Minutes of a Meeting of
2012 CHARTER REVIEW COMMISSION
held June 18, 2012

The eighth meeting of the 2012 Charter Review Commission was called to order at 6:00 p.m. by Chairman Don Zwilling. The following members of the Commission were present: Mark Barbour, Matt Clever, Dr. Gina Crawford, Brian Cruse, Sally Fell, Clete Miller, Barbara Quinn, Don Zwilling. Absent: Mike Caputo. Also present: Mayor Sutherland, Law Director Ebert, Police Chief Wright, Fire Chief Lyons, Sam Gmetro, Brandon Dimacchia, Martin Mace and Dick Majewski.

The first order of business this evening was the review of the minutes of the meeting of the Charter Review Commission held June 5, 2012. **MOTION** by Quinn, second by Barbour, to approve the minutes as prepared and distributed. **Motion carried 8-0.**

**PUBLIC COMMENTS**

Police Chief Wright addressed the commission advising that he has been on the Bay Village Police Department since 1980, serving at the chief since 1996. He comes before the commission today to state that he understands the duties of the commission, has been following what is going on, attending meetings, and reading the minutes. What troubles him is that there is consideration being given to removing the police chief and fire chief from civil service protection. Speaking as the Past President of the Cuyahoga County Chiefs of Police, and Past President of the Ohio Association of the Chiefs of Police, he feels that is a very bad idea for the City of Bay Village. It is a bad idea for any city anywhere, with the exception of possibly large urban police and fire departments. The reason is that the police chief and fire chief have civil service protection which gives them a degree of autonomy. They can do what needs to be done. You should approach the position in a collaborative spirit. When you are a department head, and come from inside the department, you understand the culture of the department, you understand the flaws of a police department, you understand the strengths of a police department, and you understand the areas that need improvement. Hopefully, that is what you bring to the job. Secondarily, once being named police chief, one of the biggest duties is to start fostering or developing candidates to take the place of the police chief once it is time for him to move on. That is a very important mission for any police chief or fire chief – to not only manage the department for today, but manage the department for five years down the road and start developing subordinate officers for future leadership positions. When you remove a police chief or fire chief from civil service protection, and allow the city to go outside the city and hire whomever they see fit for the position, that is a flawed process. An individual may be hired that is under political sway for any given issue, or maybe a lot of different issues. The individual might come in with a hidden agenda; or might come in with a public agenda. At least when there is civil service protection and you come from the inside, hopefully, you have spoken with the Mayor and the Law Director. The people in the Police Department know what to expect, and you move forward. Chief Wright further stated that he does believe an instance when it would be a good idea to remove a police chief or fire chief from civil service would be if the department is ripe for corruption. That is why many of the large cities do not have civil service protection for police chief and several ranks below the chief. If something endemic happens, they can replace the administration of the police or fire

department. Chief Wright stated that what troubles him is that there has been no communication from the city, Council, or from this committee concerning a watershed event changing the terms and conditions of employment for the future police chief and fire chief of the city. He comes to the meeting this evening to let the Charter Review Commission know what his thoughts are regarding this. He will be available for any questions or future contact. Chief Wright stated that police chiefs appointed without the benefit of Civil Service are referred to as "Yuppie Chiefs." They come into a city without any stake in the community and no ties to the community. They are in for the bigger and better deal. They don't know anyone on the police department; they don't know the culture of the police department, and they certainly don't know the strengths or areas of improvement for a police department. If a better deal is offered, they will move on to another city. Chief Wright stated that with the civil service protection he was afforded, when he raised his hand to take the oath of office, he was confident that he could give the city 33 years of service. At this point he has 31 of the 33 years completed.

Chief Wright concluded, stating that he does not come before the commission speaking for himself today. He comes speaking for future police chiefs and fire chiefs of the City of Bay Village. He does not want to see the city degrade to a position where they bring somebody from the outside, somebody with ulterior motives, or whatever the case may be. He was promoted police chief at 30 some years of age, and had a young family back then. There was no way he would have accepted the position without civil service protection. With a young family he could not take a chance on leaving civil service. He stated that the police department is becoming aware that they might take the police chief and fire chief out of civil service and that has not gone over well. He stated that he has not been afforded, nor is aware of, any open communication that has gone between the police and fire departments or this committee, which is why he stands here today.

Mr. Zwilling thanked Chief Wright for his comments.

Mr. Cruse asked Chief Wright, hypothetically speaking, what job would be out there for him that would attract him away from his job. Chief Wright answered that the job would be the Director of the FBI. Mr. Cruse asked if there is anything in civil service rules that, if that job came open and he received the appointment, would prohibit him from being able to take that job. The Chief stated that there is not. Mr. Cruse stated then that the civil service really doesn't cut both ways.

Chief Wright stated that the benefit to the community is that under civil service protection you have an internal candidate versus an external candidate. Somebody that understands the community, has worked within the community, knows the police department, and knows the men and women on the police department. You would not necessarily have that with an external candidate. Certainly the civil service protection is a benefit to the police chief as far as job protection goes.

Chief Wright stated that it is possible, even without civil service protection, the next police chief could come from a current member of the police department. However, individuals that are the most likely candidates would most likely have to pass if civil service protection is not afforded. A tenured or veteran employee interested in the police department position would ideally be

someone who has the vision, understands the mission, and is trying to drive the department to excellence.

Mr. Zwilling asked if the Charter Review Commission is being asked to take the police chief position out of civil service in what they are discussing.

Chief Wright stated that this has not been, at least to him, definitively answered either way. But, he is starting to feel that it is headed that way.

Clete Miller stated that as of the last meeting they clarified that Sections 6.1 through Sections 6.4 really are the overall definitions and the structure for those members of the Civil Service Commission, not any reclassification or declassification of any members of the civil service themselves. What they are attempting to do is better define an article for Section 6 that would provide purpose rather than just open definition. That definition would then be transferred into Civil Service Rules as a forward.

Mr. Zwilling stated that he spoke to Mr. Ebert and there may be revised language to look at this evening. He stated that he believes the commission was talking about lifting the civil service provisions out of the charter and putting them in the administrative code.

Law Director Ebert distributed revised language to the Charter Review Commission. Mr. Ebert advised that Brian Cruse and he got together after the last Charter Review Commission meeting and talked about various issues that were brought up, whether or not to move civil service to the administrative code, and did not draft anything. What Chief Wright indicates about the City of Cleveland is that they are considering taking their fire chief out of their charter as civil service.

Mr. Zwilling called for further public comments.

Fire Chief Lyons addressed the commission and stated that he was here for the police chief's presentation, and agrees almost entirely with the things he said. Chief Lyons would add for consideration one more matter and stated that most of the Charter Review Commission members are very familiar, at some point or another, with municipal government. There are up to a dozen different departments within municipal government. The police chief and fire chief, historically, are the only two directors' positions that are classified as civil service. The distinct reason for this is that as police and fire chiefs they are charged with, above all else, the protection of public safety. Sometimes, not usually, but once in a while, what they consider from their professional perspectives as chiefs of their respective departments, to be in the best interest of the safety of the citizens may be politically unpopular. The civil service protection they are afforded in those instances allow them to stand up in front of groups, such as these, and speak what they know to be the truth regarding public safety. If one is in an appointed, at will, position, one may not have as much freedom to get up and speak on behalf of public safety as one would have if he were classified as a civil servant. Historically, those are the very reasons why police and fire are classified as civil servants, and the other directors' positions are not. The other directors' positions are equally as important, but in a different way The protection of the public safety has always been considered the primary function of every government, from federal level to local level.

Barbara Quinn asked for an example of how being a civil servant versus not being a civil servant in the position of chief would affect public safety.

Chief Lyons stated, hypothetically, that if a city is facing huge budget constraints in the future and a political body might be looking to reduce the size of a department, which a chief would know from experience and best practices would put that department in a position where it could not effectively protect public safety, the chief could say that freely if protected by civil service. Whereas, if the chief were an appointed, at will, position, he might feel constraint. Especially someone who has another fifteen or twenty years to go.

Barbara Quinn asked if the chiefs have union protection to protect them from that type of case.

Ms. Quinn was informed that the police and fire chiefs are not part of the unions. The civil service protection is the only protection they have.

Chief Lyons and Chief Wright stated that they are both available for questions at any time.

Brandon Dimacchia addressed the commission, advising that he is a firefighter with the City of Bay Village. He has been with the department for about eleven years. He is also a fire instructor with the department and on the West Shore Haz Mat Rescue Team. Mr. Dimacchia stated that whatever decision is made by the commission, all he asks is that they do not compromise the quality of the services that are currently provided. He suggested asking any of the citizens that have received the services, which will result in a positive remark. He asked if the commission is looking to make any changes to please look at the past and what they currently do. It is hoped that nothing is compromised and nothing is changed for the detriment of the city.

Mr. Dimacchia was thanked for his comments.

There being no further comments from the audience, the public comments section of the meeting was closed.

## OLD BUSINESS

### Article IV – Administrative Officers and Departments

Law Director Ebert advised that it is his understanding that the commission is considering the elimination of one sentence, which the hand out Mr. Ebert provided to the commission this evening accomplishes. The Charter at this time in Section 4.1 says:

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A Department of Law, a Department of Finance, a Department of Public Safety, and a Department of Public Service and Properties are hereby established by this Charter, and the Council shall provide by ordinance for the organization thereof. The Council may establish by ordinance new departments or divisions thereof. With the exception of the Department of Law and the Department of Finance, the Council may combine or abolish existing departments and

divisions as it may deem necessary and may authorize one person to be the head of two or more departments or divisions. The Mayor may act as the head of the Department of Public Safety and/or the Department of Public Service and Properties.

Mr. Ebert stated that the idea, at some point in time, is that there would be a sharing of a Finance Director and Law Director by individual cities. Removal of the beginning of the sentence stating "with the exception of the Department of Law and the Department of Finance" gives the Mayor the opportunity to do that, if so desired.

Mr. Clever stated that the reason the sub-committee was in favor of this change is because the city, by state law, is required to have a Department of Finance and Department of Law in the municipal government, but it doesn't necessarily have to be delineated in the Charter. If the opportunity would arise, it gives the Council and the Mayor a little more leeway in that direction.

Mr. Barbour commented that the Ohio Revised Code states that you have to have a Department of Law and Department of Finance. The Mayor stated that the ORC doesn't tell the municipality how they have to do it. If, at some point in the future, they decided they were going to combine with the West Shore Council of Governments, we would still be fulfilling the statutory requirement but wouldn't be hampered by the language in the Charter. The Mayor noted that there are no plans to do that.

**Article VI – Civil Service Commission**

Law Director Ebert stated that they are not ready to proceed with this Article. He reiterated that Brian Cruse and he met after the last Charter Review Commission meeting and there is a lot of discussion when you go to the state statute and the constitution versus the charter. They did not come to any conclusion. There needs to be more discussion.

Mr. Cruse stated that the issue seems to be the concept of moving what is currently in Article VI of the Charter to ordinance, and having the language right out of the state constitution basically be Article VI that mandates Civil Service. It seems clear from the case law researched that there has to be some form of competitive examination and merit evaluation for hiring and promotions. Civil Service is there, it is just a question of where it exists. Mr. Cruse handed the sub-committee a number of cases that he came across and researched which may help the sub-committee looking further into this issue. Some of the case laws turn on very fine legal linguistic points where it is clear that the fight was political. There is one case that hinged on action that Council took by resolution rather than by ordinance, and since it was a resolution that meant that it didn't conflict with the state so home rule didn't apply. They were thrown back to the state standards.

Mr. Cruse stated that he believes that at the end of the day it is going to come down to a political question as to whether it should exist in the Charter or in ordinance form.

Mr. Clever stated that at the last Charter Review Commission meeting they had discussed leaving the verbal commitment to civil service. He asked if that would allay Mr. Cruse's concerns. Mr. Cruse stated that he picked the language from the Ohio Constitution and just

tweaked it a touch to remove the reference to county and other municipalities. But taking that language seemed, the way the cases researched went, to protect a home rule city in implementing a civil service program. The more he thought about this; in his mind it comes down to that he does not think there is a right or wrong answer legally. It is more of a political thing and what the fallout may be.

Mr. Zwilling stated that we are looking to provide the city flexibility in the area of civil service, if the commission so chooses. In Article IV, we took care of the Law and Finance Departments. This allows Council to abolish, combine, or establish any departments that they wish. He asked the hurdle of applying this to the fire and police departments.

Mr. Cruse responded that he does not want to term it in terms of applying it to fire and police. It is applying it to civil service classified positions. The state constitution is very clear that even if you are a home rule city, you have to have some form of civil service procedure for those classified positions and that has to include competitive examination.

Mr. Zwilling asked if that has to be in the Charter.

Mr. Cruse stated that in his opinion there has to be a designation in a city's Charter that it is exercising its home rule authority in implementing a civil service program. The interpretation of the case law research in court becomes the $64,000 question. He suggested that the sub-committee look through the case law research. Mr. Cruse's opinion as a lawyer is that a lot of those cases turned on political considerations, whatever they might have been, in those municipalities.

Mr. Miller asked Mr. Cruse his opinion if Sections 6.1 through 6.4 are valid content that is needed to maintain home rule for civil service if those articles stand.

Mr. Cruse stated that his very humble opinion, the way it sits in the charter, it works. It is a valid exercise of home rule authority. You could take those articles, word for word, and move them to ordinance form and still, with the correct language in the charter, meet the state's measure of a valid exercise of home rule authority for a civil service program.

Mrs. Fell stated that it is her understanding that the idea is to provide flexibility for our city government to work with other city governments. The civil service is an aspect of our current Charter which would prevent us, possibly, from doing that in the way that it is worded currently.

Mr. Cruse stated that his understanding is that if this is done, the implementation of the civil service program, if it is by ordinance, would make it easier for Bay Village to make changes. Any changes in the Charter require going to the electorate for a vote. If you move the nuts and bolts of civil service to ordinance and a change came through, Councilmanic action could make changes to the nuts and bolts of the civil service program.

Mr. Barbour stated that the one part that is not being discussed in enough detail is that you start at the top; the Ohio Constitution says in so many words, you must have civil service. Article XV, Section X, states that laws shall be passed to enact this. What the law allows is that charter

cities, if they spell it out in their charter, can manage their own particular sections of constitutional requirements. That is the current, very simplistic description of home rule. What the Charter Review Commission is talking about doing is taking Section 6 out of the Charter, putting it in our code book, and in its place putting a general grant of authority. The problem when you read the case law on this is that the general grants of authority are often times insufficient. The other problem is that you don't know if it's insufficient until it is too late. It has to be tested in court. The Charter Review Commission could do this, but what has been proposed so far is wholly insufficient to survive a court challenge.

Mr. Cruse stated that he does not disagree with Mr. Barbour completely, but he does not know if he agrees with him completely. That is why he believes the sub-committee should look at those case law examples.

Mr. Barbour noted that the current trend in the law does not favor home rule. Mr. Cruse added that courts, given the opportunity, want to whack home rule and have everyone look at what is in the state statutes. Mr. Barbour stated that he thinks the Charter Review Commission can do it, but the way it has been proposed so far it is not going to work.

Mr. Miller asked if there are qualities about Charter Sections 6.1 through 6.4 that could be challenged that would lose our ability to maintain home rule. Are those the kinds of things we should be paying attention to and reinforcing, rather than potentially diminishing our ability to manage it, should we try to reinforce it if the current laws are being challenged? If we have Articles 6.1 through 6.4 that basically outline our Civil Service that we would conduct under home rule, if current case laws are showing that those that do have home rule civil service are being challenged and losing, are there things we should be addressing in our current definition of civil service that we should be reinforcing so that we can maintain that home rule rather than trying to alternate and possibly making it potentially weaker?

Mr. Cruse stated that the simplistic answer he would give goes back to the comments heard from Jim Potter when he said, the way it is set up, our system works. There haven't been any legal challenges, to his knowledge, to Bay Village's system the way it is set up. Mr. Cruse stated that his simple answer is "If it ain't broke, don't fix it." If we are just saying take this and move it here and not do anything else to it, why move it? You've got something that is tested and tried.

Mr. Barbour stated that it is really much more complex than the commission was giving it credit for. When you read the cases and decisions, what they are basing the decisions on, we would need to rework the language if we want to move it out of the Charter. If you move it out of the Charter and you have your own code section and there is a court case, the court is going to look at the language of our Charter and say did Bay Village's Charter give you the right to set up your own system that you have here in your code section. If the answer is "no" then the default provision is Chapter 124 of the Ohio Revised Code. If it is the Ohio Revised Code, you are using that and you are losing your opportunity to have your own code section apply.

Barbara Quinn asked if Mr. Barbour and Mr. Cruse are referring to the idea that if new language were put in the Charter and the existing Charter provision moved to the administrative code that the new language may not hold up in court. Mr. Barbour responded affirmatively, noting that

currently there are four or five parts to Article VI. What the commission contemplated was making that into one paragraph.

Mr. Ebert stated that civil service procedure has been watered down by labor contracts. He stated he was appointed as a judge on a civil service appeal of a director in another city. Both sides said it didn't matter because they were going to file in court anyway. Another example in Westlake was the fire chief termination situation. There was a hearing. Five years later the court finally made a ruling. There are certain circumstances where labor contracts have superseded the civil service procedures. You can tweak portions of the provisions of civil service, but you cannot do away with civil service entirely. You can take the various classifications and look at each individual ones to see if that should be there. The city used to have a lot more civil service employees, mainly clerks/secretaries, but now they are under the AFSCME Union protection.

Mr. Zwilling suggested keeping the objective in mind of trying to help the city attain more flexibility. He noted the recent effort on the part of the state in support of regionalization among cities.

Mr. Clever thanked Mr. Cruse and Mr. Barbour for their insight into this issue. He noted that the tenor of the discussion has been centered around the idea of granting the city a little more flexibility with an eye toward regionalization. There has never been any personal vendetta or even any thought of moving the chiefs' positions from civil service. Mr. Zwilling noted that they would rather set the table for regionalization in the Charter than be compelled to act on it in one given year or another.

Article VI will be tabled pending further work by the sub-committee assigned to the section.

**Article VIII – Parks and Recreation Department**

Mayor Sutherland stated that the city has to have someone to run the Parks and Recreation Department, but asked how it could be accomplished in the future if they should decide to put that together with Community Services when the Charter says we have to have Parks and Recreation. Parks and Recreation was established in the Charter in 1967.

Mr. Ebert stated that if you drop Article VIII, a reference would be made in the Charter noting that the Article was deleted to avoid having to renumber all of the Charter sections.

Mr. Cruse stated that with the exception of Finance and Law, the only other department created by the Charter is Parks and Recreation. The issue with Article VIII is that if the city, in the future, wanted to combine it with Community Service, you would have to submit it to the electorate.

Mr. Zwilling suggested holding off on voting on these determinations by the Charter Review Commission until all the proposed changes are prepared.

**Article XI – Nominations and Elections**

Mrs. Quinn stated that a previous question she had regarding this section has been answered.

**Article XIII – Miscellaneous**

**Section 13.5 – Nominations and Petitions**

Mayor Sutherland had previously suggested that the number of signatures required for petitions may be too low. Mr. Clever stated that he did speak with the Manager of Candidates and Petitions Services at the Board of Elections. Petitions to amend the charter are governed by Article XVIII, Section 9 of the Ohio Constitution. The main mechanisms for amending Charters are a two-thirds majority vote of Council or a petition being circulated among 10% of registered electors. The municipal charter guide from the Secretary of State's Office states that case law has been established that cities can do what the City of Cleveland did, say that the Charter can be amended by 10% of registered electors based on the total turnout in the last municipal election. Given the lower turn out in a municipal election, that is dropping the standards. The City of Rocky River, in their Charter, refers to the Ohio Constitution article.

This article is consistent with the vast majority of city charters.

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**Article VII- Planning Commission**

**Section 7.4 – Mandatory Referral**

Mayor Sutherland stated that what Mr. Caputo was questioning was the fact that without any body taking action a plan can get approved, and it can be done by mistake. If the Planning Commission doesn't act within sixty days, an application is deemed approved. If the Council does not grant an extension, either by oversight or because they are adjourned, the application would be approved if not acted upon or extended in the sixty day period. Discussion followed concerning the removal of the sentence from the Charter section that authorizes this approval if the Planning Commission has not acted within sixty days.

Mr. Cruse stated that the language keeps everyone moving forward, and forces Planning Commission and Council to pay attention to an application.

Mr. Ebert stated that the Charter could be changed to allow the Planning Commission to allow more time, rather than Council. He noted that sixty days is not enough time in a lengthy construction project. Mr. Cruse agreed that he believes the issue is the number of days. Mr. Ebert suggested consideration be given to allowing 120 days for review of applications.

**SECTION 13.3 DISQUALIFICATION**

This section will be discussed further at a future meeting.

Meeting adjourned at 7:15 p.m.

The next meeting of the Charter Review Commission will be held Monday, July 2, 2012, at 6 p.m.

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| Don Zwilling, Chairman | Joan Kemper, Secretary |