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TESTIMONY OF JASON A. OTAÑO, GENERAL COUNSEL, NEW YORK CITY COUNCIL
TO THE NEW YORK CITY CHARTER REVISION COMMISSION
JULY 11, 2024

Good evening, Chairman Scissura, Vice-Chair Dukes, and members of the Commission. I am Jason Otaño and I serve as General Counsel of the New York City Council, a position I have held since 2016. Prior to my time at the City Council, I served as General Counsel to the Office of the Brooklyn Borough President from 2008 – 2012.

It is an honor to testify on behalf of the Speaker in her role as the leader of the City Council. Today, my comments will be focused on the Fiscal Responsibility section of your preliminary report, with specific attention to the first two staff recommendations in that section.

The Council's Role as Accountable City Policymaker

But, before I begin my discussion of these recommendations, I would like to step back and make some broader observations concerning the Council's place in city government and how that role is contemplated by the Charter and by State law.

First, it is impossible to consider the structure of city government without due consideration to the fact that the City is a creation of the State. The Charter does not exist in a vacuum but in fact is animated by a body of State law. Principal in that body of law is the State Constitution, which preserves the principle of home rule for cities and provides for a "Bill of rights for local governments." The first enumerated right provided in the Constitution is that a local government "shall have a legislative body elected by the people thereof" with "the power to adopt local laws."¹

The principle that local governments should be guaranteed a representative legislative body is key to our discussion. To achieve "[e]ffective local self-government and intergovernmental cooperation,"² the State Constitution mandates that there be a local legislature.

Of course, in our City that follows a strong mayor model of local government, where the mayor has exclusive control over the City's day-to-day operations, the integrity of the local legislative body is all the more essential. Indeed, the highest court in our State

¹ See N.Y. Const, art 9, §1(a). "Every local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof. Every local government shall have power to adopt local laws as provided by this article." Notably, the state constitution sets no such requirement for a chief executive of a local government.

² See *id.* at Preamble.

has held that the Charter “unequivocally provides for distinct legislative and executive branches of New York City government, with the City Council as the sole legislative branch of City government”³ fulfilling the state constitutional mandate. It is long settled law that our form of government requires a steadfast adherence to the separation of powers doctrine, where coequal branches of government are charged with performing particular functions. The structure requires that the Council make the “critical policy decisions” while the Mayor implements those policies.⁴

The importance of an independent legislative branch was emphasized in the 1989 Charter Revision. In reality, the Council as we currently know it did not exist before then. It was that Charter revision that realigned the City government’s power structure to make the Council a more powerful, more representative co-equal counterpart to the Mayor to fulfill a key American principle: that a legislature serves as a check and balance to the executive branch.

This was also true when it came to budgetary matters. During a hearing similar to this one back in 1989, the Chair of that Charter Revision Commission eloquently remarked that “a budget is not lifeless, a lifeless, boring accountant’s document. A budget is the heart and soul of the values of the people who live in New York.”⁵ To further cement the Council’s role as sole legislative body for the City in line with State constitutional requirements and to bring city government in line with the historical understanding that fiscal matters are primarily a legislative prerogative, the Council was given plenary power to adopt the City budget and as a result set spending policy.

At the 1989 revision's core was the recognition that the Council must be able to carry out its role of identifying services to be delivered to the public and deciding their level of funding without undue interference from the executive.

Along with the expansion of Council *power* was a focus on its increased *accountability* to the public. This came in the form of fair representation, which was brought about by expanding the number of members from 35 to 51. This expansion was founded in the notion that representatives from smaller districts would be more reflective of and responsive to their respective constituencies. Today, the Council fulfills the 1989 Commission’s vision of a more a diverse and representative council: one that boasts a women majority, is its most diverse, consisting of myriad traditionally underrepresented groups, and counts amongst its ranks adherents to positions along the entire political spectrum. This is the more representative body that the framers of the current Charter empowered to be the policy making body of our city.

³ New York Statewide Coal. of Hisp. Chambers of Com. v. New York City Dep’t of Health & Mental Hygiene, 23 N.Y.3d 681, 693, 16 N.E.3d 538, 543 (2014).

⁴ Greater N.Y. Taxi Ass’n v. N.Y. City Taxi & Limousine Comm’n, 25 N.Y.3d 600, 609 (2015).

⁵ Frederick A. O. Schwarz, Jr. & Eric Lane, The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter, 42 N.Y.L. Sch. L. Rev. 723, 825 (1998) (citing Public Meeting, Apr. 24, 1989, at 16-17).

It is through the lens of a balanced and representative government that I ask you to evaluate the specific staff recommendations made in the Fiscal Responsibility section of your preliminary report. Of particular concern to the Council are the first two.

First Recommendation: Additional Fiscal Impact Statement Requirements

The first staff recommendation calls for changes to legislative fiscal impact statement (or FIS) requirements in the Charter that would require them to be produced earlier in the legislative process and with the inclusion of additional parties. The Council regards this recommendation imprudent and constitutionally untenable.

Changes to the FIS requirements, as advanced by certain interest groups that have come before this Commission, should be seen as unworkable and undermining to the effectiveness and efficiency of the legislative branch. While they are presented as commonsense reforms, intended to bring about transparency in the legislative process, they actually serve the purpose of stymieing the work of the legislative body, thereby upsetting the balance of powers that are meant to ensure good governance and protect against executive overreach

The flippant notion that an FIS should be done earlier in the legislative process, because it “will be done anyway” is entirely misleading.

That legislation has been introduced, or even the subject of a hearing, in no way guarantees that it will be considered for action by a committee or the Council, let alone come before the body for a vote. During the course of a given legislative term, of the bills introduced, only about half get calendared for a hearing, and of those items that are heard, only half of those actually make it to the floor for Council vote.⁶

Placing onerous requirements at the outset of the legislative process only serves to deter the work of the legislative body and is likely to cause a chilling effect on the exchange of ideas that is central to the innovation that has been a hallmark of our City’s government.

Operationally, this recommendation is problematic. The Council already relies on numbers and estimates provided to us directly by City agencies and the Office of Management and Budget (OMB) when assessing the fiscal impacts of legislation. Generally, these assessments are not initiated until the Council receives these estimates and even then, a negotiation between the Council and the Administration usually ensues. Historically, some estimates provided by OMB and City agencies, which are often provided to the Council in delay, have been unreliable, at times inflated as part of a negotiation tactic. Sometimes, the Council takes the numbers as presented; other times we disagree. In practice, the Council often concedes that City agencies have more information than we do and accordingly heavily relies on their input in our

⁶ For example, during the 2022-2023 Legislative Session, out of 1,274 bills introduced by the Council, 522 were the subject a public hearing, and of those, 288 were enacted by the Council.

formulation of an FIS. With this, many of the FIS that we issue already have the imprint of OMB and the relevant agency.

By forcing this requirement before the legislation is in its final form, you are putting the cart before the horse. Legislation passed by the Council is oftentimes very different than the legislation that was initially introduced – a byproduct of negotiations with the Administration, input from stakeholders and the general public, as well as discussions amongst council members.⁷

Undoubtedly, an FIS produced before public hearings would need to be amended with each new version of the bill, wasting resources and potentially generating confusion. All of this would just require busy work on the part of both parties – the Administration and the Council. The Administration would have to provide the Council with numbers and estimates on every version of a piece of legislation, all to end up where we already are, with the need for an FIS assessing the fiscal impact of the final version of legislation.⁸

Even more problematic is the proposal that additional parties be involved in the assessment process. In your preliminary report, reference is made to a proposal to mandate the involvement of the Independent Budget Office (IBO), OMB, and the Council Finance Division in formulation of an FIS. Requiring this tripartite FIS with input by external parties, particularly the City’s executive branch, as a prerequisite to legislative action would violate the separation of powers doctrine. The power of policymaking, the Council’s constitutional prerogative, includes the power to control all levers along the legislative process – from the idea’s inception until local law passage. For good reason, the executive’s role is limited to the ability to veto legislation once it is passed out of the legislative body.

⁷ It is worth noting that the FIS requirements in the charter are not meant to impede upon the validity of local laws. *See* N.Y. City Charter ch 2. §33(e), “If the estimate or estimates contained in the fiscal impact statement are inaccurate, such inaccuracies shall not affect, impair, or invalidate the local law or budget modification.” The Charter assumes the very imperfect science of cost estimation, which is why the budget is modified throughout the year to account for such vagaries.

⁸ Take the example provided in your Preliminary Report regarding Local Law 38 of 2022. At introduction, the legislation included detailed provisions on how HRA should both conduct outreach around and administer the emergency assistance grant program while the agency's job centers were closed due to the COVID-19 pandemic. By the time the legislation came to a vote, the centers had been reopened to the public. The legislation was subsequently amended, in negotiation with the Administration, to remove many of these provisions in deference to administrative changes HRA adopted as a result of COVID-19. An FIS prior to the final version of the legislation would have shown varying estimates. Your Preliminary Report goes on further to state that OMB reported an estimated “175 hours per year of staff time (including some overtime) for reporting alone” and \$4.1M to operationalize “service protocol and tracking system.” The analysis sent by OMB for this FIS included inflated operational costs. Upon analysis of the information provided by OMB, the Council’s determination was that there would actually be no impact on expenditures because HRA already has existing staff that is able to complete the work scope within their job functions, and the technical system in place would already be able to provide the data necessary to comply with legislative requirements.

Either through a lack of resources or a willful attempt to slow down the work of the Council, the inclusion of outside parties in this process would be tantamount to creating an unlawful *de facto* veto on local legislation.

Under the current FIS process, nothing prevents OMB from providing their input as to the fiscal impacts of proposed legislation. Further, the Charter already authorizes IBO to provide their own FIS. Yet, a requirement that these three entities must agree upon an FIS for legislation that has yet to be placed on a committee's agenda is an invitation for impasse and obstruction.

Second Recommendation: "Harmonize" the Council's Budget & Lawmaking Powers

The second recommendation in the Fiscal Impact section of your preliminary report calls for harmonization of the budget process with the Council's power to pass legislation with budget impacts outside the annual appropriations process. This proposal fundamentally misunderstands the Council's role in the budget process and how budget making inherently intersects with policy making – they are two sides of the same coin of legislative power.

The budget is not a one and done process for an entire fiscal year. While much is made of the passage of the budget for a particular fiscal year, the reality is the City's budget process is a dance that continues to move to the rhythm of changing conditions over an entire fiscal year. During a fiscal year, the Administration and the Council continue to negotiate changes, and from time-to-time legislation passed by the Council becomes the focal point of those negotiations. Since the Charter does not allow for expenditures that have not been allocated in the budget and requires a balanced budget, the question of whether and how much to fund specific programs, even programs recently created by Council legislation, are matters negotiated throughout the fiscal year.

The leverage that the power of the purse provides the Council is integral to maintaining the balance of power necessary to sound policy making.⁹ The negotiation between a mayoral administration and the Council for ongoing budget modifications, the next fiscal year budget, and legislation do not occur in their own respective silos. They are all part of a larger set of negotiations that are the heartbeat of the checks and balances that make our representative government work. Because of these ongoing overlapping processes, it is disingenuous, ahistorical, and imprudent to characterize the legislative process as "outside the annual appropriations process." And calls to harmonize the budget and legislative processes are themselves out of tune, as budget-making and legislation are the two notes that make up the music of policy making.

If the so-called harmonization contemplated by this recommendation creates any prerequisite to legislative action, it would on its face be unconstitutional. Because the

⁹ See Spencer L. Simmons, Congress's Constitution: Legislative Authority and the Separation of Powers (referencing The Federalist No. 58 (James Madison), ("the 'power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the intermediate representatives of the people...").

budget and budget modification processes can only be initiated by the Mayor, the requirement that any budgetary process be completed before the Council can pass a local law would be a violation of separation of powers and fly in the face of the State's constitution.

Conclusion

It is noteworthy that the types of limitations to legislative authority found in the two staff recommendations I discussed do not exist in our sister cities. Not Los Angeles. Not Chicago. Not Philadelphia. Not San Francisco. Before this Commission suggests to the voters that such limitations are good policy, we urge your staff to do a deep dive into this issue and ask "why have no other similarly situated municipalities imposed comparable limitations to the legislative process?" The answer is that these limitations pose serious and troubling separation of powers and operational problems that undermine democracy and do not benefit the public interest or the public fisc.