

BEFORE THE METRO COUNCIL

AN ORDINANCE AMENDING ORDINANCE)	ORDINANCE NO. 93-480A
NO. 92-449B REVISING THE FY)	
1992-93 BUDGET AND)	Introduced by the
APPROPRIATIONS SCHEDULE FOR THE)	Finance Committee
PURPOSE OF FUNDING COUNCILOR)	
SALARIES AND BENEFITS AND A)	
CITIZEN INVOLVEMENT PROGRAM;)	
AND DECLARING AN EMERGENCY)	

WHEREAS, Voters of the Metropolitan Service District approved a Metro Charter on November 3, 1992; and

WHEREAS, The Metro Charter removes the authority to pay Metro Councilors a per diem payment and authorizes the payment of a salary to Councilors for services rendered; and

WHEREAS, The Metro Charter creates an Office of Citizen Involvement and requires the Metro Council to establish a citizen's committee, a citizen involvement process and appropriate sufficient funds to operate the office and committee; and

WHEREAS, The Metro Council has reviewed and considered the need to transfer appropriations within the FY 1992-93 Budget; and

WHEREAS, The need for a transfer of appropriation has been justified; and

WHEREAS, Adequate funds exist for other identified needs; now therefore,

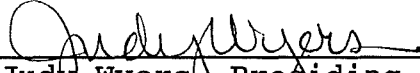
THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. That Ordinance No. 92-449B, Exhibit B, FY 1992-93 Budget, and Exhibit C, Schedule of Appropriations, are hereby amended as shown in the column titled "Revision" of Exhibits A

and B to this Ordinance. The amendment transfers \$159,416 from the General Fund Contingency to the Council Department Personal Services category and \$85,000 from the Council Department Materials and Services category to the Personal Services category for the purpose of paying Councilors salaries and benefits and providing for the Office of Citizen Involvement and citizen's committee.

2. This Ordinance being necessary for the health, safety, or welfare of the Metro area, for the reason that the Metro Charter takes effect January 1, 1993, requiring that compensation to Councilors be in the form of a salary, and that an Office of Citizen Involvement and a citizen's committee be established and funded, an emergency is declared to exist and this Ordinance takes effect upon passage.

ADOPTED by the Metro Council this 14th day of January, 1993.


Judy Wyers, Presiding Officer

ATTEST:


Clerk of the Council

Exhibit A
Ordinance No. 93-480A

FISCAL YEAR 1992-93		CURRENT BUDGET		REVISION		PROPOSED BUDGET	
ACCT #	DESCRIPTION	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT
GENERAL FUND: Council							
<u>Personal Services</u>							
511110	ELECTED OFFICIALS						
	Councilors		0	2.34	162,400	2.34	162,400
511121	SALARIES-REGULAR EMPLOYEES (full time)						
	Council Administrator	1.00	67,766		0	1.00	67,766
	Sr. Management Analyst	3.00	136,188		0	3.00	136,188
	Assoc. Management Analyst	0.50	19,000	0.50	20,000	1.00	39,000
	Clerk of the Council	1.00	30,600		0	1.00	30,600
511221	WAGES-REGULAR EMPLOYEES (full time)						
	Administrative Secretary	3.00	79,366		0	3.00	79,366
	Secretary	1.00	19,199		0	1.00	19,199
511400	OVERTIME		2,500		0		2,500
512000	FRINGE		120,570		62,016		182,586
Total Personal Services		9.50	475,189	2.84	244,416	12.34	719,605
<u>Materials & Services</u>							
521100	Office Supplies		7,100		0		7,100
521320	Dues		500		0		500
524110	Accounting & Auditing Services		60,000		0		60,000
524190	Misc. Professional Services		20,000		0		20,000
525640	Maintenance & Repairs Services-Equipment		1,000		0		1,000
525733	Operating Lease Payments-Other		15,000		0		15,000
526200	Ads & Legal Notices		1,300		0		1,300
526310	Printing Services		3,200		0		3,200
526410	Telephone		900		0		900
526440	Delivery Services		700		0		700
526500	Travel		10,000		0		10,000
526800	Training, Tuition, Conferences		5,500		0		5,500
528100	License, Permits, Payments to Other Agencies		9,500		0		9,500
528200	Election Expense		188,000		(25,000)		163,000
529110	Council Per Diem		104,400		(60,000)		44,400
529120	Councilor Expenses		33,250		0		33,250
529500	Meetings		11,000		0		11,000
Total Materials & Services			471,350		(85,000)		386,350
<u>Capital Outlay</u>							
571500	Purchases-Office Furniture & Equipment		4,000		0		4,000
Total Capital Outlay			4,000		0		4,000
TOTAL EXPENDITURES			950,539		159,416		1,109,955

Exhibit A
Ordinance No. 93-480A

FISCAL YEAR 1992-93		CURRENT BUDGET		REVISION		PROPOSED BUDGET	
ACCT #	DESCRIPTION	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT
GENERAL FUND:General Expenses							
<u>Total Interfund Transfers</u>			2,912,757		0		2,912,757
<u>Contingency and Unappropriated Balance</u>							
599999	Contingency		452,085		(159,416)		292,669
599990	Unappropriated Fund Balance		261,912		0		261,912
<u>Total Contingency and Unappropriated Balance</u>			713,997		(159,416)		554,581
TOTAL EXPENDITURES		16.25	5,233,578	2.84	0	19.09	5,233,578

**Exhibit B
Schedule of Appropriations
Ordinance No. 93-480A**

	Current Appropriation	Revision	Proposed Appropriation
GENERAL FUND			
Council			
Personal Services	\$475,189	\$244,416	\$719,605
Materials & Services	\$471,350	(\$85,000)	\$386,350
Capital Outlay	\$4,000	\$0	\$4,000
Subtotal	\$950,539	\$159,416	\$1,109,955
Executive Management			
Personal Services	\$330,171	\$0	\$330,171
Materials & Services	\$142,742	\$0	\$142,742
Capital Outlay	\$0	\$0	\$0
Subtotal	\$472,913	\$0	\$472,913
Office of Government Relations			
Personal Services	\$100,901	\$0	\$100,901
Materials & Services	\$82,471	\$0	\$82,471
Capital Outlay	\$0	\$0	\$0
Subtotal	\$183,372	\$0	\$183,372
General Expenses			
Interfund Transfers	\$2,912,757	\$0	\$2,912,757
Contingency	\$452,085	(\$159,416)	\$292,669
Subtotal	\$3,364,842	(\$159,416)	\$3,205,426
Unappropriated Balance	\$261,912	\$0	\$261,912
Total General Fund Requirements	\$5,233,578	\$0	\$5,233,578

ALL OTHER APPROPRIATIONS REMAIN AS PREVIOUSLY ADOPTED

FINANCE COMMITTEE REPORT

ORDINANCE NO. 93-480A AMENDING THE FY 1992-93 BUDGET AND APPROPRIATIONS SCHEDULE TO FUND COUNCILOR SALARIES AND BENEFITS AND THE CITIZEN INVOLVEMENT PROGRAM

Date: January 8, 1993

Presented By: Councilor Devlin

COMMITTEE RECOMMENDATION: At its January 7, 1993 meeting the Committee voted unanimously to recommend adoption of Ordinance No. 93-480 as amended. Present and voting were Councilors Buchanan, Devlin, Kvistad, Monroe and Van Bergen.

COMMITTEE DISCUSSION/ISSUES: Don Carlson, Council Administrator presented the Staff Report. He indicated the ordinance provides sufficient funds to cover councilor salaries and fringe benefits as approved by District voters with adoption of the Charter. The ordinance also provides funds to increase the Associate Management Analyst position (Ms. Shiochi) from half time to full time. The full time status is necessary to meet the needs of staffing the Metro Committee on Citizen Involvement and the Councilor Outreach program.

Mr. Carlson presented a proposed amendment to the ordinance to transfer \$25,000 from the Election Expense line item in the Materials and Services category to the Personal Services category and reduce the amount needed from the General Fund Contingency from \$184,416 to \$159,416. This amendment is proposed based on the most current estimates of the cost of the November election. He indicated the final costs from Multnomah County have not been forwarded but has been sufficiently assured that there will be at least \$25,000 in under expenditure in this line item.

In response to a question from Councilor Buchanan, Mr. Carlson said the budget change would not require the Associate Management Analyst position to be opened up for recruitment. The position was originally filled through an extensive competitive recruitment and selection process to provide staff assistance to the Metro CCI and Council on a part time basis. The request to increase the position to full time is based on the increased demand to provide the same service to the Metro CCI and Council.



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Date: December 16, 1992
To: Finance Committee
From: Donald E. Carlson, *DEC* Council Administrator
Re: Finance Committee Introduction of Councilor Salary Ordinances

Please find attached Draft Ordinance No. 93-480 and Draft Ordinance No. 93-481. The purpose of Ordinance No. 93-480 is to amend the FY 92-93 Budget and Appropriations Schedule to pay for Councilor salaries and benefits and the citizen involvement program required under the Charter. The ordinance is the same as reviewed and discussed by the Council at its December 14 Work Session.

The purpose of Ordinance No. 93-481 is to amend the Metro Code to provide establish procedures for the payment of Councilor salaries including a waiver procedure. The ordinance also repeals the provisions in the Code for the payment of per diem. This ordinance is different from that discussed at the December 14 Work Session in that:

1. In response to the concern expressed by Councilor Buchanan about the waiver period, the six month period has been deleted and language has been added to state that the waiver will remain in effect until canceled in writing by the councilor. The cancellation would be effective at the beginning of the next pay period.
2. In response to the question about the base for the provision of benefits language has been added to clarify that benefits would be based on the full salary provided by law regardless of the waiver of any salary payments.

Both these changes have been developed with the assistance of General Counsel, Dan Cooper.

Also attached is a copy of the December 9, 1992 memo to the Council which explains the purpose of the two ordinances.

Council Staff recommends that the Finance Committee adopt a motion to introduce both ordinances for filing with the Council Clerk and First Reading on the December 22, 1992 Council Meeting.

Council Salary Ordinances.memo



METRO

2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Date: December 9, 1992

To: Metro Council

From: Donald E. Carlson, ^{DEC} Council Administrator

Re: Draft Ordinances to Implement Charter Provisions for Councilor Salaries

The purpose of this memo is to provide draft ordinances to implement the salary provisions of the Metro Charter. The memo also contains two legal opinions from General Counsel on the subject.

The first opinion is in the form of a letter to the Presiding Officer dated December 7, 1992 (see Attachment 1) which states that a councilor, including the Presiding Officer, may waive all or a portion of the salary provided for in the Metro Charter. The opinion also recommends that the Council adopt an ordinance establishing procedures to implement the waiver provisions. That draft ordinance is included in this memo as Attachment 4.

The second opinion is a memo to me dated December 7, 1992 (see Attachment 2) which states that the general powers clause of the Charter (Section 9) contains sufficient authority for councilors to receive fringe benefits such as provided to Metro employees.

Attachment 3 is a draft ordinance which amends the current year budget and appropriations schedule to provide funds for councilor salaries and fringe benefits as well as additional funds for the citizen involvement program. As shown in Exhibit A the councilor salary and fringe portion of the amendment is an additional \$217,616 and the salary and fringe costs for the citizen involvement program is an additional \$26,800. The latter amount would provide sufficient funds to increase the Associate Council Analyst position to full-time (see Carlson/Shioishi memo dated December 7, 1992). The proposed amendment assumes all councilors will receive the full amount of the salary and a fringe rate of 34%. These additional costs are proposed to be funded with unspent Councilor Per Diem funds (\$60,000) and a transfer from the General Fund Contingency (\$184,416). Council Staff recommends the use of any unspent election expense funds left over after paying for the November election to reduce the draw on the Contingency. The costs of the election should be known prior to action on this ordinance in January 1993.

Attachment 4 is a draft ordinance suggested by General Counsel. It provides for councilors to be paid on a twice-a-month basis at the same time as Metro employees and a requirement for councilor's who wish to waive all or a portion of their salaries to do so for a period of not less than six months and to sign a release form upon receipt of each pay check.

Please review this material and bring it with you to the Council workshop on December 14, 1992. If you have any questions or need additional information, please let me know.

cc: Rena Cusma, Executive Officer
Dan Cooper, General Counsel

Ord. 93-xxx CouSal.memo



METRO

ATTACHMENT 1

2000 SW First Avenue
Portland, OR 97201-5398
(503) 221-1646
Fax 241-7417

December 7, 1992

The Honorable Jim Gardner
Presiding Officer
2930 S.W. Second Avenue
Portland, OR 97201

Dear Councilor Gardner:

Re: Waiver of Councilors' Salaries Under the 1992 Metro Charter

You and other Councilors have asked this Office to advise you regarding the ability of a Councilor or the Presiding Officer to waive all or part of the salary provided for in the new Metro Charter.

The case law in Oregon as well as most of the case law elsewhere approaches the validity of a salary waiver from the standpoint of an officer who is seeking a judgment for full pay after having purportedly "waived" all or part of a salary. These are cases where the officer has at first seemingly agreed to take less than the authorized salary and then at a later time sought to be paid in full. Our opinion is that the Charter clearly would preclude any challenge to the validity of an agreement by a Metro Councilor including the Presiding Officer to waive all or part of a salary. However, we believe an implementing ordinance is advisable in order to ensure that there is certainty as to the commitment to waive the salary both as to the amount waived and the duration of the waiver.

In understanding the scope and nature of this opinion, it is important to recognize that the discussion of the law starts from the premise that no legal prohibition exists against accepting a paycheck for less than what someone is willing to pay. The issue is whether an elected official or other officer ever gives up the ability to change their mind and at a later date ask the courts to force payment of the amount that they voluntarily relinquished. Since the Charter addresses the issue of waiver of a salary, it is appropriate for the District as an entity to know what its right is to expect that any waiver of a salary, whether partial or in full, be final and not subject to being rescinded at a later time. This opinion addresses that question and that question only. We specifically do not address questions regarding the effect of a waiver on individual Councilor's income tax liability or other employment or other legal issues personal to individual Councilors. We also do not address any questions related to the perceived political implications of any salary waiver decisions.

Executive Officer
Rena Cusma

Metro Council

Jim Gardner
Presiding Officer
District 3

Judy Wyers
Deputy Presiding
Officer
District 8

Susan McLain
District 1

Lawrence Bauer
District 2

Richard Devlin
District 4

Edward P. Gronke
District 5

George Van Bergen
District 6

Ruth McFarland
District 7

Tanya Collier
District 9

Roger Buchanan
District 10

Ed Washington
District 11

Sandi Hansen
District 12

I. Background

Chapter V, Section 21(1), of the 1992 Metro Charter provides that "[a] councilor may waive a salary." The Charter does not specifically state whether a Councilor may waive part of a salary. It also does not specifically state whether the Presiding Officer may waive all or part of a salary.

II. Questions Presented

Can a Councilor validly waive part of a salary?

Can the Presiding Officer validly waive all or part of a salary?

III. Answer to Questions Presented

Yes, for both questions. However, in order to avoid any possible ambiguities, it would be desirable for the Council to enact an ordinance implementing the Charter's waiver provision by providing for binding salary waiver agreements and written releases by each Councilor who waives part of a salary, and for any salary waivers by the Presiding Officer, upon periodic receipt of any salary remaining after the waiver.

IV. Analysis

A. Common Law

"At common law, acceptance by a public officer of an amount less than his or her salary does not represent a waiver, estoppel or accord and satisfaction." McQuillin Mun Corp § 12.191. (3rd Ed). See, e.g., De Boest v. Gambell, 35 Or 368, 58 P2d 72 (1899); Brown v. Department of Military Affairs, 386 Mich. 194, 191 N.W.2d 347 (1971). Accordingly, courts have often held that even a voluntary agreement by a public officer to accept less than the statutorily mandated salary of his/her office is void, and the public officer may, in an appropriate legal action, recover the full amount of the salary notwithstanding any agreements to the contrary. Fisher v. Lane, 174 Or 438, 149 P2d 562 (1944); McQuillin § 12.191., supra.

Courts base this common law doctrine on two separate principles. The first consideration is that a public official's salary is not contractual in nature, but rather a matter determined by statute or by organic

enactment. Since the salary under this view is simply not a matter governed by contract law in the first place, no purported amendment or waiver of the salary provisions mandated by law can be deemed effective. Dunn v. Meyer, 193 Ga. 91, 17 S.E.2d 275 (1941).

The second principle behind the common law rule is a court-formulated notion of public policy. The vast majority of American courts have reasoned that allowing a public official to waive all or part of a salary would offend public policy by transforming the election process into an "auction method," whereby the candidate willing to serve for the least amount of salary would gain an electoral advantage. Allen v. City of Lawrence, 61 N.E.2d 133 (1945); Sparks v. Boggs, 339 S.W.2d 480, (1960).

B. Oregon Supreme Court Precedents

Oregon courts have generally followed this widespread national rule, but with a significant exception. The primary case in this area is De Boest v. Gambell, 35 Or 368, 58 P2d 72 (1899). In De Boest, the plaintiff, an officer of the City of Portland, accepted a salary less than the amount fixed by law, and then, upon leaving office, brought an action for the remainder. The Oregon Supreme Court stated the general rule governing these cases:

"It may be stated at the outset that, where the compensation of a public officer is fixed by law, it cannot be reduced by his superior officer or the person by whom he is employed, and the mere fact that he takes the reduced salary does not prevent him from claiming the residue; nor is an agreement or promise to accept such reduced salary binding upon him. The statutory salary of a public office belongs to the incumbent, as an incident of the office and as a matter of right; and he is entitled to receive it, not by force of any contract, but because the law attaches it to the office. It cannot be reduced except by some valid statute, and hence any at-

tempted reduction thereof by any officer or board is void, and the mere acceptance of such reduced salary does not constitute a waiver or create an estoppel." De Boest, supra, 35 Or at 372-373. (emphasis added) (citations omitted)

However, the court in De Boest recognized an apparent exception to this rule for agreements between the public official and the public body which have been "fully executed and performed":

"Notwithstanding the fact that the resolution of the board [improperly reducing the plaintiff's salary] and the plaintiff's agreement to accept the reduced salary were void, he clearly had a right to release the city from any claim for his salary over and above the stipulated amount; and when at the end of each month he accepted the reduced salary as full compensation for this services for the preceding month, in pursuance of his agreement, it was, in our opinion, substantially the same as if he had made a donation to the city of the difference between his agreed and the statutory salary. It was a voluntary act on his part, in pursuance of an agreement or contract entered into by him, and there is no reason why he ought not now to be bound by it." De Boest, supra, 35 Or at 374-5.

The Court stated the general rule governing these situations as follows:

"Where a public officer enters into an agreement with the board or person by whom he is employed or appointed to accept an office and discharge the duties

thereof for a less compensation than that provided by law, and such an agreement has been fully executed and performed, although invalid, as against public policy, at its inception, it is, after having been so executed, in our opinion, binding in law, as it always was in morals.

...[W]here the officer actually agrees to the acceptance of the reduced salary, and, after it has been earned, does so accept it, he will be held to be bound by his agreement and contract, the same as in any other case." De Boest, supra, 35 Or at 375-378.

The Supreme Court followed this doctrine, in Chandler v. City of Elgin, 129 Or 558, 278 P2d 581 (1929). In Chandler a city marshall accepted a lower salary than prescribed by law. After leaving office, the official brought an action for the entire amount, even though, during each month of his service, he had requested only the lower amount and signed a receipt acknowledging full payment. The Court, citing, De Boest, supra, held that, while such an agreement was invalid prior to performance:

"after the performance of the services the party may receive less compensation therefor than the legal salary, if he choose [sic] to do so. And where he renders a bill purporting to cover such services, and the whole thereof, and such bill is allowed and paid as rendered, and payment accepted without objection or protest, it amounts to an adjudication, and, in the absence of surprise, accident, or mistake of fact, cannot be reopened. Parties cannot so divide their claims and present them by installments.

...This we believe to be the law, in accord with the great weight of authority

and controlling here." Chandler, supra,
129 Or at 562, citing De Boest, supra,
and O'Hara v. Town of Park River, 1.
N.D. 279, 47 N.W. 380.

A contrary result occurred in Fisher v. Lane, 174 Or 438, 149 P2d 562 (1944). There, the Court refused to apply the De Boest and Chandler exception to a waiver executed by a justice of the peace, because allowing a waiver in that situation would have violated the separate public policy interest in an impartial judiciary.

C. Effect of 1992 Metro Charter

Significantly, none of the courts in the cases cited above were presented with specific legislative or constitutional authority allowing public officials to waive their salaries, in whole or in part. Therefore, these cases, and the reasoning behind them, are of limited usefulness in light of the explicit salary waiver provision contained within the 1992 Metro Charter:

"Section 21. Compensation of Elected Officers

(1) Council. The salary of the council presiding officer is two-thirds the salary of a district court judge of this state. The salary of every other councilor is one-third the salary of a district court judge of this state. A councilor may waive a salary." Chapter V, Section 21(1), of the 1992 Metro Charter.

By specifically permitting a Councilor to "waive a salary," the Charter effectively does away with much of the rationale that supported the common law anti-waiver rule in the first place. The non-contractual nature of a Councilor's salary can no longer support the notion that the salary cannot be waived where, as here, the organic legislation of the public body in question specifically allows waiver. More importantly, the court-formulated concept of what constitutes good public policy has clearly been supplanted by the judgment of the

Metro electorate that salary waivers ought to be permitted. Finally, even the Oregon cases prohibiting waiver do not apply when "some valid statute" would permit the waiver. De Boest, supra, 35 Or at 372-373.

While it is clear that the Charter's provisions make it possible for a Councilor to "waive a salary," the Charter is silent on the question of whether a Councilor may waive part of a salary. Because the electorate of the region has, through the Charter, effectively overruled the common law rationale for prohibiting waivers in the first place, there is no longer a need for a court to determine what public policy in this area should be. The electorate has determined that, as a matter of public policy, salary waivers ought to be permitted for Metro Councilors. Thus, the Charter has dispensed with the major public policy consideration upon which the cases cited above were based. For this reason, the cases disallowing salary waivers are of doubtful validity where Metro Councilors are concerned.

Moreover, the Oregon cases do allow for salary waivers under certain specified conditions. Although stating consistently that salary reduction agreements are void while executory, the Oregon Supreme Court has held that such agreements are nevertheless binding if a public official voluntarily releases the public body from any claims he/she may have, upon performance of the duties in question, and pursuant to an agreement between the public body and the official. Based on these precedents, even if the Charter were silent on the issue of a salary waiver, there would seem to be nothing prohibiting the Council from enacting an ordinance or resolution implementing the salary waiver provision of the Charter by requiring Councilors who wish to waive all or a part of a salary to do so by formal agreement with Metro, including the signing of a release upon each periodic receipt of compensation which acknowledges that the Councilor has been fully compensated for all services rendered during the period in question, and releasing Metro from any future salary claims. Given the explicit language of the Charter which clearly provides for a waiver of all of a salary, we conclude there is no basis for a court to invalidate a partial waiver of a salary.

As quoted above, the relevant Charter section provides "a councilor may waive a salary." We believe that in the context of Section 21(1), the term "councilor" includes the Presiding Officer. The first

sentence of Section 21 describes the salary of the Presiding Officer. The second sentence describes the salary of "every other councilor." In this context the use of the term "a councilor" in the next sentence means all Councilors, not "every other councilor."

Charter Section 16(5) provides that the Presiding Officer is elected from the Council membership. With the exception of the salary provided for in Section 21, there is no other language in the Charter that would indicate that the Presiding Officer is not a Councilor for the purpose of being authorized to waive a salary. Further, as is indicated above, even if the Charter is construed as being silent on this issue, under Oregon law a salary waiver by the Presiding Officer would be upheld as long as the procedural requirements established by the Oregon Supreme Court are complied with.

V. Conclusion

Pursuant to the 1992 Metro Charter, any Metro Councilor, including the Presiding Officer, may waive all or part of a salary.

However, in order to assure that such waivers are valid and binding, it would be desirable that they take place within the framework of a duly enacted ordinance. Such an enactment should implement the salary and waiver sections of the 1992 Metro Charter by providing that any Councilor may waive part of a salary by signing a written agreement to that effect. Also, the ordinance should specify that Councilors' salary shall be paid periodically, and that each periodic payment shall represent full payment for all services rendered during the period in question. Finally, each Councilor who waives part of a salary should be required to sign a release upon receipt of each periodic salary payment stating that the Councilor has been paid in full for all public services for that period, and releases any and all further salary claims against Metro for the period in question.

Yours very truly,



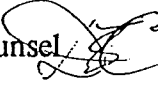
Daniel B. Cooper,
General Counsel

**METRO**2000 S.W. First Avenue
Portland, OR 97201-5398
503/221-1646

Memorandum

Date: December 7, 1992

To: Don Carlson, Council Administrator

From: Daniel B. Cooper, General Counsel 

Regarding: BENEFITS FOR METRO COUNCILORS
Our file: 6.§22.C

You have requested that this Office review the 1992 Metro Charter and advise you whether it is permissible for the Council to provide that, in addition to the salary provided for Councilors pursuant to Charter Section 21, Councilors receive an employee benefits package (medical, dental, insurance, etc.) similar to that provided for other Metro employees.

For the reasons stated below, we believe since there is no provision in the Charter that prohibits the Council from providing for the payment of such a benefit package, the general powers clause (Section 9) contains sufficient authority for doing so.

Section 21 of the Charter establishes the salary for Councilors, the Presiding Officer, the Auditor, and the Executive Officer. No other provision of the Charter specifically authorizes or restricts the ability of the Council to establish a compensation package for all Metro employees. This Office previously has advised the Council that pursuant to the provisions of ORS 268.160, the Council was precluded from paying for medical insurance and other benefit costs for Councilors because Councilors were not considered to be employees of the District pursuant to the statute, rather as officers, they were restricted to receiving only the compensation provided for by the statute (per diem and other necessary expenses). The provision of the Charter, Section 21, authorizing and directing the payment of a salary to the Councilors, indicates that the voters have approved a significant policy shift and that the Councilors no longer are restricted in this fashion.

District court judges receive salary and a benefit package pursuant to Oregon law. The Charter ties the salary of Councilors, the Presiding Officer, the Auditor, and the Executive Officer to the salary of a district court judge. The Charter specifically restricts the Metro Executive Officer (Section 17) and the Metro Auditor (Section 18) to serve full-time and prohibits their employment by any other person or entity while serving in that office. The Charter does not provide a similar restriction for the offices of Councilors, including the office of Presiding Officer. The Charter, however, does not provide for the specific payment of benefits in the form of additional compensation for any persons including the Auditor or the Executive Officer.

Don Carlson
Page 2
December 7, 1992

The only way to conclude that Councilors would not be eligible for receipt of employment benefits, such as health and medical and dental insurance, etc., would be to reach the conclusion that the Executive Officer and the Auditor were also ineligible for such benefits. Since the Charter does not specifically prohibit the payment of compensation benefits, Section 9 of the Charter (General Grant of Powers) is sufficient to grant authority to the Council to legislate a benefits package for itself, the Executive Officer, the Auditor, and all other Metro employees.

I am attaching for your reference the previous opinion of this Office to Councilor Bauer dated April 9, 1990, in this regard.

dr
1646

Attachment

Date: April 9, 1990
To: Councilor Larry Bauer
From: Daniel B. Cooper, General Counsel
Regarding: REIMBURSEMENT TO METRO COUNCILORS FOR THE COST OF
METRO HEALTH INSURANCE COVERAGE

I understand that you have requested that funds be included in the FY 1990-91 budget to allow any Councilor who chooses to join the District's health insurance program to receive reimbursement for this expense.

I have been asked by the Council Administrator to review the proposal to determine whether it would be possible for the Council to so budget and for such reimbursement payments to be made.

For the reasons stated below, my conclusion is that reimbursement of Metro Councilors by the District for the expense of obtaining medical insurance in all probability violates the provisions of ORS 268.160.

ORS 268.160 provides in pertinent part:

"Councilors shall receive no other compensation for their office other than a per diem for meetings, plus necessary meals, travel and other expenses as determined by the council."

The provisions of ORS 268.160 pertaining to the Metropolitan Service District Council are similar to the provisions of ORS 198.190 relating to special districts in general:

"The governing body may provide for reimbursement of a member for actual and reasonable traveling and other expenses necessarily incurred by member in performing official duty."

Similarly, the provisions of ORS 267.112(5) pertaining to Tri-Met Directors provide:

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"Directors shall not be entitled to compensation for their services but shall be entitled to reimbursement for actual and necessary expenses incurred or paid in the performance of their duties as members of the board."

The provisions of some city charters are also similar:

"No compensation shall be paid for members of the council except for 'allowance for expenses incidental to that service in an amount and in a manner set by the council by ordinance.'" Section 13, Lake Oswego City Charter.

Research has revealed no Oregon Appellate Court decisions construing any of these statutory provisions regarding the question of whether or not reimbursement for medical or other insurance costs could be considered to be a reimbursable expense.

In general the question of whether or not an expense is reimbursable for a municipal officer is considered to depend upon necessity of the official incurring the expense as a function of their official duties and the benefits received by the public or the municipality from the incurrence of the expense. McQuillan Municipal Corporations states:

"The true test in all such cases is, was the act done by the officer relative to a manner in which the local corporation had an interest or have an affect on municipal rights or property, or the rights or property of the citizens which the officer was charged with an official obligation to protect and defend."

McQuillan Municipal Corporations, Section 12.190.

In Brown v. Wingard, 285 S.C. 478, 330 S.E.2d, 301 (1985), the South Carolina Supreme Court held that a statutory provision that stated:

"The mayor and council may also receive payment for actual expenses incurred in the performance of their official duties with limitations prescribed by ordinance."

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Precluded the reimbursement of the mayor and council members of the City of Greenwood, South Carolina, for the expenses of their spouses travelling with them to attend a National League of Cities convention in Los Angeles in 1982. The Court found that such expenses were not directly related or required in the performance of the official duties of the mayor and council members.

In reaching the conclusion that reimbursement of medical insurance costs for Councilors is not a permissible expense for which Council members may be reimbursed, I have considered the following factors as discussed below.

Medical insurance is normally provided as a benefit furnished to employees as part of their overall compensation package. See ORS 243.205 in general. ORS 268.160 has the effect of precluding the District from treating Council members as employees in that payment of any salary is clearly prohibited. Payment of medical benefits which is commonly included as part of the overall compensation package for employees would probably be considered as compensation not reimbursement of an expense. This is particularly true if the reimbursement was for only expenses incurred in purchasing the coverage as part of the package furnished to Metro employees.

Secondly, and most importantly, the expense of obtaining medical insurance is not directly related to the functions of being a Metro Councilor. Applying the test set forth in McQuillan, I can find no rational connection between the need to incur the expense of obtaining medical coverage and holding the office of being a Metro Councilor. All individuals in our society face the question of whether they should obtain medical insurance coverage and face the risk associated of not having such coverage and finding themselves in a position of needing to pay for needed medical care directly. While it is possible to envision certain fact scenarios where holding a certain public office might greatly increase the risk of incurring medical expenses or place an individual in such a category that medical insurance otherwise available to citizens at large would not be available because of factors associated with holding a certain public office, I am aware of no information that makes me believe that is true of holding the office of Metro Councilor. There are no factual circumstances of which I am aware of which would support a finding by the Council that there is a direct connection between the need for obtaining medical insurance and holding the office of Metro Councilor. Absent such a finding by the Council I believe the courts would not support a Council determination that medical insurance was in fact a reimbursable expense. The fact

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that the insurance expense being reimbursed is that provided to the District's employees would also make it more difficult to sustain the position that medical insurance is a reimbursable expense.

If the members of the Council desire to pursue this matter further I would recommend that clarifying legislation be sought to specifically allow the payment of such insurance benefits as a reimbursement.

Some local jurisdictions are allowed to make payments of salary to elected officials. They are not subject to the restrictive legislation that the Metro Council is subject to and have the flexibility to provide insurance benefits along with the salary package. The circumstances at Metro are different because of the provisions of ORS 268.160.

DBC/gl

1094

cc: Donald Carlson

BEFORE THE METRO COUNCIL

AN ORDINANCE AMENDING ORDINANCE NO.)	ORDINANCE NO. 93-480
92-449B REVISING THE FY 1992-93)	
BUDGET AND APPROPRIATIONS SCHEDULE)	Introduced by the
FOR THE PURPOSE OF FUNDING COUNCILOR)	Finance Committee
SALARIES AND BENEFITS AND A CITIZEN)	
INVOLVEMENT PROGRAM; AND DECLARING)	
AN EMERGENCY)	

WHEREAS, voters of the Metropolitan Service District approved a Metro Charter on November 3, 1992; and

WHEREAS, the Metro Charter removes the authority to pay Metro Councilors a per diem payment and authorizes the payment of a salary to Councilors for services rendered; and

WHEREAS, the Metro Charter creates an Office of Citizen Involvement and requires the Metro Council to establish a citizen's committee, a citizen involvement process and appropriate sufficient funds to operate the office and committee; and

WHEREAS, the Metro Council has reviewed and considered the need to transfer appropriations within the FY 1992-93 Budget; and

WHEREAS, the need for a transfer of appropriation has been justified; and

WHEREAS, adequate funds exist for other identified needs; now therefore,

THE METRO COUNCIL ORDAINS AS FOLLOWS:

1. That Ordinance No. 92-449B, Exhibit B, FY 1992-93 Budget, and Exhibit C, Schedule of Appropriations, are hereby amended as shown in the column titled "Revision" of Exhibits A and B to this Ordinance. The amendment transfers \$184,416 from the General Fund Contingency to the Council Department Personal Services category

and \$60,000 from the Council Department Materials and Services category to the Personal Services category for the purpose of paying Councilors salaries and benefits and providing for the Office of Citizen Involvement and citizen's committee.

2. This Ordinance being necessary for the health, safety, or welfare of the Metro area, for the reason that the Metro Charter takes effect January 1, 1993, requiring that compensation to Councilors be in the form of a salary, and that an Office of Citizen Involvement and a citizen's committee be established and funded, an emergency is declared to exist and this Ordinance takes effect upon passage.

ADOPTED by the Metro Council this _____ day of _____,
1993.

, Presiding Officer

ATTEST:

Clerk of the Council

L:\OR93-480.MGS

**Exhibit A
Ordinance No. 93-480**

FISCAL YEAR 1992-93		CURRENT BUDGET		REVISION		PROPOSED BUDGET	
ACCT #	DESCRIPTION	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT
GENERAL FUND: Council							
<u>Personal Services</u>							
511110	ELECTED OFFICIALS						
	Councilors		0	2.34	162,400	2.34	162,400
511121	SALARIES-REGULAR EMPLOYEES (full time)						
	Council Administrator	1.00	67,766		0	1.00	67,766
	Sr. Management Analyst	3.00	136,188		0	3.00	136,188
	Assoc. Management Analyst	0.50	19,000	0.50	20,000	1.00	39,000
	Clerk of the Council	1.00	30,600		0	1.00	30,600
511221	WAGES-REGULAR EMPLOYEES (full time)						
	Administrative Secretary	3.00	79,366		0	3.00	79,366
	Secretary	1.00	19,199		0	1.00	19,199
511400	OVERTIME		2,500		0		2,500
512000	FRINGE		120,570		62,016		182,586
Total Personal Services		9.50	475,189	2.84	244,416	12.34	719,605
<u>Materials & Services</u>							
521100	Office Supplies		7,100		0		7,100
521320	Dues		500		0		500
524110	Accounting & Auditing Services		60,000		0		60,000
524190	Misc. Professional Services		20,000		0		20,000
525640	Maintenance & Repairs Services-Equipment		1,000		0		1,000
525733	Operating Lease Payments-Other		15,000		0		15,000
526200	Ads & Legal Notices		1,300		0		1,300
526310	Printing Services		3,200		0		3,200
526410	Telephone		900		0		900
526440	Delivery Services		700		0		700
526500	Travel		10,000		0		10,000
526800	Training, Tuition, Conferences		5,500		0		5,500
528100	License, Permits, Payments to Other Agencies		9,500		0		9,500
528200	Election Expense		188,000		0		188,000
529110	Council Per Diem		104,400		(60,000)		44,400
529120	Councilor Expenses		33,250		0		33,250
529500	Meetings		11,000		0		11,000
Total Materials & Services			471,350		(60,000)		411,350
<u>Capital Outlay</u>							
571500	Purchases-Office Furniture & Equipment		4,000		0		4,000
Total Capital Outlay			4,000		0		4,000
TOTAL EXPENDITURES			950,539		184,416		1,134,955

Exhibit A
Ordinance No. 93-480

FISCAL YEAR 1992-93		CURRENT BUDGET		REVISION		PROPOSED BUDGET	
ACCT #	DESCRIPTION	FTE	AMOUNT	FTE	AMOUNT	FTE	AMOUNT
GENERAL FUND:General Expenses							
	Total Interfund Transfers		2,912,757		0		2,912,757
	<u>Contingency and Unappropriated Balance</u>						
599999	Contingency		452,085		(184,416)		267,669
599990	Unappropriated Fund Balance		261,912		0		261,912
	Total Contingency and Unappropriated Balance		713,997		(184,416)		529,581
	TOTAL EXPENDITURES	16.25	5,233,578	2.84	0	19.09	5,233,578

Exhibit B
Schedule of Appropriations
Ordinance No. 93-480

	Current Appropriation	Revision	Proposed Appropriation
GENERAL FUND			
Council			
Personal Services	\$475,189	\$244,416	\$719,605
Materials & Services	\$471,350	(\$60,000)	\$411,350
Capital Outlay	\$4,000	\$0	\$4,000
Subtotal	\$950,539	\$184,416	\$1,134,955
Executive Management			
Personal Services	\$330,171	\$0	\$330,171
Materials & Services	\$142,742	\$0	\$142,742
Capital Outlay	\$0	\$0	\$0
Subtotal	\$472,913	\$0	\$472,913
Office of Government Relations			
Personal Services	\$100,901	\$0	\$100,901
Materials & Services	\$82,471	\$0	\$82,471
Capital Outlay	\$0	\$0	\$0
Subtotal	\$183,372	\$0	\$183,372
General Expenses			
Interfund Transfers	\$2,912,757	\$0	\$2,912,757
Contingency	\$452,085	(\$184,416)	\$267,669
Subtotal	\$3,364,842	(\$184,416)	\$3,180,426
Unappropriated Balance	\$261,912	\$0	\$261,912
Total General Fund Requirements	\$5,233,578	\$0	\$5,233,578

ALL OTHER APPROPRIATIONS REMAIN AS PREVIOUSLY ADOPTED