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Donald A. Drisdell  
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**CITY OF CAMBRIDGE**

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Vali Buland

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Michael C. Costello  
Assistant City Solicitor

May 8, 1998

Robert W. Healy  
City Manager  
City Hall  
Cambridge, MA 02139

Re: *Charter Amendments, City Council Order #62, dated January 12, 1998  
and City Council Order #57, dated April 27, 1998*

Dear Mr. Healy:

I am writing to supplement my opinion dated April 30, 1998 regarding the above-referenced City Council orders.

In my April 30, 1998 opinion, I noted at footnote 1 on page 7 that the Home Rule Amendment to the state constitution provides a second method for amending a charter at the local level, in addition to the charter commission method described in the body of the earlier opinion. I indicated in the footnote that it did not appear that a charter amendment that relates to the method of election of the mayor could be accomplished by that method. Massachusetts Constitutional Amendment Article 2, §4 provides that:

The legislative body of a city...may, by a two-thirds vote, propose amendments to the charter of the city...; provided, that (1) amendments of a city charter may be proposed only with the concurrence of the mayor in every city that has a mayor, and (2) any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager...shall be made only by the procedure of charter revision set forth in section three (charter commission procedure).

The Home Rule Procedures Act, M.G.L. c.43B, §10, an act passed by the legislature to implement the Home Rule Amendment to the constitution, makes reference to the same limitation on this second local method of charter amendment as regards the

method of election of a mayor. Unlike the constitutional provision, however, the Home Rule Procedures Act provides further in M.G.L. c. 43B, §10 that:

In this section, the word "mayor" shall mean an officer elected by the voters as the chief executive officer of a city or an officer lawfully acting as such....

While there may be some question as to the authority of the legislature to add this language to the act when it does not appear in the constitutional amendment, it is clear that the legislature intended that the method be available for such an amendment when the mayor is not the chief executive officer. There are no judicial decisions addressing this provision of the act. Accordingly, I am providing the following description of this additional local process for charter amendment, which, at least according to the statute, appears to be available for the types of charter amendments proposed in the council orders.

Pursuant to this second local amendment process, the City Council may propose a charter amendment by "...a vote, taken by yeas and nays, of two thirds of the members of a city council present and voting thereon...." M.G.L. c. 43B, §10(a). This section provides further that:

In addition to any amendment proposed by the city council, the city council...shall consider and vote upon any suggested charter amendment which it would have the power to propose under subsection (a) and which is not substantially the same as an amendment already considered and voted upon by it within the last twelve months, and which is suggested to it in a written request signed by the mayor or city manager or any member of the city council in a city..., or is suggested to it by a petition in substantially the form set forth in section fifteen, signed and completed in accordance with the instructions contained therein by at least ten registered voters in the case of a town and by as many registered voters, in the case of a city, as would be required to nominate a charter commission member in such city under section five, which request or petition shall be filed with the city or town clerk.

Section five requires one hundred signatures from registered voters in a city having between 50,000 and 100,000 inhabitants. M.G.L. c. 43B, §5.

No later than three months after the filing of such a petition with the city clerk, the City Council must order a public hearing to be held before the Council or a committee selected and established by the Council. At the public hearing, any number of suggested changes may be considered at the same hearing. M.G.L. c. 43B, §10(b). The hearing must be no later than four months after the filing of the petition with the City Clerk, and at least seven days notice of the hearing must be given in newspaper of general

circulation. *Id.* Final action must be taken by the Council no later than six months after the filing of the petition. *Id.*

Whenever an order proposing a charter change to the voters is approved by the City Council, a copy of the proposed amendment must be submitted to the Attorney General and to the Department of Community Affairs, and the order does not take effect until four weeks after the date of submission. M.G.L. c. 43B, §10(c). If the Attorney General does not report any conflict between the proposed amendment and the constitution or laws of the commonwealth, then the order takes effect four weeks after submission. *Id.* The proposed charter amendment must be submitted to the voters at the first regular election held at least two months after the order proposing the amendment becomes effective. M.G.L. c. 43B, §11.

In conclusion, there are some restrictions on the availability of this process in the constitutional amendment and in the statute implementing the amendment article. Generally, this process may not be used to:

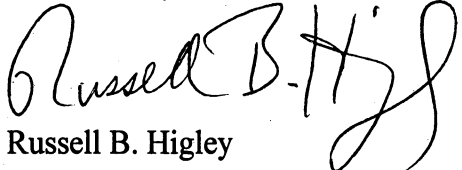
...propose any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager, or the board of selectmen or town manager.

As noted above, unlike the constitutional amendment, the statute defines "mayor" in this context to mean only an officer elected by the voters as the chief executive officer. Since the mayor in a Plan E Charter is not elected in such a manner to serve as chief executive, it would appear that this method of charter amendment is available to accomplish the changes proposed in the referenced council orders.

Therefore, the changes proposed in the referenced council orders may be accomplished by the following methods:

1. Charter commission.
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*Agenda # 8 additional  
info submitted  
at nostrum  
5/11/98@  
6:25pm.*

May 8, 1998

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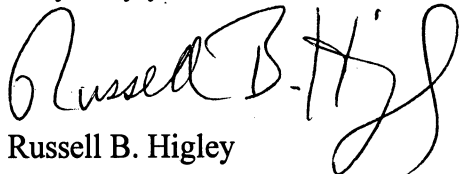
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*Addendum  
to Agenda #8  
5/11/98*



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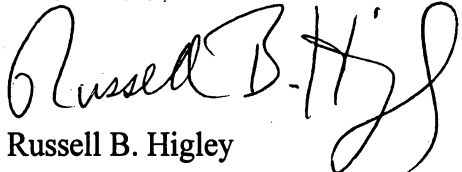
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April 30, 1998

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City Manager  
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Re: ***Charter Amendments, City Council Order #62, dated January 12, 1998  
and City Council Order #57, dated April 27, 1998***

Dear Mr. Healy:

By Order #62 of January 12, 1998, the City Council requested a report on several questions relating to possible changes in the method of election and responsibilities of the mayor in the current City charter.

The order reads as follows:

ORDERED: That the City Manager be and hereby is requested to confer with the Law Department to report back to the City Council as follows:

1. Description of the process for charter change for popular election of the Mayor by the residents of the City; and
2. Report as to what changes would be necessary to provide that the Mayor does not serve as a member of the School Committee; and
3. Legal opinion and analysis as to whether the following provisions relating to the election of the Mayor could be enacted by the City Council as an amendment to the City Council rules or the Municipal Ordinance:
  - a) The Mayor of the City of Cambridge shall be chosen at the first regular meeting of the council in January.

b) In order to be a candidate for Mayor, a city-councilor-elect must be nominated by at least one other councilor. The nomination petition shall be filed with the clerk on or before November 30<sup>th</sup> following the election of the city council members. In order to qualify as a candidate for mayor, a councilor-elect must have served at least two full terms on the city council and have reached quota on the first ballot of the general election.

c) On or before December 15<sup>th</sup> following the general election, the clerk shall preside over a special meeting called for the sole purpose of hearing candidate declarations and/or nominating speeches. Each candidate will be allowed a total of 20 minutes to outline his or her reasons for running for Mayor. Following the presentation, city councilors-elect will be allowed to ask questions of the candidates for an additional ten minutes each. Candidates will then (sic) be allowed a three minute closing summary.

d) If no candidate is elected at the first January meeting, then the Mayor shall automatically be the candidate who received the highest number of votes in the general election.

#### Discussion

The proposed changes would alter the current method of election and the duties and responsibilities of the mayor. On November 5, 1940, the voters of Cambridge voted to adopt Plan E in place of Plan B. *Moore v. Election Commissioners of Cambridge*, 309 Mass. 303, 306-307 (1941). The Plan E Charter is set forth in G.L. c. 43, §§93-116, and was added to c. 43 by St. 1938, c. 378, §15.

The Plan E Charter explicitly provides for the method of election of the mayor in c. 43, §97, which provides in relevant part that:

The city council, elected as aforesaid, shall meet at ten o'clock in the forenoon of the first Monday of January following the regular municipal election, and the members of the city council shall severally make oath, before the city clerk or a justice of the peace, to perform faithfully the duties of their respective offices, except that any member-elect not present shall so make oath at the first regular meeting of the city council thereafter which he attends. For the purpose of organization, the city clerk shall be the temporary chairman until the mayor or vice-chairman has qualified. Thereupon the city council shall, by a majority vote of all the members

elected, elect a mayor and a vice-chairman from its own members and the persons elected as such shall likewise make oath to perform faithfully the duties of the respective offices to which they are so elected, and they may so make oath at the same meeting at which they are so elected. The organization of the city council shall take place as aforesaid, notwithstanding the absence, death, refusal to serve or non-election of one or more of the members; provided that a majority of all the members elected to the city council are present and have qualified. If the office of mayor or vice-chairman becomes vacant, the city council shall in like manner elect one of its members to fill such office for the unexpired term; provided, that no such vacancy shall be filled so long as there is any vacancy in the council.

The Plan E Charter likewise explicitly provides that the mayor shall serve as the chair of the School Committee in c. 43, §100, which states in relevant part:

[The mayor] shall be chairman of the city council and chairman of the school committee. He shall have no power to veto but shall have the same powers as any other member of either such body to vote upon all measures coming before it....During the absence or disability of the mayor, or during the time such office is vacant, his duties shall be performed by the vice-chairman. In case, at any time, there shall be neither a mayor or a vice-chairman, the member of the council senior in length of service, or, if more than one have so served, then the member senior both in age and length of service shall perform the duties of mayor until a new mayor has qualified.

For convenience, the three questions of the Council Order are answered in reverse order.

Question 3 of the Council Order asks whether the proposed changes relating to the method of election of the mayor could be enacted by the City Council as an amendment to the City Council rules or by ordinance. The proposed changes significantly alter the eligibility of council members to qualify for the office of mayor and are plainly inconsistent with the method for election of the mayor currently contained in the Plan E Charter. Under the current Charter, the only pre-condition to election as mayor is that one must be duly elected a member of the City Council and properly sworn in. The proposed changes would

impose the additional pre-conditions of nomination by a fellow councilor-elect, prior service as a city councilor for at least two full terms, attainment of quota on the first ballot of the general election, and declaration of candidacy for mayor along with attendance at a special meeting held prior to swearing in as a city councilor. The proposed changes would also alter the role of the City Clerk in the election of the mayor by requiring the Clerk to preside at a meeting of the councilors-elect to be held on December 15<sup>th</sup> after a general election, a function not contemplated in the current charter.

The proposed changes would provide further for the “automatic” election as mayor of the candidate who received the highest number of votes in the general election in the event that no candidate is elected mayor by council vote at the first meeting in January. Under the current charter, at any time that there is neither a mayor or vice-chairman, the senior member performs the duties of mayor. M.G.L., c.43, §100, *supra*.

These proposed changes are significantly inconsistent with the current charter. An ordinance or local rule that is inconsistent with a charter would be invalid. *City Council of Boston v. Mayor of Boston*, 383 Mass. 716 (1981). Cambridge’s charter is a state statute, and as with all state statutes a local ordinance that is inconsistent will be held to be invalid. *Bloom v. Worcester*, 363 Mass. 136 (1973). Accordingly, the proposed changes detailed in Question 3 may not be adopted by an amendment to the City Council Rules nor by enactment of an ordinance.

Question 2 of the Council Order asks what changes would be necessary to provide that the mayor does not serve as a member of the School Committee. As noted above, the Plan E Charter explicitly provides that the mayor shall serve as chair of the School Committee, and further explicitly provides for who shall so serve when the office of mayor

and vice-chairman are vacant. Providing that the mayor would not serve as a member of the School Committee would be explicitly inconsistent with the charter and therefore could not be accomplished by local rule or ordinance. Such a change would require an amendment to the charter.

Question 1 asks for a description of the process for charter change "...for popular election of the mayor by the residents of the city..." There are two methods of amending the charter to provide for the popular election of the mayor—by charter commission or by special act.

1. Charter Commission

This method involves the filing of a petition with the Election Commissioners signed by at least 15% of the voters in the city who were eligible to vote in the last general election. Within ten days the Election Commissioners must certify the signatures on the petition and report the results to the City Council by filing with the City Clerk. Within thirty days after certification the City Council must order the question to be submitted to the voters. The question to adopt or revise the charter and to elect a charter commission must appear on the ballot at the next regular city election held on or after the sixtieth day following the Council's order to place the question on the ballot. That order must also provide for the nomination of charter commission members. The order is not subject to referendum.

If the Council fails to make the order, the question must be submitted to the voters at the first regular city election held on or after the ninetieth day after the receipt by the City Council of the Election Commission certification of signatures.

The Secretary of State provides the Election Commissioners with blank forms for the nomination of charter commission members. The last day for filing certified nomination papers for members of the charter commission is the twenty-eighth day preceding the date of the election. The nomination papers may provide information about the candidates, but no party or political designation may be used. The names of the candidates for the charter commission are placed on the ballot in alphabetical order. Voters are instructed that they may vote for not more than nine persons whether or not the voter favors the election of a charter commission. If a majority of the votes cast favors adopting or revising the charter, then the nine candidates receiving the highest number of votes will be declared elected.

Within ten days after the election the Election Commissioners notify the nine candidates elected to the charter commission of the date for the initial charter commission meeting. The commission must choose a chairman and vice-chairman and a clerk from among its members. The charter commission may adopt rules governing the conduct of its meetings and proceedings and may employ legal, research, clerical or other employees or consultants as its account may permit. Members serve without compensation, but are reimbursed from the commission's account for expenses lawfully incurred by them in the performance of their duties. In addition to funds made available by the City, the charter commission may receive funds from any other source, public or private. Contributions over \$5.00 cannot be accepted from any source except the City unless the name and address of the person or agency making the contribution, the amount, and any conditions or stipulations as to its receipt or use are disclosed in writing to the Election Commissioners. The City must provide the charter commission free office space and facilities for holding

public hearings. The City may also contribute clerical and other assistance and permit the commission to consult with and obtain advice from City officers and employees.

Within sixteen months of its election, the charter commission must prepare a preliminary report, including the text of the charter or charter revisions. The report must be published in a newspaper. Copies must also be sent to the Attorney General and the Department of Community Affairs. Within four weeks of publication the commission must hold one or more public hearings on the report. The Attorney General must, within four weeks, provide the commission with a written opinion identifying any conflicts between the proposed charter or charter revision and the constitution and laws of the commonwealth.

Within eighteen months of its election, the commission must submit its final report to the City Council. The City Council must order the proposed charter or revisions to be submitted to the voters of the City at the first regular city election held at least two months after the submission to the Council by the Charter Commission.

The procedure is set forth in Mass. Const. Amend., Art. 2, §3; G.L. c. 43B, §§3-9 (Home Rule Procedures Act).<sup>1</sup> See also Randall and Franklin, *op. cit.*, §§24-26; *Tiberio v. Methuen*, 364 Mass. 578 (1974); *Lukes v. Board of Election Commissioners of Worcester*, 423 Mass. 826 (1996). *Four Thousand, Five Hundred Sixty-eight Reg. Voters of Worcester v. City Clerk of Worcester*, 392 Mass. 424 (1984).

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<sup>1</sup> Mass. Const. Amend., Art. 2, §4 and M.G.L. c.43B, §10 provide a second method for amending a charter at the local level, but any change in a charter relating in any way to, among other things, the mode of election of the mayor, may not be accomplished by that method.

## 2. Special Act

In addition to the charter commission method for amending a charter outlined above, a city or town may adopt or change a charter by requesting the state Legislature to pass a special law. This method is based on §8 of the Home Rule Amendment which states, in pertinent part:

The general court shall have the power to act in relation to cities and towns ... by special laws enacted (1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city ... with respect to a law relating to that city ...

Mass. Const. Amend., Art 2, §8.

In a city with a Plan E charter, such as Cambridge, the General Court may enact a special law on a petition filed by the City Council, even though the petition was filed without the approval of the mayor. *Opinion of the Justices*, 375 Mass. 843 (1978).

It is clear that a special act of the General Court may be used to adopt or amend the charter of a city or town. *See, Belin v. Secretary of the Commonwealth*, 362 Mass. 530, 533 (1972), which suggested that Cambridge could eliminate proportional representation through a special act passed in conformity with §8 of the Home Rule Amendment; *Board of Selectmen of Braintree v. Town Clerk of Braintree*, 370 Mass. 114 (1976), holding that the procedure authorized by §§ could be used to increase the number of selectmen in Braintree; *Marino v. Town Council of Southbridge*, 7 Mass. App. Ct. 461 (1979), holding that the initiative provisions of a town charter adopted pursuant to the Home Rule Amendment were properly invoked to require the town council to place before the voters a question whether the town council should petition the Legislature under §8 to adopt legislation restoring the town meeting form of government.

The proposed changes to the method of election and to the duties and responsibilities of the mayor could be made by proceeding with a Home Rule Petition seeking a special act of the legislature authorizing the necessary changes to the existing charter. There are "...alternate routes to charter reform, the first entirely local, the second involving the intervention of the Legislature." *Marino v. Town Council of Southbridge, supra*, at 463. The Home Rule Petition process "...provides a complete and independent source of ...power to achieve charter reform...." *Id.* at 464.

Regarding the question of whether a special act amending a charter must be submitted to the voters, I have not been able to find any binding authority one way or the other. In 18 M.P.S., Randall and Franklin, Municipal Law, §31, p. 36 (1993) the authors state:

Traditionally, the special act will not be effective until the voters of the city or town, in response to a question or an election ballot, have voted to accept it. If the tradition of local acceptance is not followed, the charter or amendment will become effective either on the thirtieth day after it is signed or on an effective date specified in the legislation. If it has been declared an emergency law, the charter or amendment becomes effective immediately.

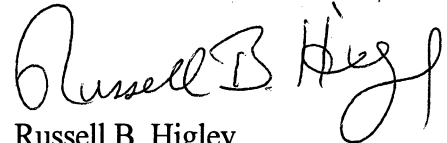
The Council can, if it chooses, include express language in a Home Rule Petition requiring acceptance by the voters prior to the special act taking effect. The Legislature may also require acceptance by the voters.

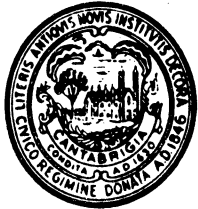
### Conclusion

The proposed changes to the method of election and to the duties of the Mayor can only be accomplished by amending the Plan E Charter. There are two methods available to amend the Charter to accomplish the proposed changes, (1) by the creation of a Charter

Commission through the procedures outlined above, or (2) by a Home Rule Petition to the  
Legislature seeking a special act.

Very truly yours,

  
Russell B. Higley



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EXECUTIVE DEPARTMENT  
ROBERT W. HEALY  
City Manager

RICHARD C. ROSSI  
Deputy City Manager

May 11, 1998

To The Honorable, The City Council:

Please find attached a response to Awaiting Report Item No. 2, regarding amendments to the Charter, received from Deputy City Solicitor Donald Drisdell.

Very truly yours,

Robert W. Healy  
City Manager

RWH/mec  
Attachment

Consent Agenda #8

3385

Relative to amendments to  
the Charter. *Addendum*

InCity Council May 11, 1998

Referred to  
~~Government Operations~~  
Committee on Motion of  
Councillors Triantafyllou  
+ Reeves

5/19/98

sent to C. Russell

JJ