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### *New York City Charter Revision*

Over a century ago, a New York City guidebook complained of the succession of city charters during the 19th century: "Theoretically all of them have had their merits, this present one included; but in their practical workings all have failed in some one or more vital parts to give satisfaction to the people of the city." Appleton's Dictionary of New York and its Vicinity (1892) at 52. The charter remains the governing document of the city of New York, and the calls for changes to the charter have not abated in the ensuing years.

Many of the most important changes have been adopted by the voters on the recommendation of charter revision commissions. This Nov. 4, on the recommendation of a charter revision commission appointed by Mayor Michael Bloomberg, the voters of the city will decide on three questions proposing changes to the charter, the most significant of which is a proposal that would alter the way New Yorkers elect their citywide and local officials by establishing a system of nonpartisan elections.

The New York City Law Department has often been at the center of changes proposed by charter revision commissions, advising commissions on applicable law, defending the work of commissions in litigation and assisting in the implementation of revisions to the charter that have been approved by the voters.

#### **Background**

In contrast to the law of some other jurisdictions, California as a notable example, where voters can adopt far-reaching legislative changes and even recall elected officials by initiative and referendum, the law of New York State provides relatively few opportunities for direct legislative action by the voters, especially at the state level. In New York City, under Municipal Home Rule Law §37 and Charter §40, provisions of the city charter may be amended by voter initiative (such as the adoption of term limits for



elected city officials in 1993), and voters decide on revisions to the charter proposed by charter revision commissions.

Such commissions may be established in a number of ways. Section 36 of the Municipal Home Rule Law provides for creation of a charter commission through either city council action (§36, subd. 2), a voter petition followed by a referendum (subd. 3), or mayoral action (subd. 4). With the exception of the commission chaired by former state Senator Roy Goodman, R-Manhattan, that was specially created by state legislation in the early 1970s, recent charter commissions have

been appointed by mayors. In general, a charter commission must review the entire charter, conduct public hearings and prepare a final report. Its proposals are then subject to a referendum at a special or general election held not later than the second general election after its appointment. Municipal Home Rule Law §36, subs. 5 and 6. A commission may draft an entirely new charter, or may propose any amendment that is within the city's local legislative power, and may propose to the voters one or more questions reflecting its amendments.

The current structure of city government results largely from the work of the 1989 Charter Revision Commission, which was appointed by Mayor Edward Koch and chaired by Frederick A.O. Schwarz Jr., who had previously served as Mayor Koch's corporation counsel. At that time, a body known as the board of estimate, which consisted of the three citywide elected officials and the borough presidents, played a central role in the city's government, exercising jurisdiction in areas such as contracting, land use and budgeting. However, in March 1989, the supreme court struck down the voting structure of the board of estimate because the equal votes given to the borough presidents on that body violated the constitutional doctrine of one-person-one-vote. *New York City Board of Estimate v. Morris*, 489 US 688 (1989).

When the *Morris* case was decided, Mayor Koch had already appointed a charter revision commission in anticipation of the possible invalidation of the board of estimate. (In the previous

year, a commission chaired by Richard Ravitch had proposed, and the voters had approved, a limited set of amendments to the charter concerning such matters as conflicts of interest, rule-making and filling vacancies in city offices.) The 1989 Commission eventually proposed abolishing the board of estimate, largely dividing its powers between the city council and the mayor while retaining the city's other elected offices and revising their duties. The voters approved these proposals at the general election in 1989. Although the ensuing years saw two referenda concerning a charter provision mandating term limits for elected city officials, it took almost a decade for another charter revision commission to be appointed. This new commission faced controversy and litigation.

### 1998 Commission, Stadium Referendum

The events of 1998 turned on an obscure but significant paragraph of state law, which originated in the state legislation relating to a charter revision in 1961. This paragraph (codified in Municipal Home Rule Law §36, subd. 5) provides that if a question proposed by a mayoral charter commission appears on the ballot, then no other question related "directly or indirectly" to charter revision may appear on the same ballot. The operation of this ballot hierarchy was exemplified by the 1998 litigation.

In April 1998, in response to consideration then being given to the possibility of constructing a new baseball stadium in Manhattan, City Council Speaker Peter Vallone announced that the council would propose legislation for a voter referendum which would have prohibited the expenditure of city funds on a stadium in that location. Mayor Rudolph Giuliani then convened a charter revision

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commission, to be chaired by former First Deputy Mayor Peter Powers. Pursuant to Municipal Home Rule Law §36, subd. 5, a ballot proposal by the mayor's commission would block the council's referendum from appearing on the ballot at the same time. The Powers Commission studied a number of issues, including non-partisan elections, but eventually focused on campaign finance reform. When the commission transmitted its proposals to the city clerk, the council sued to prevent the proposals from appearing on the ballot, resulting in a spirited exchange during the course of the litigation about the process and substance of charter revision. The Law Department represented the mayor and the Powers Commission, arguing that the commission's work had been proper and legally effective, while the council argued that the proposals were merely an exercise intended to block a referendum on Yankee Stadium. The two sides also disputed whether the council's proposal was an appropriate subject for a referendum.

The Appellate Division, First Department, reversed a supreme court justice in the Bronx and unanimously held that the commission's proposal was lawful, finding that the report of the commission sufficiently explained its reasons for proposing only a limited set of charter amendments, while leaving other topics

for further consideration by a possible future commission. The court therefore concluded that the commission's proposal would "take precedence over" the council's proposed referendum. *Council of the City of New York v. Giuliani*, 248 AD2d 1, 5-6 (1st Dept.), appeal dismissed, leave to appeal denied, 92 NY2d 938 (1998). The court did not pass upon the legality of the council's proposed referendum, but the council's proposal never appeared on the ballot.

In the years after the 1998 litigation, three more charter revision commissions placed questions on the ballot, with assistance from the Law Department. A single proposal that included a number of initiatives was turned down by the voters in 1999, but largely formed the basis for five questions that were all approved in 2001. These revisions established certain offices and agencies in the charter and implemented other initiatives, including provisions relating to gun safety, the rights of immigrants to city services and the reporting of certain suspected crimes by board of education employees, but did not fundamentally restructure city government. The 2002 Commission, the first commission appointed by Mayor Bloomberg, studied nonpartisan elections and mayoral vacancy provisions, but proposed only a question providing for an expedited special election to fill a vacancy in the office of the mayor. This proposal was adopted by the voters.

From 1998 to 2002, the issue of nonpartisan elections — in which all registered voters may participate in a nonpartisan primary election without regard to party registration and the leading primary contenders go on to appear in the general election — was the subject of discussion by the various charter commissions, but was

never placed before the electorate. This November, a referendum on nonpartisan elections will be held, along with questions on procurement reform and other administrative changes.

This year's charter revision commission was chaired by Dr. Frank Macchiarola, former chancellor of the city's school system. Throughout the spring and summer, the commission held meetings, hearings and expert forums throughout the city. Although it considered a variety of questions, the commission's primary focus has been on nonpartisan elections and procurement. In preparing its proposals, the commission and its staff received considerable assistance from the Law Department's legal counsel and contracts and real estate divisions.

The city's authority to enact non-partisan elections derive from its home rule power, established in Article 9, §2 of the state constitution and §10 of the Municipal Home Rule Law. This authority is supported by the decision of the Court of Appeals in *Bareham v. City of Rochester*, 246 NY 140 (1927), in which the Court stated that the local legislative body of Rochester could enact a local law providing for nonpartisan elections for Rochester's city council and that such a local law could supersede otherwise applicable provisions of the Election Law. Since the decision in *Bareham*, courts have repeatedly emphasized the

flexibility afforded to local governments and to New York City, in particular, in designing the manner of election of local officers. See, e.g., *Matter of Blaikie v. Power*, 13 NY2d 134 (1963), appeal dismissed, 375 US 439 (1964) (upholding city's system of at-large elections for certain city council seats); *Johnson v. City of New York*, 274 NY 411, 430 (1937) (upholding city's system of proportional representation in city council); *City of New York v. New York City Board of Elections*, Index No. 41450/91 (Sup. Ct. N.Y. Co.), aff'd, -- AD2d -- (1st Dept. 1991), appeal dismissed, leave to appeal denied, 77 NY2d 938 (1991) (upholding system of nonpartisan special elections for filling of certain city council vacancies).

On Aug. 25, 2003, the charter revision commission voted to propose three questions, with associated charter amendments, including a question on nonpartisan elections. The proposal by the commission would not take effect until after the 2005 general election and would permit candidates to indicate their party of enrollment or independent status. The commission also proposed city procurement reforms and a limited set of other changes to provisions related to such matters as restructuring the agency charged with voter assistance, increasing penalties for violations of the charter's conflicts of interest provisions and streamlining city administrative procedures (including expanding the jurisdiction of the Department of Consumer Affairs tribunal). All three questions are to appear on the November general election ballot.

At about the same time as the commission was completing its work, a coalition known as New Yorkers for Smaller Classes submitted to the city clerk a petition to create a charter commission pursuant to Municipal Home Rule Law §36(3). The petition would provide for a commission of 19 to 23 members, in

this case to be appointed by the city council, to review the charter, and to examine in particular "provisions that may relate to class size of the New York City public schools." Section 36(3), which has never before been used in New York City, permits at least 45,000 qualified electors to submit a petition to create a charter commission and, if such a petition meets "all the requirements of law," provides for the city council to submit a local law establishing such a commission to the electors at the next general election held not less than 60 days after the filing of the petition. Events of the coming days will likely determine whether the petition will result in the submission of a question to the voters in this year's general election.

## Conclusion

Charter revision provides opportunities for improvement in the structure and processes of city government, but at times also presents difficult legal questions and gives rise to litigation. The long history of Law Department involvement in charter revision is not likely to end with the November 2003 general election. If the voters adopt the nonpartisan elections proposal, the Law Department will participate in preparation of an application to the Justice Department for preclearance of the new system of elections under §5 of the Voting Rights Act (42 USC §1973c) and will advise and counsel on the implementation of the amendments.

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