



PRELIMINARY STAFF REPORT APRIL 2019



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INTRODUCTION

About This Document

In this document, the staff for the 2019 Charter Revision Commission (the Commission) makes recommendations to the Commission concerning ideas and proposals that should be further explored and about which additional public feedback should be sought. While these recommendations are intended to inform the Commission, it is important to remember that these recommendations do not in any way bind the Commission, nor do they reflect the official position of the Commission or any individual commissioner. The final decision as to whether a particular proposal or idea ultimately proceeds to the November election is a decision that rests with the Commission alone, and staff anticipates that the Commission will make these decisions in June and July after having had a chance to receive and review additional public feedback.

Background

The Charter of the City of New York (the Charter) serves as the local constitution and establishes the structure of City government. It sets forth the key institutions and processes of the City's political system and broadly defines the authority and responsibilities of City agencies and elected officials, such as the Mayor, Council, Comptroller, Borough Presidents, and Public Advocate.

The Charter can be amended in a number of ways: through local legislation (with or without a voter referendum), state legislation, a voter-initiated petition process, and the establishment of a charter revision commission under the State Municipal Home Rule Law (MHRL). Such a commission must review the entire charter, hold at least one public hearing, and may issue findings and recommendations together with draft charter amendments for presentation to the voters for approval.

The MHRL allows charter revision commissions to be created in several ways: by petition, by the locality's mayor, or by local law.¹ They may also be established by the New York State Legislature. Historically, charter revision commissions for New York City have been created by either the Mayor or the State Legislature. For example, the 1897 Charter that consolidated New York City was enacted pursuant to a commission created by the State Legislature.

¹ Municipal Home Rule Law §§ 36, 37.

Since 1975 and the conclusion of the State-created Goodman Commission, all charter revision commissions in New York City have been convened by the Mayor. The most notable of these commissions, and perhaps the most notable since the City was formed, was the 1989 Charter Revision Commission, which substantially reorganized the City's government after the United States Supreme Court declared the voting scheme of the City's main governing body – the "Board of Estimate" – unconstitutional.

The 2019 Charter Revision Commission was created by Local Law 91 of 2018, which was passed by the New York City Council on April 11, 2018 and approved by the Mayor on April 30, 2018.² This is the first charter revision commission in the City's history that was not either entirely appointed by the Mayor or appointed at the direction of the State Legislature. The Commission consists of 15 members appointed by nine separate elected officials: four members were appointed by the Mayor, four by the Speaker of the Council, and one apiece by the Comptroller, the Public Advocate, and each Borough President. Collectively, the appointed commissioners possess over a century's worth of experience in and with the City's government. Tasked with examining the entire Charter, the Commission is considering potential amendments to the Charter that would be placed before City voters for approval at the November 2019 general election.

Public Outreach and Public Participation

Since its inception in June 2018, the Commission – supported by its staff – has embarked on an extensive public engagement process and outreach effort, with the goal of receiving input from as many people and organizations as possible in order to best inform its deliberations. These efforts to date have included the Commission holding hearings in each borough to gather ideas from the public; the creation of the Commission's website, www.charter2019.nyc, which livestreams all of the Commission's meetings and where members of the public are able to submit their thoughts and ideas directly to the Commission; a robust social media presence on platforms such as Twitter, Instagram, and Facebook; and staff presentations at community events and to local organizations.

Many New Yorkers shared their ideas on how to make the City's government a better one. In the fall of 2018, the Commission heard almost 20 hours of public testimony over the course of hearings in each of the City's five boroughs, with over 150 people testifying in person. The Commission solicited and received input from members of the public, City agencies, elected officials, community-based organizations and good government groups,

² See Local Law 91/2018.

academics, and other interested parties. In all, the Commission received over 300 proposals for changes to the Charter.

A theme that emerged from the public as a result of these engagement efforts, including the fall public hearings, was a desire for a more transparent, efficient, responsive, and accountable City government. There were calls for neighborhoods to have a stronger voice in how City government interacts with and affects their communities, to improve police accountability, to improve the City's election processes, and to make the City's land use processes and planning for the City's future better, to name but a few.

Focus Criteria and Adoption of Focus Areas

In December 2018, the Commission unanimously adopted the following "focus criteria" for staff to consider in its review and evaluation of the over 300 ideas and proposals received in order to formulate its recommendations to the Commission concerning those ideas that warranted further study:

- 1) Focus on ideas and proposals that likely would not be accomplished by local law without a referendum—in other words, changes that would likely require a Charter Revision Commission or referendum to accomplish.
- 2) Focus on ideas and proposals that are not precluded by federal or state law, or the federal or state constitution.
- 3) Focus on ideas and proposals that would (a) improve government effectiveness, transparency, accountability, or efficiency; (b) encourage meaningful participation by New Yorkers; or (c) provide for balance between local and citywide interests.
- 4) Focus on ideas and proposals that affect how policy decisions are made, and by whom, rather than ideas and proposals that would involve making particular policy decisions directly.
- 5) Focus on ideas and proposals that would not reverse the decisions of the voters in recent referenda.

In January 2019, based on those "focus criteria," staff recommended and the Commission adopted 23 "Focus Areas" for further study that were organized into four thematic "buckets": Elections, Governance, Finance, and Land Use.³

Proposals in the Elections bucket included further study of instant runoff voting/ranked choice voting systems and related election reform processes; the Council redistricting

³ See Charter 2019 NYC, <https://www.charter2019.nyc/focus-areas>.

process; and an alternative public campaign financing system, such as a “democracy voucher” system.

The Governance bucket focus areas called for additional study of ideas such as the applicability of the “advice and consent” process for the appointment of certain government officials; improving systems of police accountability; enhancing the role of the Borough Presidents and borough-level governance; clarifying the role and accountability of the Corporation Counsel, particularly with respect to non-mayoral entities; examining the role of the Public Advocate and considering proposals to modify the powers of that office; and examining the structure of the Conflicts of Interest Board and lobbying by certain officials after their public service has ended.

The Finance bucket advanced further study of City budgetary issues, including how the City’s budget is structured, how to clarify or improve the tools employed by both the Mayor and the Council in the City’s \$89 billion expense budget (e.g., structuring units of appropriation, budget modifications, revenue estimates); whether certain officials or public agencies should have some form of an independent budget; how to improve the public pension systems; and how to streamline the City’s public procurement and contracting processes.

The Land Use bucket included the further study of proposals related to comprehensive planning for the City as a whole; evaluating the existing Uniform Land Use Review Procedure (ULURP) in relation to potential reforms to allow earlier and more meaningful involvement by communities, Community Boards and Borough Presidents, such as through a pre-ULURP process; and review of other land use-related bodies and their work, including the Board of Standards and Appeals, the Franchise Concession Review Committee, and the Landmarks Preservation Commission.

Expert Forums

After adoption of the “Focus Areas,” the Commission held a series of forums to receive further information from experts in each area under consideration. During these forums – which were held in public session in February and March 2019 and included over 20 hours of testimony – the Commission engaged with a wide range of distinguished panelists, including past and present agency heads, commissioners and deputy mayors in City government, community stakeholders, academics with expertise in City government and land use, as well as past members and staff of previous charter revision commissions. Viewpoints from beyond the City’s limits were heard from experts from Seattle, California, Denver, North Carolina, and Massachusetts on issues such as police accountability, ranked

choice voting, and comprehensive planning. These forums produced lively and spirited debate by and among the Commissioners and the panelists.

Upcoming Borough Hearings

The Commission will next embark on a series of public hearings throughout the five boroughs to solicit feedback and comment on the below recommendations.

ELECTIONS AND REDISTRICTING

Ranked Choice Voting

New York City utilizes two election systems: a “plurality” system for most municipal elections and a hybrid plurality/run-off system only for the primary elections for the three citywide offices (the Mayor, the Comptroller, and the Public Advocate).⁴

General and special elections for all City offices, and the primary elections for non-citywide offices, use a plurality system, also known as “first-past-the-post,” meaning that the candidate who obtains the highest number of votes wins the election, regardless of the total percentage of votes obtained by the winning candidate.⁵

The plurality system frequently results in a candidate winning with a relatively small percentage of the vote. For example, if ten candidates are running in an election, and nine of these candidates each get 9% of the votes cast, but the tenth candidate receives the remaining 19% of the votes, then that candidate wins the election even though 81% of the voters preferred someone else. Ten candidates may seem like a lot, but consider that the recent special election for Public Advocate had 17 candidates running.⁶ Generally, these multi-candidate races will be less likely in general elections because the preceding primary elections considerably winnow the field of viable candidates.

To combat issues associated with the winner receiving a relatively small percentage of the vote, in primary elections for the three citywide offices, a run-off primary is triggered if no candidate receives 40% or more of the votes cast. Only the two candidates receiving the highest number of votes participate in a second election.⁷ However, while this resolves the plurality winner issue described above, run-off elections introduce two additional problems of their own:

⁴ See, e.g., Charter §§ 4, 24, 25, 81, 91.

⁵ See Election Law §§ 6-162, 9-100, 9-212.

⁶ Jeffrey C. Mays, *Who Are the Candidates for Public Advocate on Tuesday?*, N.Y. Times, (Jan. 21, 2019).

⁷ See Election Law § 6-162(1).

First, voter participation tends to be considerably lower in a run-off than in the election that preceded it. For example, as shown in the table below, in run-off elections over the past 10 years, the drop in turnout has ranged from 35% to 61%.

Voter Turnout Democratic Primary vs. Run-off			
Election	Primary	Run-off Primary	Turnout Drop-off
2013 Public Advocate	530,089	202,647	61%
2009 Comptroller	371,018	241,206	35%
2009 Public Advocate	366,917	233,206	36%

Source: New York City Board of Elections, Statement and Return Reports for Certification.

Second, run-off elections cost money. The 2013 Democratic primary run-off for Public Advocate cost approximately \$10.4 million for election administration and approximately \$800,000 for public funds payments – over \$11 million total.⁸ Adjusted for inflation, the cost of such a run-off today would be about \$13 million, which is almost four times the Public Advocate’s current annual budget.⁹

One way to fix the issues with plurality voting is to replace it with “ranked choice voting” (RCV), which is also called “instant run-off voting” (IRV). With RCV, voters rank candidates in order of preference. If a candidate is ranked first by a majority of voters, then he or she wins the election. If no candidate is ranked first by a majority of voters, a common RCV vote counting process consists of the following actions: (1) removing the candidate who was ranked first on the fewest ballots, (2) transferring each vote cast for that candidate to the next ranked candidate on that voter’s ballot (if there is one), and (3) repeating this process until a single candidate has a majority of the remaining votes, whereupon that candidate wins the election. RCV would eliminate the need for citywide primary run-off elections because a run-off is simulated as candidates are successively eliminated until two remain in the final round.

Advocates of RCV argue that it (1) more frequently produces a result that better reflects the will of the electorate, when compared to plurality elections, and (2) saves money and

⁸ New York City Board of Elections, Annual Report 2013, at 58; New York City Campaign Finance Board, 2013 Post-Election Report, at 20.

⁹ New York City Office of Management and Budget, February 2019 Financial Plan Detail Fiscal Years 2019-2023, at E-128.

eliminates voter turnout drop-off, when compared to run-off elections.¹⁰ They further argue that RCV leads to greater civility in campaigns, in part because candidates are incentivized to build broader coalitions of voters, with one 2013 study finding that voters in selected RCV jurisdictions reported less negative campaigns than voters in plurality jurisdictions.¹¹

RCV is used in one state and 11 U.S. localities, with five other jurisdictions planning implementation before 2021. Maine uses ranked choice voting for all statewide primary elections and in general and primary elections for the U.S. Senate and House of Representatives. Cities such as San Francisco and Minneapolis limit its use to municipal elections. An additional five states and one city allow military and overseas voters to use RCV for some or all elections requiring run-offs.¹²

In 1950, Kenneth Arrow's "impossibility theorem" showed that all rational voting systems will have flaws in how they determine the top choice of the electorate.¹³ RCV, like plurality voting, is no exception.

One flaw with RCV is the potential for "ballot exhaustion." A ballot is considered to be exhausted when all of the candidates ranked on that ballot have been removed during the vote counting process. Exhausted ballots are generally discarded and do not count toward final vote tallies.¹⁴ If a relatively high number of ballots are exhausted in an election, this can undercut the legitimacy of that election or, just as problematic, the public perception of the election's legitimacy. One frequently cited example is a 2010 San Francisco Board of Supervisors race where 21 candidates ran and over 57% of ballots were "exhausted" by the time a winner was chosen.¹⁵ This occurred, in large part, because San Francisco's RCV rules only permitted voters to rank up to three candidates on their ballot, which means

¹⁰ Caroline Tolbert, Experiments in Election Reform: Voter Perceptions of Campaigns Under Preferential and Plurality Voting (Mar. 2014).

¹¹ Todd Donovan, Caroline Tolbert, and Kellen Gracey, Campaign Civility Under Preferential and Plurality Voting, 42 *Electoral Stud.* 157, 157-63 (2016).

¹² Ranked Choice Voting Resource Center, Where Ranked Choice Voting Is Used; FairVote, Ranked Choice Voting in US Elections.

¹³ See generally Allen M. Feldman and Roberto Serrano, Arrow's Impossibility Theorem: Two Simple Single-Profile Version, SSRN Electronic Journal (Mar. 2007).

¹⁴ See, e.g., San Francisco Charter § 13.102(a).

¹⁵ San Francisco Department of Elections, Official Ranked-Choice Results Report, November 2, 2010 Consolidated Statewide Direct Primary Election, Board of Supervisors, District 10.

many voters had not ranked the two candidates remaining in the final round.¹⁶ Thus, the rate of ballot exhaustion can be reduced by allowing voters to rank a greater number of candidates.

Another challenge with RCV is the potential for voter confusion. Selecting multiple candidates and assigning them a preference order, while not overly complicated, is nevertheless more involved than simply selecting one candidate as in plurality voting. No less importantly, voters may be confused about how a winner is ultimately selected because a winner is arrived after multiple rounds of counting. For example, in Burlington, VT, RCV was repealed by voters, even though most had said in exit polls that they liked RCV. Though the repeal was largely fueled by voters' dissatisfaction with the winning candidate's actions in office, supporters of a losing candidate were also able to sow confusion about RCV's vote counting procedures.¹⁷

Other cities' experiences with RCV show that these concerns can be lessened with the right planning. In expert testimony before the Commission, RCV experts explained that election officials should engage in careful ballot design and robust voter education campaigns, as has been done in other cities. Exit surveys conducted in cities with RCV largely indicates that voters understand and are generally satisfied with RCV.¹⁸ For example, after extensive outreach efforts before the 2009 Minneapolis election – the city's first election using RCV – a post-election report by city staff found that 95% of voters found RCV "simple." Then, after the 2017 Minneapolis election – the city's third election using RCV – a post-election report found that 66% of voters thought that RCV should be used in future elections, compared to only 16% who did not.¹⁹

Some commenters argue that the system design flaws noted above may particularly affect the power of minority voting blocs to elect the candidate of their choice. The 2018 Charter

¹⁶ See San Francisco Charter § 13.102(b).

¹⁷ Lynne McCrea, *Burlington Voters Repeal Instant Runoff Voting*, Vermont Public Radio (Mar. 3, 2010).

¹⁸ Francis Neely, Corey Cook, and Lisel Blash, *An Assessment of Ranked-Choice Voting in the San Francisco 2005 Election: Final Report*. Public Research Institute, San Francisco State University (Jul. 2006); Francis Neely, Lisel Blash, and Corey Cook, *An Assessment of Ranked-Choice Voting in the San Francisco 2004 Election: Final Report*. Public Research Institute, San Francisco State University (May 2005).

¹⁹ See Minneapolis City Council Standing Committee on Elections and Rules, *The 2017 Municipal Election: An Analysis & Recommendations* (May 9, 2018); Minneapolis City Clerk, *Developing a Voter Outreach and Educational Plan for Municipal Voters* (2014).

Revision Commission explained in its final report that it did not recommend RCV because, in part, it did not yet have enough information to fully understand how RCV could impact communities of color.²⁰ However, others have argued that RCV is more likely to result in the election of minority and female candidates. One study conducted by an RCV advocacy group found that, in four California cities, RCV did not have a negative impact on the candidacy rates for women and people of color and instead *increased* the probability that candidates in these groups would win elections, compared to plurality elections.²¹

Finally, implementing RCV would require planning for logistical and operational differences in election administration, including ballot design, voter education and outreach campaigns, and technology updates. For example, in testimony before the Commission, City Board of Elections (BOE) Executive Director Michael Ryan noted that the City can use its current voting machines for a future RCV election, but the underlying software must be updated, which would require approval from the New York State Board of Elections.²² Moreover, because voting for municipal, state, and federal offices occur in the same election, a bifurcated ballot might be required. If the Commission recommends RCV, ensuring sufficient lead time will be vital to effective implementation.

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning establishing RCV in New York City municipal elections. Specifically, the Commission should consider (1) which types of elections should be subject to RCV (i.e., primary elections, special elections, and/or general elections); (2) which offices should be subject to RCV; (3) when implementation should begin, including whether there should be any phase-in period; (4) whether to utilize a hybrid RCV/run-off system under which, for example, if no candidate receives more than 40% of the total ballots cast in the final tabulation round, the race proceeds to a traditional run-off; (5) how many candidates a voter may rank on the ballot; and (6) what type of tabulation method should be used.

²⁰ 2018 New York City Charter Revision Commission, Final Report of the 2018 Charter Revision Commission (Sep. 6, 2018) at 110-111.

²¹ Representation 2020, The Impact of Ranked Choice Voting on Representation: How Ranked Choice Voting Affects Women and People of Color Candidates in California (Aug. 2016).

²² Testimony of Michael Ryan, Executive Director, New York City Board of Elections, Public Meeting of the 2019 Charter Revision Commission, (Mar. 18, 2019).

Timing of Special Elections

Generally, if there is a vacancy in the office of the Public Advocate, the Comptroller, a Borough President, or a Council Member, the vacancy must be filled at a special election within about 40 to 50 days (for the Mayor, the period is about 60 days).²³ These requirements appear to be incompatible with at least two provisions of the State Election Law: (1) the BOE is required to determine the “candidates duly nominated for public office” at least 53 days before a special election and (2) BOE must mail or otherwise distribute ballots to military voters by no later than 45 days before a special election.²⁴

At the Commission’s March 18, 2019 Public Meeting, BOE Executive Director Michael Ryan stated that BOE has “almost no time” to prepare for a special election and recommended allowing 70-80 days of lead-time before a special election, which Ryan noted was the time period for State special elections.²⁵

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning (1) whether (and by how much) to change the special election timeline, such as by extending lead time for a special election from approximately 45 days to 70-80 days and (2) relatedly, whether to allow a candidate elected in a special election to serve a longer interim term to avoid having a primary and general election so quickly after that special election.

Timing of Redistricting

Every ten years, a Districting Commission appointed by the Mayor and the Council redraws the boundaries for the 51 Council districts in a 14-month process commonly referred to as “redistricting.”²⁶ The Charter requires that the next such plan be finalized by March 7, 2023.²⁷ Any changes made to the district map may impact (1) which candidates choose to run in a given district and (2) where candidates focus their petition-gathering efforts.

²³ See Charter §§ 4, 10, 24, 25, 81, 91.

²⁴ See Election Law §§ 4-114, 10-108(1)(a).

²⁵ See Public Officers Law § 42(3).

²⁶ See Charter §§ 50, 51.

²⁷ See Charter § 51(f); Election Law § 8-100(1)(c).

To qualify for the primary election ballot, potential Council candidates must obtain petitions signed by at least 5% of enrolled party voters in the relevant Council district (or by at least 450 voters if there are more than 9,000 such enrolled party voters in the district).²⁸ There is a 37-day window for obtaining these signatures.²⁹ Before the State's recent changes to the primary election schedule, this 37-day petition period would have occurred about 90 days after the new district lines are drawn, meaning that potential candidates would have had ample notice of the boundaries of their districts before they started gathering petition signatures.

But the State's recent changes to the Election Law moved both the primary election date and the time period for obtaining petition signatures to earlier in the year.³⁰ As a result, new districts will not be set until about ten days into the 37-day petition period, which means that candidates will have no advance notice of their districts and relatively little time to gather petition signatures.

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning whether (and by how much) to change the dates of the redistricting process so that the districting plan is due sufficiently before the 37-day petition period. For example, the Commission could consider shifting the redistricting process about three months earlier so that potential Council candidates have approximately the same amount of advance notice concerning the boundaries of their districts as they would have had before the State's recent change to the Election Law.

²⁸ Election Law § 6-136(2); Charter § 1057-b.

²⁹ Election Law § 6-134(4).

³⁰ See Election Law §§ 8-100(1)(a), 6-158(1).

CIVILIAN COMPLAINT REVIEW BOARD

The Civilian Complaint Review Board (CCRB) is responsible for receiving, investigating, hearing, making findings, and recommending actions concerning “complaints by members of the public against members of the police department that allege misconduct involving excessive use of force, abuse of authority, discourtesy, or use of offensive language, including, but not limited to, slurs relating to race, ethnicity, religion, gender, sexual orientation and disability.”³¹

After investigating such a complaint, CCRB provides its findings and disciplinary recommendations to the Police Commissioner.³² The Charter and the Administrative Code give the Police Commissioner “cognizance and control” over police discipline.³³ So, the Police Commissioner is free to implement CCRB’s recommendation, with or without modification, or to disregard it, but, in any event, the Police Commissioner must report to CCRB “on any action” taken with respect to CCRB’s recommendations.³⁴

Proposals

The legal framework governing police discipline in New York City is a complicated, delicate balance between local laws and State laws relating both to police discipline and collective bargaining. As a result, there is a considerable risk of unintended consequences when making changes in this area, and staff has kept this in mind while reviewing the many proposals the Commission received calling for changes to CCRB and, more broadly, to the way police discipline is handled. These proposals ranged from electing all members of CCRB and giving CCRB (rather than the Police Commissioner) final disciplinary authority over police officers, to codifying the 2012 Memorandum of Understanding (MOU) between CCRB and the Police Department which, among other things, empowers CCRB attorneys to prosecute police officers in connection with charges CCRB substantiates.

³¹ See Charter § 440(c)(1).

³² *Id.*

³³ See Charter § 434(a); Admin. Code § 14-115(a). These provisions were enacted by the State Legislature in 1897 and 1873, respectively. See L. 1897, ch. 378 and L. 1873, ch. 335. See *Patrolmen’s Benv. Ass’n of City of New York, Inc. v. New York State Pub. Empl. Rel. Bd.*, 848 N.E.2d 448 (N.Y. 2006).

³⁴ See Charter § 440(d)(3), (e).

Because of the complexity of the various legal structures and risks mentioned above, many of these proposals should be pursued through the State Legislature rather than a Charter change. But there are proposals in six areas concerning CCRB that staff believes can and should be pursued further by the Commission: (1) structural changes to CCRB; (2) requiring explanations when the Police Commissioner deviates from CCRB-recommended discipline; (3) implementing a “disciplinary matrix”; (4) allowing CCRB to delegate its subpoena power to high-ranking staff; (5) giving CCRB jurisdiction over false statements made by officers in connection with CCRB matters; and (6) protecting CCRB’s budget (discussed later in this document).

Structure of the Board

The Mayor appoints all 13 members of CCRB’s governing body, but five are “designated” by the Council and three are designated by the Police Commissioner.³⁵ The Mayor does not have to accept a particular person designated by the Council or the Police Commissioner; the Mayor may reject (and has in the past rejected) proposed designees and may require the designation of someone else who would be mutually agreeable to the designator and the Mayor.³⁶ The Mayor also designates one of the members to serve as CCRB chair.³⁷

STAFF RECOMMENDATIONS:

In staff’s view, because the Police Commissioner has final control over police discipline, and the Mayor can appoint and remove the Police Commissioner, it is important that the independent civilian oversight body responsible for investigating and making disciplinary recommendations to the Police Commissioner not also be entirely appointed by the Mayor.

Additionally, the Public Advocate has no direct, structural role in CCRB despite the fact that (1) a core responsibility of the Public Advocate is to receive and investigate public complaints and monitor the functioning of agency programs for handling complaints and (2) there are few, if any, ways in which government interaction with a person can have a greater effect on that person’s life than an interaction with the police.

Accordingly, staff recommends that the Commission further consider and solicit public feedback concerning whether to amend the structure of the CCRB so that (1) the Council has true CCRB appointees rather than designees subject to mayoral approval; (2) the

³⁵ Charter § 440(b)(1).

³⁶ See Mayor of City of New York v. Council of City of New York, 696 N.Y.S.2d 761, 766–67 (N.Y. Sup. Ct. 1999), rev’d, 721 N.Y.S.2d 39 (N.Y. App. Div. 1st Dept. 2001).

³⁷ Charter § 440(b)(1).

CCRB chair is jointly selected by the Mayor and the Council; and (3) the Public Advocate is responsible for designating or appointing one or more CCRB members.

Deviation from Disciplinary Recommendations

In 2017, “CCRB received 4,487 complaints within its jurisdiction.”³⁸ Each allegation in a complaint is investigated, and if CCRB finds that the alleged misconduct occurred and was improper “based on a preponderance of the evidence,” then the Board “substantiates” that allegation.³⁹ In 2017, CCRB substantiated allegations in 20% of complaints received.⁴⁰

When CCRB substantiates a complaint, it provides its findings to the Police Commissioner and recommends discipline.⁴¹ There are five types of discipline that CCRB can recommend, described below in ascending order of severity:

- “Instructions,” which means guidance issued by a commanding officer;
- “Formalized Training,” which means training through the Police Academy or the Police Department’s Legal Bureau;
- “Command Discipline A,” which can mean a penalty ranging from Instructions to a loss of up to five vacation days;
- “Command Discipline B,” which can mean a penalty ranging from Instructions to a loss of up to ten vacation days; and
- “Charges and Specifications,” which leads to a formal trial before the Police Department’s Deputy Commissioner (or Assistant Deputy Commissioner) of Trials (DCT) that can result in penalties ranging from a loss of vacation days to suspension or termination.⁴²

The Independent Panel on the Disciplinary System of the New York City Police Department (Independent Panel), appointed by the Police Commissioner on June 21, 2018, found that the Police Commissioner “frequently departs” from the penalty recommendations he

³⁸ New York City Civilian Complaint Review Board, 2017 Annual Report at 4.

³⁹ Id. at 24.

⁴⁰ Id. at 4.

⁴¹ Charter § 440(c)(1).

⁴² New York City Civilian Complaint Review Board, 2017 Annual Report at 29; New York City Civilian Complaint Review Board, Executive Director’s Monthly Report at 31 (Jan. 2017).

receives.⁴³ CCRB's most recent reports indicate the same. The rate at which the Police Commissioner implements the same level of discipline as recommended by CCRB is known as the "concurrency rate."⁴⁴ For the first half of 2018, the concurrency rate for complaints in which CCRB did not recommend Charges and Specifications (i.e., complaints that did not involve serious misconduct) was 54% compared with 45% for the first half of 2017.⁴⁵ For the same period of time, the concurrency rate for complaints in which CCRB recommended Charges and Specifications (i.e., complaints involving serious misconduct) fell from 37% to 26%.⁴⁶

For complaints for which CCRB recommends Charges and Specifications,⁴⁷ if the Police Commissioner intends to deviate from CCRB's recommended discipline, the MOU between the Police Department and CCRB requires that the Commissioner provide written notice to CCRB.⁴⁸ This notice must be provided at least ten business days before such discipline is imposed and must include "a detailed explanation of the reasons for deviating from CCRB's recommendation including but not limited to each factor the Police Commissioner considered in making his decision."⁴⁹

Some, notably CCRB itself and the Independent Panel, as well as several groups who attended the Commission's March 7, 2019 Public Meeting (e.g., Citizens Union, the New York Civil Liberties Union, and Communities United for Police Reform), have proposed codifying in the Charter the requirement that the Police Commissioner provide a rationale for deviating from CCRB-recommended discipline and further requiring that such a rationale be provided in all cases, not just cases of serious misconduct.

⁴³ Mary Jo White et. al., The Report of the Independent Panel on the Disciplinary System of the New York City Police Department at 1, 24-26 (Jan. 25, 2019).

⁴⁴ New York City Civilian Complaint Review Board, 2018 Semi-Annual Report at 5.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ This requirement does not appear to apply to complaints for which CCRB has not recommended Charges and Specifications. See New York City Council Committee on Public Safety Hearing, Transcript at 87-89 (Jan. 22, 2019).

⁴⁸ Memorandum of Understanding Between the Civilian Complaint Review Board (CCRB) and the Police Department (NYPD) of the City of New York Concerning the Processing of Substantiated Complaints, ¶ 6 (Apr. 2, 2012); see also 38-A RCNY § 1-45(g); 38 RCNY § 15-18.

⁴⁹ Memorandum of Understanding Between the Civilian Complaint Review Board (CCRB) and the Police Department (NYPD) of the City of New York Concerning the Processing of Substantiated Complaints, ¶ 6 (Apr. 2, 2012)

The Independent Panel addressed this issue at length in its report. The Panel found that, while it believed that the Police Commissioner is “uniquely positioned to evaluate discipline,” the “exercise of unfettered discretion has the potential to result in inconsistent outcomes, favoritism, and excessive leniency . . . [which] imposes a heightened responsibility on him to enhance public transparency and his own accountability for the decisions he makes.”⁵⁰ Accordingly, the Independent Panel recommended that the Police Commissioner “prepare variance memoranda in all disciplinary cases where he departs from a disciplinary recommendation . . . regardless of whether the departure is upward or downward.”⁵¹ The Panel also recommended that such variance memoranda should:

[I]nclude more robust and meaningful reasoning for departing from a particular recommendation or settlement agreement, and reflect all relevant inputs that the Commissioner received during the life of the case, whether formal or informal. In addition to identifying the relevant metrics and facts addressed during the Commissioner’s disciplinary committee meetings (i.e., prior disciplinary history, rank, tenure, performance evaluations, and reviews), the variance memoranda prepared by the Commissioner should include all relevant precedent . . . [in order to] enhance consistency in disciplinary outcomes across similar offenses and . . . increase visibility into the Commissioner’s considerations while holding him accountable to the process.⁵²

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning amending the Charter to require that the Police Commissioner provide variance memoranda to CCRB in all cases where the Police Commissioner intends to depart from CCRB-recommended discipline or discipline recommended by DCT.

Disciplinary Matrix

The Independent Panel found that it is “clear that there is significant suspicion and speculation by the public that disciplinary decisions are not always fair, evenhanded, and

⁵⁰ Mary Jo White et. al., The Report of the Independent Panel on the Disciplinary System of the New York City Police Department at 48 (Jan. 25, 2019).

⁵¹ Id. at 48-49.

⁵² Id. at 49.

consistent.”⁵³ The Panel further noted that “several large city police departments have successfully implemented matrices” and “strongly urges the Department to develop and adopt a nonbinding disciplinary matrix and launch a pilot program to test its efficacy.”⁵⁴ The Panel then articulated three reasons why it felt that NYPD would “benefit from implementing a matrix”:

First, even the perception of favoritism or systematic bias can undermine confidence in the legitimacy of the disciplinary system in the eyes of Department personnel and the public. Indeed, recent studies have found that disciplinary matrices may increase perceived organizational support for police departments among police officers. Further, a disciplinary matrix may help the Department detect previously unseen trends indicative of favoritism, bias, or inconsistency in the system, if any exist.

The implementation of a disciplinary matrix would reinforce the Police Commissioner’s accountability. A matrix would not limit the Commissioner’s discretion over disciplinary outcomes, but would provide helpful guidelines for him to consult when exercising that discretion.

Second, given the current legal obstacles to releasing personnel records and other information about disciplinary outcomes, implementing a disciplinary matrix may aid the Department in its efforts to be more transparent with the public. At the very least, a publicized matrix would inform the public of the Department’s view of what penalties are presumptively appropriate for specific types of misconduct.

Third, a matrix may increase efficiency in the system by providing CCRB investigators, [Department Advocate’s Office] personnel, and representatives of accused officers a more concrete basis from which to negotiate settlements of uncontested Charges and Specifications.⁵⁵

It is also worth noting that the Office of the Inspector General for NYPD (OIG-NYPD) has also recommended that the Police Department develop, in collaboration

⁵³ *Id.* at 51.

⁵⁴ *Id.* at 51.

⁵⁵ *Id.* at 51-52.

with CCRB, a more transparent set of factors for handling officer discipline in cases involving improper use of force.⁵⁶

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning amending the Charter to require the Police Commissioner to establish a non-binding disciplinary matrix for all police disciplinary cases, including whether to require that the Police Commissioner be required to (1) solicit public comment on a draft of such matrix; (2) incorporate recommendations from the Public Advocate and OIG-NYPD, or provide a rationale for not incorporating such recommendations; and (3) incorporate recommendations from CCRB, or provide a rationale for not incorporating such recommendations, regarding misconduct within CCRB's jurisdiction.

Delegation of Subpoena Power

CCRB may issue subpoenas to "compel the attendance of witnesses and require the production of such records and other materials as are necessary" for its investigations.⁵⁷ This is accomplished by a majority vote of its members.⁵⁸

CCRB has proposed that the Charter be amended to allow CCRB to delegate its subpoena power to its "highest ranking staff."⁵⁹ In its testimony, CCRB indicated that:

The current wording of the City Charter requires a majority vote of the Board in order for a subpoena to [be] issued. In practice, requiring an entire 13-person Board to meet and review routine subpoenas before Agency staff can serve them results in days or weeks of unnecessary delay. Both investigations and prosecutions suffer from these delays.⁶⁰

Speaking at the Commission's March 7, 2019 Public Meeting, CCRB Executive Director Jonathan Darche elaborated:

⁵⁶ Office of the Inspector General for the NYPD, Fifth Annual Report at 68-69 (Apr. 1, 2019).

⁵⁷ Charter § 440(c)(3).

⁵⁸ Id.

⁵⁹ Written testimony of the New York City Civilian Complaint Review Board to the 2019 Charter Revision Commission.

⁶⁰ Id.

It seems silly but days matter. In New York City, many of the locations that record video copy over it after several days. So, if the CCRB needs to investigate or gets a case, drafts a subpoena, we have to take it uptown to where the current [CCRB] chair is working - because the board is part time - and he signs it, and then we have to get someone to bring it back and then we can serve the subpoena. And if you lose two to three days, you might have lost the evidence. So, it is actually very important to be able to designate a staff member to sign those subpoenas so that we don't lose valuable evidence that is helpful in having the CCRB make a determination. The CCRB is committed to fair and impartial investigations, and we need evidence for that. And it is important for us to get that evidence. Video is a very important part of that function. The presence of body-worn camera footage is helpful in that part, but also just video that's being used by different locations [as] surveillance video. For us to get that video is very important.⁶¹

In its testimony in connection with that same public meeting, the Police Department stated that it "does not have an objection to subpoena signatory authority being expanded to include the Executive Director of the CCRB in connection with cases where there is an active CCRB investigation based on a civilian complaint. However, we would object to such an expansion, which effectively eliminates the majority Board vote safeguard against overly broad demands and demands for information that may not be relevant, if the scope of CCRB's authority is expanded beyond its current charge."⁶²

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning amending the Charter to allow CCRB to delegate its subpoena power to its highest-ranking staff.

False Official Statements in CCRB Matters

According to the CCRB, if a CCRB investigation "reveals evidence of possible misconduct that falls outside of the CCRB's jurisdiction . . . the Board notes the 'other misconduct' (OMN), and reports it to the New York City Police Department for further

⁶¹ 2019 Charter Revision Commission, Video of Mar. 7, 2019 Public Meeting at 24:20.

⁶² Written testimony of the New York City Police Department to the 2019 Charter Revision Commission at 2-3.

investigation and possible disciplinary action.”⁶³ One example of such “other misconduct” is an officer making a false official statement during a CCRB investigation.⁶⁴ From 2013 through 2017, CCRB reported 139 cases where it found evidence of officers making false official statements.⁶⁵ Additionally, between 2010 and 2018, CCRB was able to track 81 of these false official statement cases and found that the Police Department’s Internal Affairs Bureau (IAB) imposed discipline in only two such cases.⁶⁶ “In the other 79 cases, the Police Department found no wrongdoing or found the officer guilty of lesser misconduct, such as failing to properly fill out a memo book, according to information provided by the board and a document obtained by The Times.”⁶⁷

In addition, the Independent Panel noted that the issues of whether and how the Police Department disciplines officers in false statement cases were brought to its attention “repeatedly.”⁶⁸ The Panel heard concerns about “the way in which false statements are charged within the disciplinary system, the circumstances in which this misconduct is not charged at all, and the practices that may, more generally, encourage or condone false statements within the Department.”⁶⁹ The Panel also “learned that the Department seems reluctant to collect evidence from other law enforcement agencies that might provide the basis for false statement charges. For example, historically, the Department did not appear to consistently gather and analyze information about arrests that prosecutors decline to charge because of officer credibility concerns or cases in which judges make adverse findings about officer credibility.”⁷⁰

The Independent Panel concluded that it had “significant concerns about the Department’s disciplinary practices in false statement [cases]” and recommended that the Police Department “issue official guidance to [IAB] investigators and [Department Advocate’s Office] attorneys concerning when officers who make false statements should

⁶³ New York City Civilian Complaint Review Board, 2017 Annual Report at 28-29.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ Joseph Goldstein, Promotions, Not Punishments, for Officers Accused of Lying, N.Y. Times (Mar. 19, 2018).

⁶⁷ Id.

⁶⁸ Mary Jo White et. al., The Report of the Independent Panel on the Disciplinary System of the New York City Police Department at 38 (Jan. 25, 2019).

⁶⁹ Id. at 38-39.

⁷⁰ Id. at 40.

be charged” under provisions of the Department’s Patrol Guide that would effectively require officer termination.⁷¹

Some, notably Citizens Union, the New York Civil Liberties Union, and Communities United for Police Reform have also called for CCRB to have the authority to investigate and prosecute false official statement cases when they arise in connection with ongoing CCRB investigations or prosecutions.

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning amending the Charter to allow CCRB to investigate and recommend discipline with respect to false official statement cases when they arise in connection with ongoing CCRB investigations or prosecutions.

⁷¹ Id. at 7 and 53.

CONFLICTS OF INTEREST

Conflicts of Interest Board

The Conflicts of Interest Board (COIB) is responsible for establishing rules to implement, interpret, and provide clear guidance concerning the conflicts of interest laws applicable in the City, which are set forth in Chapter 68 of the Charter.⁷²

COIB consists of five members, all of whom are appointed by the Mayor with the advice and consent of the Council.⁷³ Members are to be chosen “for their independence, integrity, civic commitment and high ethical standards” and cannot, while serving, “hold any public office, seek election to any public office, be a public employee in any jurisdiction, hold any political party office, or appear as a lobbyist before the city.”⁷⁴ Members serve six-year terms and can only be removed by the Mayor “for substantial neglect of duty, gross misconduct in office, inability to discharge the powers or duties of office or violation of [the conflict of interest laws].”⁷⁵ The Mayor designates one of the members to serve as chair.⁷⁶

STAFF RECOMMENDATIONS:

In staff’s view, the structural roles of the Mayor and the Council give each a way to ensure that the conflicts of interest rules are developed and interpreted in a manner that reflects the realities of their offices. The same cannot be said of the two remaining citywide elected officials. Accordingly, staff recommends that the Commission further consider and solicit public feedback concerning whether to change the structure of COIB to include representation from the Public Advocate and Comptroller, such as by expanding COIB to include one member appointed by the Public Advocate and one member appointed by the Comptroller.

In so recommending, staff is mindful of the caution articulated by Richard Briffault, the current COIB Chair, in response to questioning by Commissioner Albanese at the

⁷² See Charter § 2603(a).

⁷³ Charter § 2602(a).

⁷⁴ Charter § 2602(b).

⁷⁵ Charter § 2602(c), (f).

⁷⁶ Charter § 2602(a).

Commission's March 14, 2019 Public Meeting.⁷⁷ Briffault suggested that because COIB members are all appointed and confirmed in the same way, they do not think of themselves as representing different interests.⁷⁸ He then warned that the experience of the State's Joint Commission on Public Ethics (JCOPE) "is a caution. I think everyone would agree that that does not work well in the way that's been set up."⁷⁹ JCOPE consists of 14 members, with three appointed by the temporary president of the Senate, three appointed by the Speaker of the Assembly, one appointed by the Senate Minority Leader, one appointed by the Assembly Minority Leader, and six appointed "by the governor and the lieutenant governor."⁸⁰

Post-Employment Appearance Restrictions

The Charter prohibits former public servants – all officials, officers, and employees of the City – from appearing before the City agency that employed them for one year following the end of their service.⁸¹ Some City officials face a more stringent ban: elected officials, deputy mayors, the Director of the Office of Management and Budget, the Commissioner of Citywide Administrative Services, the Corporation Counsel, the Commissioner of Finance, the Commissioner of Investigation, and the Chair of the City Planning Commission are prohibited from appearing before any agency in the *branch of government* they served in for the yearlong period.⁸² In these contexts, the Charter defines the term "appear" as any communication for compensation, other than those involving administrative matters.⁸³

New York State has certain lengthier post-employment appearance restrictions. For example, State officers and employees are prohibited from appearing or practicing before their former agency and from being compensated in relation to matters before their former agency for two years.⁸⁴ Furthermore, former Executive Chamber officers and

⁷⁷ See 2019 Charter Revision Commission, Transcript of Mar. 14, 2019 Public Meeting at 62-64.

⁷⁸ Id. at 62.

⁷⁹ Id.

⁸⁰ Executive Law § 94(1), (2).

⁸¹ Charter §§ 2601(19), 2604(d)(2).

⁸² Charter § 2604(d)(3).

⁸³ Charter § 2601(4).

⁸⁴ Public Officers Law § 73(8)(a)(i).

employees are prohibited from appearing or practicing in front of any State agency for two years.⁸⁵

STAFF RECOMMENDATIONS:

Post-employment appearance bans exist because there is a perception that lobbying by former government officials may result in undue influence, particularly when the former government official was an elected or high-ranking official. These individuals had significant power while in office and may thus have significant influence as lobbyists.

Therefore, staff recommends that the Commission further consider and solicit feedback concerning strengthening the City's post-employment restrictions for elected officials and senior appointed officials regarding their appearances before City entities. New York State laws regarding post-employment lobbying restrictions may serve as an example for enhancing the City's post-employment restrictions on elected officials and senior appointed officials.

⁸⁵ Public Officers Law § 73(8)(a)(iv).

CORPORATION COUNSEL

The Corporation Counsel is the head of the New York City Law Department (Law Department), an executive agency that has over 920 attorneys and 800 support professionals.⁸⁶

Generally, the Corporation Counsel is the attorney and counsel for the City as a whole, including for the Mayor, other elected officials, and every City agency.⁸⁷ The Law Department represents these entities in all affirmative and defensive litigation.⁸⁸ Law Department attorneys draft and review City and New York State legislation, real estate leases, and procurement contracts for the sale of municipal bonds; and they provide legal counsel to City officials on a wide variety of legal issues.⁸⁹

Appointment

The Mayor appoints the Corporation Counsel and may remove the Corporation Counsel at will.⁹⁰

The Corporation Counsel has an expansive role in representing not only mayoral agencies but also other City officials and entities. Because City entities do not always agree, the Corporation Counsel faces a challenge in fairly and effectively providing guidance and representation to the constituent parts of the City, while steadfastly ensuring that it is fundamentally representing the interests of the municipal corporation as a whole. In staff's view, the Corporation Counsel should be permitted to operate with appropriate independence from the interests of any particular elected official, including the Mayor, so that it can effectively defend the interests of the City overall. The Commission has heard concerns that the Mayor's appointment of, and ability to remove, the Corporation Counsel

⁸⁶ Charter § 391; New York City Law Department, [About the Law Department](#).

⁸⁷ Charter §§ 394(a), 397(b).

⁸⁸ New York City Law Department, [About the Law Department](#); Charter § 394(b), (c).

⁸⁹ New York City Law Department, [About the Law Department](#); Charter § 394(b).

⁹⁰ Charter § 6(a), (b).

creates the potential for the Corporation Counsel to prioritize the interests of the Mayor in a manner that may not be in the City's overall interests.⁹¹

The power of a legislative body to provide "advice and consent" for the Corporation Counsel would allow for input by non-mayoral elected officials at the time of appointment to ensure that the nominee is committed to fulfilling the duties of the Corporation Counsel impartially and in accordance with the position's legal and ethical obligations. Additionally, the establishment of a set term of office could allow for periodical evaluations of the Corporation Counsel's official performance.

STAFF RECOMMENDATIONS:

Staff recommends that the Commission further consider and solicit public feedback concerning whether to amend the appointment structure for the Corporation Counsel to (1) require Council advice and consent for the Mayor's appointment and (2) establish that the Corporation Counsel serves for a set term.

Conflicts of Interest

The Charter only permits officials and agencies to employ outside counsel (i.e., not the Corporation Counsel) in limited circumstances, such as when there is legal action that may affect the official or agency individually or when the action concerns contempt of court.⁹² In addition, case law allows officials and agencies to employ outside counsel in certain other instances, including when the Corporation Counsel cannot represent an official or agency due to a conflict of interest.⁹³ For example, the Council has sued the Mayor – a direct conflict of interest – on numerous occasions through outside or in-house counsel.⁹⁴

Although the Charter states that the Corporation Counsel is the "attorney and counsel for the city and every agency," in instances of conflicts of interest between the Mayor and other City officials or entities, the Corporation Counsel typically, if not invariably, chooses to represent the Mayor, with the opposing City official or entity being left to secure

⁹¹ See Council Report to the 2019 Charter Revision Commission at 3-4, 7; Written testimony of Manhattan Borough President Gale A. Brewer to the 2019 Charter Revision Commission at 13-14.

⁹² Charter § 395.

⁹³ Cahn v. Town of Huntington, 29 N.Y.2d 451, 455-56 (1972); Lamberti v. Metro. Transp. Auth. (MTA), 170 A.D.2d 224, 225 (1st Dep't 1991).

⁹⁴ See, e.g., Council of City of N.Y. v. Giuliani, 163 Misc. 2d 681 (N.Y. Sup. 1994).

outside counsel.⁹⁵ At the Commission's March 18, 2019 Public Meeting, a representative of the Law Department discussed the agency's conflict of interest decision-making process. The Law Department representative stated that the Department defines a "conflict of interest" not as merely a disagreement between entities but as a situation in which "a position being taken by one entity . . . could undermine the duties, powers, or authority of another entity It could be an actual . . . or a potential [conflict]."⁹⁶ The representative noted that once the Law Department identifies a conflict, it independently decides which position is legally correct and represents the entity taking that position.⁹⁷ However, in response to further questioning, the Department conceded that in the event of a conflict of interest between the Mayor and the Council, the Law Department has historically sided with the Mayor, who appoints the Corporation Counsel.⁹⁸

STAFF RECOMMENDATIONS:

In staff's view, while the Law Department appears to have an internal conflict of interest decision-making process, there is a lack of transparency within City government and to the public regarding its definition of a conflict of interest and its timeline for determining whether a conflict of interest exists when litigation appears possible. There is also a lack of transparency as to which City official or entity the Corporation Counsel is representing when it makes a conflict of interest decision. Furthermore, when a City entity is required to represent itself, the expense of retaining outside counsel can be prohibitive. The lack of clarity in these areas has the potential to generate confusion, result in a reluctance to file suit, or make it more difficult for a City official or entity to receive appropriate and timely representation.

Accordingly, staff recommends that the Commission further consider and solicit feedback concerning amending the Charter to require the Corporation Counsel to promulgate rules pertaining to conflicts of interest between City entities, including but not limited to rules addressing (1) what constitutes a conflict of interest; (2) notice to the opposing parties when the Corporation Counsel identifies a conflict of interest (or lack of one); (3) notice to the opposing parties if and when the Corporation Counsel authorizes the use of outside

⁹⁵ Charter § 394(a); see Michael A. Cardozo, The Conflicting Ethical, Legal, and Public Policy Obligations of the Government's Chief Legal Officer, *The Professional Lawyer*, Vol. 22, Num. 3 (Apr. 8, 2014), at 2.

⁹⁶ See 2019 Charter Revision Commission, Video of Mar. 18, 2019 Public Meeting at 01:32:57.

⁹⁷ Id. at 01:33:38.

⁹⁸ Id. at 01:50:02.

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conflict counsel; and (4) which City official or entity's funds will be used to pay for outside conflict counsel.

PUBLIC ADVOCATE

Role of the Office

The 1989 Charter Revision Commission intended the Public Advocate “to serve as a watchdog on the mayor on service issues and to propose solutions, rather than merely point out inadequacies, inefficiencies, mismanagement and misfeasance.”⁹⁹ They envisioned that the Public Advocate and Comptroller would collectively “check and balance the mayor – the comptroller for fiscal issues and the [Public Advocate] for service issues,” a role that was particularly important because, at that time, the Council’s oversight function was new and its “oversight vigor untested.”¹⁰⁰

The Public Advocate’s specific powers and responsibilities are principally set forth in section 24 of the Charter.

The Public Advocate must “monitor the operation of the public information and service complaint programs of city agencies and make proposals to improve such programs” and “review complaints of a recurring and multiborough or city-wide nature relating to services and programs, and make proposals to improve the city’s response to such complaints.”¹⁰¹

The Public Advocate must also receive, investigate, and attempt to resolve “individual complaints concerning city services and other administrative actions of the city agencies.”¹⁰² But this requirement does not cover complaints “which (i) another city agency is required by law to adjudicate, (ii) may be resolved through a grievance mechanism established by collective bargaining agreement or contract, or (iii) involve allegations of conduct which may constitute a violation of criminal law or a conflict of interest.”¹⁰³ For those complaints, the Public Advocate must “advise the complainant of the appropriate procedure for the resolution of such complaint,” refer the matter to the appropriate agency – the Department of Investigation or appropriate law enforcement agency (for a

⁹⁹ Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter, 42 N.Y.L. Sch. L. Rev. 723, 821 (1998).

¹⁰⁰ Id. at 816-17, 820.

¹⁰¹ Charter § 24(f)(1), (2).

¹⁰² Charter § 24(f).

¹⁰³ Id.

crime) or the Conflicts of Interest Board (for a conflict of interest) – and take no further action.¹⁰⁴

The Public Advocate “may review the programs of city agencies” and “inquire into any alleged failure of a city officer or agency to comply with any provision of the charter.”¹⁰⁵ If the Public Advocate does conduct such a review or inquiry, he or she must generally report the findings of the review or inquiry to the Council, the Mayor, and any agency involved.¹⁰⁶ But as with individual complaints, if the Public Advocate uncovers possible criminal conduct or a conflict of interest in the course of a review or inquiry, he or she must refer the matter to the appropriate authority and take no further action.¹⁰⁷

The Public Advocate also (1) serves as Mayor whenever there is a vacancy in that office;¹⁰⁸ (2) can introduce legislation to the Council, but not vote;¹⁰⁹ (3) serves on the Voter Assistance Advisory Committee, the Audit Committee, the Commission on Public Information and Communication, and the New York City Employees’ Retirement System (NYCERS) Board of Trustees;¹¹⁰ (4) appoints a member to the City Planning Commission and the Independent Budget Office Advisory Committee; (5) recommends five members to New York City Transit Authority Advisory Council (appointed by the Governor); and (6) appoints two voting members to the Citywide Councils on Special Education, English Language Learners, and High Schools.¹¹¹

¹⁰⁴ Charter § 24(f), (k).

¹⁰⁵ Charter § 24(h), (i).

¹⁰⁶ Id.

¹⁰⁷ Charter § 24(k).

¹⁰⁸ Charter § 10(a)-(c).

¹⁰⁹ Charter § 22(a).

¹¹⁰ Admin. Code § 13-103(b)(2).

¹¹¹ See Charter §§ 10(a)-(c), 22(a), 240(e), 1054(a), 97(a), 1061, 192(a), 259(a); Public Authorities Law § 1204-e; Education Law § 2590-b(4)(a)(2), (5)(a)(ii), (6)(a)(iv).

Ability to Access Information

The Charter does not provide the Public Advocate with “subpoena” power (discussed further below), but does provide three avenues for the Public Advocate to obtain information during his or her investigations.¹¹²

First, the Charter provides that the Public Advocate “shall have timely access to those records and documents of city agencies which the public advocate deems necessary to complete investigations, inquiries and reviews required by [Charter § 24].”¹¹³ If an agency does not comply with the Public Advocate’s request for records and documents, the Public Advocate may go directly to court for an order requiring such access.¹¹⁴ As an alternative to court, the Public Advocate “may request an appropriate committee of the council to require the production of such records and documents pursuant to [Charter § 29].”¹¹⁵

The Public Advocate’s ability to gain access to records and documents in this fashion is broader than that of the general public under the Freedom of Information Law (FOIL). For example, former Public Advocate Mark Green used the Public Advocate’s power to obtain access to police disciplinary records, which are generally not disclosable to the public under Civil Rights Law § 50-a.¹¹⁶

Second, the Public Advocate may hold public hearings.¹¹⁷ This section of the Charter is, however, silent as to whether the Public Advocate may require witnesses to attend and testify at these hearings.

Third, the Public Advocate may apply to the court for an order to conduct a “summary inquiry into any alleged violation or neglect of duty in relation to the property, government or affairs of the city.”¹¹⁸ Such an application must be “supported by affidavit to the effect

¹¹² See Green v. Safir, 174 Misc. 2d 400, 403 (Sup. Ct. 1997), aff’d 255 A.D.2d 107 (1st Dep’t 1998).

¹¹³ Charter § 24(j).

¹¹⁴ Green v. Safir, 255 A.D.2d 107 (1st Dep’t 1998).

¹¹⁵ Charter § 24(j).

¹¹⁶ Green v. Safir, 255 A.D.2d 107 (1st Dep’t 1998); see also New York Civil Liberties Union v. New York City Police Dep’t, 32 N.Y. 3d 556 (2018).

¹¹⁷ Charter § 24(m).

¹¹⁸ Charter § 1109.

that one or more officers, employees or other persons therein named have knowledge or information concerning such alleged violation or neglect of duty.”¹¹⁹ If ordered, this inquiry is “conducted before and shall be controlled by the justice making the order or any other justice of the supreme court in the same district,” and that justice “may require any officer or employee or any other person to attend and be examined in relation to the subject of the inquiry.”¹²⁰ But very few summary inquiry applications have been submitted, let alone granted: in the 146 years since this provision was added to the Charter, there have been 13 such applications made and only three have been approved (with one such approval being later overturned by the court).¹²¹

Subpoena Power

Some, notably the current Public Advocate and several past holders of the office, have asked that the Public Advocate be given the power to issue subpoenas.

Generally, a “subpoena” requires a person to appear and answer questions under oath (either at a public hearing or in some other setting).¹²² And a “subpoena duces tecum” is a particular kind of subpoena that “requires the production of books, papers and other things.”¹²³ A person who is served with a subpoena may, after requesting that the subpoena be withdrawn or modified, challenge the subpoena in court.¹²⁴ Conversely, if someone refuses to comply with a subpoena, the issuer can ask a court to compel compliance.¹²⁵

The 1989 Charter Revision Commission apparently did not extend subpoena power to the Public Advocate because they were concerned about giving such power to a single

¹¹⁹ Id.

¹²⁰ Id.

¹²¹ See Riches v. New York City Council, 75 A.D.3d 33, 39 (1st Dep’t 2010); James v. Fariña, 53 Misc.3d 704, 705 (Sup. Ct. 2016), rev’d 2019 WL 1120143 (1st Dep’t 2019).

¹²² See Civil Practice Law and Rules (CPLR) § 2301.

¹²³ Id.

¹²⁴ CPLR § 2304.

¹²⁵ CPLR § 2308(b)(1).

individual, as opposed to a board or committee.¹²⁶ In staff's view, this is perplexing given that a number of individuals already then had subpoena power. For example, subpoena power had been previously given to the Comptroller, Commissioner of Investigation, Commissioner of Buildings, Commissioner of Citywide Administrative Services, Commissioner of Environmental Protection, Commissioner of Consumer Affairs, City Clerk, and Mayor, to name but a few.¹²⁷ In any event, former Public Advocate Mark Green notes that a possible solution to this issue is to require that the Public Advocate apply to the court before issuing a subpoena.¹²⁸

STAFF RECOMMENDATION:

In staff's view, the power to, in some meaningful way, require answers to questions posed is critical for an officer responsible for serving as a "watchdog" and "check and balance" on the Mayor, as the 1989 Charter Revision Commission envisioned the role of the Public Advocate to be. Accordingly, staff recommends that the Commission further consider and solicit feedback concerning whether to establish a mechanism through which the Public Advocate may require officials and agencies to answer questions posed by the Public Advocate, whether that mechanism be some form of subpoena power or otherwise.

¹²⁶ Written testimony of Mark Green to the 2019 Charter Revision Commission at 54-55 (referring to an article by former Public Advocate Mark Green citing to the 1989 Charter Revision Commission's public meeting transcripts).

¹²⁷ Charter §§ 93(b), 805, 646, 818, 1403; Admin. Code §§ 3-212(a), 5-358.

¹²⁸ Written testimony of Mark Green to the 2019 Charter Revision Commission at 84-85.

BOROUGH PRESIDENTS

From 1901 to 1990, Borough Presidents served on the Board of Estimate, a powerful governing body that had significant authority in budget, land use, contracting, and other areas. When the U.S. Supreme Court ruled the Board of Estimate's voting structure unconstitutional, it put in motion structural reorganization of the City's government. The 1989 Charter Revision Commission chose not to eliminate the offices of the Borough Presidents due to the historical importance of boroughs and significant public testimony urging a meaningful borough role in City government.¹²⁹ Currently, Borough Presidents' limited powers include making non-binding recommendations for capital projects, having legislation introduced in the Council, appointing Community Board members, appointing one member each to the City Planning Commission, and allocating funds within their respective boroughs (5% of the City's capital budget is distributed to Borough Presidents), among others. Borough Presidents are also empowered to hold public hearings.¹³⁰

Borough Presidents are required to chair their Borough Board, make recommendations regarding their borough to the Mayor and other officials, maintain a planning office for the borough, monitor service delivery in the borough, propose a borough capital budget, and recommend executive budget modifications to the Mayor and Council.¹³¹ Borough Presidents also play a role in the City's land use process. In addition to appointing Community Board members and a member each to the City Planning Commission, they have authority to issue non-binding recommendations concerning the approval, disapproval, or modification of land use applications under the Uniform Land Use Review Procedure (ULURP).¹³²

One theme that emerged in the proposals submitted to the Commission and in the discussions at its public meetings regarding the role of the Borough Presidents is that many feel there is a need to enhance the ability of the Borough Presidents to obtain information and meaningful engagement from agencies, particularly the borough-level officials and divisions of the agencies.

¹²⁹ Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter, 42 N.Y.L. Sch. L. Rev. 723, 810-812 (1998).

¹³⁰ Charter §§ 82, 192(a), 2800(a)(1).

¹³¹ Charter §§ 82, 211(c), 251.

¹³² Charter § 197-c(g), (h).

Borough Service Cabinets

The Charter provides for direct engagement between Borough Presidents and borough-level officials in certain agencies through a “borough service cabinet.”¹³³ These cabinets are responsible for coordinating borough-level service delivery, considering interagency problems affecting such service delivery, planning and developing programs to address the needs of the borough, and consulting with residents of the borough and relevant Community Boards about service problems.¹³⁴ Each cabinet consists of a representative from each agency responsible for “delivering services” in the borough and is chaired by the Borough President.¹³⁵ The agency representatives must be “senior officials of the agency with line authority as borough representatives of the agency.”¹³⁶

But the Charter does not (1) clearly identify the agencies that are responsible for designating representatives for the cabinet; (2) authorize the Borough President to require agency representatives to attend cabinet meetings or otherwise provide information or answer questions; or (3) make the Mayor or any particular officer or agency responsible for ensuring that agencies meaningfully engage with the cabinet.

Public Hearings

Borough Presidents may also hold “public hearings on matters of interest.”¹³⁷ But a Borough President generally cannot require anyone to attend these hearings, provide testimony, or otherwise answer questions.

A quasi-exception to this is in the realm of contracts. If a Borough President identifies an issue with a contract relating to services in the borough, he or she may, through a process laid out in Charter § 333(b), require a hearing by a “contract performance panel” (consisting of the Public Advocate, the Comptroller, and the Mayor) on that issue. But while the Borough Presidents can testify at that hearing, they cannot ask questions or require the contractor in question to attend, as these powers rest with the panel.¹³⁸

¹³³ Charter § 2706(b).

¹³⁴ Id.

¹³⁵ Charter § 2706(a), (b).

¹³⁶ Charter § 2706(a).

¹³⁷ Charter § 82(5).

¹³⁸ See Charter § 333(b)(2).

Obtaining Documents and Records

A Borough President may access public records in the same fashion as any member of the general public through the Freedom of Information Law (FOIL).¹³⁹ But, unlike the Public Advocate, for example, the Charter does not expressly give the Borough Presidents any power beyond this to require that agencies provide documents, records, or other information.¹⁴⁰

STAFF RECOMMENDATIONS:

Staff recommends that the Commission further consider and solicit public feedback concerning whether to amend the Charter to (1) require that agencies provide a Borough President with documents and records relating to matters within their jurisdiction (e.g., budget and land use matters) and within the borough upon receiving a request from the Borough President and (2) provide a mechanism for clearly identifying which agencies are responsible for participating in borough service cabinets and ensuring their meaningful engagement, such as by requiring that an officer or agency be made responsible for coordinating agency engagement in such cabinets.

¹³⁹ See generally Public Officers Law art. 6.

¹⁴⁰ See Charter § 24(j).

LAND USE

ULURP Pre-Certification Notice and Comment

The Charter establishes a Uniform Land Use Review Procedure (ULURP), which specifies a timeframe and sequence for public review of land use applications by different actors – Community Boards, Borough Presidents, the City Planning Commission (CPC), and, ultimately, the Council. ULURP, and the so-called “ULURP clock,”¹⁴¹ begins when an applicant formally files its application with the Department of City Planning (DCP) and DCP certifies that the application is complete. In practice, however, DCP discusses and reviews draft applications long before they are formally filed and certified.¹⁴² This non-public “pre-certification” process often lasts for well over a year (and in some instances can be a multi-year process).¹⁴³

Some Community Boards and Borough Presidents have expressed to the Commission that the current ULURP process provides insufficient opportunity for community engagement. Specifically, Community Boards and Borough Presidents feel that (1) they receive inadequate notice of, and information about, applications that are about to proceed through ULURP, and (2) they lack the time and opportunity to influence applications prior to certification, at which point they feel that applications are effectively already finalized.

While it is true that some applicants engage with the applicable Community Board, Borough President, and Council Member before the official ULURP clock commences, they

¹⁴¹ Within five days after a ULURP application has been filed, the Charter requires DCP to forward a copy of the application materials to the affected community board, Borough President, and borough board. Charter § 197-c(b). Thereafter, DCP is responsible for certifying that the application is complete and ready to proceed through ULURP. Charter § 197-c(c). When DCP so certifies, the formal ULURP “clock” begins to run, starting with a 60-day community board review period, followed by a 30-day Borough President/borough board review period, and concluding with CPC and Council review periods, resulting in a binding final decision. Charter § 197-c.

¹⁴² See 62 RCNY § 10 (CPC rules discussing procedure for meeting with applicants prior to filing); see also New York City Department of City Planning, Applicants – Overview (“The Department reviews all applications before the public review process begins. An applicant’s first conversations with the Department are typically before an application has even been put together.”).

¹⁴³ See Matt Chaban, *A New BluePrint: City to Speed Up Land-Use Reviews*, N.Y. Observer, (June 21, 2012) (“[P]re-certification process at the Department of City Planning . . . can take months, and sometimes even years . . .”).

are not required to do so. DCP has stated that applicants who do engage in this informal pre-ULURP process have found it beneficial, stating that this engagement helps the applicants shape their projects to address local neighborhood concerns and results in better outcomes.¹⁴⁴

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning a pre-certification engagement process to provide more time and an earlier opportunity for Community Boards and Borough Presidents to review and comment on applications that are likely to proceed through ULURP. For example, a fixed pre-certification “comment period” (e.g., 30 days) could be established. In order to facilitate meaningful engagement, this comment period could be initiated by having the applicant submit a Project Information Form (PIF) to affected Community Boards and Borough Presidents with information necessary to evaluate the substance of the proposed project, such as relevant plans, diagrams, and proposed actions.

Additional ULURP Review Time for Community Boards

As discussed above, once a Community Board receives an application that DCP has certified as complete, it has 60 days to (1) notify the public of the application in a manner specified by CPC rules; (2) hold a public hearing on the application; and (3) submit written recommendations to CPC and the affected Borough President.¹⁴⁵

CPC rules require that Community Boards provide advance notice of these public hearings as follows: (1) notice must be published in the City Record for the five days “immediately preceding and including the date of the public hearing”; (2) notice must be published in the Comprehensive City Planning Calendar at least five days before the hearing; and (3) notice must be given to the applicant at least 10 days before the hearing.¹⁴⁶ Quorum for these public hearings is 20% of the Community Board’s membership or seven members, whichever is greater, but any recommendation must be adopted by a majority of the Community Board’s membership.¹⁴⁷

¹⁴⁴ See generally 2019 Charter Revision Commission, Mar. 21, 2019 Public Meeting (testimony of DCP Director Marisa Lago).

¹⁴⁵ Charter § 197-c(e), (i).

¹⁴⁶ 62 RCNY § 2-03(c).

¹⁴⁷ 62 RCNY § 2-03(d)(3), (f)(1).

The City Record is not published on Saturdays, Sundays, or legal holidays, so unless the Community Board hearings are held on Fridays, the five-day publication requirement will effectively require at least seven days of advance notice.¹⁴⁸ This does not include the delay between (1) the date when a Community Board provides a notice for publication to the City Record and (2) the earliest date that the City Record publishes such notice.

Some Community Boards have informed the Commission that they have difficulty holding required application hearings in July and August. The Charter requires that Community Boards conduct at least one public hearing each month, except that such hearings are generally not required in July and August.¹⁴⁹

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning whether (and by how much) to extend the time period for Community Board review under ULURP for those applications certified by DCP at a point in the calendar year which results in a substantial portion of the Community Board's review period falling within the months of July and/or August (e.g., extending the time period for such review from 60 to 75 days in those instances).

Planning

Urban planning professionals use the term "comprehensive plan" to describe a document that articulates long-term development goals related to transportation, utilities, land use, recreation, housing, and other types of infrastructure and services. These goals - which are expressed separately from municipal laws and regulations - are meant to direct legislative and administrative decision-making. In some jurisdictions, zoning laws and other land use decisions are required or strongly encouraged to conform with comprehensive plans; in others, comprehensive plans simply serve as general policy guides. In New York City, a "master plan" was required under the 1936 Charter; however, this requirement was repealed by referendum through New York State's 1975 Charter Revision Commission, the

¹⁴⁸ See Charter § 1066(a).

¹⁴⁹ Charter § 2800(h).

cited reason being that such a plan was never adopted and that more flexible procedures would better fit the City's needs.¹⁵⁰

New York City now plans through an assortment of nonbinding documents, City initiatives, and amendments to the Zoning Resolution itself. From a land use perspective, this approach is legally permissible. State law requires that local land use regulation "accord with" a "comprehensive" or "well-considered" plan, but State courts have interpreted this language to require only that a municipality carefully consider community-wide benefits when regulating land use.

The Commission heard considerable (and often conflicting) testimony about city planning and, in particular, "comprehensive" city planning. In staff's view, these disagreements were complicated by the fact that stakeholders had very different views on what the terms "comprehensive" and "planning" mean, let alone how that planning should be done and by whom and, indeed, whether it should be done at all.

Some argued that the City needs a binding document guiding the development of land and property, as well as the allocation of City resources and facilities, to ensure that these unfold in an "equitable" fashion over the short- and long-term. Others, sometimes pointing to the City's past failed experience with "master plans," argued that such a document would be impractical to develop and enforce and, even if successfully crafted, would leave the City without the flexibility it needs to adapt to rapidly changing circumstances that characterize a modern city. Some of those who argued the latter called instead for the development of a strategic document setting forth the goals, principles, and priorities of the City and the policies, programs, and actions the City intends to use to achieve its ends.

The Commission also heard considerable debate about how planning (whether comprehensive or otherwise) should be done. Some urged that planning must be "bottom up," originating with and being led by the communities themselves and ending in a kind of

¹⁵⁰ See State Charter Revision Commission for New York City, A More Efficient and Responsive Municipal Government: Final Report to the Legislature, (Mar. 31, 1977) ("The Charter requirement of an overall Master Plan . . . in 38 years, was never fully implemented, has been replaced in the new Charter by a less ambitious provision for 'plans for the development, growth, and improvement of the city and of its boroughs and community districts.' These plans may be as comprehensive as desired and could even include an overall Master Plan if that should ever seem practicable. Such plans now may be initiated not only by the City Planning Commission as formerly, but also by the Mayor and by a Community or Borough Board.").

patchwork quilt of neighborhood plans. Others held that planning must be “top down” to avoid being derailed by parochial interests.

While there was general disagreement about what, if any, kind of planning the City should be undertaking, the testimony the Commission has received thus far does speak to a level of public disillusionment with or confusion about the kinds of planning already required in the Charter. And, in staff’s view, the somewhat scattered approach the Charter currently takes to its various planning requirements exacerbates this disillusionment and confusion and warrants further consideration by the Commission.

The Charter establishes no fewer than 12 separate kinds of plans or similar documents that could, in staff’s view, fairly be considered part of a “strategic” or “comprehensive” plan for the City. But the Charter does not always make clear how (and whether) these plans are intended to fit together, what they must address, how they relate to one another, how progress (or lack thereof) toward their goals is measured and assessed, and how the public can affect the content of these plans (if at all).

The Charter-required plans and similar documents are described below:

Borough Strategic Policy Statements (Borough SPS)

- **Summary:** Each Borough SPS must include “(i) a summary of the most significant long-term issues faced by the borough; (ii) policy goals related to such issues; and (iii) proposed strategies for meeting such goals.”¹⁵¹
- **Process/Timing:**
 - By September 1 in every fourth year (next occurring in 2022), each Borough President must submit a Borough SPS to the Mayor, Council, and Community Boards in the borough.¹⁵²
 - Each Borough President must “consult” with the Community Boards in his or her borough when preparing the Borough SPS.¹⁵³
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:**
 - City Strategic Policy Statement (City SPS)
 - Ten-Year Capital Strategy (TYCS)
 - Zoning and Planning Report (ZPR)
 - Community development plans approved under Charter § 197-a (197-a plans)

¹⁵¹ Charter § 82(14).

¹⁵² *Id.*

¹⁵³ *Id.*

- **Affected by the Following Plans:** None specified in the Charter.

City Strategic Policy Statement (City SPS)

- **Summary:** The City SPS must include “(i) a summary of the most significant long-term issues faced by the city; (ii) policy goals related to such issues; and (iii) proposed strategies for meeting such goals.”¹⁵⁴
- **Process/Timing:**
 - By November 15 in every fourth year (next occurring in 2022), the Mayor must submit a “preliminary” City SPS to the Borough Presidents, Council, and Community Boards.¹⁵⁵ While preparing the preliminary City SPS, the Mayor must “consider” each Borough SPS.¹⁵⁶
 - By the start of the following February (about two and a half months after submission of the preliminary City SPS), the Mayor must submit a “final” City SPS to the Borough Presidents, Council, and Community Boards.¹⁵⁷ The final City SPS must “include such changes and revisions as the mayor deems appropriate after reviewing the comments received” in response to the preliminary City SPS.¹⁵⁸
 - DCP is responsible for assisting the Mayor in developing the preliminary and final City SPS.¹⁵⁹
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:**
 - TYCS
 - ZPR
 - 197-a plans
- **Affected by the Following Plans:**
 - Borough SPSs

Ten-Year Capital Strategy (TYCS)

- **Summary:** The TYCS must include “(1) a narrative describing the strategy for the developing of the city’s capital facilities for the ensuing ten years; the factors underlying such strategy including goals, policies, constraints and assumptions and

¹⁵⁴ Id.

¹⁵⁵ Charter § 17(a).

¹⁵⁶ Id.

¹⁵⁷ Charter § 17(b).

¹⁵⁸ Id.

¹⁵⁹ Charter § 191(a)(6).

the criteria for assessment of capital needs; the anticipated sources of financing for such strategy; and the implications of the strategy, including possible economic, social and environmental effects; (2) tables presenting the capital commitments estimated to be made during each of the ensuing ten fiscal years, by program category and agency. Where relevant the anticipated sources of financing for particular categories and projects shall be specified; and (3) a map or maps which illustrate major components of the strategy as relevant.”¹⁶⁰

- **Process/Timing:**
 - By November 1 in every even-numbered year, the Office of Management and Budget (OMB) and DCP must submit to the Mayor, Council, Borough Presidents, and CPC a draft TYCS.¹⁶¹
 - By the following January 16, CPC must hold a public hearing on the draft TYCS and submit its comments and recommendations to the Mayor, Borough Presidents, and Council.¹⁶²
 - By the following March 25, relevant Council committees must, as part of their budget oversight hearings, hold hearings on the draft TYCS and the Council must submit its recommendations to the Mayor.¹⁶³
 - By the following April 26, the Mayor publishes the final TYCS.¹⁶⁴
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:**
 - Capital Budget¹⁶⁵
 - FYCP¹⁶⁶
 - 197-a plans¹⁶⁷

¹⁶⁰ Charter § 215(b).

¹⁶¹ Charter § 228.

¹⁶² Charter § 234.

¹⁶³ Charter § 247. Presumably, in years that do not require a new draft TYCS, these hearings are not required.

¹⁶⁴ Charter § 248.

¹⁶⁵ Charter § 257 (“Not later than thirty days after the budget is finally adopted, the mayor shall prepare a statement of how the capital budget and program as finally adopted vary, if at all, from the ten-year capital strategy . . .”).

¹⁶⁶ Id.

¹⁶⁷ 62 RCNY § 6-04(b)(4).

- **Affected by the Following Plans:**
 - Borough SPSs¹⁶⁸
 - City SPS¹⁶⁹
 - 197-a plans¹⁷⁰
 - Previous reports required under Charter § 257 “comparing the most recent ten-year capital strategy with the capital budgets and programs adopted for the current and previous fiscal years”¹⁷¹

Four-Year Capital Program (FYCP)

- **Summary:** The FYCP must set forth “for both program categories and individual projects: (1) A statement for each of the three succeeding fiscal years of the total dollar amounts necessary to complete projects initiated in prior years and projects proposed in the executive budget, the amounts necessary for projects proposed to be initiated in future years and the amount necessary for amendments and contingencies; and (2) A statement of the likely impact on the expense budget of staffing, maintaining and operating the capital projects included in or contemplated by the capital program.”¹⁷²
- **Process/Timing:**
 - The Mayor’s executive capital budget, due by April 26 each year, is required to include an “executive capital program.”¹⁷³
 - When the Council adopts the normal budget for the upcoming fiscal year (see further discussion below in “City Budget”), it also adopts the FYCP.¹⁷⁴ Similar to the veto and veto override provisions for the normal budget, if the FYCP differs from the Mayor’s executive capital program, the Mayor may veto the changes, and the Council may, in turn, override that veto.¹⁷⁵ At any

¹⁶⁸ Charter § 215(c).

¹⁶⁹ Id.

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² Charter § 214(b).

¹⁷³ Charter §§ 214(b), 249.

¹⁷⁴ See Charter § 254(a).

¹⁷⁵ Id.

time after adoption, the Council may amend the FYCP if the Mayor requests such an amendment.¹⁷⁶

- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:**
 - Future TYCS¹⁷⁷
- **Affected by the Following Plans:**
 - Past TYCS¹⁷⁸

Community Development Plans (197-a plans)

- **Summary:**
 - A plan “for the development, growth, and improvement of the city and of its boroughs and community districts may be proposed by (1) the mayor, (2) the city planning commission, (3) the department of city planning, (4) a borough president with respect to land located within his or her borough, (4) a borough board with respect to land located within its borough, or (6) a community board with respect to land located within its community district.”¹⁷⁹
 - Such a plan may be a “comprehensive or master plan”¹⁸⁰ for the area or “a targeted plan which considers one or a small number of elements of neighborhood, community districts, borough or citywide problems or needs.”¹⁸¹
 - In either case, such plans must meet the following requirements:

¹⁷⁶ Charter § 216(a).

¹⁷⁷ Charter § 215(c).

¹⁷⁸ Charter § 257.

¹⁷⁹ Charter § 197-a(a).

¹⁸⁰ 62 RCNY § 6-04(a)(1) (“A plan may take the form of a comprehensive or master plan for a neighborhood, community district, borough or other broad geographic area of the city. Such a plan would combine elements related to housing, industrial and commercial uses, transportation, land use regulation, open space, recreation, community facilities and other infrastructure and service improvements which promote the orderly growth, improvement and future development of the community, borough or city.”); see also Charter § 197-a(b) (requiring CPC to “adopt rules establishing minimum standards for the form and content” of 197-a plans).

¹⁸¹ 62 RCNY § 6-04(a)(2) (“Such a plan shall have as its focus issues that are related to the use, development and improvement of land within the sponsor’s geographic jurisdiction and may give consideration to the provision of various city services necessary to support orderly growth, development and improvement of that area.”).

- “be presented in clear language and coherent form with elements, chapters or sections that are organized in logical sequence”;¹⁸²
 - “state their goals, objectives or purposes clearly and succinctly . . . contain documentation and explanation of the data, analysis or rationale underlying each [policy statement or recommendation and] demonstrate a serious attempt to analyze and propose policies that address the problems they identify”;¹⁸³
 - “contain, as appropriate, inventories or description and analysis of existing conditions, problems or needs; projections of future conditions, problems or needs; and recommended goals and strategies to address those conditions, problems or needs . . . [with the] information and analysis relied upon to support its recommendations [sufficiently] identified so that when the plan is later under review, the accuracy and validity of the information and analysis may be understood”;¹⁸⁴
 - “be accompanied by documentation of the public participation in their formulation and preparation, such as workshops, hearings or technical advisory committees”;¹⁸⁵ and
 - “include discussion of their long-range consequences, their impact on economic and housing opportunity for all persons (particularly those of low and moderate income), their provision of future growth and development opportunities, their ability to improve the physical environment and their effect on the fair geographic distribution of city facilities.”¹⁸⁶
- **Process/Timing:**
 - The sponsor of a 197-a plan must notify DCP at least 90 days before submitting a proposed plan.¹⁸⁷

¹⁸² 62 RCNY § 6-04(a)(4).

¹⁸³ 62 RCNY § 6-04(a)(5).

¹⁸⁴ 62 RCNY § 6-04(a)(6).

¹⁸⁵ 62 RCNY § 6-04(a)(7).

¹⁸⁶ 62 RCNY § 6-04(b)(1).

¹⁸⁷ 62 RCNY § 6-02(a).

- Within 90 days after submission of the plan, DCP determines whether the plan meets the standards (discussed above) and, if so, presents the plan to CPC.¹⁸⁸
- Within 30 days after such presentation, CPC determines whether the plan meets the standards. If the CPC determines that the proposed plan does not meet the standards, it sends the plan back to the sponsor with a statement explaining its deficiencies. If the CPC determines that the proposed plan does meet the standards, it directs DCP to undertake any required environmental reviews.¹⁸⁹
- The CPC then directs DCP to distribute the plan to all affected Community Boards, Borough Presidents, and Borough Boards. The CPC may also direct its distribution to other agencies whose operations or interests are affected and any City or State agencies with jurisdiction over elements of the plan.¹⁹⁰
- Each Community Board which receives the proposed plan from DCP conducts a public hearing on the plan. Subsequent to the hearing and within 60 days following receipt of the plan, the Community Board sends its written recommendation to CPC, as well as copies to the Borough President, Council, and the sponsor.¹⁹¹
- Following receipt of the proposed plan, the Borough President of the relevant borough has 120 days to review the plan and submit written recommendations to the CPC, as well as copies to the Council and the sponsor. The Borough President may choose to conduct a public hearing.¹⁹²
- If the proposed plan affects land in two or more Community Districts in the relevant borough, the Borough Board conducts a public hearing on the plan. The public hearing must take place and the Borough Board must transmit a report within 120 days of receiving the proposed plan.¹⁹³
 - **NOTE:** If a plan affects an entire borough, a single boroughwide public hearing may be held in lieu of separate hearings held by the Community Boards. Any Community Board or Borough Board may make a request to DCP to receive and review a proposed plan that does not involve land within its district or borough. Such a request

¹⁸⁸ 62 RCNY § 6-03(a), (b).

¹⁸⁹ 62 RCNY § 6-03(b).

¹⁹⁰ 62 RCNY § 6-06(a).

¹⁹¹ 62 RCNY § 6-06(b).

¹⁹² 62 RCNY § 6-06(c).

¹⁹³ 62 RCNY § 6-06(d).

must state the reason why the plan affects the welfare of its district or borough. Upon receiving the plan, the Community Board or Borough Board may conduct a public hearing and may make a recommendation to CPC.¹⁹⁴

- Once the affected Community Board(s), Borough President(s), and/or Borough Boards have completed their review of any proposed plan involving land in their respective districts/boroughs, the CPC begins its review and schedules a public hearing. The hearing takes place within 60 days following receipt of the last affected Community Board's, Borough Board's, or Borough President's recommendation, or the final day of the time period provided for each body's respective review.¹⁹⁵
- The CPC then votes to approve, approve with modifications, or disapprove the plan. This vote is taken within 60 days following the CPC public hearing. If the CPC finds it is unable to vote within that time frame, it must provide a written explanation to the sponsor.¹⁹⁶ The CPC accompanies its resolution with a report that describes its considerations and explains any determination.¹⁹⁷
- The CPC then sends the proposed plan to the Council. The Council has 50 days to hold a public hearing and approve, approve with modifications, or disapprove the plan by a simple majority vote.¹⁹⁸
- If the Council sends back a proposed modification of a plan, the CPC must review the proposed modification within 15 days, including an assessment of whether the modification must be subject to additional environmental review, and respond to the Council with its findings and recommendations.¹⁹⁹
- If the Council does not vote on the proposed plan, the CPC's decision regarding the proposed plan stands.
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:**
 - TYCS
 - ZPR
- **Affected by the Following Plans:**

¹⁹⁴ 62 RCNY § 6-06(e).

¹⁹⁵ 62 RCNY § 6-07(a).

¹⁹⁶ 62 RCNY § 6-07(c).

¹⁹⁷ 62 RCNY § 6-07(d).

¹⁹⁸ Charter § 197(d).

¹⁹⁹ 62 RCNY § 6-08(a).

- Borough SPSs
- City SPS
- TYCS
- ZPR
- 197-a plans “of a neighboring or superior jurisdiction”²⁰⁰

Zoning and Planning Report (ZPR)

- **Summary:** The ZPR must describe the CPC’s “planning policy” and include “a summary of the significant plans and studies completed or undertaken by [DCP] in the preceding four years,” “an analysis of those portions of the zoning resolution that merit reconsideration in light of the planning policy of [CPC],” and “proposals for implementing the planning policy of [CPC] whether by amendment of the zoning resolution, development of plans or otherwise.”²⁰¹
- **Process/Timing:** By December 31 in every fourth year (next occurring in 2020, except as discussed in the Note below), CPC must file the ZPR with the Mayor, Council, Public Advocate, Borough Presidents, and Community Boards.²⁰²
- **Public/Community Role:** None required by the Charter.
- **Progress/Success Indicators:** None required by the Charter.
- **Affects the Following Plans:**
 - 197-a plans
- **Affected by the Following Plans:**
 - Borough SPSs
 - City SPS
 - TYCS
 - FYCP
 - 197-a plans
- **NOTE:** On November 19, 2012, the Report and Advisory Board Review Commission (RABR Commission), acting pursuant to Charter § 1113, voted to “waive” the requirement that a ZPR be developed. Pursuant to Charter § 1113(d)(4) and (5), if the Council does not, within 100 days of any given RABR Commission waiver of a report, vote to disapprove the waiver, then the impacted report is deemed no longer required. It does not appear that the Council took any action with respect to this report; therefore, staff believes the ZPR is no longer required.

²⁰⁰ 62 RCNY § 6-04(b)(4).

²⁰¹ Charter § 192(f).

²⁰² Id.

The RABR Commission determined that the ZPR became “duplicative” because it is “paralleled and superseded in the City Charter requirement for PlaNYC as a result of Local Law 17 of 2008” (discussed further below). The RABR Commission also felt that DCP’s website, and in particular the “Strategic Plan” that DCP maintains on that website, would result in “fresher and more abundant information than can be provided in a once every four year publication.”²⁰³

Statement of Community District Needs

- **Summary:** A statement prepared for the Community District by its Community Board that includes “a brief description of the district, the board’s assessment of its current and probable future needs, and its recommendations for programs, or activities to meet those needs.”²⁰⁴
- **Process/Timing:** Prepared annually by each Community Board (on a schedule set by the Mayor), but no further process established in the Charter.
- **Progress/Success Indicators:** None required by the Charter.
- **Affects the Following Plans:**
 - Citywide Statement of Needs (CSON)
- **Affected by the Following Plans:** None required by the Charter.

Citywide Statement of Needs (CSON)

- **Summary:** The CSON must “identify by agency and program: (1) all new city facilities and all significant expansions of city facilities for which the mayor or an agency intends to make or propose an expenditure or to select or propose a site during the ensuing two fiscal years and (2) all city facilities which the city plans to close or to reduce significantly in size or in capacity for service delivery during the ensuing two fiscal years.”²⁰⁵
- **Process/Timing:**
 - By November 15 of each year, the Mayor must submit to the Council, Borough Presidents, Borough Boards, and Community Boards a “citywide statement of needs” prepared in accordance with “Fair Share” criteria.²⁰⁶
 - The CSON is developed based on needs information submitted to the Mayor by each City agency, and, to prepare its needs information, each agency is

²⁰³ Report and Advisory Board Review Commission, Report and Advisory Board Review Commission Recommendations (Nov. 19, 2012).

²⁰⁴ Charter § 2800(d)(10).

²⁰⁵ Charter § 204(a).

²⁰⁶ Charter § 204(a).

in turn required to “review and consider” the district needs statements provided by the Community Boards (discussed above).²⁰⁷

- After receiving the CSON, each Community Board must hold a public hearing on it, and each Community Board and Borough President may, within 90 days after receiving the CSON, submit comments to DCP.²⁰⁸ Borough Presidents may also suggest alternative sites for facilities listed in the statement, provided that those alternative sites are within the same borough and satisfy Fair Share criteria.²⁰⁹ Agencies must “consider” all written statements submitted through this process when taking action on a matter addressed by the CSON.²¹⁰
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:** None specified in the Charter.
- **Affected by the Following Plans:**
 - Statement of Community District Needs²¹¹

Long-Term Sustainability Plan/Updates

- **Summary:** Charter § 20(e) required the development of a “comprehensive, long-term sustainability plan,” formerly known as “PlaNYC.”²¹² That plan was required to include “an identification and analysis of long-term planning and sustainability issues associated with, but not limited to, housing, open space, brownfields, transportation, water quality and infrastructure, air quality, energy, and climate change” and to establish long-term goals (to be achieved by April 22, 2030) in those areas together with a “list of policies, programs and actions” for the City to meet those goals.²¹³ Since 2015, plan updates (see below) must also address “the resiliency of critical infrastructure, the built environment, coastal protection and communities.”²¹⁴

²⁰⁷ Charter § 204(e)(1).

²⁰⁸ Charter § 204(f).

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Charter § 204(e)(1).

²¹² See Local Law 17/2008.

²¹³ Charter § 20(e)(1).

²¹⁴ Charter § 20(e)(2).

- **Process/Timing:**
 - The Office of Long-Term Planning and Sustainability²¹⁵ (OLTPS) must update the Long-Term Sustainability Plan by April 22 in every fourth year (next occurring in this year).²¹⁶
 - OLTPS is assisted in this effort by a “sustainability advisory board” appointed by the Mayor and comprising “representatives from environmental, environmental justice, planning, architecture, engineering, coastal protection, construction, critical infrastructure, labor, business and academic sectors.”²¹⁷
 - Plan updates must take into account the long-term (21-year) and intermediate (10-year) population projections that DCP is required to make by April 22 in every fourth year (next occurring in 2022).²¹⁸
- **Progress/Success Indicators:** Plan updates are required to include “implementation milestones for each policy, program and action contained” in the plan (and a rationale for any changes to such milestones).²¹⁹
- **Affects the Following Plans:** None specified in Charter.
- **Affected by the Following Plans:** None specified in Charter.

Sustainability Indicators Report

- **Summary:** The report shows the City’s performance with respect to a set of indicators developed by OLTPS “to assess and track the overall sustainability of the city with respect the categories . . . of housing, open space, brownfields, transportation, water quality and infrastructure, air quality, energy, and climate change; the resiliency of critical infrastructure, the built environment, coastal protection and communities; and regarding city agencies, businesses, institutions and the public,” as well as any additional categories identified by OLTPS.²²⁰

²¹⁵ The Office of Long-Term Planning and Sustainability “may, but need not, be established in the executive office of the mayor and may be established as a separate office or within any other office of the mayor or within any department the head of which is appointed by the mayor.” Charter § 20(a).

²¹⁶ Charter § 20(e)(2).

²¹⁷ Charter § 20(g).

²¹⁸ Charter § 20(d), (e)(2).

²¹⁹ Charter § 20(e)(2).

²²⁰ Charter § 20(b), (c).

- **Process/Timing:** By December 31 in each year, OLTPS publishes this report.²²¹
- **Progress/Success Indicators:** (See discussion above.)
- **Affects the Following Plans:** None specified in the Charter.
- **Affected by the Following Plans:** None specified in the Charter.

Comprehensive Waterfront Plan

- **Summary:** The plan must describe the “planning policy” of DCP with respect to the City’s waterfronts and must include “an assessment of waterfront resources for the natural waterfront, the public waterfront, the working waterfront and the developing waterfront.”²²² The plan must also include “proposals for implementing the planning policy of [DCP] whether by amendment of the zoning resolution, development of plans or otherwise.”²²³
- **Process/Timing:** By December 31 in every tenth year (next occurring in 2020), DCP must file the plan with the Mayor, Council, Public Advocate, Borough Presidents, and Community Boards.²²⁴
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:** None specified in the Charter.
- **Affected by the Following Plans:**
 - Borough SPSs
 - City SPS
 - TYCS
 - FYCP
 - 197-a plans

Agency Plans

- **Summary:** The Charter provides that agencies must “prepare and submit to the mayor and other appropriate government authorities short term, intermediate, and long range plans and programs to meet the needs of the city.”²²⁵
- **Process/Timing:** None specified in the Charter.
- **Progress/Success Indicators:** None specified in the Charter.
- **Affects the Following Plans:** None specified in the Charter.
- **Affected by the Following Plans:** None specified in the Charter.

²²¹ Charter § 20(c).

²²² Charter § 205.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Charter § 386(a).

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning amending the Charter to (1) make clear how these various planning documents should relate to and impact one another and ensure that the timing and development of such plans facilitate that end, such as through establishing a “planning cycle”; (2) ensure that such plans address anticipated future planning challenges and include specific indicators for measuring progress consistently throughout such documents and over time; (3) require that such planning consistently identify and address short-term (within the current electoral term), intermediate (within the next electoral term), and long-term issues; (4) require that some element of this planning describe contemplated short-term, intermediate, and long-term changes to land use and development in communities, such as reasonably anticipated neighborhood rezonings (particularly now that the ZPR is defunct); and (5) establish a clear and, to the extent feasible, uniform process for ensuring that the public and other stakeholders have an opportunity to meaningfully weigh in on what the plans address and how.

CITY BUDGET

Broadly speaking, the Mayor proposes a budget for the City and, usually after considerable negotiation (and, from time to time, acrimony), the Council adopts a final budget.²²⁶ If, at the end of the budget process, the Council departs from the budget the Mayor has proposed in a manner that the Mayor disagrees with, then the Mayor may “veto” any (or all) of the changes the Council has made.²²⁷ The Council may then either accept the compromise or, with a two-thirds vote, “override” the veto and adopt the budget it originally passed.²²⁸ In the end, the adopted budget (on the operating side) must be balanced, with projected operating revenues equaling or exceeding total operating funds appropriated.²²⁹

By adopting the final budget, the City becomes legally authorized to spend money on the individual programs delineated in the budget for the next fiscal year.²³⁰ Sometimes though, during that year, the needs of the City may change or the City may take in more or less revenue than expected in the final budget. To deal with such events, the Charter provides for mid-year budget modifications and impoundment of funds.²³¹

Staff has focused on four parts of the budget process where defects have been alleged: (1) the size and structure of “units of appropriation” (UAs) in the expense budget; (2) the timing of the non-property tax revenue estimate for the annual budget; (3) the timing of mid-year budget modifications; and (4) the permissible uses of the impoundment power during the fiscal year.

Units of Appropriation

The expense budget consists of UAs for each agency.²³² Each UA must represent the amount appropriated for personnel or other costs relating to “a particular program,

²²⁶ See generally Charter ch. 10.

²²⁷ See Charter § 255(a).

²²⁸ See Charter § 255(b).

²²⁹ See New York State Financial Emergency Act, at § 8(1)(a).

²³⁰ See Charter § 227.

²³¹ See Charter §§ 107, 106(e).

²³² See Charter § 100(a), (b).

purpose, activity or institution."²³³ But the Charter does not further explain what this phrase means, and as far as staff is aware, there are no court decisions interpreting its language. Some, notably the Council, the Comptroller, and the Independent Budget Office (IBO), argue that this ambiguity has led to UAs that are too large to allow for meaningful budget oversight and limits the Council's ability to play the policy-making role envisioned by the 1989 Charter Revision Commission. Others, notably the Office of Management and Budget (OMB), take the view that smaller UAs would limit the ability of agencies to implement programs as the agencies would be constantly returning to the Council for budget modifications (discussed further below).

This dilemma is not new: the 1989 Charter Revision Commission grappled with it, as well. Frederick Schwarz (the chair of the 1989 Charter Revision Commission) and Eric Lane (the Executive Director and General Counsel of the 1989 Charter Revision Commission) noted that inappropriately broad UAs were a vestige of the pre-1989 Charter that they attempted to address:

Despite the [pre-1989] Charter's requirements, the personal services [PS] categories were subject to substantial agency discretion. For example, the Police Department could characterize all of its PS expenditures as one UA called "policing." Or it could break them down into a variety of PS categories such as traffic, public transportation, patrol, investigation, internal affairs. Choices on how to define a UA could be of enormous political importance in executive-legislative relationships and . . . commanded a considerable amount of our attention in 1989.²³⁴

To impose discipline on the sizing and structuring of UAs while still allowing for flexibility, the 1989 Charter Revision Commission added a provision to Charter § 100(c), clarifying that a UA "could not extend beyond a single program, purpose, activity, or institution, unless the Council adopted (either on the recommendation or with the approval of the mayor) a resolution 'setting forth the names, and a statement of the programmatic objectives, of each program, purpose, activity or institution to be included in such a single unit of appropriation.'"²³⁵

²³³ Charter § 100(c).

²³⁴ Frederick A.O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter, 42 N.Y.L. Sch. L. Rev. 723, 833 (1998).

²³⁵ Id. at 845 (quoting Charter § 100(c)).

In staff's view, the inclusion of a mechanism to expand UAs shows that the 1989 Charter Revision Commission intended the phrase "a particular program, purpose, activity or institution" to impose some meaningful limitation on the structure and size of UAs. But in the absence of any court decisions interpreting this phrase, it is unclear if any meaningful legal limitation on UA size or structure has resulted. It is also unclear if any practical limitation has resulted. For example, the Mayor's recently submitted preliminary budget for Fiscal Year 2020 includes a proposed UA for the Police Department entitled "Operations" that seeks to appropriate \$3.4 billion for departmental functions ranging from communications and support services to street patrol and investigatory services.²³⁶ The \$3.4 billion in this single UA is approximately 61% of the total amount appropriated to the Department.²³⁷

It is worth noting that the Charter provides two additional ways for the Mayor and the Council to directly confront issues with the size and structure of UAs: (1) in its response to the Mayor's preliminary budget, the Council may include "recommendations for any changes in the unit of appropriation structure which the council deems appropriate"²³⁸ and (2) when adopting the final budget, the Council may ultimately (and subject to the veto/override process) amend the Mayor's executive budget to increase, decrease, add, or omit UAs.²³⁹

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning (1) whether the phrase "a particular program, purpose, activity or institution" should be amended to better reflect the intent of the 1989 Charter Revision Commission or to otherwise provide better defined bounds to the structure and size of UAs and (2) whether a specific mechanism for resolving the UA structure between the Mayor and the Council should be established either during the "budget season" (January to June) or, perhaps to separate the debate over UA structure from the debate over UA funding, outside that period. For example, building upon the resolution mechanism established by the 1989 Charter Revision Commission, the Mayor and the Council could be required to jointly adopt a resolution sometime between July and December establishing a UA structure for the ensuing fiscal year's budget.

²³⁶ City of New York, Fiscal Year 2020 Preliminary Expense Revenue Budget at 29E.

²³⁷ Id. at 30E.

²³⁸ Charter § 247(b).

²³⁹ Charter § 254(a).

Impoundment

As discussed earlier, if the Council and the Mayor ultimately disagree on budget policy, the Mayor may manifest his or her objections by vetoing changes the Council makes to the executive budget, and the Council may then either relent and accept the changes in the Mayor's veto or override that veto with a two-thirds vote and adopt the budget it chooses.²⁴⁰

Despite this, if the Mayor determines that any appropriation in the budget should not be spent during the fiscal year, he or she may "impound" that money and prevent it from being spent.²⁴¹ But the Charter is silent on why the Mayor may choose to do this. Must it be for an economic or financial reason, such as to ensure that the budget is balanced and that the City does not spend more than it has? Or can the Mayor impound for "policy" reasons, wielding the power as a way to "override the override" and effectively become the final word on budget policy?

The framers of the 1989 Charter Revision Commission felt the answer was clear. In their view, "the Charter's existing language did not authorize any policy impoundments [and] the Charter could not authorize policy improvements [through impoundment] because such authority would conflict with the state constitutional requirements that every local government have a directly-elected legislative body responsible for initial policy making."²⁴² For that reason, they declined to pursue a proposal to "clarify" that the Mayor could only impound money "to insure a balanced budget" and not for "policy reasons" because they felt it would be redundant.²⁴³ They also felt such a clarification was unnecessary because, at that time, they were not facing a "record of impoundment abuse."²⁴⁴ In Schwarz and Lane's view, had the 1989 Charter Revision Commission faced such a record, it likely "would have gone on to wrestle with trying to devise substantive limitations" on impoundment.²⁴⁵

²⁴⁰ See Charter § 255.

²⁴¹ Charter § 106(e).

²⁴² Frederick A.O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter, 42 N.Y.L. Sch. L. Rev. 723, 840-41 (emphasis added).

²⁴³ Id. at 840.

²⁴⁴ Id. at 841.

²⁴⁵ Id.

In 1994, roughly five years after the 1989 Charter Revision Commission concluded its work, Mayor Rudolph Giuliani became the first mayor in the City's history to impound budget funds after an acrimonious budget battle with Council Speaker Peter F. Vallone.²⁴⁶ The Mayor had proposed \$800 million in spending cuts as an austerity program to close a budget gap, and the Council wanted to replace \$96.6 million of these cuts in "programs like education, youth activities, day care and soup kitchens" with an equal amount of cuts elsewhere.²⁴⁷ The Mayor vetoed the changes; the Council overrode the veto; the two sides battled inconclusively in court; and then the Mayor imposed the \$800 million cut via impoundment over the Council's objection.²⁴⁸

In 1998, the Mayor and Council tussled again over the budget in what appears to have been spillover from a political dispute centering on where the Yankees should play.²⁴⁹ In staff's view, a news report reveals a key part of this engaging saga:

Mr. Giuliani then delivered a withering critique of the Council's budget. He said that Council leaders had used inordinately optimistic projections regarding Wall Street's health to calculate tax revenues for the next several years. The budget also significantly increases the city's deficit, jeopardizes at least one Federal grant, reduces financing for the Police, Fire and Correction Departments -- and even snips \$1 million from the budget of the Mayor's office.

"I would imagine that's in order to create some kind of irritation for me; thank you," he said. Noting that "I can play that game," the Mayor said that he would use his impoundment powers to cut \$1 million from the Council's budget.²⁵⁰

²⁴⁶ Steven Lee Myers, *On His Own, Mayor Cuts \$800 Million From City Budget*, N.Y. Times (Dec. 30, 1994)

²⁴⁷ *Id.*

²⁴⁸ *Id.*; Jonathan P. Hicks, *Giuliani Threatens to Impound Funds for Social Service Agencies*, N.Y. Times (Dec. 2, 1994).

²⁴⁹ Dan Barry, *Council Votes Own City Budget, Starting a Fight With Giuliani*, N.Y. Times (June 6, 1998).

²⁵⁰ *Id.* (emphasis added).

A few days later, the Mayor opined further on impoundment:

The Charter “gives the Mayor the power of impoundment,” he said. “And it gives the Mayor the power to set up accounts in each one of the agencies and to hold back the spending of money until we’re sure that we’re not going to have a shortfall in some part of the budget, or the entire budget. And you know I’ll use those powers aggressively.”

How the Mayor uses his powers to impound -- to freeze funds selectively -- will be closely watched by the Council’s leaders. They say those drastic powers were meant for times of fiscal crisis, and not for the Mayor’s political whims; the Mayor’s advisers say that the Charter language makes no specific constraints.

“The Council could say it’s a misuse of the power, and even though that may have been the intention, the Charter doesn’t spell it out,” said Frank Mauro, who was the director of research for the commission that amended the Charter in 1989. “Whether or not a court would say that’s a proper exercise of his power remains to be seen.”²⁵¹

With respect to the first (1994) episode, in staff’s view, while there very well may have been financial reasons for preferring one type of \$96.6 million budget cut (say, a cut to soup kitchen funding) to another type of \$96.6 million cut (say, a cut to Fire Department overtime), it is at least arguable (if not probable) that a decision between two equally sized cuts is a budget policy decision. Accordingly, staff believes that the 1989 Charter Revision Commission would not have envisioned such a debate to be one ultimately resolvable by the Mayor through impoundment unless some financial basis for preferring one cut to the other could be established.

With respect to the second (1998) episode, setting aside the colorful backdrop, staff thinks it is clear that the 1989 Charter Revision Commission would have frowned upon the use of impoundment (or threat thereof) as a retaliatory stroke in a “game.” In staff’s view, the 1989 Charter Revision Commission would have considered the veto and veto override process the appropriate avenue for this sort of political gamesmanship.

Further, staff believes that the 1989 Charter Revision Commission’s likely disapproval of the use of impoundment as a retaliatory measure is consistent with the position taken by the

²⁵¹ Dan Barry, *Plot Quickens in Action Tale of Budget Battle*, N.Y. Times (June 10, 1998) (emphasis added).

current OMB. In a supplemental written statement submitted in connection with the Commission's March 11, 2019 Public Meeting, OMB stated that the purpose of the impoundment power is "to provide the Mayor with tools to ensure that the budget is balanced, even in difficult times." But they went on to argue that it "would be impossible to develop a set of criteria to reasonably limit the Mayor's impoundment powers. Any such criteria will be artificial and unrelated to the circumstances that cause the underlying economic stress. Future Mayors will need flexibility to employ their impoundment powers in a way that addresses fiscal strains that we cannot know today."²⁵²

STAFF RECOMMENDATION:

In staff's view, had the 1989 Charter Revision Commission been faced with the record of impoundment use (or threats thereof) from the Giuliani years, they would have persisted in their efforts to clarify the scope of the impoundment power. Accordingly, staff recommends that the Commission further consider and solicit feedback concerning whether to finish the task of the 1989 Charter Revision Commission and clarify that the impoundment power must be used for financial or economic reasons rather than to settle budget policy disputes, while bearing in mind OMB's cautions to avoid establishing fixed criteria for determining whether a particular kind of financial or economic reason justifies impoundment and to ensure such power can be exercised quickly. In staff's view, such a clarification should seek to preserve the flexibility of the impoundment power while providing an avenue for the courts to resolve whether, in a particular instance, impoundment is being wielded as an "override to the override."

Revenue Estimates

Knowing how much revenue is available is critical to establishing a balanced budget.²⁵³ The City's revenue is generally classified into two categories: revenues from property taxes and revenue from sources other than real property taxes. The Council, through fixing the property tax rate at budget adoption, sets revenue from property taxes.²⁵⁴ The Mayor provides an estimate of the expected revenue from sources other than real property taxes, which is called the "revenue estimate."²⁵⁵

²⁵² Supplemental written testimony of OMB to the 2019 Charter Revision Commission at 2.

²⁵³ See New York State Financial Emergency Act, at § 8(1)(a).

²⁵⁴ Charter § 1516.

²⁵⁵ See Charter § 1515(a).

The revenue estimate comes during the budget “endgame,” which the Charter lays out as follows:

After the Mayor has prepared and submitted his or her preliminary budget and has received responses from the Council, the Mayor submits an “executive budget” to the Council by April 26.²⁵⁶ Then, between May 6 and May 25, the Council holds public hearings on that budget.²⁵⁷

The Charter does not give the Council a deadline to adopt the budget. Rather, it only provides for what happens if the Council does not adopt a budget by June 5. In such a case, the budget for the current fiscal year is deemed to have been extended into the new fiscal year (which begins on July 1) until a new budget is adopted.²⁵⁸

The Charter does, however, give the Mayor a specific deadline for submitting the revenue estimate to the Council – June 5.²⁵⁹

When the Council adopts its final budget, it must “immediately” increase property tax rates if necessary to ensure a balanced budget – for example, if there is a gap between the total funds appropriated, on the one hand, and total revenues in the revenue estimate plus real property tax revenue at current rates, on the other hand.²⁶⁰

If the Council’s adopted budget makes any changes to the Mayor’s executive budget, the Mayor may veto those changes within five days after the Council’s adoption.²⁶¹ The Council may then, within ten days after the veto, override that veto with a two-thirds vote.²⁶²

Within this Charter-mandated process, the Mayor and the Council engage in budget negotiations, generally between early May and early June, to determine how best to spend the City’s funds over the next fiscal year. Some, including the Council, have urged that past mayors have used the revenue estimate in policy disagreements, politicizing what the

²⁵⁶ See Charter § 249(a).

²⁵⁷ Charter § 253.

²⁵⁸ Charter §§ 254(d), 226.

²⁵⁹ Charter § 1515(a).

²⁶⁰ Charter § 1516(a).

²⁶¹ Charter § 255(a).

²⁶² Charter § 255(b).

Council argues should be a purely ministerial exercise of projecting revenues to the City. For example, if a mayor disagreed with some of the proposed expenditures in budget negotiations, a mayor may set a lower revenue estimate late in those negotiations to force the Council's hand to either increase property tax rates or make budget cuts.

Some argue that that is exactly what happened in the 1998 episode discussed earlier. Before the 1998 Mayor-Council budget battle escalated to impoundment, it spilled over into the revenue estimate process:

A day after the City Council defied Mayor Rudolph W. Giuliani by passing a budget without his consent, he struck back yesterday declaring that New York would collect less money next year than the Council had assumed -- meaning the brand-new budget has a big-old hole. The move escalated a game of political brinkmanship, with higher property taxes as the stakes.

In a curt letter to the Council, the Mayor estimated that the city's revenues would be \$251 million less than he had projected in April. The new forecast left the Mayor and the Council accusing each other of forcing a possible tax increase. It came despite the nearly unanimous view of credit raters and other budget analysts that the city's financial vigor -- fueled by the Wall Street boom -- meant the Mayor's earlier revenue estimates had been too low, not too high.

* * *

"I have to give them a revenue estimate," Mr. Giuliani said, "and obviously, that revenue estimate is going to be lower -- either lower, considerably lower or substantially lower -- than it was before, because the action that they've taken both in the budget, which I've just outlined, and in future years does some damage to the city this year, and significant and substantial damage in the year 2000, 2001 and 2002."²⁶³

In staff's view, although in this episode the Mayor attempted to couch the change to the revenue estimate as financially necessary in light of the Council's budget proposals, the circumstances surrounding the debate - a larger fight over whether to use City money to "help build a new stadium for the Yankees" - strongly suggest that concerns other than pure fiscal responsibility were a motivating factor in the decision to reduce the revenue estimate that year.

²⁶³ Mike Allen, *By Mayor's Calculation, A Hole in Council's Budget*, N.Y. Times (June 7, 1998).

Leaving the past aside, the current mayoral administration appears to view a political usage of the revenue estimate as inappropriate. In supplemental written testimony to the Commission in connection with the Commission's March 11, 2019 Public Meeting, OMB cautioned that the revenue estimation process should not be subjected to "negotiation with the legislative branch" as that would "introduce a political process into the determination of revenue estimates" and "the result of this political process will be revenue estimates that are less likely to be achieved and are more likely to result in budgetary imbalance."²⁶⁴

In a statement in connection with that same meeting, IBO noted that "the revenue estimate process as it relates to budget adoption is not working as intended. As a result, the Council has no opportunity to negotiate the final revenue estimate, and no choice but to accept it." IBO proposed that the non-tax revenue estimate be required earlier (May 25) and that, if the Mayor does not submit the estimate by such date, IBO's own revenue forecast (updated to reflect any subsequent budget changes) be treated as the official estimate.²⁶⁵

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit feedback concerning whether to (1) establish an earlier due date for the revenue estimate to better ensure that this estimate is not a weapon in a future "game of political brinkmanship" between the Mayor and Council and (2) provide some kind of fail-safe in case the revenue estimate is not provided on its given due date, such as having the IBO's own revenue forecast (updated to reflect any subsequent budget changes), be treated as the binding revenue estimate.

Budget Modification Timing

The City may generally only spend money on the specific programs and in the specific amounts appropriated for each UA in the adopted budget, save for the two exceptions discussed below.²⁶⁶

²⁶⁴ Supplemental written testimony of OMB to the 2019 Charter Revision Commission at 2.

²⁶⁵ See Charter §§ 237, 252.

²⁶⁶ See Charter § 227(a).

After the Council has adopted a final budget, the Mayor may transfer money from one UA to another, but if that transfer involves (1) moving money from one agency to another or (2) increasing or decreasing any UA by more than 5% (or more than \$50,000, whichever is greater), then he or she must notify the Council.²⁶⁷ The Council then has until 30 days after its first Stated Meeting following receipt of that notice to disapprove the proposed transfer.²⁶⁸ If the Council takes no action in that 30-day period, then the modification is automatically approved.²⁶⁹

Similarly, if after budget adoption, the Mayor wishes to create a new UA, appropriate new revenues (other than federal, state, or private funding that the City exercises no control over), or appropriate previously unappropriated revenues, then that action is subjected to the “normal” budget process, meaning that the Council may amend the action, the Mayor may veto any such amendment, and the Council may override such veto.²⁷⁰

But neither Charter § 107(b) nor § 107(e) make clear when the Mayor must notify or make his or her request of the Council. Some, notably the Council and the Comptroller, argue that the Mayor has used this lack of clarity to justify submitting a budget modification late in the fiscal year, months after the budget change has been implemented.

As a remedy, both the Council and the Comptroller have proposed that the Mayor’s “financial plan” updates be accompanied by any proposed budget modifications necessary to implement the updates.

Financial plans cover the current fiscal year and next three fiscal years and must show, for each fiscal year, that the City’s anticipated expenditures will not exceed its anticipated revenues.²⁷¹ The financial plan is prepared with the preliminary budget and must be updated (1) when the Mayor submits his or her executive budget (before April 26); (2) within 30 days after final budget adoption (which would usually mean July); and (3) within the second quarter of the fiscal year (October through December).²⁷²

²⁶⁷ Charter § 107(b).

²⁶⁸ Id.

²⁶⁹ Id.; see also Council of City of New York v. Giuliani, 163 Misc. 2d 681, 685 (Sup. Ct. 1994).

²⁷⁰ See Charter § 107(e).

²⁷¹ See Charter § 258(b).

²⁷² See Charter §§ 258(c)(2), 226.

These mid-year updates to the financial plan may contain funding for new programs, spending reductions for existing programs, and changes in revenue forecasts for the current fiscal year. Although these forecast changes are known upon submission of the plan updates, sometimes the corresponding budget modification requests are not submitted until late in the fiscal year. Some, including the Council and the Comptroller, argue that this inappropriately encroaches upon the Council's Charter-mandated role in the budget process.

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning whether to (1) require that financial plan updates be accompanied by any proposed budget modification necessitated by such update or (2) clarify the timeframe in which budget modifications must be submitted.

“Rainy Day” Fund

The Commission received testimony in support of allowing for a “rainy day” fund. A rainy day fund is a pool of money set aside to be “used in the event of an economic downturn or a crisis that reduces revenue so that spending would not have to be drastically cut or taxes increased to maintain a balanced budget.”²⁷³

While nothing in the Charter currently precludes setting up and making deposits into a rainy day fund, withdrawing funds when the rains come is a different matter.

The Charter and the State Financial Emergency Act (FEA) provide that, at the end of each fiscal year, the City cannot have a budget deficit “when reported in accordance with generally accepted accounting principles” (GAAP).²⁷⁴ Under GAAP, a deficit exists whenever expenditures for the current fiscal year exceed revenues for the current fiscal year.²⁷⁵

The problem here is that one generally deposits money into a rainy day fund over many fiscal years, and under GAAP any money deposited into such a fund in past years cannot

²⁷³ Written testimony of Carol Kellerman to the 2019 Charter Revision Commission at 2.

²⁷⁴ Charter § 258(a); New York State Financial Emergency Act, at § 8(1)(a).

²⁷⁵ See Dall W. Forsythe, Cyclical Budget Management In New York City (Apr. 20, 2006) at 3; see also New York City Comptroller, Measuring New York City's Budgetary Cushion: How Much is Needed to Weather the Next Fiscal Storm? (Aug. 2015), at 1.

be considered “revenues for the current fiscal year.”²⁷⁶ So, if the City found itself with current revenues of \$80 billion and current expenditures of \$100 billion, even if it withdrew \$20 billion from the rainy day fund to cover the shortfall, the City would still be considered under GAAP to have a “deficit” of \$20 billion and would be out of compliance with both the Charter and the FEA.²⁷⁷

Solving this issue would require two things to happen: (1) the Charter would have to be amended to allow for withdrawals from rainy day funds to be counted toward resolving a deficit and (2) the FEA would either (a) have to be amended by the State or (b) expire in 2033.²⁷⁸

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning whether to (1) amend the Charter to allow for the usage of a rainy day fund in the future and (2) recommend that the State amend the FEA to allow such usage, as well.

Independent or Guaranteed Budgets

The Commission has received several proposals to protect, to some degree, the budgets of certain elected officials or agencies from the “chopping block” of the budget process. While there are a variety of ways to accomplish this, in staff’s view, the proposals generally took one of two approaches: (1) allowing the entity to bypass the Mayor and propose its budget directly to the Council for approval (which staff refers to herein as “independent” budgets) or (2) provide a budget “floor” for the entity, such as a floor linked in some way to another entity’s budget (which staff refers to herein as a “guaranteed” budget).²⁷⁹

For example, the Civilian Complaint Review Board (CCRB) has proposed that the Charter provide for its budget to be linked to that of the Police Department, such as by requiring that CCRB’s budget be some fixed percentage (e.g., one percent) of the Police Department’s budget. In a written statement in connection with the Commission’s March 7,

²⁷⁶ See *id.*

²⁷⁷ See *id.*

²⁷⁸ See New York State Financial Emergency Act, at § 13; New York City Independent Budget Office, Dawn of a New Era: New York City Fiscal Policy After(?) the Financial Emergency Act (Nov. 2007) at 2.

²⁷⁹ See, e.g., Charter §§ 1052(c) (providing the Campaign Finance Board with an independent budget), 259(b) (providing the Independent Budget Office with a guaranteed budget).

2019 Public Meeting, CCRB presented that its budget is “approximately 0.27 percent of the NYPD’s total budget” and that its funding for “investigations, prosecutions, and employees” totals slightly less than \$1 million a year. CCRB argues that this level of funding is not sufficient to support its headcount, noting that agencies that perform similar oversight functions, such as the Inspector General for the NYPD, the Department of Investigation, and the City Commission on Human Rights, all have higher budgets on a per head basis than does the CCRB. CCRB also noted that it is common practice for police oversight agencies in other cities to have budgets tied to a fixed percentage of the police departments they are tasked with overseeing.²⁸⁰

The Police Department, at that same meeting, asserted in its response that the CCRB budget, like most other agency budgets, should consist of a “list of factors unique to the CCRB . . . and not factors unique to the NYPD.”²⁸¹

And OMB, in supplemental written testimony to the Commission, sounded a cautionary note regarding guaranteed budgets of this type for all City agencies. It noted that, “[l]egislatively establishing fixed budgets for certain agencies without regard to the City’s budget process undermines the ability to set appropriate funding levels on a year by year basis” and “diminish[es] the ability of the Mayor and the Council to meet demands by allocating funds in a manner that meets the City’s most pressing needs.”²⁸²

As in other issue areas, staff considered the approach taken by the 1989 Charter Revision Commission. IBO was the only agency to which the 1989 Charter Revision Commission gave Charter budget protections (the Campaign Finance Board’s budget protections were added later).²⁸³ Schwarz and Lane reasoned that the 1989 Charter Revision Commission made this decision to forestall a situation where “a future mayor and speaker, each jealous of their monopoly on budget information and analysis” would seek to reduce the effectiveness of the IBO by manipulating its budget “because they feared a non-partisan, independent, competent rival.”²⁸⁴

²⁸⁰ Written testimony of the CCRB to the 2019 Charter Revision Commission at 2-4.

²⁸¹ Written testimony of the NYPD to the 2019 Charter Revision Commission at 3.

²⁸² Supplemental written testimony of OMB to the 2019 Charter Revision Commission at 4.

²⁸³ Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter, 42 N.Y.L. Sch. L. Rev. 723, 903 (1998).

²⁸⁴ Id.

In staff's view, the need to allow for a flexible budgeting process must be weighed against the reality that government officials are still only human and, as the 1989 Charter Revision Commission observed, they may be inclined to retaliate against rivals for reasons other than sound budgeting policy. Staff believes that the risk of being retaliated against is acute for officers and agencies in public oversight roles, generally, and particularly acute for those oversight bodies that find themselves on the short end of David-and-Goliath relationships with the entities they are meant to check. Staff also suspects that the list of officers and agencies that meet this description will be relatively limited, including, for example, independently elected officials (the Public Advocate, the Comptroller, and the Borough Presidents), the Conflicts of Interest Board, the Department of Investigation, the Board of Correction, and CCRB.

STAFF RECOMMENDATION:

Staff recommends that the Commission further consider and solicit public feedback concerning (1) whether to extend some form of budget protection (independent or guaranteed budgeting) to the entities meeting the standard discussed above (including any refinements to that standard) and (2) identifying those entities.

DIVERSITY IN PROCUREMENT

The Minority and Women-owned Business Enterprises (M/WBE) program is “designed to enhance participation by minority-owned and women-owned business enterprises in city procurement.”²⁸⁵ The program includes citywide “participation goals... which may be met through awards of prime contracts and subcontracts.”²⁸⁶ These goals are divided by contract type (e.g., construction, professional services, standard services, etc.) and are expressed as a percentage of “total annual agency expenditures” on contracts of such type.²⁸⁷

Existing law requires that the head of each City agency “designate a deputy commissioner or other executive officer to act as the agency M/WBE officer who shall be directly accountable to the agency head concerning activities of the agency in carrying out its responsibilities” under the M/WBE program.²⁸⁸ Existing law also provides for a citywide M/WBE director who (1) is responsible for overseeing the program; (2) is designated by the Mayor; and (3) “either reports directly to the mayor or is a commissioner” (commissioners generally do not report directly to the Mayor).²⁸⁹

The citywide M/WBE director requirement was added to the program by Local Law 1 of 2013, which was enacted on January 7, 2013 and took effect on July 1, 2013.²⁹⁰ Since then, the position appears to have uniformly been held by a senior official who reports directly to the Mayor (a Deputy Mayor, then a Counsel to the Mayor, and now a Deputy Mayor again). And, since the fall of 2016, the position has received assistance from an Office of Minority and Women-owned Business Enterprises (OMWBE) located within the Mayor’s Office.

STAFF RECOMMENDATIONS:

For over six years and through two administrations, responsibility for the M/WBE program has resided in an official who reports directly to the Mayor. There is no legal requirement

²⁸⁵ Admin. Code § 6-129(a).

²⁸⁶ Admin. Code § 6-129(d)(1).

²⁸⁷ Id.

²⁸⁸ Admin. Code § 6-129(f).

²⁸⁹ Admin. Code § 6-129(c)(14).

²⁹⁰ Local Law 1/2013.

that this continue in future administrations. There is also no legal requirement that the position's supporting office (OMWBE) exist at all going forward. Accordingly, staff recommends that the Commission further consider and solicit feedback concerning whether to amend the Charter to require that the citywide M/WBE director be (1) a deputy mayor or another senior official who reports directly to the Mayor and (2) supported by an OMWBE.

OTHER PROPOSALS

The following proposals either came up repeatedly during the Commission's hearings and forums or garnered significant interest from one or more commissioners. In staff's view, for the reasons discussed below, these proposals did not satisfy the Focus Criteria identified by the Commission in December 2018.

Democracy Vouchers:

The Commission received a proposal to replace the City's current campaign finance program with a system in which voters are given contribution vouchers ("democracy vouchers") to donate to their chosen local candidates for office. Candidates would then be able to redeem these vouchers for public funding.

In 2017, Seattle implemented the first and, as far as staff is aware, only such program in the world (although other municipalities in the country are considering implementing similar programs).²⁹¹ Seattle has since held one election funded with democracy vouchers and that election involved "only a handful of races."²⁹² Seattle plans to hold another election using vouchers in 2019 and then will hold its first mayoral election using vouchers in 2021.²⁹³ In the meantime, Seattle's system is being challenged in court as unconstitutional under the First Amendment in a case that has been scheduled to be argued before the Washington State Supreme Court on May 14, 2019.²⁹⁴

The City generally can, without a referendum, enact local laws relating to campaign finance.²⁹⁵ In fact, the City enacted its current campaign finance system through the

²⁹¹ Russell Berman, [Seattle's Experiment with Campaign Funding](#), *The Atlantic*, (Nov. 10, 2015); Tanvi Misra, [More Cities Want to Embrace 'Democracy Vouchers'](#), *CityLab*, (Aug. 8, 2018); see also 2019 Charter Revision Commission, [Transcript of Feb. 25, 2019 Public Meeting](#) at 89.

²⁹² 2019 Charter Revision Commission, [Transcript of Feb. 25, 2019 Public Meeting](#) at 90.

²⁹³ [Id.](#) at 81, 90-91.

²⁹⁴ [Id.](#) at 87.

²⁹⁵ See Election Law § 1-102.

Campaign Finance Act in 1988²⁹⁶ and has since amended its finance system through local laws on numerous occasions.²⁹⁷

Procurement:

The Commission received several proposals relating to procurement, particularly with respect to the timing of City payments for non-profit service providers. There were generally three themes to these proposals: (1) timeframes and deadlines are needed for the various oversight agencies involved with procurement to ensure accountability for timely payment; (2) some “penalty” mechanism is needed to encourage procurement oversight agencies to proceed expeditiously, such as requiring that the City pay interest on loans service providers need to obtain to cover their costs while waiting for City payments; and (3) the City should establish a public-facing contract tracking and reporting system so that service providers will know the status of their contracts and payments and, more to the point, where the delays are occurring.

The Commission’s March 11, 2019 public meeting dealt with these issues specifically, and, in staff’s view, there was no real dispute that the procurement process should be improved and that service providers need to be paid more quickly. As the Acting Director of the Mayor’s Office of Contract Services (MOCS) testified: “As I have publicly shared in the past, including at Council committee hearings, I agree that New York City procurement must be overhauled.”²⁹⁸

That said, staff believes that the types of proposals presented to the Commission are ones that either can already be accomplished by local law without referendum or are arguably already required of certain agencies. These issues can, therefore, be handled

²⁹⁶ Local Law 8/1988.

²⁹⁷ See Local Laws 4/1989, 69/1990 (clarifying the law to make it simpler and less burdensome for participating candidates); Local Laws 48/1998, 21/2001 (banning corporate contributions, lowering contribution limits, and increasing public matching fund ratios); Local Laws 58/2004, 59/2004, 60/2004 (further increasing public matching fund payments and bringing non-participating candidates under the Campaign Finance Board’s jurisdiction); Local Law 17/2006 (implementing stronger “pay-to-play” restrictions regarding lobbyists and further increasing public matching fund payments); Local Law 116/2013 (allowing contributions by text message); Local Laws 41/2014, 166-174/2016, 182-194/2016 (further strengthening independent expenditure reporting requirements).

²⁹⁸ Written testimony of the Mayor’s Office of Contract Services to the 2019 Charter Revision Commission at 1.

appropriately through oversight by the Council, the Comptroller, and others; or by the passage of local legislation.

With respect to establishing (1) timelines and deadlines for action by procurement oversight agencies and (2) penalties for failing to comply with those timelines and deadlines, the Charter currently provides that the Procurement Policy Board (PPB) “shall promulgate rules as required by this chapter, including rules establishing . . . the time schedules within which city officials shall be required to take the actions required by this chapter [relating to procurement] . . . in order for contracts to be entered into, registered or otherwise approved, and time schedules within which city officials should take action pursuant to any other provision of law or rule regarding individual contracts.”²⁹⁹ The Charter also specifically requires that the PPB establish rules specifying “the appropriate remedies, including monetary remedies, for failure to meet the terms of any applicable schedule for taking such actions,” which PPB has done through PPB (9 RCNY) Rule 4-12 requiring interest payments for untimely contracts in certain cases.³⁰⁰

Further, in staff’s view, establishing or changing timelines for official actions and related penalties for non-compliance with those timelines can be accomplished by local law without a referendum because the referendum requirement generally does not apply to a local law that “merely regulates the operations of city government.”³⁰¹ In fact, the requirement that PPB set timeline and penalty provisions was itself added to the Charter by just such a local law.³⁰² Additionally, staff notes that there are several bills currently pending before the Council along these lines.³⁰³

Similarly, while MOCS testified at the Commission’s March 11, 2019 public meeting that it was in the process of phasing in a public-facing contract tracking and reporting system

²⁹⁹ See Charter § 311(b)(6).

³⁰⁰ See id. Note, however, that MOCS appeared to indicate at an April 16, 2019 hearing of the Council Committee on Contracts that Rule 4-12 is not resulting in the payment of any interest for retroactive contracts because of the existence of the City’s program that offers loans to non-profit entities awaiting contract registration.

³⁰¹ See Mayor v. Council, 9 N.Y. 3d 23, 33 (2007).

³⁰² See Local Law 20/2004.

³⁰³ See Int. 1067/2018 (reporting on the promptness of agency payments to contractors); Int. 1448/2019 (expediting inter-agency oversight review process of contracts); Int. 1449/2019 (providing for bridge loans to contractors waiting for City payments); Int. 1450/2019 (relating to interest paid on late contract payments to non-profit service providers).

called “PASSPort,” such a system could be required or codified by local law without a referendum.³⁰⁴ Section 6-131 of the Administrative Code already requires the Mayor to establish a public online searchable database on an official City website that includes “summaries of the material terms of City Contracts.”³⁰⁵ In accordance with this provision, the City implemented the Vendor Exchange System (VENDEX), which allowed for contract reporting through the storage of contract information and vendor evaluations.³⁰⁶ Through its own initiative, MOCS is now launching PASSPort in three phases, which goes further by moving VENDEX online and allowing for contract tracking through up-to-date disclosure.³⁰⁷ Staff also acknowledges the existence of “HHS Accelerator,” an online system that provides centralized access to applications, requests for proposals, and financials relating to the City’s human services contracts.³⁰⁸

Pensions:

The Commission received proposals for changes to the manner in which public pension funds for New York City employees are invested.

Staff did observe that there are public pension systems in other countries, notably Canada, that appear to be significantly outperforming the City’s pension system on a long-term basis. But, when compared with other large public pension systems in the United States, the City did not seem to significantly under- or out-perform its peers on a long-term basis. See the chart below for a performance comparison of several large U.S. public pension systems:

³⁰⁴ Written testimony of the Mayor’s Office of Contract Services to the 2019 Charter Revision Commission at 2.

³⁰⁵ Admin. Code § 6-131(a).

³⁰⁶ N.Y.C. Health Dept, NYC Health VENDEX Page; Mayor’s Office of Contract Services, NYC MOCS About the Procurement Process; 9 RCNY § 1-01.

³⁰⁷ Mayor’s Office of Contract Services, NYC MOCS About/Go To PASSPort.

³⁰⁸ Mayor’s Office of Contract Services, NYC MOCS About/Go to HHS Accelerator.

Public Employee Pension Fund Performance & Returns by Assets					
Pension Fund	Asset size (in billions)	FY 18 Return	FY 17 Return	5-year Return	10-year Return
1 California Public Employees' Retirement System	\$354.7	8.6%	11.2%	8.1%	6.5%
2 California State Teachers' Retirement System	\$223.8	9.0%	13.4%	9.1%	6.3%
3 New York City Retirement Systems	\$195.0	8.7%	13.0%	7.2%	6.5%
4 Florida Retirement System	\$160.4	9.0%	13.8%	8.7%	6.9%
5 Texas Teachers' Retirement System	\$151.2	9.2%	12.9%	8.7%	6.6%
6 New York State Teachers' Retirement System	\$119.9	9.0%	12.5%	9.3%	7.2%

Source: Pensions&Investments, <https://www.pionline.com/section/returns-tracker?year=2018>; NYC Comptroller

By way of rough comparison, the Canada Pension Plan (CPP) had an 11.6% rate of return in fiscal year 2018 and a 12.1% rate of return over the preceding five years. However, due to differences in accounting methodologies and fiscal year timelines, the cited return rates may not be directly comparable to the U.S. public pension systems noted above.³⁰⁹

In any event, there are significant State law impediments to implementing changes to how public pension funds are administered and invested (and who makes those decisions). Accordingly, staff believes that proposals of this type would need to be pursued through the State Legislature rather than a Charter change. For example, in 2011, then-Comptroller John Liu and then-Mayor Michael Bloomberg proposed that the State consolidate the five pension boards³¹⁰ into one board with a single set of investment strategies managed by an in-house investment staff.³¹¹

With respect to a more limited proposal, such as requiring that the investments and operations of the City's public pension funds be periodically examined by a purely advisory

³⁰⁹ Companies and governments in the United States use "generally accepted accounting principles" (GAAP) when preparing financial statements. Canada and most other countries (except the United States, Japan, and China) use the International Financial Report Standard (IFRS) for their financial statements. See generally PwC, IFRS and US GAAP: Similarities and Differences (2018); Ernst & Young, US GAAP Versus IFRS: The Basics (Feb. 2018); CPP Investment Board, 2018 Annual Report: Investing for Contributors & Beneficiaries (2018), at 46.

³¹⁰ The five New York City pension funds are: New York City Employees' Retirement System (NYCERS); Teachers' Retirement System of the City of New York (TRS); New York City Police Pension Fund (POLICE); New York City Fire Pension Fund (FIRE); New York City Board of Education Retirement System (BERS). Each is governed by its own board of trustees, comprised of elected and appointed officials and union representatives. See Office of the City Comptroller, Pension / Investment Management FAQs.

³¹¹ See Steven Greenhouse, Mayor and Comptroller Seek Joint Management for 5 Pension Plans, N.Y. Times, Oct. 27, 2011.

entity of some kind, staff's view is that such an advisory entity could likely be created by local law without a referendum (if, indeed, it could be created by a local law at all).³¹²

Landmarks Preservation Commission Stipends:

The members of the Landmarks Preservation Commission (LPC) currently "serve without compensation, but shall be reimbursed for expenses necessarily incurred in the performance of their duties."³¹³ The Commission has received proposals to provide for a stipend or similar form of compensation for LPC members.

In staff's view, amending the Charter to authorize stipends for LPC members (while leaving the amount of such stipends to the normal budget process) could be accomplished by local law without a referendum because such an approach would not disturb the budget-making powers of the Mayor or Council.³¹⁴

Animal Welfare:

Although it was not within the "Focus Areas" the Commission adopted at the end of January 2019, the Commission heard extensively in its September hearings about proposals to remove responsibility for animal welfare from the Department of Health and Mental Hygiene and transfer it to another agency. Transferring functions from one mayoral agency to another mayoral agency can generally be accomplished by local law without a referendum.³¹⁵ Staff also notes that there is a bill currently pending before the Council to accomplish such a transfer.³¹⁶

³¹² If changes to how public pension funds are administered and invested cannot be made by local law (whether with or without a referendum), then it is unlikely that local law can be used to create a body to meaningfully investigate such changes, either. See, e.g., In re Office of Atty. Gen. of State of New York, 269 A.D.2d 1, 12 (1st Dep't 2000) (quashing subpoena from Attorney General to company in connection with investigation of potential fraud on the grounds that enforcement was preempted by federal law).

³¹³ Charter § 3020(3).

³¹⁴ See Mayor v. Council, 9 N.Y. 3d 23, 33 (2007).

³¹⁵ See Municipal Home Rule Law § 10(1)(ii)(a)(1); Charter § 38.

³¹⁶ See Int. 1478/2019.

