

CITY OF BALTIMORE
STEPHANIE RAWLINGS-BLAKE, Mayor



DEPARTMENT OF LAW
GEORGE A. NILSON, City Solicitor
101 City Hall
Baltimore, Maryland 21202

October 17, 2013

The Honorable President and
Members of the Baltimore
City Council
c/o Karen Randle, Executive Secretary
409 City Hall
Baltimore, MD 21202



RE: City Council Bill 13-0236 – Charter Amendment-City Council – Independent
Counsel

Dear President and Members:

You have asked the Law Department to review for form and legal sufficiency City Council Bill 13-0236. City Council Bill 13-0236 proposes to amend the Baltimore City Charter to authorize the City Council to retain the services of independent legal counsel; provide for the qualifications and term of that counsel; specify the duties of that counsel; provide for the compensation and expenses for that counsel; and submit the amendment to the voters of the City for either rejection or adoption.

City Council Bill 13-0235 provides that by resolution, the City Council could employ or contract for the services of independent general counsel. The counsel must be a member of the Maryland Bar and would serve at the pleasure of the City Council. The duties of the counsel would be to provide legal advice to the City Council and its members, committees and subcommittees, assist City Council in its investigations, represent the City Council in judicial or other proceedings to which the Council is a party or desires to intervene, and generally serve as an attorney for the City Council. The compensation for the position would be set by resolution of the City Council. The bill requires that the City Council President certify the estimated amount of money needed for the counsel's compensation and expenses at least 30 days before the Board of Estimates adopts its proposed Ordinance of Estimates for the next fiscal year. The bill requires that the Board of Estimates include up to \$100,000 of this amount in the proposed Ordinance of Estimates, but may include more at its discretion. The amount may not be deducted from the operating budget of the City Council. The bill also adds a sub-section to Section 24(c) of Article VII of the Charter, allowing the City Council to employ independent counsel irrespective of the other requirements in that section pertaining to the authority of the City Solicitor to authorize the employment of outside counsel for the City Council and the authority of the Board of Estimates to approve payment for outside legal counsel.

F/A

The most fundamental legal issue with the bill is that the bill purports to authorize the City Council to employ or contract for the general counsel position and provides for the general counsel to represent the City Council in judicial or other proceedings if the Council is a party to or desires to intervene in the proceedings. The legal issue with this proposal is that the City Council is not a legal entity but rather a branch of local government. The corporate legal entity is the Mayor and City Council. Baltimore City Charter, Art. I, Sec.1. Only the Mayor and City Council may enter into contracts and be recognized as a legal entity for the purposes of judicial proceedings. The City Council may employ a general counsel in the same manner as it employs other staff but it cannot enter into a contract other than by and through the Mayor and City Council. Similarly, it cannot be a party to a lawsuit other than as part of the legal entity, the Mayor and City Council. For this reason, the bill cannot provide, as it does on page 2, lines 11 and 12, that the City Council's attorney can represent the City in any judicial action. Furthermore, the bill, if passed, would need to be read in harmony with Section 24(b) of Article VII of the City Charter that gives the City Solicitor sole charge and direction of the preparation of all suits, actions and proceedings, as well as giving legal advice on all matter of issues that affect the Mayor and City Council.

In addition, there are several other legal and practical considerations generated by the bill that impact the ability of the general counsel to advise the City Council:

(1) The City Charter requires the Law Department to provide advice and opinions on any legal question affecting the interests of the City. Art. VII, Sec. 24. This responsibility includes providing advice regarding proposed legislation. The Law Department would continue to analyze proposed legislation for its impact on the City's legal affairs and offer bill reports as it does now, even if the duties of the proposed General Counsel include providing legislative advice to the City Council. This will result in a duplication of functions now performed by Law Department. In addition, there is no mechanism to resolve disputes regarding conflicting advice. This could result in litigation leading to additional expense and the potential delay of the important work of the City Council. Finally, the bill does not provide for who defends the City and funds the litigation if advice from the general counsel results in litigation against the Mayor and City Council and the Law Department is on record as having advised against the action.

(2) The process for hiring the general council is unclear. Is this person hired by the President or the Council as a whole? If the Council hires, how do they act – majority vote, $\frac{3}{4}$ vote? Is the general counsel a City employee or a contract employee? Does the person have to be reappointed when a new term begins?

Several Maryland counties specifically provide for a legal advisor for their Councils but limit the role of that attorney to be consistent with the legal status of the Council. For example, in Montgomery County, §108 of the Montgomery County Charter provides that the “Council may employ special legal counsel to assist in exercising its powers and may provide by law for the special legal counsel to assist, advise or represent any office of the legislative branch in the exercise of its duties.” This provision limits the role the special legal counsel to assisting in the exercise of powers the Council and the legislative branch. This approach is consistent with the fact that the Council does not exist as a separate legal entity. Similarly, in Howard County, §216 of the Charter states that the “Council may, subject to appropriation, by resolution employ legal advisors as necessary to perform its functions.” Again, this provision limits the role of the legal adviser to those matters within the authority of the Council and does not seek to grant powers that cannot be exercised by a body that does not have status as a legal entity. In Baltimore County, the Council’s attorney may “advise for the purposes strictly limited to the exercise of its legislative and budget powers and cannot prosecute lawsuits against the county or the county council. See Baltimore County Charter, §510.

The Law Department proposes that the bill be amended adopt a model that recognizes the City Council is not a separate legal entity that can sue or be sued or enter into contracts but that still provides the City Council legal assistance consistent with the duties of that body as provided in the City Charter.

If the bill was amended as indicated above, the Law Department could approve City Council Bill 13-0236 for form and legal sufficiency.

Sincerely yours,

Elena R. DiPietro
Elena R. DiPietro
Chief Solicitor

cc: Andrew Smullian, Deputy Chief
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