

Nancy E. Glowa
City Solicitor

Arthur J. Goldberg
Deputy City Solicitor



Assistant City Solicitors
Paul S. Kawai
Keplin K. U. Allwaters
Sean M. McKendry
Megan B. Bayer
Brian A. Schwartz
Diane O. Pires

Public Records Access Officer
Seah Levy

CITY OF CAMBRIDGE

Office of the City Solicitor
795 Massachusetts Avenue
Cambridge, Massachusetts 02139

April 26, 2021

Louis A. DePasquale
City Manager
Cambridge City Hall
795 Massachusetts Avenue
Cambridge, MA 02139

Re: Legal Opinion Regarding Request to Have Legal Resources Committed to Assist City Council with Legal Research and Drafting of Ordinances Pursuant to Orders Voted Upon in Public at Scheduled City Council Meetings

Dear Mr. DePasquale:

I. INTRODUCTION.

I write in response to proposed Order No. O-8 of April 12, 2021, which was not voted upon that night due to a Councilor's exercise of the Charter Right to postpone discussion to the next regularly scheduled meeting of the City Council, which is April 26, 2021. The proposed order requested that "the City Council shall have a budget for outside legal research that shall be utilized at the discretion of the City Council when designated by a majority of members in pursuance of the Council's authority to exercise the legislative powers of the City in drafting ordinances via an order that is voted upon in public at a scheduled City Council meeting," and that "the precise amount of the budget line item for outside legal research in the City Council budget shall be determined as part of the FY22 budget process but shall be not less than 5% of the total amount of the legal department's FY22 budget."

As outlined in the below opinion, I am of the opinion that the City Council's request for a budget to cover outside legal assistance is inconsistent with the provisions of the City's Plan E Charter, that the City Council does not have the authority to make an appropriation for staff which is not recommended by the City Manager, and that the attorney for the City Council is the City Solicitor and those attorneys in the City's Law Department who report to the City Solicitor. However, I have proposed a detailed plan below to address the City Council's concerns related to more timely legal assistance.

II. LEGAL ANALYSIS.

I first address the question of whether the City Council has the legal authority to appoint counsel, or to have legal counsel dedicated solely to serving the needs of the City Council.

A. Chapter 2.26—Law Department, Section 2.26.030 of the Municipal Code.

Pursuant to Cambridge Municipal Code §2.26.030 (the “City Solicitor Ordinance”), the City Solicitor is the exclusive legal counsel for all City departments, including the City Council:

The City Solicitor shall draft all legal instruments of whatever nature which may be required of him by any ordinance, the City Council, the Mayor, or the City Manager.

The City Solicitor shall prosecute and defend all suits, causes and actions in which the City is a party. He shall represent the City before administrative agencies on any matter in which the interest of the City may be affected. He shall defend the officers and employees of the City for any act or omission in the discharge of their official duties. ***He shall furnish legal opinions on matters submitted to him by the City Manager, Mayor, City Council, School Committee, or head of department.*** (Emphasis supplied).

Mun. Code, c. 2.26, §2.26.020-030.

A plain reading of the City Solicitor Ordinance dictates that the proposed duties the City Council seeks to shift to an outside attorney, i.e., performing legal research, are duties that properly fall under the City Solicitor. Indeed, the City Solicitor is the attorney for the City Council, and all legal matters of any City department, including the City Council, are the responsibility of the City Solicitor.

B. The City’s Plan E Charter.

Under the City’s Plan E Charter, the City Council does not have the legal authority to appoint legal counsel. Pursuant to the City’s Plan E Charter, the City Council has the authority to appoint people to three (3) positions—the City Manager, the City Clerk, and the City Auditor. Under the principles of statutory interpretation, if a statute has expressly set out language on a particular matter, that language is viewed as conclusive as to legislative intent. . Thus, had the Legislature intended to imbue the City Council with the power to appoint counsel, it is presumed under the principles of statutory interpretation that it would have done so. No statute expressly authorizes the City Council to include in its department an office of counsel to the City Council or to permanently employ its own attorney. In the absence of the statutory authority to do so, it is settled law that a department of a city or town has no authority to employ counsel. Board of Public Works of Wellesley v. Board of Selectmen of Wellesley, 377 Mass. 621, 624-625 (1979);

O'Reilly v. Town of Scituate, 328 Mass. 154 (1951). G.L. c. 43 does not expressly grant to the City Council the authority to appoint other employees as may be necessary for the proper conduct of its business. Mayor of New Bedford v. City Council of New Bedford, 13 Mass.App.Ct. 251, 254 (1982).

Additionally, under the City's Plan E Charter, the City Manager is required to "...supervise the administration of the affairs of the city...", and to "...make all appointments and removals in the departments... of the city for which he is responsible...." G. L. c. 43, §104. Consistent with the City Charter, the City Solicitor is appointed by the City Manager. Cambridge Municipal Code, §2.26.010. The functions of the Law Department and the City Solicitor, including the decision to hire outside counsel, rest within the realm of executive and administrative responsibility specifically placed by the Plan E Charter within the control of the City Manager. This arrangement reflects the reality that the variety and complexity of issues usually involved in litigation and in the rendering of legal advice, the need for client and work product confidentiality, and the need for executive decision-making discretion require that decisions regarding the management and control of lawsuits, and regarding legal representation generally, be made by the person charged with executive responsibilities which, in this case, is the City Manager.

Further, an appropriation by the Boston City Council (which has a different charter whose differences are not material to this particular issue) to hire its own legal counsel independent of the Mayor's approval was found to be an invalid exercise of the Boston City Council's legal authority. In 2003, the Appeals Court reviewed a decision from the Superior Court which had issued a ruling that the City Council for the City of Boston did not have the authority to fill the position of "counsel for the City Council" absent the approval of the Mayor of Boston. City Council of Boston v. Mayor of Boston, 58 Mass. App. Ct. 542, 544 (2003). In affirming the Superior Court's decision, the Appeals Court ruled that:

The duties proposed for legal counsel to the council, as described, would overlap significantly and thereby interfere materially with those that are presently reserved exclusively to corporation counsel. Counsel to the council would be responsible, among other things, for providing legal advice on matters relating to council business, reviewing and furnishing opinions on draft legislation, and representing the council in legal proceedings. These responsibilities would duplicate those already assigned to corporation counsel under CBC §5-8.1, insofar as that section calls upon corporation counsel to advise the divisions of the city on legal matters and to represent them in disputes. Based upon the language of the council's order purporting to establish the new position, we conclude that, as matter of law, the addition of the challenged position of "counsel for the **city council**" would constitute a reorganization of the office of corporation counsel. Such a reorganization can only occur with the joint approval of the mayor and the council, and the mayor accordingly enjoys veto power over the creation of such a position.

Id. at 545.

In the Superior Court case which preceded the Boston City Council's unsuccessful appeal, the court found that "the duties of Corporation Counsel and those proposed for a private attorney for the Council overlap almost completely ... [including] rendering advice and furnishing legal opinions of law to the City Council." Boston City Council v. Menino, No. CIV.A. 0-1267, 2000 WL 744356, *6 (Suffolk Sup. Ct., May 9, 2000) (the "Superior Court Case"). In that case¹, the Court held that the structure of the City of Boston's municipal charter made it inappropriate for the Boston City Council to retain an attorney to provide legal advice to the Boston City Council when that role was already assigned to the City of Boston's legal department. The Court held that:

[t]he City Charter, as outlined above, mandates a governmental structure organized by departments. The creation of a permanent position or office of Counsel to the City Council disrupts this structure. It puts part of the function of the Law Department in the legislative department and is not lawful.

The Court went on to further hold that "the establishment of such a position creates a serious potential for confusion and contradiction in the direction of the City's litigation, *as well as the potential for disruption of the City's business in the event that the advice rendered differs between each attorney.*" (Emphasis supplied.) See Boston City Council v. Menino, supra, citing Board of Public Works of Wellesley v. Board of Selectmen of Wellesley, 377 Mass. At 624.

The Appeals Court affirmed the Superior Court's decision holding that the Boston City Council did not have the authority under that City's charter to retain legal counsel absent the Mayor's (the executive in the City of Boston) approval to hire such a person. Similarly, in the City of Cambridge, the City Manager is the executive under the City's Plan E Charter. Indeed, under the Plan E Charter, G. L. c. 43, §104, the City Manager "... shall make all appointments and removals in the departments, commissions, boards and offices of the city for whose administration he is responsible ..." and under G. L. c. 43, §105 "such officers and employees as the city council, with the advice of the city manager, shall determine are necessary for the proper administration of the departments, commissions, boards and offices of the city for whose administration the city manager is responsible shall be appointed, and may be removed, by the city manager." G. L. c. 43, §§104-105. Thus, in the City of Cambridge, the City Manager, not the City Council, has the authority to appoint outside counsel; however, the City's Ordinances further provide that the City Solicitor serves all of the City's legal functions, and thus, the issue of whether to hire outside counsel in any given situation is within the province of the City Solicitor.

C. An Appropriation for Outside Counsel by the City Council Without the Recommendation and Approval of the City Manager is Unlawful Pursuant to G. L. c. 40, §5.

Pursuant to G. L. c. 40, §5 ("Section 5"), "a town may at any town meeting appropriate money for the exercise of any of its corporate powers; provided, however, that a town shall not appropriate or expend money for any purpose, on any terms, or under any conditions inconsistent

¹ While a decision of the lower court does not have any binding precedential authority, the lower court's decision cited here was upheld on appeal in City Council of Boston v. Mayor of Boston, supra, and is cited for its instructive purpose only in this analysis.

with any applicable provision of any general or special law.” G. L. c. 40, §5. (Section 5 also applies to cities pursuant to G. L. c. 40, §1 which states that: “. . . Except as otherwise expressly provided, cities shall have all the powers of towns and such additional powers as are granted to them by their charters or by general or special law, and all laws relative to towns shall apply to cities.” G. L. c. 40, §1). A plain reading of Section 5 dictates that where an appropriation would be inconsistent with a general or special law, said appropriation would be unlawful. *Id.* In this case, G. L. c. 43, §105 states that: “Such officers and employees as the city council, with the advice of the city manager, shall determine are necessary for the proper administration of the departments, commissions, boards and offices of the city for whose administration the city manager is responsible shall be appointed, and may be removed, by the city manager. . . .” G. L. c. 43, §105. Thus, if the City Council wished to appropriate funds in order to hire outside legal counsel, the City Council may only do so if the City Manager has requested or recommended such an appropriation; otherwise, the appropriation would be unlawful under G. L. c. 43, §105.

III. PRACTICAL CONSIDERATIONS IN ACHIEVING THE CITY COUNCIL’S GOALS.

A. The Current Circumstances.

The Law Department is aware of and understands the City Council’s frustration with respect to its desire to obtain legal assistance on drafting new ordinances and home rule petitions, as well as obtaining legal opinions and advice that is both timely and responsive to the City Council’s policy goals. The increase in urgent legal matters that had to be addressed over the last year due to the COVID-19 pandemic, compounded by the strain that has been thrust upon the entire City administration as a result of the pandemic, has impacted the ability of the Law Department to timely respond to all requests. For example, the Law Department has prepared a significantly increased volume of Council Order responses in recent months: in 2020, the Law Department submitted 102 Council Order responses, an increase of more than 175% when compared to 2019.

Despite these challenges, the Law Department has continued, as always, to provide high quality legal representation to the City. The Law Department is committed to providing both the level of service and the reasonable timeliness in its responses to which the City Council is entitled. However, it is not possible, legally or ethically, to provide independent legal counsel to the City Council that would not be under the direction of and reporting to the City Solicitor for the reasons set forth above. It could lead to “duelling lawyers”, representing different components of the same client - the City of Cambridge – a situation which “creates a serious potential for confusion and contradiction in the direction of the City’s litigation, as well as the potential for disruption of the City’s business in the event that the advice rendered differs between each attorney.” Boston City Council v. Menino, supra.

In addition, as a practical matter, the City Solicitor and those who report to her must gather information from various City departments in order to learn the existing operational implications of the area of law in question prior to responding to a request from the City Council concerning the legality of proposed legislation. For instance, a proposed change to the City’s Zoning Ordinance would, at minimum, require that the Law Department consult with the Inspectional Services Department (“ISD”) to learn whether the type of activity the proposed change in the ordinance seeks to allow is already permitted as an accessory use in some

circumstances, and to learn whether the department that enforces the ordinance, such as ISD for the Zoning Ordinance, would be able to interpret the proposed language in a way that is consistent with the desired result. Because the City Solicitor is the attorney who represents all City departments, boards and commissions in all legal matters affecting the City, any proposed outside attorney would be required to consult with and/or report to the City Solicitor, who would in turn be working with other City Departments in responding to the Council Order. This would not likely make it possible to provide responses to the City Council more quickly and it could moreover create confusion and disruption to the City's business as described above.

It is therefore essential that we find a solution that meets the City Council's objectives while doing so legally, transparently, and productively, and I believe we can do so as described below.

B. Proposed Staffing Solutions.

I have recommended to the City Manager the following procedure. The City Solicitor will appoint an attorney in the City Solicitor's as the main point of contact so that City Councilors will be able to make contact with someone in the Law Department at all times and get timely responses as to the status of work. The City Solicitor and Deputy City Solicitor will also continue to be available to City Councilors with respect to questions as to Conflicts of Interest Laws, Open Meeting Law, and other procedural questions.

With respect to specific work assignments, the procedure will be as follows. After the City Council has voted upon a Council Order, it is referred to the City Solicitor and possibly to other City Departments, given that many Council Orders have compound components and require input from a number of departments. Thus, when the Council Order is assigned to the Law Department, it will be immediately assigned to a specific Assistant City Solicitor, and the Assistant City Solicitor who is assigned to the matter will contact both other relevant City Departments as well as the sponsor(s) of the Council Order or, if it has simultaneously been referred to a Council Committee for consideration, the Chair(s) of that Council Committee, and will establish a projected timeline that is timely and responsive to addressing the policy goals to be accomplished in responding to the Council Order. The appointed point of contact in the Law Department will also be available to confer with City Councilors who have questions.

Recently the Law Department has had some vacancies, which are presently being filled, and new positions are also being added to the Law Department. As the Law Department becomes fully staffed, including with new attorneys, we will better be able to provide the expeditious responses that the City Council desires. In addition to having a main point of contact appointed in the Law Department, we also commit to having the Assistant City Solicitors dedicate a greater percentage of their time to Council Order responses in order to make sure we have measurably more resources dedicated to getting City Council work done.

IV. CONCLUSION.

For the reasons outlined above, I am of the opinion that the City Council's request for an appropriation to hire outside legal counsel violates the general laws of this Commonwealth, the City's Plan E Charter, and the City's Ordinances. However, with respect to the City Council's

legitimate request for obtaining legal assistance with drafting of new ordinances and home rule petitions, as well as obtaining legal opinions and other legal advice, I believe the proposed recommended responsive and collaborative measures outlined above will enable the Law Department to assist the City Council in achieving its desired goals.

Very truly yours,



Nancy E. Glowa
City Solicitor