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CONFIDENTIAL ATTORNEY – CLIENT PRIVILEGED COMMUNICATION

INTEROFFICE MEMORANDUM

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SUBJECT: Legislative and Executive Authority under Revised Charter

The form of Portland's government will change substantially as a result of the passage of Measure 26-228, a charter amendment, by Portland voters in 2022. This charter amendment ("revised charter" or "charter") establishes a new form of government and sets forth the basic structure of that government. The revised charter provides that, on January 1, 2025, all legislative and quasi-judicial authority will vest in the Council, and all executive and administrative authority will vest in the Mayor. The revised charter also assigns specific duties to Council, the Mayor, and a City Administrator who is hired by the Mayor and designated to carry out certain executive and administrative functions.

These changes mean that the Council will be the legislative and policy body for the city. The Council adopts laws and the budget, raises city revenues and appropriates funds for city functions. The Mayor, aided by the City Administrator, will be responsible for the execution and enforcement of the city's laws and budget priorities and for administration of the city's bureaus and facilities.

The revised charter is intended to provide a broad framework, which means that elected officials must develop and implement the details of the new government structure. Determining what is a legislative act and what is an executive or administrative act under the revised charter will be complicated in some circumstances. The purpose of this memorandum is to provide a tool to assist Portland's elected officials as they consider code amendments to implement the new government structure. This memorandum discusses: (1) some of the significant responsibilities the revised charter assigns to Council, the Mayor and the City Administrator; and (2) the legal framework for deciding whether actions that are not specifically assigned by charter are legislative or executive/administrative.

1. Responsibilities assigned by charter

Under Oregon's "home rule" constitutional provisions, city charters may provide broad authority for the city to make laws and conduct city business. *See* Art IX, Sec.2 and Art IV, Sec 1(5), Oregon Constitution. Portland's revised charter contains broad grants of general authority (Ch. Sec. 1-102, 2-104, 2-106) as well as numerous grants of specific authority.

a. General Allocation of Powers

The general allocation of these powers in Portland's revised charter is provided in Ch. Sec. 2-101, Municipal Powers Allocation:

The municipal powers and authority of the City are vested as follows: legislative and quasi-judicial authority is vested in the City Council and executive and administrative authority is vested in the Mayor, subject to the initiative and referendum and other powers reserved to the people by the constitution of the State of Oregon as defined and prescribed by the provisions of the constitution and general laws relating thereto, and by any more specific allocation set forth in this Charter. Legislative authority means the power to make appropriations, raise revenue and make laws and quasi-judicial authority means the power to apply laws and policies to a set of circumstances. Executive and administrative authority means the power to execute and administer the laws, including by adopting administrative rules.

Ch. Sec. 2-104, General Powers, contains a number of important elements regarding allocation of charter powers: (1) it restates the general division of authority between the Council and the Mayor in Ch. Sec. 2-101; (2) it emphasizes that the charter's assignment of specific powers is controlling; (3) it permits Council to delegate quasi-judicial, but not legislative power; (4) it permits the Mayor to delegate executive and administrative functions; and (5) it explicitly prohibits the Council from exercising the executive and administrative powers granted to the Mayor.

Finally, Ch. Sec. 2-106, Enumeration of Powers not a Limitation, states in relevant part:

The City Council may exercise any legislative or quasi-judicial power or authority, and the Mayor may exercise any executive or administrative power or authority, granted by Oregon statute to municipal corporations at any time and also to cities of a class which includes the City of Portland.

In summary, the general allocation of powers gives Council authority to make laws, make appropriations, raise revenue and decide quasi-judicial cases, while the Mayor and the City Administrator have authority to execute the laws and administer bureaus, employees, facilities and resources. However, as provided in both Ch. Sec. 2-101 and Ch. Sec. 2-104, if the charter contains a specific allocation of power to an individual or body, that allocation prevails over the general allocation provisions.¹

b. Specific Allocation of Powers

Ch. Sec. 2-105 enumerates specific city powers, many of which have both legislative and executive or administrative elements. As a result, the charter does not identify who will exercise these specific powers, and roles will have to be determined based on whether the specific proposed action is deemed to be legislative, quasi-judicial or executive/administrative, as

¹ Further, if state or federal law requires action by a governing body, by ordinance or by the Mayor, then the body or individual identified in that law, may be the appropriate entity to act. Evaluation of specific state and federal laws is outside the scope of this memorandum.

discussed in Section 2 below.

The charter contains numerous specific allocations of authority that are binding regardless of whether a court would consider the action to be legislative or executive/administrative; this memorandum will not address all of these allocations but will identify some of the more important ones below.

Specific Council powers and duties

- Select Council President and Vice-President (Ch. Sec. 2-110)
- Set Council meetings, determine rules of Council procedure and establish committees (Ch. Sec. 2-111)
- Adopt ordinances, resolutions, reports or orders in conducting legislative and quasi-judicial business (Ch. Sec. 2-117)
- Fill vacant Council, Mayor or Auditor position (Ch. Sec. 2-206)
- Approve budget (Ch. Sec. 2-128)
- Issue bonds (Ch. Sec. 7-203)
- Establish bureaus and their authority (Ch. Sec. 2-301, 2-603)
- Adopt and amend code (Ch. Sec. 2-304)
- Establish boards and commissions and confirm board and commission appointments (Ch. Sec. 2-103, various sections)
- Investigate board, department or acts of officer, employees in aid of legislative function (Ch. Sec. 2-109)
- Confirm appointment of City Administrator, City Attorney and Chief of Police (Ch. Sec. 2-401, 2-601)
- Remove City Administrator for cause by the affirmative vote of at least nine (9) Councilors. (Ch. Sec. 2-401)
- Sell or dispose of city property and vacation of streets (Ch. Sec. 1-104)
- Approve settlements greater than \$50,000 (Ch. Sec. 1-106)
- Make appropriations and impose annual tax levy (Ch. Sec. 2-123)
- Fix and change salaries of every officer (Ch. Sec. 2-602)
- Receive reports (various sections)
- Grant utility franchises (Ch. Sec. 10-207)
- Set fees and water rates (Ch. Sec. 11-105, 12-103)

Specific Mayor powers and duties

- Submit proposed budget and periodic amendments (Ch. Sec. 2-128, 2-401)
- Exercise executive and administrative power over bureaus (Ch. Sec. 2-301)
- Investigate city bureaus or employees (Ch. Sec. 2-403)

- Execute and administer city code (Ch. Sec. 2-302)
- Establish and abolish advisory boards and commissions (Ch. Sec. 2-103)
- Appoint board and commission members, subject to Council confirmation (Ch. Sec. 2-601)
- Advance the City's core values efforts to mitigate the climate crisis and prioritize environmental justice initiatives (Ch. Sec. 2-401)
- Supervise general affairs of city (Ch. Sec. 2-401)
- Place matters on Council agenda (Ch. Sec. 2-401)
- Vote on matters before the Council in case of a tie and cast deciding vote (Ch. Sec. 2-401)
- Appoint the City Administrator, subject to Council confirmation, remove Administrator and give direction to the Administrator. If the office of Administrator is vacant, the Mayor must fulfill the duties of the Administrator until the office is filled (Ch. Sec. 2-401)
- Appoint, subject to Council confirmation, and remove the City Attorney and the Chief of Police (Ch. Sec. 2-401)
- Deliver State of the City address to Council annually (Ch. Sec. 2-401)
- Authorize, negotiate and execute all contracts and intergovernmental agreements, consistent with the City budget (Ch. Sec. 2-401)
- Approve settlements of less than \$50,000 (Ch. Sec. 1-106)
- Encourage programs for the physical, economic, social and cultural development of the City and actively promote economic development (Ch. Sec. 2-401)
- Serve as ceremonial head of the City and issue ceremonial proclamations (Ch. Sec. 2-401)
- All other executive and administrative powers not conferred elsewhere by this Charter (Ch. Sec. 2-401)

Specific City Administrator powers and duties (all found in Ch. Sec 2-406)

- Efficiently administer all City affairs
- Except for the City Attorney and the Chief of Police, appoint, reassign, discipline and remove all directors of bureaus and departments and all employees
- Execute and enforce all laws adopted by Council
- Attend meetings of the Council, and its committees, and such meetings of boards and commissions as the Administrator chooses
- Investigate affairs of the City under the Administrator's supervision
- Control and administer the financial affairs of the City
- Prepare an annual budget under the direction of the Mayor for the Mayor's submission to the Council
- Prepare and submit to the Council such reports as it may require
- Keep the Council fully advised as to the financial condition and needs of the City
- Adopt administrative rules

- Perform other duties as directed by the Mayor, the Charter or City Code

2. Legislative v. Executive/Administrative Authority

For actions that are not specifically allocated by the charter, the city will need to determine whether an action is legislative (Council authority) or whether an action is executive or administrative (Mayor's authority).

a. Definitions

The revised charter defines the Council's "legislative authority" as "the power to make appropriations, raise revenue and make laws." Ch. Sec. 2-101. Thus, in exercising legislative authority, the Council may make appropriations through adoption of the city budget and periodic budget amendments; may raise revenue by means including approval of the annual tax levy, bond issuance, special assessments and fees for services; and may make laws through adoption of ordinances. The Council powers necessarily include public meetings, gathering public input, debating and evaluating policy choices and adopting laws to reflect those choices.

The revised charter defines the Mayor's "executive and administrative authority" as "the power to execute and administer the laws, including by adopting administrative rules." Ch. Sec. 2-101. While the charter does not further explain what "execute" and "administer" mean, the voters approved a specific list of duties that includes "[a]ll other executive and administrative powers not conferred elsewhere by the Charter" (Ch. Sec. 2-401(n)). Thus, the enumerated specific duties for the Mayor describe functions the charter considers to be executive/administrative and provide context for the type and scope of duties that are executive or administrative. Similarly, the City Administrator is responsible for performance of administrative duties, and the specified duties of the City Administrator, including appointment, assignment, discipline and removal of most bureau directors; execution and enforcement of all

city laws; control and administration of city financial affairs; rulemaking for general conduct of administrative departments; and “proper and efficient administration of all City affairs,” provide additional context. *See* Ch. Sec. 2-406.

The dictionary defines “execute” as “of or relating to the execution of the laws and the conduct of public and national affairs” and “belonging to the branch of government that is charged with such powers as diplomatic representation, superintendence of the execution of the laws, and appointment of officials and that usually has some power over legislation (as through veto).”² “Administrative” is defined as “of or relating to administration or an administration: relating to the management of a company, school, or other organization.”³ Black’s Law Dictionary defines “administration” as “1. The management or performance of the executive duties of a government, institution, or business. 2. In public law, the practical management and direction of the executive department and its agencies.”⁴ Therefore, executive power means the power to implement and enforce the policies and laws of the city and to appoint the agents charged with such enforcement⁵ and administrative power means the power to manage or direct public departments and governmental functions. The terms executive and administrative are frequently used interchangeably.⁶

b. Oregon case law

In general, the Council will be responsible for establishing city policy, adopting the budget and raising revenue. The Mayor will be responsible for carrying out the policies and

² Merriam Webster Online Dictionary www.merriam-webster.com

³ Merriam Webster Online Dictionary www.merriam-webster.com

⁴ Black’s Law Dictionary (8th Ed. 2004).

⁵ McQuillen, The Law of Municipal Corporations, Sec 10.06.

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managing the bureaus, staff and city facilities and resources.⁷ However, distinguishing between these roles at the municipal level is difficult and has been a contentious exercise throughout Oregon's history. To the extent it is not clear from the charter whether the Council or Mayor is responsible for a particular action, Oregon case law is instructive.⁸

According to Oregon courts, "[t]he crucial test for determining that which is legislative and that which is administrative, is whether the ordinance was one making a law or one executing a law already in existence." *Monahan v. Funk*, 137 Or. 580, 585, 3 P.2d 778 (1931) (citing *Campbell v. Eugene*, 116 Or. 264, 240 P. 418). Further, "the distinction between 'legislative' and 'administrative' matters is the distinction between making laws of general applicability and permanent nature, on the one hand, as opposed to decisions implementing such general rules, on the other." *Foster v. Clark*, 309 Or. 464, 790 P.2d 1 (1990). "A particular activity is 'administrative,' and not 'legislative,' if it does not set new policy, but merely carries out legislative policies and purposes already declared." *Monahan v. Funk*, at 584.

The court subsequently noted in *Monahan v. Funk*, 137 Or. at 584—85 that:

In determining whether the ordinance in question (is) legislative or administrative * * * authorities * * * are in accord that actions which relate to subjects of a permanent or general character are considered to be legislative, while those which are temporary in operation and effect are not. Acts which are to be deemed as acts of administration and classed among those governmental powers properly assigned to the executive department are those which are necessary to be done to carry out legislative policies and purposes already declared, either by the legislative municipal body, or such as devolved upon it by the organic law of its existence. The form of the act is not determinative; that is, an

⁷ The charter provides that many of the executive and administrative functions will ultimately be carried out by a City Administrator, but for simplicity, this memorandum identifies those powers as resting within an executive branch headed by the Mayor.

⁸ The distinction between legislative and administrative authority arises primarily in cases deciding whether a governing body's decision can be referred to the voters. Under Art IV, Sec 1(5) of the Oregon Constitution, only legislative acts can be referred to the voters. Administrative acts cannot. While we can rely on the general principles stated in these cases, the specific facts may not be instructive because specific actions assigned to the Council by the revised charter might be determined to be administrative rather than legislative by the courts. For example, the revised charter requires Council to sell or dispose of property by ordinance, but in *Monahan v. Funk*, 137 Or. 580, 3 P.2d 778 (1931) the court found that an ordinance authorizing the purchase of property was not legislative where the voters approved bonds for the project.

ordinance may be legislative in character or it may be administrative: 43 C.J., 585, s 952; *Long v. Portland*, 53 Or. 92, 98 P. 149, 1111, 1112; *Campbell v. Eugene*, 116 Or. 264, 240 P. 418.

A change to the policies governing administrative decisions is legislative rather than administrative. For example, in *State ex rel Dahlen v. Ervin*, 158 Or. App. 253, 974 P.2d 264 (1999), a proposed initiative sought to change the rules for making siting decisions rather than change a specific siting decision. The court found that establishing that process was legislative while the act of undoing the siting decision under the proposed review process would be the administrative decision: “Adopting a policy, and establishing procedures for implementing that policy, are the essence of legislation.” *Id.* at 257.

The facts in *Foster* provide perhaps the best example of the distinction between legislative acts and administrative/executive acts. Portland’s Council had legislatively adopted a complete code establishing the process for street renaming. Once that law was in place, the act of renaming a street was administrative:

Those PCC sections contain a complete scheme for changing Portland city street names, including rules on petition forms, fees, review by various City officials, and final consideration by the City Council. This represents a completed legislative plan, requiring no further legislative contribution. Acts of renaming streets under the policies embodied in the plan thereafter become administrative acts, not legislation. *Foster v. Clark*, 309 Or. at 473.

Thus, whether a municipal action is legislative or administrative depends on “the nature of the legal framework in which the action occurs.” *Id.*

In a more recent case, *Rossolo v. Multnomah County*, 272 Or.App. 572, 357 P.3d 505 (2015), the court summarized a series of cases in which Oregon courts concluded that an enactment of a local governing body that implements prior policy is not legislative:

See *Yamhill County v. Dauenhauer*, 261 Or. 154, 156, 492 P.2d 766 (1972) (proposed initiative measure precluding construction of bridge not proper subject for an election because the voters earlier approved bonds for the bridge and construction of the bridge

*586 was approved previously by the county board); *Tillamook P.U.D. v. Coates*, 174 Or. 476, 481, 149 P.2d 558 (1944) (ordinance approving issuance of bonds previously approved by voters is “administrative rather than legislative in character”); *Whitbeck v. Funk*, 140 Or. 70, 75, 12 P.2d 1019 (1932) (ordinance authorizing purchase of property for public market was not referable because of a prior ordinance approving the debt financing for the facility; concluding that the ordinance “does not enact legislation” but “is merely carrying out a business transaction designating real property for use as a public market”); *Roberts v. Thies*, 70 Or.App. 256, 260, 689 P.2d 356 (1984), rev. den., 298 Or. 553, 695 P.2d 49 (1985) (ordinance authorizing acquisition of property for a park was administrative because prior municipal legislation and land use plans authorized development of the park). *Id.* at 474, 790 P.2d 1.

In conclusion, the Mayor’s power to be involved in legislation is limited. The Mayor may introduce proposed laws on the Council agenda, vote in the event of a tie on Council⁹, propose the budget and adopt administrative rules to implement Council laws. The Mayor may not take actions that infringe on the Council’s authority to make laws, adopt the budget, make appropriations or raise revenue. Conversely, Council may enact laws of general applicability within the broad municipal powers granted by the charter, including city-wide regulations for the conduct of city business, such as a purchasing code. The Council may not exercise executive or administrative powers.

As discussed above, the line between legislative and executive/administrative powers is not always clear. As we begin the process of implementing the revised charter, the City Attorney’s Office will continue to work closely with Council to identify areas of ambiguity and develop guidance.

LR/MH/am

⁹ The Mayor’s authority to vote on matters before Council in case of a tie has two necessary elements: (1) there is a tie vote, and (2) the Mayor is casting the deciding vote. Because at least seven affirmative votes are required to pass most non-emergency ordinances, the Mayor would only be called on to vote on such ordinances when the vote of all 12 members of Council results in a 6 to 6 tie. In other voting circumstances (e.g. emergency ordinances, adopting a consent agenda), more than seven affirmative votes are required, so there is no scenario in which the Mayor’s vote on a tie would be the deciding vote, and the Mayor’s tie-breaking authority will not be triggered. For motions, quasi-judicial cases, reports and resolutions, Council will determine by code the number of affirmative votes needed to pass, which will determine the circumstances in which the Mayor will vote.