

METRO
CHARTER
COMMITTEE

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AGENDA

DATE: May 22, 1992
MEETING: Drafting Sub-Committee
DAY: Friday
TIME: 8:00 a.m.
PLACE: Metro, Council Chamber, 2000 SW 1st Avenue, Portland

8:00 Meeting called to order.

Consideration of Charter elements which have been drafted. Discussion of recommendations to be made to the full Committee on additional Charter provisions.

10:00 Meeting adjourned.

MINUTES OF THE CHARTER DRAFTING SUBCOMMITTEE
OF THE METROPOLITAN SERVICE DISTRICT

May 22, 1992

Metro Center, Council Chambers

Subcommittee Members Present: Hardy Myers (Chair), Ron Cease, Larry Derr, Frank Josselson, Ray Phelps, Mary Tobias

Subcommittee Members Absent: Matt Hennessee

Chair Myers called the subcommittee meeting to order at 8:10 a.m.

1. Charter drafting elements requiring subcommittee guidance

Tim Sercombe, committee counsel and drafter of the charter, distributed a list of issues with which he needs subcommittee guidance to draft the charter. He also distributed a draft outline of the charter. He said that, when representing more than one person, he tries to set up the ground rule regarding from whom he takes direction so that he does not get inconsistent direction from different parts of the client. He said that he is operating under the assumption that his direction would come from the full subcommittee, and not necessarily from individual members, or from the full Committee. If there is any doubt as to what the instructions are from the subcommittee or the full Committee, he said he would look to Chair Myers for guidance. He said that, from his experience in dealing with and interpreting charters and how they function, there are some definite objectives to have in drafting a charter in order to express the ideas of the charter. He said that a charter should have language to assure some degree of flexibility, in terms of references and specificity, in the concept that is placed in the charter in order to avoid the need for amendments to the charter and popular vote with change of circumstances. He said that, typically, the language in a charter is written more generically as opposed to specifically. He said that some of the concepts that the full Committee has agreed upon are very specific in terms of a procedural process. He gave the example of JPACT's consultation on the merger of Tri-Met. He said that if JPACT is a different entity or called something different in a few years, and it is specifically referenced in the charter, the result may be a charter amendment in order to replace that condition before the entity can take over Tri-Met. He said that another concept is clarity--the words ought to be relatively clear so that there are not future debates over the meanings and consequences of different words. He said that the third function of the charter, and the historic primary function of the charter, apart from its self-empowerment nature, is to define intramural relationships within the entity with some degree of clarity. He said that intramural relationships involve the relationship between the governing body and other officers of the municipal corporation and what the duties are for each of those entities created under the charter and what happens if there is some conflict between the entities. He said that the fourth principle is that the rationale for having a chartered organization, apart from it defining its substantive functions and what it does, is to empower it in a way so that disputes about the ways it chooses to exercise its functions are minimized. In other words, so that it is relatively clear through a charter what powers the entity has to accomplish the functions that are assigned to it by charter. He said that there are different too-broad techniques that are used in drafting charters, in terms of empowerment.

Tim Sercombe said that he would like some assistance from the subcommittee with the issue of limited powers or general powers being granted in the charter. He said that the issue should be separated from the substantive functions assigned to the entity. He said that, in the *issues determined to date*,

there are a number of places where it talks about the regional government being empowered to contract, convey property, to sue and be sued, and other very specific ways that it accomplishes functions that the charter assigns to it. He said that there are two models of empowerment in charters. One is a charter that says that the functions of the entity will be set out and then it will get limited powers to accomplish those functions. He said that most modern city and county charters avoid the need to list very specific powers by having a general powers grant. A general powers grant says that the charter will set out the functions of the entity, in terms of a mission, but, in the accomplishment of the mission, it has any power that state law allows it to have. There is no need in the charter to talk about specific abilities or powers because it has everything. He said that it is purely an issue about what powers it can employ to accomplish the functions, not whether or not it can take on functions. He said that he would suggest distinguishing between those two things in the charter. He said that he would recommend that the Committee employ a general powers grant to allow the entity to use whatever means necessary to accomplish the functions in a technical sense. He said that ORS 268 does list a number of powers for Metro, which is typical for agencies with delegated powers from the legislature. He said that is not typical for charters. He asked if that is acceptable to the subcommittee.

Chair Myers asked if any members of the subcommittee thought that the general powers approach to the exercise of the specifically assigned functions would be a variance of what the Committee has decided so far.

The subcommittee was in agreement that it would not be in variance.

Frank Josselson said that the ordinary home-rule charter governments are city, county, and general purpose governments. He said that the government that the Committee contemplates is a limited, or multi-purpose, government. In terms of distinguishing the functions and responsibilities that are delegated to this government from any other charter government, he said that would be one distinction. He said that his perception of what the Committee has done is more analogous to a state agency with limited powers as opposed to a general purpose unit of local government, and the charter should reflect that.

Tim Sercombe said that could be made clear in the charter by having very specific language on its functions and the process it uses to take on or shed functions. Overall, there will be a limitation on what it does by the basic constitutional requirement that it be a function in the area of matters of metropolitan concern. There will be different ways in the charter that those functions can be defined and regulated without having to go the route of spelling out every power it uses to accomplish those functions.

Ron Cease said that he would not view it as a general purpose government, although it is multi-functional. He said that even in the statutes, when it talks about counties being general purpose, there are plenty of things that are prohibited by law. He asked if the whole question of general purpose versus multi-purpose becomes a meaningful issue. He said that the charter will indicate what the government can do and how it can get more functions and the process it must go through. He asked what general purpose means in a legal sense.

Tim Sercombe said that general purpose means that the government performs a variety of governmental functions. It is typically used to talk about local governments. It is used to distinguish entities with single or more discrete functions, such as service districts.

Larry Derr said that he would envision that the charter could basically be one paragraph if that was the intent, but it is not. He said that general purpose would mean that the government can do everything that it has authority to do under the constitution, or you can say that it can only do certain

things, which is the direction the Committee has taken. He said that is the functions side. On the powers side, as Tim Sercombe was saying, now that the functions are limited, it has all the powers necessary to carry that out.

Tim Sercombe said that the next issue is the limitations on the home rule charter because they affect the manner in which Metro could be empowered. He said that there are two principle limitations that have developed on the authority of home rule entities. One is that entities lack extra-territorial power outside of their defined area of governance. In order to have extra-territorial powers, the entity must look to state statute rather than the charter. If the entity is performing something outside of the area where people have voted on the charter, the entity needs to look to some other authority. He said that a second principle is that, without regard to how home-rule allocates substantive authority, one of the limitations is that entities cannot affect the way in which other local governments or governmental agencies govern themselves or the duties of their officers, unless they are allowed under state law. He said that a city charter cannot say that the county elections officer is required to perform certain functions, in terms of the way that the city government is run. He said that the limitation suggests that, even in areas of metropolitan concern, there may be a limitation on the authority of Metro through its charter to say what other local governments or state agencies do. He said that it comes up a couple of times in the *issues determined to date* with the authority of LUBA or LCDC, in terms of its authority to review certain decisions that are made by the regional government. He said that it also comes up in the duties of local governments in rendering land use decisions, the continuation of the board of Tri-Met after a merger, and the authority to dissolve the Boundary Commission or Tri-Met in a way that is different than provided by state law. He said that the subcommittee will have to look at to what extent do they want to put something in the charter if it is arguably outside the authority of the government, and then seek the statutory authority to do that, and at what extent should the charter remain silent and seek statutory authority.

Ron Cease said that it could be placed with a separability clause so that, if it were challenged, it would not affect the whole charter.

Tim Sercombe said that it could be done and the charter could probably be drafted to avoid the problem of, for example, having the charter outline a process, different than the current process, for dissolving the Boundary Commission. Metro could then go to the legislature to seek consistency, but the legislature may do something a little different than what occurs under state law but is still inconsistent. He said that the Committee wants to avoid the result that the Boundary Commission cannot be resolved because the charter says one thing and state law says another. He said that it is not an issue of separability in terms of the unlawfulness of what is being done, but that the charter says it must be done through process A and state law says that it must be done through process B and the result is that it cannot be done.

Ron Cease asked what the Committee should do with issues that need state law changes. He asked, if issues are left out of the charter and the charter is adopted, what would happen to the issues that the Committee recommended but left out of the charter.

Tim Sercombe said that Metro could have authority in its charter to do particular things or functions which can be supplemented by state law. He said that Metro could turn to both the charter and state law for substantive functions. The charter can contain a limitation on the power to accomplish a function and the charter might prevail in that regard. He said that if the charter said that Metro could do A,B,C, and D, and the state says that Metro could do E, then, in terms of its authority, it could do A through E. If the charter says that Metro can only do A through D and cannot do E, then the charter would control over state law in terms of what Metro can do. A charter can limit the authority of the entity and it can also empower the entity. Unless the charter limits it, the powers can be supplemented by state law.

Ron Cease asked if the charter says that Metro can do A through D and the state law says that it cannot do C, would the state law prevail under the home rule powers since state law can prohibit it from doing something.

Tim Sercombe said, generally, yes. He said that those principles established for cities and counties for conflict resolution would be used to resolve conflicts between this charter and state law. The rules state that when there is a state law that addresses a substantive or regulatory concern of the state which conflicts with a substantive or regulatory provision of local law, the state law will prevail. If the conflict relates to matters of procedure or structure of the local government, the local government will prevail unless the reason for the state law is to protect the interest of the persons who are participating in the process from the government.

Ron Cease said that in 1989, the Legislature passed a statute which says that the Metro council could put structural questions on the ballot so that it could change the number of council members. He asked if the charter provided a different way to change the number of councilors, would the charter override the state law.

Tim Sercombe said yes.

Chair Myers said that he understood the Committee's opinion was that where a charter provision would arguably require legislative action to avoid conflict, the provision should be in the charter with whatever qualifier is necessary in order to condition its effectiveness on legislative action.

Tim Sercombe said that there are ways of drafting around that, such as saying, "to the extent allowable by law, Metro shall...", and look to the state law for empowerment and reduce the risk of some conflict between the technical use of the charter and what state law says. He said that the risk is the degree of specificity employed in the charter to describe that process and whether or not it will be consistent with what state law ultimately does.

Chair Myers said that if it is not ultimately consistent, then state law controls it.

Tim Sercombe said that is true, depending on the language used in the charter. He said that the charter provision should not be read as a limitation on the process purely--it should not say this is the only way to do it.

Ray Phelps said that he disagrees with Chair Myers. He said that he is not sure that the Committee ever discussed what would happen if there were conflicts with state law. He said that it was always glossed over with a reference to change state law. He said that he is not convinced that a lot of the state law can be changed. He said that there should be some mechanism in the charter that allows for time certain for certain state laws to be enacted, and failing that, those charter provisions dependent on that, should be eliminated.

Larry Derr said that the trouble with Ray Phelps suggestion is that there will be some gray areas as to the extent to which state law would have to change to allow certain things.

Ray Phelps said that the Committee knows the basic provisions which require state law changes.

Ron Cease said that some are known and some are not.

Ray Phelps said that he is talking about provisions which are dependent upon state changes.

Mary Tobias said that Ray Phelps is correct that the Committee never really had a discussion of how

much reliance should be placed on whether or not there can be statutory changes. She said that she is not sure about a drop dead date because of her hope that the charter remain broad enough to be evolutionary over time and the time certain idea precludes that. She said that she does not think that she could list those provisions which are in direct conflict with the state statutes.

Ray Phelps said that he is more inclined to think that it occurs with more frequency in the planning, future vision, and land use components. He said that those would be more suspect with respect to getting changes accomplished than otherwise, particularly regarding the items that Tim Sercombe has flagged for discussion. He said that he does not think that the Committee has dealt with the issue at all.

Ron Cease asked what the long term problem would be if the charter is full of things that the regional government has no authority to do unless state law changes. He asked if that created another kind of problem.

Ray Phelps said yes. He said that the law should say what it is suppose to do. He said that he has dealt with a lot of statutes that are no longer enforceable, but there is no way to get rid of them. He said that a citizen will come in and say that the law is on the books and the government must do something, but the government cannot do anything because it does not mean anything.

Tim Sercombe said that the more that is in the charter that is specific, the more controversies there will be in the future about its affects. He said that if the charter has certain processes structured, and some are inconsistent with state law, and, to the extent that they are inconsistent, there could be a drop dead date by which state law would have to change or else those parts which are presently inconsistent with state law will no longer be in effect. He said that gets into all sorts of questions regarding to what degree state law must change--must it change in all the particulars for the processes to be given effect or are they given effect only in those particulars in which state law has changed to allow them to go into effect. He said that it also gets into conflict questions between the state and local government.

Frank Josselson said that he is not aware of any provision in any resolution that the Committee has adopted that would clearly necessitate conforming legislation. He said that, rather than discussing the issue in the abstract, as Tim Sercombe encounters provisions that he thinks may require conforming legislation, he should point them out to the Committee so that the Committee can debate them. He said that he believes that the Charter Committee has the authority to dissolve the Boundary Commission. He said that if Tim Sercombe disagrees with him or thinks that it is a gray area, it would be wise to point that out to the full Committee. He said that if there is language that Tim Sercombe can use to avoid a conflict, he said that would be helpful. He said that some of the *shall* provisions, such as the LCDC staff report being done by Metro staff, could be drafted as *may*.

Larry Derr said that he thinks there are fewer areas of head to head conflict than Ray Phelps perceives, particularly under the land use functions. He said that while the Committee has been quite specific under the land use functions, the vast majority of provisions are issues that are already in the statute. He said that there might be a question of if the statute ever changed, would the charter prevail. He said that the Boundary Commission issue, particularly because it is extra-territorial, is probably a gray area. He said that Tri-Met could be another one.

Ron Cease asked if Tri-Met would be a little different in that the statute specifically authorizes Metro to take it over.

Larry Derr said that Tri-Met is a little like the planning functions, in that the Committee moved into the charter things that the statute already says that Metro has some discretion over. The question

becomes is it unsalable to the legislature.

Tim Sercombe said that he does not think that there is any gray area in the issue of whether or not the charter can affect the existence of procedures used by state agencies or local governments in a way different than state law. He said that he thinks that the Boundary Commission provision is not that gray. He said that the statute provides a process for Metro to take over the Boundary Commission and requires the advancement of that specific proposition before the voters. He said that is the exclusive process in which Metro can take over the process of that state agency. He said that the issue could not be affected by the charter, except to the extent that the charter places further intermural limitations on the regional government in whether or not it takes over other functions of the Boundary Commission. He said that the charter cannot prescribe the process by which that occurs in a way that is different than state law, it can only supplement the state law process by saying that there must be a report before it is done. He said that the way that the state law says that it is accomplished is exclusive and it controls. He said that one of the questions to think about is the reasons or advantages for paralleling state process in the charter when the process is desired to continue and whether or not that process has some disadvantages if the process changes as a matter of state law.

Ray Phelps said that when and if Tim Sercombe changes a mandatory statement to permissive when writing the charter, he would like to know which changes they are. He said that a certain number of decisions and representations were being provided to the Committee based on the fact that certain things would be done. He said that if that is not now the case, the Committee needs to know that. He said that there are certain cost ramifications and process implications as to whether or not the result intended can be mandated.

Tim Sercombe said that, as a general rule, when there ever is any change in the direction that he has been given regarding the draft, he will highlight it and explain why.

Ray Phelps said that he thinks there is a big importance in changing *shall* to *may*.

Tim Sercombe said that the third item on the list is *matters of metropolitan concern*. He said that he has not been able to read all the minutes and is unfamiliar with some of the discussion. He asked if there has been full Committee discussion about the concept of matters of metropolitan concern and whether or not there should be a generic definition placed in the charter.

Ron Cease said that the Committee did discuss it and had a problem with it. He said that he thought a motion passed, in reference to taking on a function or putting it before the voters, the council had to have an indication of why the function was metropolitan in scope.

Larry Derr said that the motion was as close as the Committee got to it. He said that the Committee wrestled with putting words on paper and decided that they could not figure it out and that it might be counterproductive anyway because it would be limiting.

Janet Whitfield read the motion regarding metropolitan concern: "If the regional government is to undertake an additional function, it must provide a statement indicating why the proposal has metropolitan significance and why it would be appropriate for the regional government to take on the function."

Frank Josselson said that he recalls that the Committee decided not to define the term.

Mary Tobias asked if any of the criteria had been adopted.

Chair Myers said that the Committee made efforts at trying to put together a more specific definition.

Ron Cease said that the Committee decided that it was too difficult to come up with a definition that could be applicable in all cases and for the future when things could be uncertain. He said that the Committee left it up to the council by saying that they had to indicate that the issue is of metropolitan concern. He said that making them state their case is not a bad way to do it.

Chair Myers asked Tim Sercombe if he thought there needed to be a definition.

Tim Sercombe said that he realizes that there is not a definition now and he did not know if the Committee had decided to not define it. He asked if the subcommittee wanted him to take a stab at a generic statement of it at all.

Chair Myers asked if it is necessary for the charter.

Tim Sercombe said that the only advantage of defining it in the charter is that, if the Committee feels that a broad concept of what is of metropolitan concern will be of assistance to future Metro councils or electorates in deciding whether something should be taken on as a function or service of the entity. He said that there are pros and cons. To some extent, if the charter provides an overall standard or guidance, it will allow testing of particular ideas or functions in the future against that guidance. If it is left silent, then the definition will evolve without standards on a case by case basis. He said that may be something that the Committee prefers, although it might initially be more litigious in terms of the initial choices. If there are disagreements, it would be decided judicially. If there is a standard in the charter that has been popularly accepted by the approval of the charter, it will forge some guidance to decision makers in deciding that, both by the governing body and the judicial body.

Ray Phelps said that the definition of affecting two or more jurisdictions floated around the Committee. He asked where it finally ended up.

Chair Myers said that the Committee worked at trying to piece together a definition. Ultimately, it failed.

Larry Derr said that it was just in the context of planning. When the Committee moved to functions, they said that it did not fit.

Ray Phelps suggested that the issue be resurfaced because it would be a terrible episode to at least not try something generic enough to get the popular expression of support for guiding courts and to discourage a lot of litigation. He said that it would be difficult to try to accomplish something of metropolitan concern if there is one person not liking the definition and there is no measuring stick to say that it was a reasonable place to go.

Ron Cease said that there is a trade-off. There could be more court suits, however, if there is a definition, the organization is tied to the definition. He said that if a function went to the ballot and the voters approved it, that should settle the problem.

Tim Sercombe said that there might be a legal issue that still exists. He said that one technique besides defining it, which he is proposing in the outline, is to state "matters of metropolitan concern include but are not limited to the following" and have a generic listing. He said that this part of the charter would not work to define what the functions are, but it would work to define and give examples of what are issues of metropolitan concern. He said that most of the controversies can be settled by having the list.

Mary Tobias said that, from the beginning, one of the things the Committee is trying to do is to establish a framework in which more and more problem solving for big issues and problems gets done

by the region rather than fragmented from jurisdiction to jurisdiction. She said that has been done through the partnership with the RPAC and all kinds of mechanisms. She said that one of the things the Committee heard consistently in the first round of public hearings is that the issue of what is of metropolitan significance has been one of the things that has kept all of the participating governments in debate. She said that there was a strong call for some kind of a test, whether it is a definition or not. She said that Tim Sercombe's suggestion of a list of "these issues are, but not limited to" perpetuates the contest. If there is a criteria or test, although it will not go on forever, issues can be held up and measured against them. She said that there is real value to that in resolving one of the big areas of continual tension that has faced the government from the beginning, with Metro saying that it is significant and one jurisdiction not wanting to be involved saying that it is not. It gets down to the debate on that particular issue and how that particular issue will be carried out versus whether or not that particular issue is indeed metropolitan. She said that it changes the arena in which the debate is being held. She said that she does not recall the Committee ever making a decision stating that there will not be a definition of metropolitan significance or a way to judge metropolitan significance. She said that it would be useful to have some kind of language that might set the test put into the charter. She said that she does not like the proposal of having a list.

Larry Derr said that it may be an issue that the Committee will need to revisit. He asked if this area is beyond the scope of the subcommittee. He said that the subcommittee is not suppose to be making policy decisions, but is suppose to be helping Tim Sercombe interpret the policy decisions that have been made.

Chair Myers said that this kind of issue is one where Tim Sercombe's function becomes that of counsel to the Committee. If he would like to come to the Committee with proposed, further provisions, which would be segregated, to recommend, for legal or political reasons, the consideration of them, it is within his responsibility. He said that the subcommittee is not in a position to tell Tim Sercombe to integrate a definition of metropolitan concern into the charter.

Ray Phelps said that he thought the Committee had decided that this was one decision where the drafter might be asked to make a recommendation because the Committee was perplexed and wanted to move along. He said that he liked the recommendation.

Chair Myers said that, with respect to any decision the Committee has made, he expects the Committee's drafter and counsel to raise questions in regard to anything that has been decided or to raise questions to matters that may have been omitted. He said that it is up to the Committee to decide whether or not they want to act on those or not. He said that he does not view Tim Sercombe just in the position of a scribe—he has been hired to be a lawyer also.

Mary Tobias agreed with Chair Myers. She said that, because of the short amount of time that the Committee has and the work that Tim Sercombe has to do, the Committee will not have time to go through all the different recommendations that he makes.

Tim Sercombe said that the next question is to what extent the full Committee has debated text. He said that the provisions relating to growth management seem to have been debated the most. He asked if that text should be used or if he should suggest ways of rewriting the text if he feels it would be more flexible or practical to do in a different way. He said that he is only talking about the language, not the concept or substance.

Larry Derr said that his first observation is that some of the language is sacred and some of it does not make a difference as long as the idea gets across. He said that he did not know how Tim Sercombe would know the difference. He said that the minutes might help a little. Because of that problem, he said that Tim Sercombe should not try to make it more flexible if that means substantive expanding or

changing, but there is not any reason why he could not try to achieve the same thing with words that may be clearer or more to the point in a given instance. He said that if Tim Sercombe runs across something that, as written, either has to be put down the way it is written, although it will not work, or make a substantive change, it should be flagged.

Tim Sercombe said that the tax base on non-approved revenues is likely to be very complex and there are complex drafting issues about the difference between taxes and other revenues, the manner in which the base is calculated, and there are issues about the effects of exceeding the base. He said that one of the problems is that this particular type of tax limit has not much precedent and is a limit on indeterminate taxes where the government will not know it has exceeded the limit until the taxes are actually collected. He said that he understands the way that the concept works is that there is a base that controls the amount of tax revenue collected apart from those taxes which have been specifically and popularly approved. He gave the example of the government imposing a hotel/motel tax: If the government was close to the base and the base would be proposed in the budget cycle which would not exceed the limit, but, in the fiscal year, the government collected more revenue than was allowed under the base because the hotel/motel business was really good. He asked what would happen when that would occur and what was the responsibility of the government when that occurs. He said that one obvious consequence is a refund mechanism which would be somewhat complicated because there would be a variety of taxes that would make up the excess. Another option is that it would effect the future year's tax base by reducing it according to the amount of which there is an excess of revenues in a particular tax year. He said that the difficulty with that consequence is the budget cycle. Anytime that taxes collected in a particular fiscal year exceed a particular sum, it will affect the tax base by the amount that the government can go out for tax revenue in the next fiscal year, but the government is not going to know how much it will get over the limit until the current fiscal year's books are closed, which is after the budget for the next fiscal year is complete.

Frank Josselson said that less than one meeting was devoted to finance. He said that he would encourage Tim Sercombe to do his best to interpret what the Committee has done and then suggest means of resolving issues, such as the one he identified. He said that the tax and finance area is the one that has been given the least attention by the Committee. He said that Tim Sercombe could figure out the broad scope of it from Ron Cease's motion. He said that it does raise a myriad of issues that Tim Sercombe should point out.

Ray Phelps said that he does not agree totally with Frank Josselson's comments. He said that the finance subcommittee spent a great deal of time on the finance issues and he encouraged Tim Sercombe to review the finance subcommittee minutes. He said that with respect to the full Committee, Frank Josselson is correct, but it was based upon three or four meetings of a six member subcommittee. He said that the problem Tim Sercombe is describing is a wild card that flew up in one meeting with no preparation. He said that he is not sure what promoted it and it was not discussed, which explains Tim Sercombe's problem with the concept of the tax base and the \$12 million. He said that Tim Sercombe could be creative there, but with respect to the rest of it, there is not much problem. He said that there was not a lot of thought given to the tax base concept.

Chair Myers asked if by tax base, Tim Sercombe was referring to the tax limitation.

Tim Sercombe said yes.

Frank Josselson said that it is not a tax base.

Ray Phelps said that it functions the same way.

Tim Sercombe asked if the limitation means that the government cannot raise by taxation more than a

certain amount or if the government cannot spend from taxation.

The subcommittee agreed that the limitation applies to the ability of the government to raise more than a certain amount by taxation.

Larry Derr said that if it was expenditure, it would get into federal funds where there are billions of dollars that they are not allowed to spend.

Ray Phelps said that the concept was very sketchily thought out and Tim Sercombe has found the problem. He said that the Committee ought to revisit it.

Tim Sercombe said that the other main issue is how does it work if the government takes on additional functions with its own revenue stream and how it works when taxation revenue streams are shared with another government as a means of jointly accomplishing a function. He said that there are some very complicated issues about putting in a tax base like this in the charter.

Ray Phelps said that was the part that was not clearly discussed.

Frank Josselson said that he agrees with Ray Phelps. He suggested that Tim Sercombe look at the minutes and do the best that he can with them. He asked that issues be identified and brought to the attention of the Committee.

Tim Sercombe asked if there was much Committee discussion about the relationship between the council chair and the regional administrative officer. He said that the outline looked like there was specific thought about the regionally elected officer as far as recommending budgets and other functions. He said that it was not clear, and one of the intramural issues is going to be, what the relationship will be if there is an elected full time compensated officer and a full time manager. In a practical sense, if a position is created where someone is a full time compensated person, that person will seek to find functions to fill up their time. He said that, in this case, it might go beyond some administrative functions assigned to the regionally elected officer by the charter. He said that there might be a need in the charter to talk about who has administrative control over different functions of the regional government. He said that this will be an issue, especially with the appointment of department heads, hiring and firing of personnel, and negotiations of contracts.

Ray Phelps said that the outline states that the regional manager is appointed by the council and fired by the chair.

Chair Myers said that the negotiation of contracts is under the regional manager responsibilities.

Frank Josselson said that basically, the whole structural concept evolved out of one meeting. He said that the basic principles are set forth in the minutes of that meeting. He suggested that Tim Sercombe record the minutes as faithfully as he can. He said that a lot of time was spent on structure, but the particular model that was developed was not given great consideration.

Ray Phelps said that page nine of the *issues determined to date* outlines the structure. He said that the idea was that the full time administrator would do the administrative functions of the government, based on the other parts of the charter. He said that Tim Sercombe could draw a fairly decent description of that relationship to the council chair because the council chair can unilaterally dismiss the regional manager. He said that Tim Sercombe could be a little creative with the non-interference clause.

Frank Josselson said that he would encourage Tim Sercombe, in regards to all the aspects but

particularly the finance and structure portions, to be a scribner but to be as close as what he understands the sense of the Committee.

Tim Sercombe said that is what he interprets his instructions to be. He said that in the decision that has been made about a regionally elected officer with firing power over the manager, without council consent, a manager system of typical manager form and a non-interference clause--which he interprets to mean that the governing body members cannot interfere with purchase of supplies or the hiring or firing of personnel--sets up an interesting relationship when there is a single person to terminate the employment of the manager and there is a non-interference relationship as well. He asked about the degree of Committee consensus and discussion on that relationship. He said that he was also unclear on whether the non-interference clause included the regionally elected official.

Frank Josselson said that there was no discussion. He said that the non-interference clause was a vestige of a prior proposal which would have separated policy making from operational functions of the government and kept the council out of the operational functions. With the structure that the Committee ended up with, there is the obvious problem that Tim Sercombe pointed out. He said that he thinks that most of the members of the Committee would say that they did not have in mind the characteristic kind of non-interference that is normally in a charter. He said that the kind of non-interference they had in mind was that the council would make policy and the manager would perform the operations of the government without council interference.

Ray Phelps said that, for the purposes of non-interference, he does not believe that it would extend to the council chair's relationship to the regional manager. In other words, there is a bifurcation of responsibilities.

Frank Josselson said that Tim Sercombe would be a lot closer to the sense of the Committee if he took that approach. The council cannot get involved, but the chair runs the whole shebang.

Mary Tobias said that she does not necessarily agree that most of the Committee members subscribe to Frank Josselson's last thought. She said that she does subscribe to the rest of it. She said that there were Committee members who did not want the chair in operations.

Frank Josselson said that is not the way it came out. He said that it came out that the chair would have exclusive agenda setting authority for the council, has budgetary authority, would hire the manager with the advice and consent of the council, and could fire the manager without the consent of the council. When the larger elected chair is given that authority, he/she is being turned into an executive. He said that the council really created the system that Ray Phelps described so that the non-interference is that the council will not get involved with operations. He said that it does not apply to the presiding person.

Ray Phelps said that if it is drafted that way, the Committee will probably revisit it but that is where it stands.

Tim Sercombe said that the functions of a non-interference clause are to protect against corruption by saying that there are certain things that elected officials cannot touch, which is usually phrased more discretely than micro-managing, and usually involves money such as in purchasing transactions or the hiring or firing of employees, that for reasons of limiting the opportunity for corruption, those decisions should be made by an administrator and not a politician. The second function is that the non-interference clause operates to protect the councilors, or governing body members, from constituent requests to fix particular relationships. He said that it most often comes up in union negotiations where the manager does negotiations and contracting which are ratified by the council, but it is done in a manager/council dealing and not in a direct negotiation. He said that the subcommittee may want to

think about whether they want the non-interference clause and, if they do, how it works between the regionally elected officer and the manager.

Larry Derr said that the concept that got drafted is broader than either of the functions Tim Sercombe mentioned considering the concept of micro-managing as something to be avoided by the council versus the administrative officer.

Tim Sercombe said that he understands that the Committee does not want the council, in a broad sense, to be haggling over details. He said that if the Committee's thought is to put it as a limitation on council power to say that at certain points, in terms of what the council decides to do, that it cannot adopt administrative policy, distinguished from legislative policy. He said that it will be difficult to draw the line to distinguish what is legislative and what is administrative policy. He said that the harm the Committee is trying to remedy--avoiding micro-management--may be replaced by a greater problem of line drawing which will tend to be a factor in second guessing or evaluating decisions made by the council.

Frank Josselson said that it may be a distinction given the structure that the Committee has proposed and is best dealt with generically. He said that he would be inclined to say that the council shall have the responsibility to make macro-policy, with respect to the operations of the government to make major policy, with respect to the services to be delivered by the government. The council is not to get at the minor aspects or details of operational aspects. He suggested using the terms major policy decisions and operational decisions.

Tim Sercombe said that the typical way of allocating power in a charter is to allocate all power to the governing body, except as otherwise allocated by the charter through other officers or committees who will have particular powers. He said that it is atypical, if not unique, to say that the governing body has a limitation on the kind of policy that it can set or a function that it can perform that is not exclusively given to someone else. He said that the more typical way of stating that would be to say that these are the manager's functions and they are exclusive and cannot be done by the council, rather than stating that the council power is limited by issues below major policy decisions.

Frank Josselson said that there was a consensus around the Committee that the primary function of the government is to do planning and policy making, particularly in growth management. He said that, as a result, a majority of the Committee wants the council to not be involved in the day-to-day functions of the different functions. He said that the Committee wants council powers limited in that respect, but that the planning and policy making functions actually get carried out by the council.

Larry Derr said that Tim Sercombe is really talking about how to get there and the idea of being more specific on the positive side than on the prohibitory side might be a clearer way to do it.

Ray Phelps said that Tim Sercombe's point about assigning tasks lower down would get the Committee where it wants to be--if the regional manager is suppose to do X, then the council may not and it is an exclusive function of the regional manager. He said that the subcommittee seems agreed on it.

Mary Tobias said that, regarding Frank Josselson's comment regarding macro-policy versus the operation, if the Committee is not careful about how it is shaped, there is a risk of more and more policy being created through administrative rule of staff by default. She said that if the activities of the council are channeled too carefully, there will always be things that have to happen and policy that will not fit the macro concept that will emerge, via the interpretation of the macro concept, and will be similar to DLCD creating all sorts of things that have no public scrutiny because it is administrative rule.

Ray Phelps said that is a different discussion for a different time. He said that, given the consensus of the Committee up to this point, the subcommittee is trying to download those distracting issues that take up the time to determine the paint, colors, and things like that to free up and force the policy process. He said that Mary Tobias' conversation comes later.

Mary Tobias said that the model that Tim Sercombe suggested would not be in conflict with what the Committee has done if it says that the governing body is empowered to carry out the planning and policy making of the government. She said that it goes back to Wes Myllenbeck's statements about the Washington County model where no powers are given to the county manager, other than those delegated to the manager by the commission. The charter does not set it out--it is the governing body itself that is deciding.

Ray Phelps said that he does not think that is the consensus of the larger Committee.

Mary Tobias said that she did not know that it was in violation of the intent of the large Committee.

Ray Phelps said that he would differ with Mary Tobias. He said that he supports Mary Tobias, but must agree with Frank Josselson's representation of where the Committee has been.

Mary Tobias said that she would like Tim Sercombe to point out those places where, as the dynamics of the charter start to play together, real life inserts itself. She said that the Committee has not had a lot of practical discussions, only theory. She said that the charter could say whatever it wants about segregating out operations and policy and drawing lines on paper, but if the council decides to take on more and more operations, there is little that can be done. If the manager will allow that kind of interference, there is nothing that can be done.

Frank Josselson said that, to the extent that a charter can prohibit that, the charter should prohibit it in terms of service delivery.

Chair Myers said that Tim Sercombe has a basic understanding of what the objective is of the Committee with respect to separating policy formulation and administration. He asked that Tim Sercombe approach it in the way that is best to express his understanding. He asked the subcommittee if Tim Sercombe thought that the objective of the Committee is different from a non-interference clause and could best be approached with assignments of exclusive functions, would that be fine.

The subcommittee agreed that a difference approach would be acceptable.

Ray Phelps said that if Tim Sercombe begins to delineate functions, the more administrative functions further down, the more he will comport with the sense of the full Committee. He said that if the question is whether A or B belongs with the regional manager, presiding person, or the policy group, try to get it with the regional manager.

Chair Myers said that the next issue on the list, the composition of RPAC, would be an area that Tim Sercombe would have to work around.

Tim Sercombe asked if there was any discussion of a provision of a judicial officer or municipal judge. He said that the issue will come up if the government has regulatory or police power to say that individual persons cannot do X. If someone does X, he/she would be subject to a fine. He said that leads to the issue of enforcement of those sorts of things and there are a variety of different models.

Ray Phelps said that Metro currently uses the district courts. He asked Dan Cooper if Metro contracts

with the district court for parking tickets at the zoo.

Dan Cooper, General Counsel for Metro, said that is under a specific statute.

Larry Derr asked what would happen if someone dumped phosphates in the river.

Dan Cooper said that Metro wrote a regulation but never had to try to enforce it because the Legislature took it over. He said that he did not know how it was going to be enforced.

Frank Josselson said that the area in which that would be likely to occur is solid waste. He said that he cannot think of other areas where that is likely to occur with respect to the authorities that the Committee would delegate to regional government.

Larry Derr said the management of property.

Chair Myers asked if it is a different problem than that faced by Portland--a city without a municipal judge system.

Tim Sercombe said that it is not different. He said that he would have to check the statutory authority of local governments to see if there is enough authority to include a regional government. He said that, presumably, the regional government could go to a district court to enforce municipal ordinances.

Larry Derr asked if a general grant of powers would be enough to provide for regulatory provisions and then for penalty provisions.

Tim Sercombe said yes. He said that he is suggesting that a general grant of power or the home rule power of the regional government might include the ability to create a court system.

Larry Derr asked if, in the absence of the creation of a court system, the charter would need to say something specific in order to be able to utilize the state court system and call it out at the ordinance level with fines and a prosecution in district court.

Tim Sercombe said no. He said that the only advantage of the regional government having its own court system or a provision for it in the charter is if, in the future, the state court system becomes unavailable.

Chair Myers said that providing for a court system versus the capability of creating one are two different things. He said that the Committee did not have any discussion about providing for a court system, but he does not think that there would be much sentiment for it. He said that he thought it would be another piece of baggage.

Dan Cooper said that he would prefer that the flexibility be left in the charter for a broad enforcement power through ordinance, whether that be hearing officers or a court system.

Chair Myers said that he is getting to the point of whether something is outright created by way of a particular mechanism versus, under the general powers grant, the capability of making certain choices about how to do that being left with the government.

Tim Sercombe said that there are two reasons, assuming that the Committee does not want to create one at the outset, why one should be provided for. If it is provided for in the charter and people vote on it, it is more likely that, if the issue is whether or not it can be provided for in a judicial system, it

will more likely be resolved in favor of the regional government. The second reason for doing it would be to put any sort of limitations on what the court system does or does not do that should be in the basic constitution of the organization.

Chair Myers asked, under the general powers grant, if that needs to specifically reference this particular choice or is it captured within broader language.

Tim Sercombe said that it is captured within broader language and does not need to be referenced. He said that the issue of putting in a provision about a court system or judge is not one of empowerment--it is one of bootstrapping any argument about whether or not the government has the ability to do it and whether it would be placing any limitations on that power that should be in the charter.

Chair Myers asked Tim Sercombe, acting as counsel, to provide a recommendation to the Committee.

Frank Josselson agreed with Chair Myers, but suggested that the terms municipal judge and municipal court be avoided. He said that if the recommendation has the terms municipal judge or municipal court in them, the judge will act very negatively.

Ray Phelps said that if Tim Sercombe said that it is implicit in the general powers, at a later date if events and situations occur, with the general powers authority, the council could create a court.

Larry Derr said that, to the extent that it is a gray area and it has been called out in the charter and people have voted on it, there is more to argue about before the Supreme Court. He said that it is not an issue that has come up before or one that would get a lot of support as a current element of the regional government, so it may not be something that is seen as all important.

Ray Phelps said that, politically, if it is in the general grant of authority and if he were a member of the council and the decision came before the council, he would probably put a referral out. He said that if those words were put in the charter, it would bring out an issue of sensitivity that may not warrant that. He said that, politically, the government would not set up a court system of any kind without first going to the people.

Chair Myers suggested that Tim Sercombe bring the subcommittee a draft of the general powers provision which comprehends a municipal judge but does not call it out and separately developed language that would call it out if the Committee wished to do that.

Mary Tobias asked if the subcommittee feels that if Tim Sercombe were to raise this issue to the full Committee that the consensus would be that the council should not have the authority to create a court.

Chair Myers said that he is not saying that the council should not have the power to do it. He said that the question was whether it would be the sense of the Committee that the general grant of power ought to make it explicit versus letting it be captured in a broader language with somewhat more uncertainty.

Mary Tobias said that she thinks she is hearing people say that this issue should not be brought up to the full Committee.

Ray Phelps said that there are other elements of the general grant where he would have liked more specificity but he knew it was in the general grant all along. He said that this is one area that would be needless to bring it up. He said that he is glad it was brought to the subcommittee's attention, but

there is really no need to call out for something specific when it is covered by the general grant of authority.

Mary Tobias said that if the Committee's counsel has raised an issue to the subcommittee that has not been considered in general, it is totally inappropriate of the subcommittee to not carry it to the full Committee.

Chair Myers said that he is not saying that. He said that he is asking Tim Sercombe to draft a general powers grant without specific reference to the creation of a courts system if the general powers grant comprehends it anyway. He said that the issue will be raised to the full Committee and there should be language available to spell it out if the Committee wishes to do so.

Frank Josselson said that there is no doubt that the Committee wants this government to have all power that is required to discharge the delegated functions and conduct enforcement. He said that, if at some point in the future, the regional government determines that it is appropriate to have a municipal court to do that, then it should be done. To call it out in the charter and create it is opening a can of worms.

Tim Sercombe said that he understands the instructions. He said that he would like to rethink the answer about whether or not, given the general powers grant of authority, to separately provide for a court system as a possibility. He said that it is an issue that is not very clear under state law about the authority of a regional government to have a court system. He said that if he concludes that there is some need to specifically refer to a court system to assure that any future questions would be decided, then he would come back with a more specific recommendation.

Chair Myers said that his earlier suggested approach was intended to include the notion that Tim Sercombe would evaluate and provide the Committee with the assessment of whether a broader general powers clause with no specific reference to it would be likely to include that empowerment. He said that if a separate provision is needed, it poses the question to the Committee of whether or not they want it to have the authority.

Frank Josselson said that if it gets to that point, Tim Sercombe will want to explain to the Committee responsibilities of the district courts and other courts with respect to the enforcement under the municipal courts. He said that the charter will probably get attacked on the basis of duplicating functions. To the extent that authorities can be and are being performed by other units of government, he said that he thinks it will be the sense of the Committee that they be left there.

Chair Myers said that he thought the subcommittee dealt with two out of the three remaining issues on the list--duties of the regional manager and appointment of department heads. He asked Tim Sercombe to explain the last issue--provisions for the adoption of ordinances.

Tim Sercombe asked if there had been any discussion about formal mechanisms by which ordinances are adopted and options to that.

Ray Phelps said that he thought the expectation was to follow the present practice.

Tim Sercombe said that the current process in charters is a relic of how business was done 100 years ago before photocopy machines were invented. He said that, especially in the Legislature, there is the practice of reading legislation sequentially in two or three readings and requiring that it be considered at different points in time before it can be adopted. He said that there are some historic reasons for that in terms of the ability of people to see and inspect legislation before it is adopted. There are also political reasons for that process, to assure that policy is not struck at a single time and that there is

some juncture between the times of consideration of policy that would allow for politicking. In practice, the way that it works in cities, and less so in counties, is that the requirement that a bill be considered on two separate occasions or have two different readings can be waved by unanimous action of the governing body and considered at one time. He said that is what happens in practice most of the time. It calls into question whether the Committee wants the structure of separate readings or if the Committee wants to do away with that and have a procedure that says that ordinances can be adopted without the folderol.

Larry Derr asked what the current statutory procedure was.

Tim Sercombe said that he did not know of a statutory procedure.

Frank Josselson said that there is a general special districts statutory procedure.

Dan Cooper said that Metro follows ORS 198.

Frank Josselson said that the case law is very unclear about what can be done by ordinance and what can be done by resolution or order. He said that, in most special district cases, the government makes its best guess based on state statutes. He said that the more important question to him, rather than if it be done by ordinance or resolution, is whether it is to be subjected to a public hearing. He said that the courts have not said what an ordinance is, what has to be done by ordinance, and what has to be subjected to public hearing and what does not. He said that he is not sure that issue can be dealt with in the charter.

Ray Phelps said that there are at least one or two opinions of Metro's counsel which sort of got into the issue because the peculiarity of the government is the separation of powers and who speaks to whom and how and what is binding. The position taken by those documents is that the speaking is done by ordinance and that resolutions were not binding on the administrative side. The opinion was that the administrative kinds of processes and what the council can do in respect to directing the government's activities and how the council gives those instructions. He suggested keeping that notion and translating it into charter language. He said that an ordinance structure for the regional government is more significant because of the separation of powers that other governments do not have.

Dan Cooper said that the present statutory provision does not call the council the policy making body, it is called the legislative body. The statute provides that the legislation must be adopted by ordinance and it also states that all powers not otherwise expressly provided for are reserved for the council, but the executive is clearly set out to be the executive administrator of the agency. He said that he agrees with the opinion that there is a separation of power between the legislative body and the executive administrator so, following through with the state and federal government structures, it must go through the legislative body in order to impact the executive through legislation and the legislation must be adopted by ordinance.

Ray Phelps said that it could probably work to the advantage of keeping the council in the higher level as the administrative functions get dropped down as well.

Larry Derr said particularly if the Committee is clear that the ordinance adopting process has a certain degree of formality about it as Frank Josselson suggested. He said that each ordinance could have two hearings without a full reading of the ordinance.

Tim Sercombe said that occasionally, state law requires that some administrative actions be taken by ordinance. He said that the issue is not really as clean as one would suspect. He said that he is not

just talking about the distinctions in a generic sense between what an ordinance does, in terms of adoption of permanent policy of general applicability, and what a resolution does in terms of administrative policy versus some other form of government action. He said that there may be peculiar things in state law that could be done by resolution or order that are required to be done by ordinance, such as calling that a public hearing must be done by ordinance. He said that if the charter states that the council can only act by ordinance in a legislative sense, there might be administrative and external things that talk about the form in which it must act that might not be consistent with the way that it is done in the charter. He said that there are some risks in over-categorizing the way that the council acts and requiring it to act exclusively in one form because other things may affect that decision.

Ray Phelps suggested that Tim Sercombe get copies of the opinions because they might be helpful and would give him more of a tonier sense of what the struggle has been. He said that it would allow Tim Sercombe to have the last seven or eight years of history as what the intent was to see whether or not that could be blended. Otherwise, there will be a problem with the separation in this particular circumstance.

Frank Josselson said that he would caution that saying a particular thing has to be done by ordinance, order, or resolution creates a trap for the government. He said that a general statement, for example, that legislative policy decisions can only be made after there is a public hearing and administrative, intramural kind of decisions can be made with no hearing would not bother him.

Tim Sercombe said that he could write that. He said that Frank Josselson is talking about a situation where the council would be adopting some policy or legislation and state law would not otherwise require a hearing before it and the politics of it would also not require a hearing. Therefore, there is a need in the charter to say there is a more absolute requirement for that contingency. He said that the problem is that there may be some kinds of policy where, either because of the course of prior public hearings on some issues or the policy is not that significant, there may not be a need for a public hearing. Putting a black and white requirement in the charter may not get the government very much.

Chair Myers asked if city and county charters address the question of hearing requirements, as distinct from procedural readings.

Tim Sercombe said no.

Larry Derr said that they tend to address it by stating that some categories of things must be addressed by ordinance and most ordinance procedures require a hearing, but it begs the question of when a hearing or ordinance is needed. He said that there still needs to be a demarkation.

Mary Tobias said that she thinks it would be foolish to create a charter that does not put policy issues and legislative matters into a process where the public has access over time to the issue so that no matter what point in time, a citizen can insert him/herself before the final decision is made. She said that she would be really uncomfortable with this government having the ability to do a policy matter in a format in which it has not had review. She said that the reading is an anachronism of sorts but it assures that the issue is on the table for a long enough period of time. She said that it protects the elected body in a time where people are distrustful of government. She said that it would create a real problem for the government if the body is suddenly enabled to hear a policy matter, either among themselves or in front of a public hearing, and then instantly decide on it without having citizen access back in.

Frank Josselson said that the only question that raises is what is a matter of policy and what is not.

Mary Tobias said that she does not believe there will be any matters before the council of such urgency that time for public access to them, beyond one meeting, is that critical. She said that it is hard enough to access a government and it makes it much harder if the citizens are only given one shot. She said it is a government credibility issue.

Frank Josselson asked if a procedure that is similar to ORS 183, the APA procedure, would be an appropriate procedure for this government in regards to the rule making portion.

Ray Phelps asked if it would be with respect to the timing of an ordinance.

Frank Josselson said that it would be with respect to the procedures for enacting rules, what rules are and what orders are. He said that the APA exempts the kinds of intramural things from any of the procedures.

Ray Phelps said that it has an emergency process with a restricted application. He said that it would not be a bad model to try to follow.

Frank Josselson suggested that Tim Sercombe look, conceptually, at the decision making process in ORS 183.

Tim Sercombe said that there is some guidance from that chapter in distinguishing between different kinds of actions if the Committee wants the charter to have specific requirements for different kinds of actions by the governing body. He said that his opinion is that the process for publishing, making available, and allowing for written comment with delayed action--the process for rule making by state agencies--is not a particularly workable model for legislation for a municipal governing body, but there are some distinctions that would be helpful.

Frank Josselson said that he completely agrees. He said that there are technicalities in ORS 183 that should not be imposed on the regional government. He said, in general, the Committee knows what those technicalities are.

Ray Phelps said that it is not a bad process. He said that the technicalities mentioned by Frank Josselson and Tim Sercombe are technicalities that frustrate people, but ORS 183 must have cumbersome processes because it is dealing with the entire state.

Frank Josselson said that he agrees with Mary Tobias in that the questions of major policy that have any significant public affect ought to be subjected to at least one public hearing as opposed to notice and comment.

Ray Phelps said that there is always the opportunity to implement something under the emergency process. He asked if the charter would provide for that and if Tim Sercombe would anticipate, by adopting something like that, that certain things, such as revenue measures, would be exempt from being adopted by emergency ordinance.

Tim Sercombe said that there are other controls on the effective date of ordinances that the Committee has already come to consensus on. He said that his only concern was the matter in which ordinances are adopted and not their effective date. He said that he was suggesting that the charter not be detailed on the manner in which ordinances are adopted and, unless the Committee feels there is a need for controls to be placed, which would not otherwise be there politically or under state law, that detailed processes on how ordinances are considered be avoided. He said that the more detail that is put into a charter, the more opportunity for screw-ups exist. He said that it is difficult to contemplate all the different situations that might arise in the process. He said that whenever there is

a process, the question should be asked whether or not it is necessary to remedy something that is not otherwise required by state law or for political control. If it is not, then it probably accomplishes more harm than good to put something in of any detail. In accessing whether or not a hearings requirement should be put in for all policy enactments, for example, the Committee should ask whether it is likely for the government to not get public input before the policy is adopted. If it is not, then the provision does not need to be in there. If it is put in, the second question is whether or not there are some occasions where it could create legal problems later on. The question might come up that if there is a public hearing on a particular policy, the council considers it and later decides to amend it, he said that the question should be asked whether or not it needs a new public hearing--how detailed of an amendment must it be for another hearing, must it go to a revision before the hearing requirement kicks in, or can it be a simple amendment without a public hearing. He said that those will be the kind of issues that come up if the charter includes the requirement that every policy enactment must be preceded by a public hearing and comment on the enactment. Unless there is a need for some political or legal control, as opposed to what may be a good idea, there is some risk to putting good ideas into the charter because problems might occur.

Ray Phelps said that is why Frank Josselson's idea was good, at least for construction purposes, because there is discussion about revising and amending and how far it should go before it must be done again. He said that he is not encouraging the subcommittee to be that detailed, but it is not a bad place to put the idea through.

Frank Josselson said that it is just a start and Tim Sercombe can use his own judgement. He suggested that Tim Sercombe go back to the Committee deliberation because there is a significant element of the Committee that believes that Metro has had a tendency to operate without a great deal of public scrutiny.

2. Review of the Regional Government Charter Outline Draft

Chair Myers asked what the purpose was of the subcommittee reviewing the outline at this stage.

Tim Sercombe said that he would like the subcommittee to review it to determine whether or not he is barking up the right tree.

Ray Phelps asked how Tim Sercombe would like the subcommittee members to communicate back to him, whether he is or is not on target.

Chair Myers said that there are some places where there are points that have not actually been decided by the Committee, like the name of the government, which are filled in as part of the outline. He asked if Tim Sercombe is proposing those as recommendations. He said that it might be better, in the first draft of the charter, to leave blanks that are actually open questions to help identify and organize for the Committee the decisions that the full Committee has yet to make and that the subcommittee might want to make recommendations about.

Ray Phelps said that it might be a better idea to allow Tim Sercombe to put suggestions like the name of the government in, and make an identification that it is his own contribution. He said that the Committee discussions will go much quicker if there is a point of reference rather than having blank lines and people being creative from ground zero. He said that he understands that it is a process issue, but he wonders if the Committee will have enough time to start from scratch.

Chair Myers said that he does not mean that Tim Sercombe should not make a recommendation. He said that he does not have a strong feeling that it should not be in the document, but it should be

flagged in some way as an actual detail that the Committee has not resolved that Tim Sercombe is supplying.

Tim Sercombe said that he plans to highlight any draft in places where he has added or modified language or concept. He said that chapter two of the outline deals with the authority and it deals with some of the issues the subcommittee discussed before. There is a part where there could potentially be a definition of metropolitan concern. There is a laundry list, taken in large part from the statutes, of what are areas of metropolitan concern. He said that it would then move into what are functions of metropolitan concern that would be allowed under the charter as proposed and what would require additional process. He said that this part tracks the Committee deliberations about what are permissible current and continued functions and what processes are required for new functions. Apart from the general processes, there would be special processes for the assumptions of entire functions of particular governmental units. It goes on to talk about the powers of the regional government to exercise the functions. There is some typical language in terms of general powers and grants that come from the model charters that local governments use now. He said that there may be also, in this section, particular discussion of contractual powers, such as the government's ability to make commitments for future payments of money and whether or not that is allowed and is proper. He said that there are some sensitive provisions about the effect of exercise of regulatory powers by the government and how that works with the regulations of other local governments in determining which provision is exclusive. He said that he does not have a recommendation on that issue yet, but this would be the place in the charter to discuss it if the Committee chooses to. The next section would deal with the limitations on powers, including taxing powers that require popular approval and tax base limitations on certain taxes and charges.

Frank Josselson suggested that Tim Sercombe avoid using the term tax base for the reasons earlier mentioned--it implies that the government has a tax base which it does not.

Ray Phelps said that it could get into the Ballot Measure Five issue which the charter should not get into.

Frank Josselson suggested that it simply say "limitations for certain taxes and charges."

Tim Sercombe said that if it is a limitation on the amount of revenue that can be raised, then it could be called something different than tax base, but that is truly what it is doing. If the Committee says that the government cannot raise more than a certain amount of tax revenue, then the base of revenue that it can raise is being limited.

Chair Myers said that it is a tax raising revenue limitation. He said that a different term needs to be found because tax base has an association with property tax in the public's mind. He asked if state law regarding tax bases pertains to anything other than property tax.

Tim Sercombe said that he is not aware of any other type of revenue raising to which the term "tax base" is applied. In the outline, after tax issues, there may be debt limit issues or limits on contracting that would also go into this part of the charter that talk about limitations on general powers or functions. He said that the third chapter would be the form of the government which would be brief and generally describe the form of government in terms of the council, chief elected officer, and other appointive offices. Those particular entities would be discussed in separate chapters later on that would deal specifically with each of the entities. Chapter four would be the governing body--its powers, limitations on its powers, its composition, qualifications for office, and ethical limitations. He said that some charters proscribe, separately from state law, self-dealing and say that no councilor shall have a pecuniary interest in any contract in which the expenses are paid by the government and those sorts of things which are a bit more black and white than the present code of ethics that are in ORS 244.040.

The meetings of the regional council would be discussed in this chapter as would vacancies. He said that he is not set on this form. There is some duplication between this chapter and provisions in chapter five which may be put in another chapter because some of the issues about vacancies and qualifications overlap between the councilors and the chief elected officer. Chapter five would deal with the chief elected officer and his/her functions and other provisions relating to that office and its election. Chapter six would be a provision on other officers and commissions of the regional government. It would discuss a regional manager and his/her duties. He said that he put in the outline for discussion, and not for recommendation, the language that is used in the model city and county charter draft on the typical functions of the manager. One provision is the model charter's non-interference clause. RPAC and its terms, qualifications, composition and duties will be discussed in chapter six. He said that the duties listed come from the Committee's deliberations. The municipal judge would also be included in the chapter. He said that the subcommittee already discussed it and he understands his instructions. There would also be miscellaneous provisions on officers and employees, which could include a limitation on holding more than one elected office, officers being employed elsewhere, running for more than one office at the same time, compensation limitations, and issues of a merit system for personnel. Chapter seven would deal with elections--the manner in which elections would occur. Chapter eight would discuss ordinances, how ordinances are adopted, their effective date, reiteration of prior voter approval for certain tax measures, and other controls on ordinances that the Committee considers, such as a single subject limitation. Chapter 13 is the chapter on growth management. He said that he tried to make the language in the chapter more generic than the draft that the Committee has been working with. He said that he would like the subcommittee to tell him if he is becoming too generic and whether or not he should go back to particular words which were key in terms of the Committee's deliberation. He said that, as Larry Derr said earlier, there probably are some words which have particular and loaded meanings which need to be preserved and others do not. For example, he said that he did not know if the term "future vision" is a key concept to put in the charter as what the document is entitled or if it is a more descriptive term. He said that the last chapter would be miscellaneous provisions relating to the continuity of ordinances and rights of the Metropolitan Service District to the new regional government and other issues regarding the separability. He said that there would also be a procedure for charter amendment and revision and there may be a different process to consider to allow for revision of the charter as opposed to its amendment by initiative or referendum. He asked if the structure is problematic in any way or if he is heading in the right direction. He said that he would like to, with the subcommittee's permission, begin to move into drafting a charter following the outline, subcommittee instructions, and identifying where changes or additions should be made.

Frank Josselson said that the Committee received an outline including a preamble and name of the organization which the Committee worked on. He said that he thought it achieved a remarkable degree of consensus.

Janet Whitfield said that it was the *purposes of the government*. The Committee discussed them, but did not vote on them so it was not included.

Frank Josselson suggested that Tim Sercombe look at that document. He said that more time was spent by the Committee in consideration of the growth management issue than anything else. He suggested that Tim Sercombe look at the two documents that were subjected to public hearing--one was an outline and the other was a narrative prepared by Larry Derr which was pretty simple to read. In terms of the other functions of the government, the motions are pretty clear and could be taken verbatim from the minutes.

Chair Myers said that the elements in the points of emphasis for the government were not voted on, but were basically agreed to. The language was not worked out by the Committee.

Ray Phelps said that he agrees that there was a fairly well developed consensus around it.

Frank Josselson said that the Committee spent substantial time on it, re-ordering and word-smithing the points. In terms of a preamble, he said that there was a strong consensus on the Committee that there be a mission statement. He said that the minutes will disclose the consensus of the Committee in terms of what the mission statement ought to say. He said that Tim Sercombe's job would probably be the easiest with the functions because that is where the Committee spent most of its time.

Tim Sercombe said that the outline should reflect, in terms of those functions, the Committee deliberations.

Frank Josselson said that the future vision concept is crucial to those who advocated it. The actual definition of what the future vision is was word-smithed meeting after meeting. He said that the specific language is there and should be incorporated verbatim.

Tim Sercombe said that some of the language is not particularly elegant and could possibly be expressed more generically while still having the mandate. He said that he needs to know about the degree of fidelity to the draft that the Committee looked at. He said that he has looked at it and has drafted it more generically. He said that he needs to know if there is consensus that the charter should include the Committee language and, for example, that the only description for the commission that advises the council on the future vision is that it must be broad-gauged.

Frank Josselson said that, in respect to those functions, more blood was shed over each of the words and more thought was given to them than anything else in the charter. He suggested that Tim Sercombe stick as close to the language as possible.

Chair Myers said that there may be individual detail which is captured in a short hand way that, from the standpoint of drafting, could be restated in a way that might be readily agreed to be more appropriate. He said that "broad-gauged" is not a term that he would expect to see in the charter. He said that there is probably a more elegant or legal way to describe it. He said that "broad-gauged" captures a policy judgement which can be faithfully adhered to with a slightly different statement.

Frank Josselson said that Tim Sercombe should be able to identify what was important and what was not in the outline. He said that he would be comfortable if the subcommittee directed Tim Sercombe to confer with Larry Derr about any of the issues. He said that he thinks the Committee would regard Larry Derr as a pretty objective commentator on the deliberations of the Committee with respect to those function issues.

Ray Phelps said that he would prefer to stay with the protocol that was originally called out for. He said that Chair Myers should make the decision as to whether or not Larry Derr can be more informative.

Chair Myers suggested that Tim Sercombe identify where he had questions about specific language questions and let him know.

Tim Sercombe said that he understands his instructions to be that the subcommittee does not want him to rewrite the provisions so that it is more charter-like. If there are particular problems with particular choices of words, those will be identified.

Ray Phelps said that another way of getting to the issue of language is to have Larry Derr react to it.

Chair Myers suggested that each subcommittee member review the draft and call him with their

questions and comments. He said that there should be a conduit between either him or Janet Whitfield to Tim Sercombe so that Tim Sercombe is not getting many different lines of communication and so that he knows what information is flowing. He asked that the members review it as soon as possible. He said that it would be more in the spirit of the importance assigned to growth management if it could all be moved back and made part of the authority of the regional government in chapter two. He said that the Committee conception had been that the first line of responsibility assigned to the government would be pertaining to growth management and then the service functions of the district.

Tim Sercombe said that he understands that the growth management process is not really a function, or even an authority, but it is a particular program that the Committee wants to put in the charter to assure that the function of regional planning is carried out in a particular way so he had not put it in a chapter describing the functions and process for taking on functions, but put it in a separate chapter as a program that is an implementation of a function or a way that a function is desired to be carried out.

Frank Josselson said that it is important for Tim Sercombe to understand that a majority of the Committee said that growth management policy making is the most important function of the government. He said that implies that everything else the government does is secondary. The preamble, statement of purpose, and authority of regional government ought to reflect that.

Ray Phelps said that he agrees with Frank Josselson's interpretation.

Tim Sercombe said that he understands. He said that he assumed that was the reason the Committee recommended a special program for growth management in the charter. He said that it would affect other parts of the charter in terms of the priority of mission, such as the preamble. In terms of empowerment, those things may not need prioritization of mission. He said that it would flow out more in the preamble and the chapter that describes how growth management planning is done.

Frank Josselson said that some members went to the extreme of proposing that the council be required to spend half of every meeting on growth management. He said that the Committee viewed the functions of the government as being primarily to deal with regional growth.

Mary Tobias said that the Committee never talked about what a charter is and she is convinced that, although the members may think they know, the members do not know what a charter is. She said that is one reason for this discussion and may end up being what defeats the charter at the polls. She said that she does not believe that the charter is the place for a primary function of the government to be stated as growth management. She said that presumes that there will be growth to manage which is a presumption that cannot be based in fact, it can only be forecasted. She said that she has no problem with the way the Tim Sercombe laid it out, except that she thinks chapter two, *authority of regional government*, is mistitled. She said that Frank Josselson has faithfully represented the majority opinion of the Committee, but the majority opinion of the Committee was arrived at because they do not know what a charter is and what it is really suppose to do as a document.

Frank Josselson said that the regional government is more analogous to an agency with enumerated powers than a general purpose municipal government. In terms of a charter, it is a charter that is going to be unique for local governments in the state of Oregon because it will call out specific enumerated powers with procedures to expand the list.

Tim Sercombe said that he understood that is what the statutes do now.

Frank Josselson said that is correct.

Tim Sercombe asked if there is Committee consensus on the voters' intent on adopting a constitutional amendment to allow for home rule and self-empowerment and the distinction between that process and a process of delegated functions that are now set out by statute. He said that, presumably, the Committee must have discussed how it is now set up and the opportunity created by the passage of the constitutional amendment as distinguished from what exists now is how empowerment works under a charter, as distinguished from a statutory scheme.

Ray Phelps said that he does not think the Committee talked about it very much, but the representation made with respect to the need for the charter, both legislatively and politicking, was with the notion that this government could set its own work agenda rather than have itself yanked back and both depending on whether it could get enough votes in Salem. To that extend, he said that was the common and articulated understanding of what the charter would accomplish. He said that Frank Josselson is tracking with that kind of notion.

Frank Josselson said that he does not know that the Committee ever agreed to it, but Ron Cease said early in the process that, in the charter, the chapters in ORS 268 delegated to Metro probably could not be expanded, but they could be contracted. He said that the functions delegated to the regional government would contract to some extent. The charter would enumerate them and prescribe procedures for expanding the list of enumerated powers. He said that, in that respect, it is a charter that is very much unlike any other municipal charter.

Tim Sercombe said that it is very clear from the Committee deliberations that they want limitations on functions.

3. Additional Business

Chair Myers said that it would be more useful to have another meeting of the subcommittee to begin working through a draft and begin to identify and arrive at recommendations for unresolved details before the next full Committee meeting.

The next meeting of the subcommittee was scheduled for Friday, May 29 at 8:00 a.m.

The full Committee meeting of May 28 was canceled.

Chair Myers said that the full Committee will receive the draft of the charter before the June 6 meeting in order to prepare.

Frank Josselson asked that the subcommittee members receive a copy of the charter draft the day before the subcommittee meeting. He asked that Tim Sercombe be given a copy of the preamble and statement of purpose discussed by the Committee.

The subcommittee meeting was adjourned at 11:00 a.m.

Respectfully submitted,



Kimi Iboshi
Committee Clerk

Reviewed by,



Janet Whitfield
Committee Administrator