
CITY OF BALTIMORE

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January 10, 2020

The Honorable President and Members
of the Baltimore City Council
Attn: Natawna B. Austin, Executive Secretary
Room 409, City Hall, 100 N. Holliday Street
Baltimore, Maryland 21202

Re: City Council Bill 19-0470 – Charter Amendment – City Council – Exercise of
Legislative Powers

Dear President and City Council Members:

The Law Department has reviewed City Council Bill 19-0470 for form and legal sufficiency. The bill modifies the Mayor and City Council's authority to legislate certain powers and duties of units of the Executive Branch; and submits this amendment to the qualified voters of the City for adoption or rejection.

Multiple concerns about the legality of this bill are raised by its introduction. They stem from what, on its face, is a relatively small change in charter language, but which carries significant consequences. Specifically, the proposed language loosens the legislative constraints imposed by the City Charter, allowing the Mayor and City Council more freedom to enact legislation that would otherwise be barred by existing charter provisions.

The Proposed Change

Today, the Mayor and City Council have the power "to pass all ordinances, *not inconsistent with the Charter*. Art III, § 11 [*emphasis supplied*]. In effect, local legislation that is inconsistent with the City Charter is void. The quoted language is reflective of language used to empower home rule under the Maryland Constitution. Specifically, "*any public local laws inconsistent with the provisions of said charter and any former charter of the City of Baltimore or County shall be thereby repealed.*" MD Const. Art. XI-A, § 1 [*emphasis supplied*].

The City Charter uses this language again in discussing the duties that could be assigned by ordinance to municipal officers and agencies: "*Consistent with the Charter*, and subject to the supervision of a superior municipal officer or agency, a department, officer, commission, board or other municipal agency provided for in the Charter shall perform additional duties and possess additional powers, as may be prescribed by ordinance" City Charter Art VII, § 2(a) [*emphasis supplied*]. It is this provision of the City Charter, Article VII, § 2(a), that is the focus of the proposed charter amendment.

The proposed amendment would revise this paragraph to read, “*Except as expressly prohibited by the Charter*, a department, officer, board . . .mayoral office or other government unit . . . shall perform additional duties and possess additional powers as required by ordinance.” Page 1, lines 21-25 [*emphasis supplied*]. In effect, legislation that is merely inconsistent with the Charter would be permissible. Legislation in direct conflict with the Charter would be forbidden. Leaving aside the question as to whether Article III, § 11 should be revised alongside Article VII, § 2(a) to provide consistency, (the Law Department recommends it, if this bill moves forward), we turn to the difference in terminology. What is the impact of prohibiting legislation that is “expressly prohibited” by the Charter rather legislation that is merely “inconsistent”?

Impact on the Charter

According to the Court, a “conflict exists only when an ordinance prohibits something permitted by the legislature or permits something prohibited by the legislature.” *Montgomery County v. Eli*, 20 Md.App. 269, 278 (Md.App. 1974), citing *Heubeck v. City of Baltimore*, 205 Md. 203, 208 (1954). If we substitute the term “charter” for “legislature” in this ruling, it follows that a conflict with the City Charter arises only when an ordinance prohibits something permitted by the Charter or permits something prohibited by the Charter.

In contrast, the Court in *Edwards Systems Technology v. Corbin*, 379 Md. 278 (2004), establishes when an ordinance may be inconsistent with an existing law or charter:

A locally-enacted ordinance may be inconsistent with state public general laws in one of three ways: 1. it could be in direct conflict with a public general law; 2. it could be the type of ordinance which is expressly preempted by a public general law; 3. it could be impliedly preempted by public general laws because the General Assembly has intended to occupy the entire field within which the ordinance falls.

379 Md. at 296–97 (2004) [citations omitted]. The above rule is expressly concerned with local legislation that is inconsistent with public general law. But a charter is construed in the same manner as a statute. *See, Howard Research and Development Corp. v. Concerned Citizens for Columbia Concept*, 297 Md. 357, 364 (1983) (“charter or an ordinance generally is read and construed in the same manner as a statute.”) The application of the rule leads to the following conclusion: An ordinance is “inconsistent” with the City Charter not only when the requirements of the ordinance are in direct conflict with the Charter but also when its activities are expressly preempted by Charter provisions or preempted by the occupation of the entire subject matter of charter provisions.

Given the interpretation of the terminology at issue, the effect the proposed change becomes clear. A charter amendment that would prohibit the Mayor and City Council from adopting legislation only when it is in direct conflict with the Charter, rather than when the legislation is merely inconsistent with Charter, expands the legislative powers available to the Mayor and City Council. It effectively reduces or limits the occasions when legislation would otherwise be impermissible.

Example of Impact

To take an obvious example, the City Charter grants the Department of Transportation administrative control over certain activities, such as street construction, lighting, and conduit, among others. *See*, City Charter, Art. VII, § 116. Nowhere, however, does the Charter actually grant the department regulatory control over “transportation issues.” None of the departmental charter powers are so broadly worded as to expand its reach to things like parking, the City Circulator or Zip Cars. Yet these activities are regulated by the City’s Department of Transportation (“DOT”). DOT’s regulation of these activities is deemed consistent with the general character of the department, as it is currently expressed in the City Charter.

If Council Bill 19-0470 were to become law, there would be no direct conflict with the City Charter if the Mayor and City Council were to adopt an ordinance transferring control over parking or the Circulator to the Department of Housing or to some other department. In contrast, a reassignment would be inconsistent with the tenets of the current Charter.

The example illustrates the bill’s ability to expand the legislative powers available to the City Council. It results from loosens the Charter’s ability to constrain local legislation. In so doing, it raises questions about the nature of the City Charter, the voters’ role in establishing the City government, and the extent to which the voters of Baltimore, acting through an amendment to the City Charter, are empowered to modify the legislative powers of the Mayor and City Council.

Reducing Voter Control of City Government

In reducing the constraints the Charter places on the legislative powers of the Mayor and City Council, Council Bill 19-0470 effectively reduces the power of the voters to impact City government operations. As noted in *Ritchmount Partnership v. Board of Sup’rs of Elections for Anne Arundel County*, 283 Md. 48 (1978), the charter is the document by which the voters of Baltimore establish the basic framework under which the government operates:

Article XI-A, s 1 effectively reserves to the people of this state the right to organize themselves into semi-autonomous political communities for the purpose of instituting self-government within the territorial limits of the several counties. The means by which the inhabitants acquire such autonomy is the charter. Being, in effect, a local constitution, the charter fixes the framework for the organization of the county government. [citations omitted] It is the instrument which establishes the agencies of local government and provides for the allocation of power among them.

From beginning to end, the charter adoption and ratification process is an act of the people, an expression of the local popular will to which the Maryland Constitution has attached fundamental legal significance... Furthermore, under the procedures set out in §§ 1 and 1A of Article XI-A, a proposed charter cannot become operational until it receives the imprimatur of the people through ratification at a popular election....

Consequently, in adopting a home rule charter the people have the right to make provision therein for any form of government they deem suitable for their needs, so long as they do not in the process run afoul of the letter and spirit of the Federal and State Constitutions...

Ritchmount Partnership, 283 Md. At 58-59.

When local legislation is required to be “consistent with” the Charter or “not inconsistent” with its principles and tenets, the voters remain in control of the general operation of government, as required by the Home Rule Amendment, Article XI-A of the Maryland Constitution. Under that Amendment, voters are neither expected nor required to frame charter provisions anticipating the specific details of how the government should be organized today or at any given future moment. They are required and expected to establish merely the general framework and parameters by which their government is to operate. In contrast, if the charter language were to shift and allow the adoption of any legislation except when it is in direct conflict with the Charter, it places a heavy burden on the voters to frame charter provisions precisely, to anticipate how local legislators might thwart, undermine or avoid the charter constraints the voters have placed on legislative actions.

General knowledge of and preferences for the way government should be organized might characterize the general electorate. But few voters have knowledge of the precise details that underlie government operations and the processes and procedures required to deliver public services or to organize administrative affairs. The details of service delivery and administration are left to elected and appointed officials to oversee and determine, by legislation when necessary. It is these limits on information known to the general public that explains why a charter is defined in law to be merely a document “intended to provide *a broad organizational framework* establishing the form and structure of government...” *Cheeks v. Cedclair Corp.*, 287 Md. 595, 606–07 [*emphasis supplied*]. It is not intended to be – nor can it be - a detailed prescription of how the government should be organized or operated.

To the extent a change in charter language requires it to be, that language is unconstitutional. To the extent a change in charter language undermines the power of the voter to retain control over the general framework of City government, that language is unconstitutional. To the extent a proposed charter amendment intends to delegates to the Mayor and City Council the power of the electorate to establish and secure the basic principles that underlie the composition of City government, that charter amendment is unconstitutional.

Expansion of Legislative Power

We turn now to the question as to whether a charter amendment can modify the legislative powers of the Mayor and City Council. In this instance, the question is, whether a charter amendment can expand the range of subjects that can be objects of local legislation.

The Court in *Ritchmount Partnership*, which so ably addressed the voters’ control over a local charter, also examined the legislative powers available to a governing body acquiring home rule. The Court concluded that Article XI-A “was intended to encompass two distinct categories of home rule powers: the power to enact local law (legislative power) and the power to form and establish local government.” 283 Md. At 59. As discussed, the Court concluded that the power to create the form and structure of the government was “vested in the people,” but it also held that the power to enact local law was “expressly authorized by the Legislature.” *Id.* The later conclusion derived directly from the Constitution. Article XI-A states that the City’s express powers – that is, its powers to legislate on different subjects, which are now found in Article II of the City Charter - “shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly.” MD Const. XI-A, § 2.

The plain assertion in both the Maryland Constitution and in *Ritchmount Partnership* that local legislative powers cannot be enhanced or expanded by charter amendment places Council Bill 19-0470 at odds with it. The proposed amendment loosens the constraints imposed by the City Charter. It thereby expands the content over which local legislation may be enacted.

The Law Department, nonetheless, is reluctant to conclude that the expansion of legislative content in this instance is prohibited by Article XI-A, § 2. To this end, we think it is clear that if the amendment proposed adding an entirely new subject to the list of subjects that can be objects of local ordinances – for example, adding the power to direct the affairs of the Police Commissioner - the amendment would be unconstitutional by operation of Article XI-A, § 2 quoted above. *See also, State v. Stewart*, 137 A. 39, 41 (1927) (“Legislature has its reserved right to enlarge, diminish, or change the grant of powers...”). Here, however, no entirely new subject is being added to the legislative powers available to the City government. The amendment simply enhances the range over which local legislation may operate for any subject currently delegated to Baltimore.

No court has examined this particular issue. Given the evident ambiguity, and the lack of judicial guidance, the Law Department refrains from concluding that the bill violates Article XI-A, § 2 of the Maryland Constitution.

Conclusion

The Law Department nonetheless concludes that Council Bill 19-0470 is unconstitutional. If adopted, it would impermissibly require the Charter to be a detailed blueprint for the conduct of City government, rather than a broad organizational outline of its operation, if the voters are to secure the basic principles that underlie the composition of City government. The bill would introduce the need for voters, in framing charter amendments, to understand the intimate operation of government and to anticipate how the local legislative body might be able, by legislative fiat, to undermine and avoid charter constraints. It would impermissibly delegate to the Mayor and City Council the power of the electorate to establish and secure the basic governing principles of the City.

It is for the above reasons the Law Department cannot approve Council Bill 19-0470 for form and legal sufficiency.

Sincerely,



Victor K. Tervala
Chief Solicitor

cc: Andre M. Davis, City Solicitor
Matt Stegman, Mayor’s Legislative Liaison
Caylin Young, President’s Legislative Director
Elena DiPietro, Chief Solicitor, General Counsel Division
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