preserve the authority of statutes such as the Administrative Procedure Act." (Emphasis added.)

Based upon the foregoing, we are constrained to advise that the proposed Charter amendment would be in conflict with the Administrative Procedure Act and would be illegal.

The proper approach to have been taken in attempting to gain Council control over certain rule-making functions of certain agencies would have been (to the extent it is within County power to do so) to withhold totally the rule-making authority from these agencies. However, the approach taken, an effort to modify the procedure by which rules become effective, runs afoul of the preemptive procedures established in the Administrative Procedure Act.

In the foregoing analysis, we have taken the proposed amendment at face value as applying to rules and regulations promulgated by agencies. We are, however, aware that, because of a latent inconsistency in the wording of the amendment, it arguably achieves the rather startling effect of abolishing all rule-making functions in the County of Maui. This is so because rules which are adopted as ordinances are no longer rules; they are ordinances. See Sections 91-1(4), HRS, defining "rule" and Section 91-1, HRS, defining "agency."

This reading, however, does violence to the apparent intent of the amendment and runs into the further problem that there are subjects with regard to which the Charter simply cannot abolish the rule-making function. The area of personnel rules and regulations is the primary example, of course, because that matter was litigated in the HGEA case. Other suspect, but as yet unlitigated areas, include the rules made pursuant to Section 437-6, HRS, respecting the motor vehicle industry, Section 287-2, HRS, respecting motor vehicle safety, and Section 286-103, HRS, concerning driver licensing.

The concern here is not just that the rules may deal with matters of statewide concern; there is also concern that statutes on matters of statewide concern confer the rule-making authority on an administrative agency or officer not on the County's legislative body.

We have not found problems with the other proposed amendments not discussed herein. However, if there are other areas of concern to you which I have neglected to consider to your satisfaction, please let me know and we will consider them further.

Most sincerely,

DEPARTMENT OF THE
CORPORATION COUNSEL

Sonia Faust

SONIA FAUST
Deputy Corporation Counsel

SF:jkm

Enclosure

APPROVED:

Paul R. Mancini
Corporation Counsel
County of Maui

Sarah E. Sykes
November 30, 1991

91-31

Maui County Charter Commission
ATTN: Mr. Robert Nakasone
P.O. Box 307
Kahului, Maui
Hawai'i 96732

Dear Mr. Nakasone and Members of the Commission,

I read with great interest recent newspaper articles about your review of Maui County's Charter. While there are certainly many innovative suggestions being considered, I should like to offer an old idea.

Sub-units of government within a county are not uncommon on the Mainland and in other countries. Townships, in particular, have much to offer in terms of solving some of the problems Moloka'i encounters. Township units could also resolve some of the problems inherent in unique lifestyles island-to-island within Maui County, and even on the Island of Maui alone.

Hana, Lahaina, Lanai, Moloka'i each as their own township within the county could be eligible for separate and additional federal, state and private funds, primarily because of their unique make-up. This sort of solution could reduce the revenue distribution burden for county-wide programs, absorbing some of the CIP costs as well as training and manpower development costs.

Maui County faces a tremendous financial burden in the next few years as remedial infra-structure needs are met. Establishing some of the poorest areas, the most needy areas, and the most politically sensitive areas as townships in their own right could greatly reduce that burden for the County as a whole.

Much information about townships has been researched and applications for Moloka'i already explored. If you have any interest in pursuing this solution, please let me know, and I'll help if I can.

Sorry this is a bit late in the process, but we live half the year in Wailau Valley on Moloka'i's north shore: no phone, no paper, no mail, etc. This is my first opportunity to comment. Thanks for your time.

Sincerely,

Sarah E. Sykes

P.O. Box 370 Kaunakakai, Hawaii 96748 808-553-3831

Sarah E. Sykes
November 30, 1991

Maui County Charter Commission
ATTN: Mr. Robert Nakasone
P.O. Box 307
Kahului, Maui
Hawai'i 96732

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P.O. Box 370 Kaunakakai, Hawaii 96748 808-553-3831

Sarah E. Sykes
December 17, 1991

Maui County Charter Commission
P.O. Box 307
Kahului, Maui
Hawai'i 96732

Dear Mr. Nakasone and Members of the Commission,

Thank you so very much for taking the time to visit Moloka'i personally to listen well to even the very few people who came to comment on the Charter.

As I said that evening, it is possible to grant some autonomy, and therefore some responsibility, to unique areas within Maui County through changes in the Charter creating townships. . . or alternatively, creating real, functional neighborhood boards. The best option, however, for increasing funding sources, is with townships.

The State of Hawai'i-Department of Business and Economic Development did do a study within the last two years on greater self-governance possibilities for Moloka'i. I've been trying to track down their written report for the last two weeks. I'm still working on it, but had wanted to include it with this initial information. If it exists, I will get it to you.

Townships can start with few functions, and grow as necessary. Since they are served by an elected volunteer board, there are few initial costs. They are generally geographically delineated. All of this serves Moloka'i, Hana, Lanai, Kihei, etc. quite well. The enclosed information should be of some help in examining options.

Separately, may I again firmly state that I oppose at-large districts without residency requirements. In fact, as it works now, however poorly at times, it works as well as it can considering the unique problems of equalizing representation among three islands as equitably as practicable.

Finally, it really would be great to Sky-Bridge public hearings and council sessions. Truly interactive communication is the key to the greatest community participation.

Thanks again for coming to Moloka'i!

Sarah E. Sykes

P.O. Box 370 Kaunakakai, Hawaii 96748 808 553 3831