



Committee: Directly to Council
Committee Review: N/A
Staff: Livhu Ndou, Legislative Attorney
Purpose: To receive testimony/final action - vote expected
Keywords: #CharterAmendments #CountyAttorney

AGENDA ITEMS #26&30
July 26, 2022
Public Hearing/Action

SUBJECT

Resolution, Proposed Amendment to County Charter – County Attorney – Removal Procedures

Lead Sponsor: Council President Albornoz

EXPECTED ATTENDEES:

N/A

COUNCIL DECISION POINTS & COMMITTEE RECOMMENDATION:

Vote on whether to adopt the resolution to place on the 2022 general election ballot a proposal to amend Section 213 of the Charter regarding removal of the County Attorney.

DESCRIPTION/ISSUE

If approved, the Resolution would place on the 2022 General Election Ballot Question B. Question B would ask voters to decide whether to amend Section 213 of the County Charter to require both the County Council and the County Executive to remove the County Attorney.

SUMMARY OF KEY DISCUSSION POINTS:

- Under current law, only the County Executive may remove the County Attorney.
- This Charter amendment would require the Council to consent to the Executive's removal of the County Attorney. It would also allow the Council to remove the County Attorney with the Executive's consent.

This report contains:

Staff memorandum	Pages 1-4
Resolution	© 1
Marc Hansen letter	© 4

Alternative format requests for people with disabilities. If you need assistance accessing this report you may [submit alternative format requests](#) to the ADA Compliance Manager. The ADA Compliance Manager can also be reached at 240-777-6197 (TTY 240-777-6196) or at adacompliance@montgomerycountymd.gov

MEMORANDUM

July 21, 2022

TO: County Council

FROM: Livhu Ndou, Legislative Attorney

SUBJECT: Resolution to adopt a Proposed Amendment to County Charter – County Attorney – Removal Procedures

PURPOSE: Public Hearing/Action

Summary

On June 19, 2022, the Council received a letter from former County Attorney Marc Hansen, proposing a change to the Charter that would require both the Executive and the Council to agree to remove the County Attorney.¹

Background

Under § 213 of the County Charter, the County Attorney is a legal advisor to both the County Executive and the Council. The County Attorney is appointed by the Executive, subject to confirmation by the Council. The County Attorney often provides legal advice to both of its clients—the Executive and the Council. This includes legal advice on proposed and pending legislation, as well as the powers of each branch.² Since the County Attorney represents both the

¹ Whether dismissal of the County Attorney should require joint action by the Council and the Executive was not discussed by the most recent Charter Review Commission.

² “*The County Executive shall appoint a County Attorney, subject to confirmation by the Council. The County Attorney shall be the chief legal officer of the County, conduct all the law business of the County, be a legal advisor to the Council, and be the legal advisor to the County Executive, all departments, and other instrumentalities of the County Government.* The County Attorney shall represent the County in all actions in which the County is a party. The County Attorney and the staff of the office shall engage in no other law practice. The County Attorney may, with the approval of the Council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the County Attorney. *The County Attorney shall serve at the pleasure of the County Executive but, upon request, shall be entitled to a public hearing before the Council prior to dismissal from office.*” Montgomery County Charter, § 213 (emphasis added).

Executive and the Council, it is important for the County Attorney to be able to give legal advice impartially.

The County Attorney can only be removed by the Executive; but may, upon request, have a public hearing before the Council prior to removal. While the Charter does allow the County Attorney to have a public hearing before removal, the Council does not have the authority to reverse the Executive's decision. Further, it is unclear whether Section 213 would allow the County Attorney to breach attorney-client privilege by disclosing confidential information when speaking publicly about their removal.

The County Attorney's Office has an ethical duty to serve both the Executive and the Council as clients, regardless of whether the proposed Charter amendment is passed. All evidence indicates that the County Attorneys have always done so with great integrity. But, since only the Executive can remove the County Attorney, combined with the fact that Council has its own staff of Legislative Attorneys, there could be an incorrect perception that the County Attorney only works for the Executive. The sole authority of the Executive to remove the County Attorney could also lead to a fear of reprisal for the County Attorney when legal advice is given that seems to favor the Council over the Executive; for example, in the instance of high-profile issues where the Executive and Council have differing policy positions. The intent of this charter amendment is to resolve these issues by requiring the Council and the Executive to agree to remove the County Attorney.

Other Jurisdictions

Neighboring jurisdictions vary on the issue of how the County Attorney may be removed. While they all allow removal by the Executive, only some allow any participation in that process by the Council. These jurisdictions either:

- give the Executive sole discretion to remove the County Attorney;
- only allow the Executive to remove the County Attorney with a majority vote of the Council; or
- allow either the Executive with a majority vote of the Council, or the Council alone to remove the County Attorney.

The below chart depicts the current law in neighboring jurisdictions:

	Client	Appointment	Confirmation	Removal Authority
Montgomery County Charter, § 213	Council and Executive	Executive	Council	Executive
Anne Arundel County Charter, § 525	Council and Executive	Executive	Council	Executive, but Council can prevent removal with a majority vote

Baltimore City Charter, Article VII, § 23	Council and Mayor	Mayor, with term concurrent with Mayor's term	Council	Mayor
Baltimore County Charter, § 3-2-1002	Council and Executive	Executive	Council	Executive
Frederick County Charter, § 411	Council and Executive	Executive	Council	Executive with majority of Council's consent; or supermajority of Council
Howard County Charter, § 405	Council and Executive	Executive, with term concurrent with Executive's term	Council	Executive with majority of Council's consent; or supermajority of Council
Prince George's County Charter, § 322	Council and Executive	Executive	Council	Executive

Discussion

Proposed Resolution

The resolution before the Council would ask voters to decide whether to amend the Charter to require joint action by the Executive and the Council in order to remove the County Attorney. The attached resolution provides the following language:

The County Attorney shall serve at the pleasure of the County Executive and the Council [but, upon request, shall be entitled to a public hearing before the Council prior to dismissal from office]. If the County Executive removes the County Attorney, the Council must approve or disapprove the removal by an affirmative vote of six Councilmembers within 30 days of receiving notice of the removal. The County Executive must provide notice of the removal to the County Council within 3 days. If the Council does not act within 30 days, the County Attorney must not be removed. The County Attorney may also be removed by an affirmative vote of seven Councilmembers, with the consent of the County Executive. The County Council must provide notice of the removal to the County Executive within 3 days. The County Executive must approve or disapprove the removal within 15 days of receiving notice of the removal. If the County Executive does not act within 15 days, the County Attorney must not be removed. During the period of time before removal is confirmed, the County Attorney must be put on paid leave.

This amendment would accomplish several objectives:

- Either the Executive or the Council would be able to initiate removal of the County Attorney.
- The Executive would have 15 days to respond, and the Council would have 30 days to respond. Council Staff recommends giving the Council additional time to approve or disapprove the dismissal because Council action requires a vote by multiple persons and the Council would need to act during scheduled full Council sessions.
- Failure to respond in time would be interpreted as disagreement with the removal.
- Paid leave would be provided while the County Attorney is awaiting the decision. This leave would start immediately, although both clients have 3 days to provide the other client with notice.

Potential Amendments

In speaking to former County Attorneys and the County Executive's Office, Council Staff received the following proposed amendments:

- Term Limits – Setting terms limits could lead to disruption in the County Attorney's Office due to turnover, but it would also ensure that a new County Executive could appoint a new County Attorney without the consent of Council.
- Time to Respond – To avoid having the Council come back for a session during recess, which would happen if the County Executive removed the County Attorney right before a Council recess, the number of days could be changed to 45. In addition, the County Executive has asked for equal time to allow time for internal discussion and investigation.
- “A” versus “The” – The current Charter says that the County Attorney serves as “a” legal advisor to the Council, and “the” legal advisor to the Executive. Changing “a” to “the” legal advisor to the Council could clarify that the Council and Executive are equal clients. However, additional language would be necessary to clarify that the Council can still have its own staff of Legislative Attorneys.
- Outside Counsel – There may be a situation where the County Attorney cannot represent the County because of a conflict of interest. The current Charter allows the County Attorney to “with the approval of the Council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the County Attorney.” While the term “of such character or magnitude” has historically been interpreted to include a matter where the County Attorney concludes a conflict of interest exists, this could be explicitly stated.

This report contains:

Resolution

Marc Hansen letter

© 1

© 4

Resolution No.: _____
Introduced: July 12, 2022
Adopted: _____

**COUNTY COUNCIL
FOR MONTGOMERY COUNTY, MARYLAND**

Lead Sponsor: Council President Albornoz

SUBJECT: Proposed Amendment to County Charter

Background

1. Section 5 of Article XI-A of the Maryland Constitution, §7-102(c)(3)(i) of the Election Law Article of the Maryland Code, and §16-14 of the Montgomery County Code provide that amendments to the Charter of Montgomery County may be proposed by a resolution of the County Council. Section 5 of Article XI-A of the Constitution also provides that amendments to the Charter may be proposed by a petition signed by at least 10,000 registered voters of the County and filed with the President of the County Council.
2. Under §7-103(c)(3)(i) of the Election Law Article of the Maryland Code, ballot questions for proposed Charter amendments must be certified to the State Board of Elections not later than the 95th day before the general election. County Code §16-16 provides that a ballot title or summary, prepared by the County Council, of all proposed Charter amendments must appear in print on the voting machine or ballot.
3. The Council intends to submit for inclusion on the 2022 general election ballot:

Question B: County Attorney – Removal Procedures, which would amend §213 of the Charter.

Action

The County Council for Montgomery County, Maryland approves the following resolution:

1. Subject to the approval of the County Attorney as to the form of the questions, the following Charter amendment must be placed on the 2022 general election ballot:

B**County Attorney – Removal Procedures**

The County Council proposes to amend Section 213 of the Charter of Montgomery County as follows:

Sec. 213. County Attorney.

The County Executive shall appoint a County Attorney, subject to confirmation by the Council. The County Attorney shall be the chief legal officer of the County, conduct all the law business of the County, be a legal advisor to the Council, and be the legal advisor to the County Executive, all departments, and other instrumentalities of the County Government. The County Attorney shall represent the County in all actions in which the County is a party. The County Attorney and the staff of the office shall engage in no other law practice. The County Attorney may, with the approval of the Council, temporarily employ special legal counsel to work on problems of an extraordinary nature when the work to be done is of such character or magnitude as to require services in addition to those regularly provided by the County Attorney.

The County Attorney shall serve at the pleasure of the County Executive and the Council [but, upon request, shall be entitled to a public hearing before the Council prior to dismissal from office]. If the County Executive removes the County Attorney, the Council must approve or disapprove the removal, by a majority vote, within 30 days of receiving notice of the removal. The County Executive must provide notice of the removal to the County Council within 3 days. If the Council does not act within 30 days, the County Attorney must not be removed. The County Attorney may also be removed by a supermajority (two-thirds) vote of the Council with the consent of the County Executive. The County Council must provide notice of the removal to the County Executive within 3 days. The County Executive must approve or disapprove the removal within 15 days of receiving notice of the removal. If the County Executive does not act within 15 days, the County Attorney must not be removed. During the period of time before removal is confirmed, the County Attorney must be put on paid leave.

The ballot for this question must be designated and read as follows:

Question B**Charter amendment by act of County Council****County Attorney – Removal**

Amend Section 213 of the County Charter to require the consent of both the County Executive and the County Council in order to remove the County Attorney.

This amendment would allow either the County Executive or the Council to initiate removal of the County Attorney. If the County Executive requests removal of the County Attorney, the Council will have 30 days to agree or disagree; if the Council does not respond within 30 days, the County Attorney cannot be removed. If the Council requests removal of the County Attorney, the County Executive will have 15 days to agree or disagree; if the County Executive does not respond within 15 days, the County Attorney cannot be removed. In the interim, the County Attorney will be placed on paid leave.

FOR **AGAINST**

This is a correct copy of Council action.

Approved as to form and legality:

Judy Rupp
Clerk of the Council

John Markovs
Acting County Attorney

Marc Hansen
201 Chestnut Ave.
Washington Grove, Md., 20880

Montgomery County Council
100 Maryland Ave.
Rockville, Md., 20850

Re: County Attorney—Proposed Charter Amendment

Dear Councilmembers,

Since retiring as the County Attorney in February, I have given some thought to the role the County Attorney plays in the County government—and especially the institutional relationship between the County Attorney and the County Council.

I have concluded that the relationship between the Council and the County Attorney would be strengthened if the County Attorney could not be dismissed unless **both** the Executive and Council agree. I believe that this change, which would require a Charter amendment, would enable the County Attorney to perform the duties owed to the Executive and the Council more effectively.

A brief description of the problem.

As you know, under the County Charter, the County Attorney serves as the chief legal officer of the County—specifically, the County Attorney represents the County in all legal proceedings and serves as “the” legal advisor to the Executive Branch and as “a” legal advisor to the Legislative Branch.

The County Attorney is often called upon to provide legal advice regarding legislation pending before the Council. The Executive sometimes opposes legislation that has the support of a majority of the Council. In addition, the County Attorney is also often called upon to provide legal advice regarding the nature and extent of the powers granted under the Charter to the Executive and the

Council. It perhaps goes without saying that, in these situations, it is important that the County Attorney be perceived as rendering legal advice without partiality toward or bias in favor of either branch of County government.

Moreover, like the Inspector General, the County Attorney should be given some assurance that in providing what might be perceived as unwelcome advice (especially to the Executive) that she or he may do so free from the fear of reprisal in the form of dismissal.

Although Charter Sec. 213 provides some minimal protection against retaliatory dismissal, in the final analysis, the County Attorney serves at the pleasure of the County Executive—even though the Council confirms the Executive’s appointment of the County Attorney. In short, the Executive and Council appoint the County Attorney but only the Executive may dismiss the County Attorney.

This fact unavoidably leads to the *realpolitik* perception that the County Attorney “works” for the Executive and this in turn erodes the trust the legislative branch places in the County Attorney’s advice—especially in the instance of high-profile issues where the Executive and Council have differing policy positions.

The current Charter protections are insufficient.

Charter Sec. 213 provides “The County Attorney shall serve at the pleasure of the County Executive but, upon request, shall be entitled to a public hearing before the Council prior to dismissal from office.”

The option of permitting the County Attorney to demand a “public hearing” is a curious provision. How does the right of a public hearing provide meaningful protection to the County Attorney?

It is hard to imagine under what conditions a County Attorney, who has been fired, might want to elect to demand a public hearing. First, in complaining publicly about her or his dismissal, the County Attorney would likely need to disclose confidential information that the County Attorney under normal circumstances could not make public without the consent of the client. The County Attorney, therefore, would have to be willing to conclude that Sec. 213 constitutes implied consent to publicly disclose confidential information. The County Attorney would have to assume the risk that, if the Executive filed a complaint with the Attorney Grievance Commission, the Commission would agree that Charter Sec. 213 impliedly authorized the County Attorney to publicly disclose confidential matters.

Second, since the Council is without power to change the Executive's decision, what is to be gained by a publicly airing the details of the dispute that led to the County Attorney's dismissal?

The Howard and Anne Arundel County Charters provide greater (but not optimal) protection to their county attorneys.

Section 405 of the Howard County Charter provides,

The County Solicitor shall serve at the pleasure of the Executive and the Council for a term concurrent with the term of the Executive. The County Solicitor may be removed from office during his or her term by either:

- (i) The Executive with the consent of the Council; or
- (ii) A two-thirds vote of the entire Council.

The Howard County Charter stops short of providing a full partnership between the Executive and Council because the County Solicitor must undergo the process of reappointment by the Executive every 4 years.

In 2020, Anne Arundel County amended Section 525 of its Charter to provide,

The County Attorney shall serve at the pleasure of the County Executive and may be removed by the County Executive, unless the County Council, by resolution on the affirmative vote of not less than five members, votes to prevent removal of a County Attorney appointed by the County Executive.

The Anne Arundel Charter's process presents some concerns: (1) By failing to act, the Council tacitly approves the removal of the County Attorney—this process lacks public transparency—*i.e.* the public may never know why the Council elects not to act; and (2) the Charter fails to provide a time frame in which the Council may reinstate the County Attorney by adoption of a resolution—this uncertainty apparently could extend for an unknown duration and create significant disruption in the law office.

The National Civic League's Model City Charter provides a good solution.

The National Civic League first issued a model city charter in 1900 during the Progressive Era, a time of significant reform for local governments. The newest version of the *Model City Charter* addresses the appointment and dismissal of the city attorney. The Commentary to the model charter favors a model charter provision that requires that

[T]he attorney be nominated by the mayor and confirmed by the council and serve until removed by the joint action of both council and mayor.

Requiring action by both council and mayor is designed to limit concern that the attorney's advice is tilted to either the legislative or executive branch.

Oftentimes, a council or mayor will ask for the attorney's legal opinion and this requirement provides an element of protection for the attorney when the advice conflicts with the goals of either the council or mayor.¹

The Commentary notes that the city attorney serves as legal counsel to the organization as a legal entity and not to the city council, mayor, manager, or city departments as separate clients.² The Commentary goes on to observe, "Obligating the attorney to act on behalf of the organization rather than individual constituent members of the organization requires the attorney to provide counsel in the best interest of the entity, not the interest of one inquiring source."³

Conclusion

The Montgomery County Attorney is in the same organizational situation as the city attorney referenced in the National Civic League's *Model City Charter*. The County Attorney represents the County as an entity. The constituent parts of the County government (the Executive, the Council, the departments, offices, and commissions of the government) are not the client of the County Attorney, although they sometimes are empowered to speak for the County government—*i.e.* the client.⁴

It is important that the County Attorney's legal advice be perceived by the Legislative branch as objective and not biased in favor of the Executive because the County Attorney is motivated by a sense of self-preservation.

For these reasons, I recommend that the Council approve a proposed Charter amendment that provides that the County Attorney may only be dismissed with the

¹ *Model City Charter* (9th Ed. 2021), p.33.

² *Id.*

³ *Id.*

⁴ Having the chief legal officer of a local government represent the organization (and not constituent parts of the organization) is extremely common in the United States, because it avoids the potential chaos of internal legal warfare wreaking havoc in the organization.

concurrence of both the Executive and Council, and the Council place the proposed amendment on the 2022 general election ballot.⁵

Thank you for your consideration of my thoughts on this important matter.

Sincerely,

Marc Hansen

Marc Hansen

CC: Marc Elrich, County Executive

Richard Madaleno, Chief Administrative Officer

Marlene Michaelson, Executive Director, Council Staff

John Markovs, Acting County Attorney

Christine Wellons, Sr. Legislative Attorney

⁵ I would propose the following amendment to Charter Section 213: [The County Attorney shall serve at the pleasure of the County Executive but, upon request, shall be entitled to a public hearing before the Council prior to dismissal from office.] The County Attorney may be dismissed by a resolution approved by the County Executive and at least 7 members of the Council.