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Honorable Members of the Vermilion City Council
685 Decatur Street
Vermilion, Ohio 44089

and

James Forthofer, Mayor
5511 Liberty Avenue
Vermilion, Ohio 44089

Re: Legal opinion addressing multiple issues raised by Vermilion City Council (Council) and the Office of the Mayor (Mayor)

Honorable Members of Council and Mayor James Forthofer:

In response to requests for legal opinions concerning various matters related to the scope of authority of the Mayor and Council as dictated by Vermilion's Charter, Ohio statutory law and case interpretation and the matter of recoupment of wages from overpayments made to employees; please be advised as follows:

ISSUES PRESENTED

1. Does the Mayor have the right to attend and participate in all matters before Council, including permissible subjects discussed in executive session pursuant to R.C. §121.22(G)?
2. Does Council have the authority to rescind Ordinance No. 260.02 thereby abolishing the position of Administrative Clerk of Boards and Commissions ("Administrative Clerk")?
3. Does Council have the authority to combine the position of Clerk of Council ("Council Clerk") and the Administrative Clerk and/or to appoint a person to the combined position?
4. Does the City have the authority to recoup overpayments to employees as a consequence of those employees receiving raises without the consent of Council?

ASSUMPTIONS AND BACKGROUND

Various personnel matters have been presented to Council which by their nature are permissible subjects for discussion in “executive session” permitted under R.C. §121.22 (Ohio Public Meetings Act or Sunshine Law).

At various times the Council has elected to bar the Mayor from participating in the executive session discussions. The Mayor meanwhile has taken the position that he has a right to take part in all discussions in all matters coming before Council, including matters discussed in executive session.

On or about December 31, 2016, the Administrative Clerk opted to retire. The Administrative Clerk’s responsibilities included attendance at meetings of the various boards and commissions. The Clerk also memorialized the actions of such entities by preparing minutes and distributing them to officials in the city. At the time the Administrative Clerk retired, the former mayor requested that the current Council Clerk assume the duties of the Administrative Clerk. The Council Clerk serving in that capacity was granted additional compensation for the additional duties. Council is currently considering abolishing the Administrative Clerk position as provided for in Vermilion Codified Ordinance Section 260.02. As it has been presented to this writer, Council is also contemplating adding an assistant to the Council Clerk and/or combining the position of Council Clerk with the former Administrative Clerk’s position. Thereafter, a person or persons would be appointed to the combined clerical position. The combined position would then be filled by one or more persons and would maintain records of the proceedings of Council and the various boards and commissions and would report to Council.

In good faith, the former mayor awarded various persons employed by the city with salary increases without the knowledge and consent of Council. Article 11 – General, Section 11-5 – Salaries, Compensation and Bonds, grants Council the power to fix the salaries of the employees of the municipality. The question posed is, can the city recoup overpayments to various employees that were granted raises by the previous mayor.

LEGAL AUTHORITIES REVIEWED

In addressing the various issues posed, the following Charter Provisions were examined and analyzed:

1. _____ Article III (“Council”), Section 1 (“Number and Term”);
2. _____ Article III (“Council), Section 7 (“Council Meetings”);
3. _____ Article III (“Council”), Section 8 (“Clerk of Council”);
4. _____ Article IV (“Mayor”), Section 4 (“Powers and Duties”);
5. _____ Article V (“Administrative Departments”), Section 1 (“General Provisions”);

6. _____ Article XI (“General”), Section 5 (“Salaries, Compensation and Bonds”); and

7. _____ Additional provisions that relate to the various boards and commission established by the Charter – e.g., Article VI (“Planning Commission”); Article VII (“Civil Service Commission”); Article VII-A (“City Parks and Recreation Board”); and Article X (“Finances and Taxation”).

In addition, we reviewed City Code §260.02 (“Administrative Clerk of Boards and Commissions”); R.C. 121.22 (“Ohio’s Open Meetings Act” or “Sunshine Law”); R.C. 4113.13 (“Semimonthly payment of wages”); provisions of Fair Labor Standards Act (“FLSA”); and relevant case law related to the issues addressed in this opinion.

ANALYSIS

1. DOES THE MAYOR HAVE THE RIGHT TO ATTEND AND PARTICIPATE IN ALL MATTERS BEFORE COUNCIL, INCLUDING PERMISSIBLE SUBJECTS DISCUSSED IN EXECUTIVE SESSION PURSUANT TO R.C. §121.22(G)?

The term “executive session” is not defined in the Charter. Moreover, R.C. 121.22 does not define “executive session,” it merely permits a public body to hold executive sessions for the “consideration” of certain “matters” outlined in R.C. 121.22(G). But Ohio courts have defined “executive session” to generally mean a “closed-door conference convened by a public body, after a roll call vote, that is attended by only the members of the public body (and those they invite), that excludes the public.”¹ By this definition, Council could arguably exclude the Mayor from attending an executive session. However, this definition must be read in conjunction with the Charter, specifically Article IV, Section 4.²

Article IV, Section 4 of the City’s Charter grants the Mayor certain “legislative powers,” including the “right” to participate in “all matters” before Council:

Legislative Powers. The Mayor shall attend Council meetings but shall have no vote therein. He shall have the **right** (*emphasis added*) to recommend and introduce legislation **and to take part in the discussion of all matters coming before Council** (*emphasis added*).

It is noted that there is no other provision of the Charter that restricts or impedes this “Right of the Mayor.” Further, although Article IV, Section 4 does not mention executive sessions, the words “all matters coming before Council” is sufficiently broad to cover matters discussed

¹ *State ex rel. Bratenahl v. Village of Bratenahl*, 8th Dist. Cuyahoga No. 105281, 2018-Ohio-497, ¶ 28, citing R.C. 121.22(G); *see, also Thomas v. Bd. of Trustees*, 5 Ohio App.2d 265, 268, 215 N.E.2d 434, 436 (7th Dist.1966); *Dayton Newspapers, Inc. v. City of Dayton*, 23 Ohio Misc. 49, 56, 259 N.E.2d 522, 528 (C.P.1970), *aff’d*, 28 Ohio App.2d 95, 274 N.E.2d 766 (2nd Dist.1971).

² *See State ex rel. Fenley v. Kyger*, 72 Ohio St.3d 164, 165, 648 N.E.2d 493, 494 (1995) quoting *State ex rel. Lightfield v. Indian Hill* (1994), 69 Ohio St.3d 441, 442, 633 N.E.2d 524, 526 (“In matters of local self-government, if a portion of a municipal charter expressly conflicts with parallel state law, the charter provisions will prevail.”); *see, also* Sections 3 and 7, Article XVIII, Ohio Constitution; *see, also* City Code §202.03; R.C. 1.42.

during an executive session. This is because “[u]ndefined language used in a municipal charter must be construed according to its ordinary and common usage.”³ And a common dictionary definition of the term “matter” is: “[a] subject under consideration.”⁴ Because Council holds an executive session for the “consideration” of those “matters” described in R.C. 121.22(G)(1)-(8), the Mayor has a “right” to be present for the discussion of those matters under Article IV, Section 4 of the Charter. Accordingly, Council cannot exclude the Mayor from executive sessions but could exclude “all other persons” in accordance with various cases interpreting R.C. 121.22(G).

Hypothetically, could Council bar the Mayor from an executive session called to discuss his/her removal from office? Guidance on this extremely remote question can be found both in the Charter as interpreted above and in R.C. 121.22(G)(1). R.C. 121.22(G)(1) grants Council the authority to enter into executive session to discuss certain personnel matters (e.g., dismissal, discipline, promotion, or demotion of employees or officials). It also allows Council to enter into executive session to consider the investigation of charges or complaints against a public official.⁵ But Council cannot enter into an executive session for the purpose of disciplining or removing an Elected Official, such as the Mayor:

Except as otherwise provided by law, no public body shall hold an executive session for the discipline of an elected official for conduct related to the performance of the elected official’s official duties or for the elected official’s removal from office.⁶

It should be noted that the Sixth District Court of Appeals has interpreted R.C. 121.22(G)(1) to allow a public body to discuss the discipline or removal of elected officials in an executive session.⁷ But *Bartow v. Harbal* is distinguishable for two reasons. First, the political subdivision in *Bartow* was a statutory village (i.e., the “Village of Genoa”). Therefore, the court did not have to contend with or interpret a municipal charter provision similar to Article IV, Section 4. Second, the case did not address whether council could exclude an elected official from an executive session; the court addressed only whether council could “discuss” the elected official’s removal from office during an executive session. Therefore, *Bartow* is inapplicable to this inquiry.

2. DOES COUNCIL HAVE THE AUTHORITY TO RESCIND ORDINANCE NO. 260.02 THEREBY ABOLISHING THE POSITION OF ADMINISTRATIVE CLERK OF BOARDS AND COMMISSIONS (“ADMINISTRATIVE CLERK”)?

³ *State ex rel. Johnson v. Richardson*, 131 Ohio St.3d 120, 2012-Ohio-57, 961 N.E.2d 187, ¶ 20 (2012), citing *State ex rel. Commt. for the Proposed Ordinance to Repeal Ordinance No. 146-02, W. End Blight Designation v. Lakewood*, 100 Ohio St.3d 252, 2003-Ohio-5771, 798 N.E.2d 362, ¶ 19.

⁴ See <https://www.merriam-webster.com/dictionary/matter> (last accessed March 14, 2018); see, also “MATTER,” Black’s Law Dictionary (10th ed. 2014).

⁵ See R.C. 121.22(G)(1).

⁶ *Id.*

⁷ *Bartow v. Harbal*, 6th Dist. Ottawa No. 90-OT-009, 1991 WL 127565.

The legislative powers of the City are vested in Council.⁸ This power is limited only by the Charter, the Ohio Constitution, and U.S. Constitution.⁹ As a general rule, the authority of Council to enact an ordinance carries with it the power to amend or repeal the same ordinance, i.e., in the absence of any statutory or charter inhibition.¹⁰ Here, Council enacted City Code §260.02, which established the Administrative Clerk position. Council therefore has the reciprocal authority to enact legislation repealing Section 260.02 to abolish the position of Administrative Clerk. If Council opted to rescind City Code §260.02, the various boards and commissions created by Charter would be required to maintain their own records of proceeding.¹¹

3. DOES COUNCIL HAVE THE AUTHORITY TO COMBINE THE POSITION OF COUNCIL CLERK AND THE ADMINISTRATIVE CLERK AND/OR TO APPOINT A PERSON TO THE COMBINED POSITION?

Article V, Section 1 of the Charter grants Council the authority to “combine departments or divisions” within the City. It further permits council, after departments/divisions are combined, to then “authorize one person to be the head of two or more such departments or divisions.”¹² Article V, Section 1 does not empower Council to combine “positions”; it speaks only to Council’s authority to combine “departments” or “divisions.”

A plain reading of Article III, Section III-8 establishes that the Clerk of Council is a position. The same would be true of other persons employed by Council as authorized by the above statutory provision. It is my opinion and you are so advised that if Council were to combine the position of Council Clerk with the former position of Administrative Clerk, it would be an ultra vires act.

If Council were to maintain Section 260.02 and then appoint the Clerk of Council or some other employee of Council to that position it would be in direct conflict with Article IV, Section IV-4, Duties and Powers of the Mayor, last paragraph. That Charter provision grants the Mayor the exclusive authority to appoint all the employees of the municipalities except those “whose term of office may be affixed by this Charter.” The Administrative Clerk position does not fall in that category. The Clerk of Council position does, however, fall in that category, as the Clerk of Council is appointed by Council and holds that position until removed by Council.

Inasmuch as Council does not have the Charter authority to appoint the Administrative Clerk, it logically follows that Council cannot unilaterally transfer the responsibilities of the Administrative Clerk to the Council Clerk. The Charter does not expressly grant Council the authority to transfer duties from a Mayor appointed position to a Council appointed position. Furthermore, the Charter cannot be reasonably interpreted to grant Council this power as such a

⁸ See Vermilion Charter, Article III, Section 1; *see, also* City Code §202.02(c).

⁹ *See, e.g.* Vermilion Charter, Article III, Section 1.

¹⁰ *See Thompson v. City of Marion*, 134 Ohio St. 122, 126, 16 N.E.2d 208, 210 (1938).

¹¹ *See* Vermilion Charter, Article VI, Section 1 (“Planning Commission”); Article VI, Section 1 4(b)(4) (“Board of Zoning Appeals”); Article VII, Section 3 (“Civil Service Commission”); and Article VII-A, Section 1 (“City Parks and Recreation”).

¹² *See* Article V, Section 1.

reading would enable Council to divest the Mayor of his authority to appoint, remove, or discipline any employee or officer of the City.

4. DOES THE CITY HAVE THE AUTHORITY TO RECOUP OVERPAYMENTS TO EMPLOYEES AS A CONSEQUENCE OF THOSE EMPLOYEES RECEIVING RAISES WITHOUT CONSENT OF COUNCIL?

Under Ohio and federal law an employer may recoup overpayments or unauthorized payment through payroll deductions. But Ohio law appears to require an employer to obtain the employee's consent before making the payroll deductions.

The Department of Labor views an "overpayment" to an employee as a "loan or advance of wages."¹³ Moreover, there is nothing in the Fair Labor Standards Act ("FLSA") that prevents an employer from recouping an overpayment from an employee's paycheck through a deduction.¹⁴ This is true even if the employee has not expressly authorized the deduction and the recoupment cuts into the minimum wage due to the employee.¹⁵

Ohio law appears to also allow an employer to make payroll deductions, but only if the employee authorizes the deduction. R.C. 4112.15(D)(1) defines "wage" to mean "the net amount of money payable to an employee ... less ... any employee authorized deduction." Furthermore, R.C. 4112.15(D)(3) defines an "employee authorized deduction" to include "repayment of a loan or other obligation." Although the statute does not expressly require that the employee's authorization be in writing, the City should obtain the employee's written authorization prior to deducting pay from that employee's paycheck or paychecks.

It is my opinion and you are so advised that if the City were to deduct the overpayment from an employee's paycheck without the employee's consent, that action would likely violate R.C. 4112.15(D)(3). If the employee does not consent to the deduction, the City has the option to file a small claim's complaint, to recoup the overpayment or unauthorized payment.

Respectfully submitted,

Kenneth S. Stumphauzer

KSS/jh

cc:

¹³ See [Department of Labor, Wage and Hour Opinion FLSA2004-19NA](#).

¹⁴ See *Id.*

¹⁵ *Id.*