

Charter Review Issues and Comments : Submitted by Palmer Wilson on 06/11/20

Issues and Comments

Section 2.03 : Powers and Duties of Commission

The City Commission shall annually perform performance reviews on the following charter officers: the City Manager, the City Attorney, and the City Clerk.

Comment:

This should include the fact these reviews are in writing and should be public documents not protected by normal personnel files privacy limitations. The public should have a right to know how well these appointed persons are performing their jobs.

Section 2.06 : Judge of Qualifications, Election, and Forfeiture

Written notice, approved by at least three (3) members of the existing membership of the City Commission that are eligible to vote on the matter, must be delivered to the accused Commissioner who shall have an opportunity to be heard and defend against the accusation.

Comment: Should there not be some stated time between written accusation and the hearing where the accused can defend one's self? While a subsequent paragraph of this section does require a hearing within 90 days, it does not state what minimum amount of time will be allocated to the accused to prepare for any such hearing is scheduled.

*Where a suspension of a Commissioner occurs pursuant to this section of the Charter, the suspended official shall have the right to an immediate hearing upon demand to determine if there is sufficient evidence to establish the following two elements: (1) that **probable cause** exists to believe that the charges are true; and (2) that, if true, the charges would be grounds for removal. This hearing shall be held and the matter decided by the City Commission. The rules of procedure shall be the same as those which apply to the hearing for removal. (emphasis added)*

Comment: As this is an administrative civil hearing should it not refer to the preponderance of evidence standard as opposed to probable cause standard which is the criminal bar that must be reached?

If the City Commission does not find by an affirmative vote of at least three (3) of the existing members of the Commission that are eligible to vote on the matter that the evidence produced at the hearing is sufficient to establish the aforementioned two elements, the suspension shall terminate immediately and the official shall be reinstated pending a final hearing on removal.

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Comment: Same as above.

*In order for the City Commission to remove the accused official from office, the Commission must find that the **substantial competent evidence** presented at the hearing supports the charges which are the basis for the removal proceeding.(emphasis added)*

Comment: Again as noted above, the civil standard for adjudication is preponderance of evidence, otherwise known as 51%. Unknown what substantial competent evidence translates to and would lead to challenges.

This section also does not state if the accused can have legal counsel nor does it state if such legal counsel can conduct examination and cross-examination of witnesses.

Section 2.07 : Forfeiture of Office

The Mayor or a Commissioner shall forfeit that office if the Mayor or Commissioner:
(a) Fails to meet the residency requirements,
(b) Violates any express prohibition of this charter,
*(c) Is convicted of a crime involving **moral turpitude**, or*
(d) Fails to attend three (3) consecutive regular meetings of the Commission without being excused by the Commission.(emphasis added)

Comment: As noted in previous testimony before the Commission, the term moral turpitude has varied definitions and a review of Florida Supreme Court decisions on same indicates a lack of a definitive catalog of crimes that would fit such term. I suggested and continue to do so, to merely replace that word with “felony” that should suffice to meet the presumed intent of the paragraph.

Section 2.09 : Investigations

The City Commission may request investigations into the affairs of the city and the conduct of any department, office, or agency and for this purpose may subpoena witnesses, administer oaths, take testimony, and require the production of evidence.

Comment: This would be a nightmare to implement as none of the elected Commissioners have been trained in conducting investigations, evaluating applicable evidence, or rendering what otherwise would seem to be involved conclusions of facts. It would also encumber significant portions of their time that will impact on their ability to conduct the required responsibilities of governing. Should a need for such investigations become necessary, this section should authorize the Commission to seek outside investigative support from other governmental agencies or private contracted sources and have the results of the investigations provided to the Commission for action. If the issue rises to criminal action, then law enforcement can handle the investigation. As written is impossible to control and will waste valuable time.

Section 2.11. Compensation.

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The City Commission shall determine the annual salary of the Mayor and Commissioners by ordinance.

Comment: This may open the Commission to possible criticism from the public or claims of self-serving actions. Would it not seem more neutral to establish a rate of pay effective on Jan 1 of year following the vote on this charter and then add an increment equal to the Consumer Price Index for our area that automatically engages each subsequent budget year unless the Commission votes as part of their budget proceedings on the budget for that year to waive it. This makes more sense both economically as well as from a fiscal responsibility stance. Such incremental raises are common components of government personnel contracts, union contracts, and pensions. But best of all it removes any potential claim of taking care of themselves from the picture. **SPECIAL CONCERN**

Section 3.02 : Appointment and Qualifications of the City Manager

“...education and experience in the accepted competencies and practices of local government management.”

Comment: Why not use the accepted personnel management term of “Knowledge, skills, and abilities” or as they are known “KSAs” contained in the job or class description? Most governmental agencies based selection and promotion of personnel based upon these stated job related descriptors.

The City Manager shall receive such compensation as the City Commission may by resolution fix.

Comment: As the City Manager has a contract would it not be preferable here to just state that the salary and conditions of appointment will be noted in the contract approved by the Commission

The City Manager shall be removable by the City Commission; but if removed at any time after having served six (6) months, he the Manager may demand written charges and a public hearing upon the same before the City Commission, and his final removal of the City Manager shall not take effect until such hearing has been had, but the City Commission may suspend him the Manager from office pending such hearing.

Comment: As most City Manager contracts include specific language regarding the conditions and compensation regarding removal after the six month period, it seems some reference to the applicable contract would suffice to control the process. In fact a contract might contravene the above language.

Submit to the City Commission and make available to the public a complete report on the finances and administrative activities of the city as of the end of each fiscal year;

Comment : Include the date such report will be completed and that it will be posted to the City website.

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Section 3.03 : City Attorney

The City Attorney shall serve as chief legal adviser to the City Commission, the Manager, the City Clerk, and all city departments, offices and agencies; shall represent the city in all legal proceedings and shall perform any other duties prescribed by state law, by this charter, or by ordinance.

Comment: This section is devoid of any description of the relationship between the City Attorney and the Commission with respect to determining how the City will respond to legal actions against the City. While the City Attorney certainly has responsibility to evaluate potential liability for a particular course of action, the City Attorney is not elected by the people and thus does not represent the people, the Commissioners do. As written it provides too broad an authority to act without Commission review and direction. The Commissioners should be part of any determination of a legal course of action with the attorney providing the technical legal guidance or opinion of the success of such courses of action, **but not the final decision on how to proceed**. We went through an extensive period in past years where questions continue to arise as to the actions of the previous Commissions regarding how legal actions or proposed legal actions were handled. While the current City Attorney appears well qualified to provide a legal opinion, the Commission should be making the final decisions as they are the only ones the public can hold accountable. **SPECIAL CONCERN**

Section 3.04 : City Clerk.

The City Clerk shall be the custodian of all city records; shall give notice of Commission meetings to its members and the public; shall keep minutes of its proceedings; serve as the election official; and perform such other duties as are assigned by this charter or the City Commission.

Comment: Consider adding some reference to the Clerk's public records responsibilities. Does the Clerk also maintain the website? If so, maybe that should be here also.

Section 4.03 : Budget Message

The City Manager's message shall explain the budget both in fiscal terms and in terms of the work programs, linking those programs to organizational goals and community priorities

Comment : Should also state that the message should highlight whether previous goals and objectives were met and how they impacted operations or are supported if multi-year in term. Not a detail as one would find in the actual budget but a set of summary statements. It is important for the public to know if the City achieved it previous year goals and objectives in order to evaluate its proposed ones.

Section 4.04 : Budget

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The budget shall provide a complete financial plan of all city funds and activities for the ensuing fiscal year and, except as required by law or this charter, shall be in such form as the City Manager deems desirable or the City Commission may require for effective management and an understanding the relationship between the budget and the city's strategic goals. The budget shall begin with a clear general summary of its contents; shall show in detail all estimated income, indicating the proposed property tax levy, and all proposed expenditures, including debt service, for the ensuing fiscal year; and shall be so arranged as to show comparative figures for actual and estimated income and expenditures of the current fiscal year and actual income and expenditures of the preceding fiscal year.

Comment: This section should include a requirement that a detailed set or organizational charts be included so that the public can associate spending with sections within the department. It should also require a line item expenditure listing of personnel positions by function and not just class or job title; e.g., within the police department there should an organization chart that shows structure down to shifts and function with personnel costs associated to those levels. The mere listing of say 30 police officers and a cost is not helpful when it is unknown what those 30 officers functions are such a patrol versus traffic versus investigations. In addition, the listing of supervisors versus subordinate also provides indicators of function capabilities needed to assess proper goal accomplishment. Not picking on the police per se only using as an example and the same would hold true for all city departments.

The document should also show all transfers between accounts and key them to Commission approval and need associated with goals. Finally the budget should clearly show not only strategic goals but also their incremental yearly objectives and single year goals with their objectives. Focusing only on strategic goals does not help evaluate city management effectiveness.

Section 4.06 : Independent Audit.

*The City Commission shall provide for an independent annual audit of all city accounts and may provide for more frequent audits as it deems necessary. An independent certified public accountant or firm of such accountants shall make such audits. Such audits should be performed in accordance with Generally Accepted Auditing Standards (GAAS) and Generally Accepted Governmental Auditing Standards (GAGAS). The City Commission shall, using competitive bidding, designate such accountant or firm annually, or for a period **not to exceed five (5) years (1)**, but the designation for any particular fiscal year shall be made no later than thirty (30) days after the beginning of such fiscal year. The standard for independence is that the auditor must be capable of exercising objective and impartial judgment on all issues encompassed within the audit engagement. No accountant or firm may provide any other services to the city during the time it is retained to provide for independent audits fo the city. **The City Commission may waive this requirement by a majority vote at a public hearing. (2)** (emphasis added)*

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Comment: (1) No audit firm should be retained for more than three (3) years in a row and should not be able to rebid for an additional three years after completion of their initial three years. There is a history here of auditors getting too friendly to the City. And (2) this stipulation should not be able to be waived; impacts their impartiality. **SPECIAL CONCERN**

Section 5.01 : Environmental Stewardship.

Tree protection sufficient to maintain a substantial tree canopy for air quality and removal of pollutants draining into the aquifer.

Comment : Not really an expert on this area but is this an accurate scientific statement to justify the tree issue and does this contravene the State code for tree retention? Just a question.

Section 5.02 : Zoning Goals.

The City of New Smyrna Beach in order to preserve the special character of the city's mideighteenth century history; strengthen the city's economic base; and enhance the environmental quality and sense of place in neighborhoods, shall enact ordinances that:

- (a) Preserve the scale and character of the city's neighborhoods.*
- (b) Maintain the city's tree canopy, green areas, and historic footprint.*
- (c) Create standards in ordinances ensuring the sustainability of a parcel zoned for building purposes without danger from flood or other inundation or from any other menace to health, safety, or public welfare.*

Comment : This section seems to greatly restrict zoning with a broad brush that way too broad and restrictive. Because a parcel is not developed (or green as noted herein) should not be forever restricted to non-development. These parcels are owned by individuals and as such the US Supreme Court has repeatedly reinforced property rights of individuals, especially when done without due process. Subsection (a) lacks definition that can be defended as one person's view of scale and character may differ from another. Subsection (b) is also vague as noted above may restrict property rights without benefit of due process, while subsection (c) seems appropriate and defensible. **SPECIAL CONCERN**

Section 5.03 : Historic Preservation

The City of New Smyrna Beach in order to preserve and enhance the historic quality of the city; foster economic development; manage growth; improve property values; and add to the quality of life of its citizens and visitors shall enact ordinances that strengthen the city's commitment to historic stewardship:

- (a) Update the definition of historic to the standard used by state and federal agencies such as the National Registry of Historic Places.*
- (b) Expand and make contiguous the Coronado Historic and Mainland Historic Districts.*
- (c) Expand the city's historic overlay districts.*

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(d) Develop proactive ordinances that will create a seam less methodology for owners to access historic preservation property tax exemptions (Section 50-34 NSB Code of Ordinances).

(e) Empower code enforcement to assist and facilitate owners of historic properties to utilize the Historic Grant Program (Article III, Chapter 50 Section 50-43 NSB Code of Ordinances) and other grant sources.

Comment : While this section appears well intentioned it also reflects potential agendas of the writers, is too specific for charter in one area (subsection (b) and (c) while too broad a brush and general in the wording of the preamble portion. Other subsections seem to be more agenda items for a Commission review and establish an ordinance as opposed to the listing of same in a charter. But it also can't be more obvious than that the writers are trying to lock in future generations from making any changes to their perceived view of what the City should look like and that is not the purpose of City Charters but rather the purpose of zoning, overlays, and land development regulations. While there is support for the preservation of the historic buildings and areas of the city, such status should not be used to cut off growth for five year periods (charter annual reviews) and there is ample guidance for same in a variety of other laws, programs, and ordinances. The section should not be in the Charter. **SPECIAL CONCERN**

Section 5.04 : Sale, Lease, Trade, or Gifting of Public Land and Structures

*All land, including **marshland**(1), and structures owned by the City of New Smyrna Beach may not be sold, leased, traded, or given away by the city unless such sale, lease, trade, or gift is (2)**approved by a majority vote of the electors of the City of New Smyrna Beach**. The City Commission shall pass an ordinance by a majority vote to place the matter of sale, lease, trade, or gift on the ballot for the voters to decide. The decision of the voters will be binding. If approved by the voters, the City Commission shall have the authority to issue such documents as needed to complete the transaction. (emphasis added)*

Comment: First and foremost, this provision a nightmare waiting for a place to happen. It is unworkable within the constraints of the normal operations of city government and like the preceding section, again reflects the potential agendas of certain participants within the Committee. Of note is that the reference to marshland (1) may be preempted by disposition process specified by state law. The greater problems lies with the sequencing of elections on a two year cycle would restrict any of the options listed from taking place until then. This is not a good business practice as economic conditions do not flow with election years as a rule, thus the benefit of best price may be lost. Secondly no business man is going to make a proposal that has to wait for the next election; e.g., time is money. The inclusion of leases is totally unworkable as leases don't coincide with elections. The intent here is obvious; don't separate any city property from the city control, period. This is not in the best interest of the citizens who pay taxes.

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There are better ways to encourage public guidance for the actions enumerated as we live in an electronic world. Listing of all city properties that are leased with end dates for renewal and current usage and lease rates coupled with public notification on the city website of pending leases or renewals coming up will serve the same purpose with less conflict and interdiction to

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the normal city business cycles, although other options should and could be considered. The appropriate way to seek citizen input is by bringing these actions before the Commission and allow the public to weigh in. As written this section should not be part of the Charter. **SPECIAL CONCERN**

Section 6.04 : Canvassing Board

A city canvassing board shall be established for the purposes of canvassing ballots and election results. The canvassing board shall be composed of the City Clerk and the two (2) City Commissioners whose zones are not on the ballot. After any primary or general election, the Volusia County Canvassing Board may serve in lieu of the city canvassing board.

Comment : To eliminate any concerns over impartiality the City should use the Volusia County Canvassing Board.

Section 6.07 (c) Commission Zones; Adjustment of Zones

(2) Proposed plans must be available to the public for inspection and comment not less than one (1) month before the first public hearing on said plan. The plan shall include a map and description of the zones recommended.

Comment : Notice should also include drawings of the previous boundaries and comparative data of population within the previous and proposed zones. If available, comparative voter registration data should also be provided.

Section 7.01 : Advisory Boards.

*The City Commission may at any time appoint an advisory board, or advisory boards, who [which] shall be composed of **citizens who are qualified to act in an advisory capacity** to the City Commission, the City Manager or to any department of the city government, with respect to the conduct and the management of any property or institution or the exercise of any public functions of the city. The members of such board shall serve without compensation for the time fixed in their appointment, or at the pleasure of the City Commission, and their duties shall be to consult and advise with such municipal officers and make written recommendations which shall become part of the records of the city. (emphasis added)*

Comment : Have concern with the text in bold above as does the words qualified to act refer to their status as citizens or residents or does it reflect to their education and experience or professional licenses. For example on Planning and Zoning can only those with a Planning or Zoning background be on the board or any city with common knowledge of such. Maybe a better set of wording would help here as it is assumed maximum citizen participation as opposed to restricted is what is desired.

Section 7.03 : Charter Review.

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There shall be a periodic review of this Charter by a Charter Review Advisory Committee appointed by the City Commission in 2026 and every five (5) years thereafter. Each Zone in the city shall have representation on the Committee.

Comment : What does the word representation mean? Can more than one person per zone be on the committee? Does the committee members have to be taxpayers? Unclear from the writing and given the seriousness of charter rewrites, they should probably be taxpayers who have what is called “skin in the game” from having to foot the bills resultant from their actions. **SPECIAL CONCERN**

Section 8.03 : Same-Qualifications.

*Each Commissioner shall be a qualified elector **and freeholder** in New Smyrna Beach, but no employee or elected or appointed officer of the city shall be a Commissioner and no Commissioner shall serve more than three consecutive terms. (emphasis added)*

Comment : The term ”freeholder” infers property owner while elsewhere in related sections the requirement is registered voter. Suggest removal of the term “freeholder”.

Section 8.06 : Authority Over City's Utilities.

*The Commission shall, pursuant to the New Smyrna Beach Charter, manage, operate and control all of the city's utilities and shall **employ and discharge at their pleasure all employees** whose services are performed in any manner in connection with said utilities.*

Comment : Given the hands off on employment and discharge of city employees as under the authority of the City Manager. Should not the same apply to the UC employees. It is not practical, efficient, nor appropriate that the Commission get involved in personnel actions at that level. Needs limitation to the appointment of the UC commissioners only.

Section 8.08 : Monthly Statements; Fiscal Year; Annual Audit

The Commission shall submit to the City Commission a monthly statement showing all sums or amounts received, operating expenses, amount charged to depreciation and extensions, reserve fund and amount appropriated to interest and sinking fund. The fiscal year of the Commission shall begin October 1 and end September 30 of each year and the books and records of the Commission shall be audited by an independent certified public accountant as of the close of business of each fiscal year.

Comment : Same three year limit on auditor contract as noted for the City auditors should be included here. See section 4.06 **SPECIAL CONCERN**

Section 8.09 : General Powers and Authority

The Commission shall prepare and submit its budget for the ensuing year to the

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*City Commission on or before June 1 of each year, setting forth its estimated gross revenues and estimated requirements for operations and maintenance expenses, debt service, and depreciation. **A copy of the budget shall be published once in a newspaper of general circulation in the city during the month of June.** The Commission shall adopt the budget for the ensuing year only upon approval by ordinance of the City Commission. The City Commission may not withhold its approval or deny passage of an ordinance approving the budget where such withholding or denial would cause the Commission to violate any of the covenants or terms of its bond resolutions and related contracts, resolutions, and documents. (emphasis added)*

Comment : Bolded language is antiquated and should include a requirement that the budget be placed on the UC website for public view. Nobody reads paper newspapers much anymore and this requirement is still around to help out the bottom line on newspapers.

Section 8.14 : Borrowing money

*The Commission, upon a majority vote, is hereby authorized to borrow at any time an amount of money equal to ten (10) percent of the book value of the electric and water plants for any six (6) month period and to pay interest on such sum borrowed at a rate not to exceed the then prevailing interest rate and to issue its promissory note or notes as evidence of said indebtedness, which notes shall be signed by the **Chairman** of the Commission and the Secretary thereof, provided that at no time shall such promissory note or notes exceed ten (10) percent of the book value of such plants and provided further that money so borrowed shall be expended only for current operating expenses. (emphasis added)*

Comment : Replace Chairman with gender neutral Chair or Chairperson as appropriate.

Section 8.15 : Revenue Certificates and Promissory Notes

*The Commission shall, upon the approval by ordinance of the City Commission, after conducting a public hearing or hearings, have the right, power and authority to issue revenue certificates or promissory notes for the purpose of paying all or a part of the cost of acquisition, construction, repairing, extensions, additions, equipping and the reconstruction of any of the city's utilities. The City Commission shall not withhold its approval or deny passage of an ordinance where such a withholding or denial would cause the Commission to violate any of the covenants or terms of its bond resolutions and related contracts, resolutions and documents. All of such revenue certificates or promissory notes while authorized and issued by the Commission shall be obligations of the city of New Smyrna Beach and no referendum or **freeholder** election shall be required as a condition precedent to the issuance of such revenue certificates or promissory notes. All revenue certificates shall be offered for sale to not less than three (3) responsible bond brokers and the best bid excepted unless, in the discretion of the Commission, a better bid can be obtained by negotiation. In such cases the Commission shall have the right to reject all bids and sell said certificates upon the best terms offered therefor. (emphasis added)*

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Comment : Remove “freeholder” for the same reason as in Section 8.03 comments

Submission of the Draft for Voter Approval

With regard to the submission of the draft for approval by the voters at the next election I recommend that those sections with special concerns¹ and adverse impact as identified herein, should be set for individual section voting. In essence the draft should not be an all or nothing approach.

Respectfully submitted as a supplement to my testimony on 06/11/20 at the Charter Review Workshop conducted at the Brannon Center in New Smyrna Beach, FL

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¹ Indicated by the words **SPECIAL CONCERN** next to the Section comments.