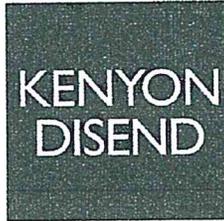


Michael R. Kenyon
Rachel B. Turpin
Ann Marie J. Soto
Kim Adams Pratt
Robert F. Noe
David A. Linehan
Amy S. Mill
Charlotte A. Archer
Alexandra L. Kenyon



Bruce L. Disend
Doug F. Mosich
Of Counsel

Shelley M. Kerslake
1967 - 2014

**CONFIDENTIAL ATTORNEY-CLIENT PRIVILEGED COMMUNICATION
NOT SUBJECT TO PUBLIC DISCLOSURE**

TO: Mayor and Councilmembers
FROM: David A. Linehan
DATE: July 6, 2016
RE: July 7, 2016 City Council Meeting Agenda Items

This memo serves to advise Councilmembers and the Mayor of legal issues regarding certain items put forward for potential action at the City Council Meeting scheduled for July 7, 2016.

I. Agenda Posted on July 1, 2016

With respect to the agenda posted by City Clerk Brenda Martinez on Friday, July 1, 2016, we address only one item: The resolution referenced in Item 6, "Resolution Regarding Labor Policy and Grievance Review." I understand from the Mayor that this is a held-over item from the previous meeting. I have not seen the text of the resolution and do not really have a clear idea of its purpose, but I would be happy, upon request, to review the proposed resolution before the meeting. I would also note, merely as a reminder, that discussion of sensitive employment matters may be more appropriately conducted in Executive Session, when appropriate under RCW 42.30.110(f) (to receive and evaluate complaints or charges brought against a public officer or employee), or 42.30.110(g) (to review the performance of a public employee); and discussions of strategies or positions to be taken in a grievance proceeding may be exempt from OPMA altogether under RCW 42.30.140(4).

II. Agenda Items Proposed by Councilmembers Pepper and Morgan on July 1st

I understand that Councilmembers Pepper and Morgan forwarded four additional agenda items, with supporting documentation, late in the afternoon of Friday, July 1st, as the official agenda notice was being finalized and posted by the Clerk. While those items may not have arrived in sufficient time to be posted with the preliminary agenda, a majority of the Council retains the prerogative to amend the agenda to add or remove items from consideration at the meeting. I offer the following advice and observations concerning these four additional agenda

items in the event that the Council chooses to amend the agenda and consider them at the July 7th meeting.

A. Resolution on Interim Legal Services

This resolution, if adopted, would be invalid *ab initio* (that is, invalid from its inception rather than later voidable). State law is clear that the power to appoint and contract for City Attorney services lies with the Mayor in a mayor-council form of government. The City Council has no authority to independently appoint a City Attorney or retain contract legal services for general City Attorney services. As I mentioned in a previous e-mail before the June 16th Council Meeting, Washington courts have, on rare occasion, recognized a city council's ability to retain legal counsel in narrow, discrete circumstances—e.g., when there was a separation-of-powers dispute wherein the court recognized that it would be appropriate for the council to have its own, independent legal representation to advise it on matters in which the council's interests were directly adverse to the interests of the mayor. But this narrow exception does not apply to retention of general legal counsel to represent the City as a whole. In Black Diamond, only the Mayor has the power to appoint a City Attorney or retain contract City Attorney services for the City. The Council has no authority to appoint or contract with a City Attorney not approved by the Mayor, just as the Council has no authority to hire other members of the City Staff or to independently select and contract with other professional consultants for geotechnical or traffic studies not put forward by the Mayor.

Accordingly, the proposed resolution for interim legal services is invalid, and the Mayor would be under no obligation to use the services of any attorney with which the Council has purported to contract, nor would the City be obligated to pay for services rendered thereunder.

B. Resolution Revising Council Rules of Procedure

Without offering any opinion on the manner in which the new Council Rules were adopted or the validity of their adoption, I have only one legal concern with the substance of the proposed amendments proposed by this resolution. Specifically, the proposed change to Rule 18.1.4(b), which the "Summary of Rule Changes for the Agenda Bill" describes as follows:

Revise 18.1.4(b): Add clarifying language that the Growth Management Committee would consider quasi-judicial matters where it pertains to city policies or code. (A clause was already included that the committee would not consider matters prohibited by law.)

This proposed "clarification" of Rule 18.1.4(b) is problematic because it is (a) vague in its intent, and (b) may conflict with specific provisions of the Black Diamond Municipal Code relating to quasi-judicial decisions—specifically, BDMC 18.08.030, .060, and .070. These Code provisions spell out precisely which types of land-use decisions are quasi-judicial and they direct that such decisions be made by the Hearing Examiner (Type 3), or by the City Council following a recommendation by the Hearing Examiner (Type 4). Again, it is unclear what the intent is for saying in the Council Rules that the Growth Management Committee "would consider quasi-

judicial matters where it pertains to city policies or code.” But any intent to modify the existing BDMC provisions governing quasi-judicial processes (such as by requiring some sort of interim review by a committee) could only be enacted, if at all, through a duly adopted ordinance, not a change to the Council Rules.

C. Resolution Regarding Absences of Councilmembers

I have no legal concerns about Section 1 of this resolution. The relevant statute, RCW 35A.12.060, provides that failure to attend a regular council meeting may be “excused by the council,” which clearly indicates that the determination of whether a Councilmember’s absence should be excused is one that the Council is authorized to make. Here, Council Rule 5.1.1 provides that if a Councilmember gives prior notice of an absence to the Clerk or the Mayor, the absence will be recorded as “excused.” While this seems to be a rather “low bar” for excusing absences, I am aware of no provisions of state law that prevents the Council from setting the bar wherever it sees fit on this issue.

I offer no opinion regarding Section 2 of this resolution, as it merely applies the Council’s excused-absence rule to particular facts occurring on particular dates, about which I have no personal knowledge.

D. Resolution Revising Committee Membership

As a general rule, city councils have the authority to “organize and regulate [their] internal affairs,” RCW 35A.11.020, and to “determine [their] own rules,” RCW 35A.12.120. Accordingly, establishing committees and setting rules for determining the composition of those committees are generally within the Council’s purview so long as the committee structure and composition do not violate other state or local laws. That said, as I have previously advised on another occasion, any committee structure that contemplates having a quorum of sitting Councilmembers in regular attendance—which the proposed “Growth Management, Land Use and Community Services” and “Government Operations and Administration” Committee memberships both clearly would have—is problematic for a number of reasons.

First, if a committee meets regularly on a pre-set schedule (established by ordinance, resolution, or rule) and that committee contains a quorum of Councilmembers, that committee meeting arguably constitutes a regular meeting of the Council under the OPMA. This means that the Mayor would then be required to attend and preside over all such committee meetings per RCW 35A.12.110 (“Meetings of the council shall be presided over by the mayor . . .”), in addition to other state statutory and local code requirements for regular meetings of the legislative body of the City (e.g., keeping of minutes, etc.). Indeed, it is likely that standing committees holding regular meetings with a quorum of Councilmembers would violate BDMC 2.04.010, which provides for regular Council meetings only on the first and third Thursdays, and Council work sessions on the second Thursday of each month. No other regular meetings of Council are authorized under the Code. Any change to BDMC 2.04.010 would require adoption of a new ordinance, not a mere resolution affecting the Council Rules.

Second, as you know, Open Public Meeting Act (“OPMA”) requirements would require giving public notice of either a regular or special meeting, including preparation of an agenda, and an opportunity for public attendance at every Committee meeting where a quorum is present. This may require coordination with the Clerk and expenditures of City funds or use of other resources that may or may not be available. Further, at a practical level, the hours of operation of the City are set by local Code, and my understanding is the Mayor will not authorize Staff overtime to attend after-hours Committee meetings due to, among other things, budgetary impacts. Council lacks authority to compel Staff to attend such meetings, which may diminish their utility.

Third, even if all procedural requirements for public meetings are acknowledged, having a quorum of Councilmembers present at a Committee meeting significantly increases the risk of mistakes and misunderstandings, even with the best of intentions. All manner of substantive remarks, discussions, proposals, agreements, deliberations, and recommendations at such meetings could easily be construed – rightly or wrongly – as *de facto* final actions, taken without proper notice and without input from or deliberation by the full Council at a regular or special meeting. Indeed, it would not be hard to see how a complainant could make an argument that the contemplated committee meetings may effectively turn a five-member City Council into a three-member City Council, in violation of numerous laws. In short, in my view, this committee structure is inviting litigation, with liability being very difficult to predict or contain. Conceivably, every one of these Committee meetings could spawn lawsuits, the outcome of which may not be known until finally resolved after a fact-intensive—and therefore costly—trial.

Most of these potential lawsuits are likely to arise under the OPMA. In addition to the legal and other fees that the City would expend on such lawsuits, a successful plaintiff is also entitled to recover his or her attorney fees. RCW 42.30.120(2). Councilmembers, as members of the City’s “governing body,” who are found to have violated the OPMA “shall be subject to personal liability in the form of a civil penalty in the amount of one hundred dollars.” RCW 42.30.120(1).¹

Finally, in my view, the Council should not be too confident that adding a textual disclaimer in Council Rule 18.1.3(c) saying that “A committee recommendation does not constitute enactment of any ordinance or resolution” will insulate the City from liability if litigation ensues. While this proposed language may be persuasive as a first line of defense, determined plaintiffs will likely argue that this language is mere “window dressing,” designed to mask, rather than prevent, the taking of final action at committee meeting. Ultimately, it will be up to a court of law to decide whether, in a particular set of circumstances, this disclaimer is valid and shields the City or Councilmembers from liability.

Please let me know if you would like to discuss any of the above issues in further detail.

¹ The OPMA applies only to members of an agency’s “governing body.” RCW 42.30.020(2). A mayor, as the chief executive of a city, is not a member of the “governing body” and accordingly cannot be personally liable under the OPMA.