



NAILAH K. BYRD
CUYAHOGA COUNTY CLERK OF COURTS
1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

BRIEF IN OPPOSITION
February 22, 2021 22:26

Confirmation Nbr. 2187122

EX. REL. GARRY KANTER

CV 21 942733

vs.

Judge: DEBORAH M. TURNER

CITY OF CLEVELAND HEIGHTS AND CITY
COUNCIL, ET AL

Pages Filed: 49

COURT OF COMMON PLEAS

CUYAHOGA COUNTY, OHIO

STATE EX. REL. GARRY KANTER	)	CASE NO.: CV-21-942733
	)	
Relator	)	JUDGE: DEBORAH M. TURNER
vs.	)	
	)	BRIEF IN OPPOSITION
	)	TO MOTION TO DISMISS
CITY OF CLEVELAND HEIGHTS	)	
COUNCIL MEMBERS, et. al.	)	
	)	
Respondents	)	
	)	

I. INTRODUCTION

This matter arises from the Respondents, City of Cleveland Heights, Council Members failure to fulfill a mandatory duty imposed upon them by the City's Charter to appoint a qualified elector to fill a vacancy on Council that has now existed since March 2, 2020.

Respondents have responded to Relator's Complaint with a Motion to Dismiss acknowledging that they have not done their mandatory duty but arguing that the Complaint must be dismissed because notwithstanding the fact that the City's Charter provides that vacancy "**shall be filled by appointment by a majority of the remaining members of the Council**", there is no time limit within which they must act, concluding that this Court is essentially powerless to compel them to do so by granting the relief sought by Relator. Respondents also argue that the Complaint should be dismissed because Relator failed to attach to his Complaint an affidavit verifying the facts alleged in it.

These arguments should be rejected by the Court and Respondents required to respond to the Complaint. Appendix A through C in support of this motion are attached hereto and incorporated as if fully set forth herein.

II. LAW AND ARGUMENT

A. TO HOLD THAT THE TERM “SHALL’ IN THE CITY’S CHARTER DOES NOT IMPOSE A MANDATORY DUTY TO ACT WOULD MAKE THE PROVISION MEANINGLESS AND LEAVE ITS RESIDENTS WITH NO OTHER ADEQUATE REMEDY TO COMPEL CITY COUNCIL TO DO ITS DUTY.

The Cleveland Heights Charter (“Charter”) expressly grants the City’s Council – and only the Council - the sole power and authority, and the clear legal duty to perform the requested act - filling a vacant council seat. Specifically, Section III-4 which provides in relevant part that “[a]ny vacancy in the Council, except as otherwise provided in the Charter, shall be filled by appointment by a majority of the remaining members of the Council....”

Relator has made no assertion as to any “certain period of time” or “mandatory timeframe” or “within a reasonable time” as Respondents’ Motion to Dismiss incorrectly avers via State ex rel. Devine v. Hoermle, 168 Ohio St. 461. (1959).

Nor has Relator has made an assertion as to any conflict between Ohio Revised Code and the city’s Charter and Ordinances as in State ex rel. Devine. Rather, only the city’s Charter has been cited by the Relator.

Further, unlike State ex rel. Devine, there is no dispute as to the fact that is it is Council’s duty to fill the vacancy. Cleveland Heights is a Council-Manager form of municipality, while Columbus is a Strong Mayor-Council form.

And yet, State ex. rel.Devine was decided in a 4 to 3 decision, with Judge Bell’s dissenting opinion at p. 467-68 addressing precisely why the Respondent’s Motion to Dismiss in the instant case should be denied:

‘The . . . [people of Columbus] will not be presumed to have intended to enact a law [charter provision] producing unreasonable or absurd consequences. It

is the duty of the courts, if the language of a statute fairly permits or unless restrained by the clear language thereof, so to construe the statute as to avoid such a result [Emphasis added.]”

The Charter of the City of Columbus is silent as to *when* the council shall perform its mandatory duty to fill a vacancy. In my opinion, it is inherent in such a mandatory provision that the duty to be performed must be performed. And if it must be performed, it is likewise inherent that the performance should be accomplished within a reasonable time. Certainly when the daily necessities of a city such as Columbus are considered, and when orderly progressive legislative action is a constant and essential factor in the filling of those needs, 30 days represents a reasonable time. Failure of council to act within that time is an unreasonable abdication of its duty [Emphasis added.]. . . .

What is at issue is not whether Council has failed to act ‘within a reasonable time’ of 30 days, but that the vacancy is coming up on a year and media reports that Council has discontinued efforts to make the appointment. It is apparent that Council is not going to make the appointment as required by the Charter. Instead, only after this Complaint was filed, they have begun deliberations on changing the Charter so as to relieve themselves of their duty. For example:

As reported on December 28, 2020, attached at Appendix A:

“[City Council President Jason] Stein noted earlier that the remaining council members had held at least eight executive sessions totaling more than 12 hours to discuss the appointment, but that the impasse continued. He saw little reason to reconvene until there was some indication of a potential compromise...” – cleveland.com, December 28, 2020

As reported on February 16, 2021, attached at Appendix B:

“Although the current charter states that “council shall make an appointment,” there is no time limit set forth -- a “flaw” which has come into play since Councilwoman Melissa Yasinow resigned last March with a little under two years left on her term, Council President Jason Stein pointed out. “

...

“I think (the current system) is broken, that it needs to be fixed and that it should go to the people for a vote,” (Councilperson Davida) Russell said.” - Cleveland.com, February 16, 2021

...

“Both Hart and Seren have also lobbied for “rank-choice” voting, where everyone submits their first and second picks, with points being awarded accordingly then tallied. Ungar has countered that it’s too easy to “game the system” that way. “In any event, “people are clamoring for a fix to this,” Seren said. “Or, we can continue to punt.” - Cleveland.com, February 16, 2021

...

“Dunbar had said earlier that “we need a change because this hasn’t worked. We need a deadline and a plan for what will happen” if consensus cannot be reached.” - Cleveland.com, February 16, 2021

To hold as the Respondents urge that the term “shall” in the City’s Charter does not impose a mandatory duty to act would make the provision meaningless and leave its residents with no other adequate remedy to compel City Council to do its duty. The absence of a deadline does not transform the meaning of the Charter’s “shall be filled by appointment” from a Requirement into an Option.

The City has previously taken the position in State of Ohio ex rel. Garry Kanter v. City of Cleveland Heights City Council, CV15-853953, that the word “shall” denotes an action that is “required” and “mandatory” as it is used in its Charter and ordinances.¹ It should now be estopped from taking a contrary position in this litigation.

““may be recorded in writing.” Section 107.04(a). Contrast this permissive language with the mandatory language found at R.C. 121.22(C), which establishes that the minutes of all public bodies “shall be promptly prepared, filed, and maintained.” R.C. 121.22(C). In other words, the plain language of R.C. 121.22(C) and Sec. 107.04(a) is in conflict with each other. While the use of the term “shall” in R.C. 121.22(C) dictates that minutes are required, Sec. 107.04 sets a different standard by the use of the term “may.” The City ordinance establishes a discretion, not a requirement, of the Council to record minutes of its committee meetings, including the Council Committee of the Whole meetings.”

...

“Furthermore, that the permissive meaning of “may” was intended by its drafters can be inferred based on the use of “shall” in preceding sentence of Section 107.04(a), which establishes that regular, special, and emergency meetings of Council “shall” be recorded in writing. Sec. 107.04 (a). “When certain language is used in one statute and wholly different language in another, ‘it will *** be presumed that different results were intended.’”

¹ See its Brief in Support of Motion to Dismiss at pp. 8-9 attached at Appendix C.

...

“Fundamentally and under general statutory construction, the use the term “shall” makes the provision mandatory and the use of the term “may” makes the provision permissive or discretionary.”

B. THE REQUIRMENT FOR AN AFFIDAVIT HAS BEEN SUPERCEDED BY THE CIVIL RULES OF PROCEDURE.

Citing two unreported cases, Respondents argue that the Complaint should be dismissed because it fails to include Relator’s affidavit verifying the facts as required by R.C. 2731.04.

However, there is contrary reported case law including from the Ohio Supreme Court.

The Court in State ex. Rel. Millington v. Weir (1978), 60 Ohio App.2d 348, 349 rejected this requirement stating:

[T]he procedure in R.C. 2731.04 where inconsistent with the civil rules is no longer applicable. The only inconsistency is that part of R.C. 2731.04 which provides that the application for the writ of mandamus must be verified by affidavit. Civ.R. 11 eliminates the requirement of an affidavit except when otherwise specifically provided by the civil rules. Civ.R. 11 applies fully to mandamus actions in this court. **Hence, the petition (or complaint) need not be verified or accompanied by an affidavit as the requirements of R.C. 2731.04 are superseded by the civil rules.**

The Ohio Supreme Court in State, ex. Rel. Madison v. Cotner (1981), 66 Ohio St.2d 448, 449, cited the above case with approval stating:

Respondent Cotner further requests this court to strike relators’ complaint for noncompliance with R.C. 2731.04 which requires mandamus complaints to be verified. This contention is not well taken. Civ.R. 11 provides in part: “Except as otherwise specifically provided by these rules, pleadings need not be verified or accompanied by affidavit.” We find that the verification requirements contained in R.C. 2731.04 have been displaced by Civ.R. 11. See State, ex rel. Millington v. Weir (1978), 60 Ohio App.2d 348, 397 N.E.2d 770.

It should also be noted that the Respondents do not dispute in their Motion any of the relevant facts pertaining to the Complaint. More specifically, that: (1) the charter provision has been correctly cited; (2) a vacancy has existed for almost a year now (March 2, 2020); and, they

have failed to fill the position. Under that circumstance, dismissing the Complaint would be unwarranted. However, if the Court believes Relator, who is acting pro se, needs to submit an affidavit, he requests that the Court grant him leave to do so before dismissing the Complaint on that basis.

III. CONCLUSION

For the reasons stated, Relator, respectfully requests that the Court deny the Motion to Dismiss, and if the Court is inclined to find that an affidavit was required, grant Realtor leave to file an Amended Complaint with one.

Respectfully submitted,

/s/ Garry Kanter

Garry Kanter
3624 Cummings Rd.
Cleveland Heights, Ohio 44118
(216) 835-0541

CERTIFICATE OF SERVICE

A copy of the foregoing was served this ____ day of February, 2021, via the Court's e-filing system and/or electronic mail to the following:

William R. Hanna
whanna@walterhav.com

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Attorneys for Respondents

/s/ Garry Kanter

Garry Kanter

APPENDIX A

Resolution in order: Coming up on 10 months, Cleveland Heights yet to fill vacant council seat

By Thomas Jewell, special to cleveland.com



Progress does continue on the \$80 million Top of the Hill project, with the 525-space parking garage under construction on the right and the 260-unit luxury apartment building in the distance on the left. In the middle, Nighttown remains closed due to the pandemic, although a virtual New Year's celebration is being planned. Tom Jewell/Special to cleveland.com

CLEVELAND HEIGHTS, Ohio -- Approaching the 10-month mark and a new year, the City Council seat left vacant since early March remains unfilled.

It's also been over seven months since the six remaining council members selected four finalists from a field of over 20 applicants who expressed interest in serving Melissa Yasinow's unexpired term, which runs through the end of 2021.

The deadlock prompted a letter in October from those finalists -- Craig Cobb, Tony Cuda, Robert Koonce and Anthony Mattox Jr. -- noting that it took them a half-hour to sit down via Zoom meeting and agree on some key points to resolving the issue.

This was followed by another appeal to council members at their last regular meeting of the year on Dec. 14 from resident Rosa Kovacevich, urging them to make the appointment to the seventh seat.

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“While I understand and appreciate Mayor (Jason) Stein’s response to my earlier letter, it is simply unacceptable to decide that since council can’t agree on a candidate, you’re going to abdicate your responsibility to appoint one,” Kovacevich wrote in a follow-up that was read during the public comment portion of the Zoom meeting.

Stein noted earlier that the remaining council members had held at least eight executive sessions totaling more than 12 hours to discuss the appointment, but that the impasse continued.

He saw little reason to reconvene until there was some indication of a potential compromise -- a standoff that still does not sit well with Kovacevich.

“The unwillingness of this council to find a solution to this stalemate is undermining trust in local government and puts all residents at a disservice by depriving us of a seventh voice that could offer solutions for the challenges we face,” Kovacevich stated.

Citing a year of unprecedented hardships for so many Cleveland Heights residents, Kovacevich believes that local government should be at the “forefront of finding creative solutions” to problems facing the city that will continue in the months to come.

“I urge again that council discuss this issue publicly, use rank-choice voting to pick from the finalists or return to the applicant pool to find a candidate everyone can agree on,” Kovacevich said.

At least two members, Vice Mayor Kahil Seren and Councilwoman Melody Joy Hart, have called for moving the discussions into a public forum.

“In discussing our rationales, public scrutiny could be the spur we need to get this done,” Seren said earlier. “We should have a public conversation and get this over with.”

Seren was also the first to announce his first and second choices, those being Mattox and Cuda, respectively.

Also calling for a “full and free discussion,” along with no voting in executive session, Hart followed up later with her top picks, those being a reversal of Seren’s, with Cuda at the top of her list, followed by Mattox, and then Koonce, whom Seren described as “less of a known entity to me.”

And although Cobb proved a more-than-capable councilman when he was appointed to fill the unexpired term vacated by Cheryl Stephens after she won election to Cuyahoga County Council in November 2018, he appears beset by the fact that he lost in the 2019 general election for the remainder of Stephens’ term to Davida Russell.

Seren believes council should avoid appointing someone twice, with Hart agreeing that she and her colleagues should not “go against what the voters wanted.”

While council would be well within its rights to reappoint Cobb to council, Seren said “to do that would show a bit of tone deafness -- it’s time to run for a seat.”

It should also be noted that the appointment of Cobb -- who prior to both Hart's and Seren's recent comments had considered withdrawing his name from the list of finalists -- took a little over four months, with council at that time setting a deadline for swearing in Stephens' successor.

Back to the current vacancy, Kovacevich concluded her comments by adding that "this is becoming a regional embarrassment and with almost a year left in the seat's term, deciding not to decide should simply not be an acceptable course of action for public servants."

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APPENDIX B

Cleveland Hts. council discusses charter amendment on filling vacancies

By Thomas Jewell, special to cleveland.com

CLEVELAND HEIGHTS, Ohio -- It's been almost a year now that a City Council vacancy has gone unfilled. The remaining six members recently moved out of their sporadic executive sessions on the matter for a public discussion about adding a deadline for filling such vacancies to the city charter.

And just like in the executive sessions, this discussion resulted in an impasse.

Council members have been unable to come to an agreement as to which of four finalists selected last May should be their next colleague. The pool started out with more than 20 applicants.

With another executive session scheduled for this week "to discuss the appointment of a public official," council so far has been unable to get four votes in favor of any of the finalists: Craig Cobb, Tony Cuda, Robert Koonce and Anthony Mattox Jr. The four collaborated on a joint letter in late October urging council to make a decision.

In order to get a charter amendment on the ballot, it would take five votes in support, Council Vice President Kahlil Seren noted during the Feb. 1 public discussion.

Although the current charter states that "council shall make an appointment," there is no time limit set forth -- a "flaw" which has come into play since Councilwoman Melissa Yasinow resigned last March with a little under two years left on her term, Council President Jason Stein pointed out.

City Law Director Bill Hanna provided council with language from 20 surrounding cities and villages, all of which have deadlines for appointing council vacancies. Most are set at 30 days, some at 45 and at least one at 60.

Seren suggested a 45-day deadline for council to appoint, with the authority then being turned over to the mayor after 90 days.

Councilman Mike Ungar noted that the Charter Review Commission in 2019 recommended a charter amendment setting a 90-day time limit, although council pushed that proposal back to 150 days before tabling the proposed charter amendments indefinitely.

Cautioning against any "rush to judgment" or a "knee-jerk reaction," Ungar said he would rather not sacrifice quality for speed, asking council to stand down on this issue at least until the city's first mayor is elected.

"I'm not minimizing the seriousness of the situation, but I feel this is slightly reactionary, and out of respect to the new mayor, I think we ought to wait on it," he

A 'philosophical discussion'

Councilwoman Davida Russell brought up the possibility of a charter amendment that would put council vacancies on the ballot in the next election, an idea she heard repeatedly from residents when she was campaigning in 2019.

"I think (the current system) is broken, that it needs to be fixed and that it should go to the people for a vote," Russell said.

Saying that legislation could be crafted around the regular elections that are held every year, Seren then said he would support "a direct democracy vote, as opposed to an appointment."

Ungar said that one of the most prominent questions asked of candidates applying for a council vacancy is whether they would be willing to run in the upcoming election.

He also referred to the 20 surrounding municipalities researched by Hanna whose charters have a deadline in place for filling council vacancies and seem to be working.

"This is the first I've heard of some of the things we're discussing tonight," Councilwoman Mary Dunbar said of what Seren characterized as a "philosophical change" being proposed.

Dunbar had said earlier that "we need a change because this hasn't worked. We need a deadline and a plan for what will happen" if consensus cannot be reached.

Far afield

Roughly an hour in and bumping up against the start of the regular council meeting, Stein said the discussion could be continued at a later date.

"We are really in the weeds right now, but I can see there is interest on council," Stein said, although adding, "I don't plan on bringing in a panel of other mayors or anything like that."

Stein added that Hanna could check with the Cuyahoga County Board of Elections on feasibility, as requested by Ungar.

Aside from Yasinow's successor, also missing from the Feb. 1 Committee-of-the-Whole discussion was Councilwoman Melody Joy Hart, who has repeatedly called for moving the appointment debate out of executive session and into a public forum.

Writ of Mandamus

Meanwhile, resident and taxpayer Garry Kanter noted on Friday (Feb. 12) that it had been a month since summons were sent out in a lawsuit he filed against City Council seeking a court order compelling them to make an appointment.

The city had yet to respond to the request for a Writ of Mandamus in Cuyahoga County Common Pleas Court within 28 days, although the Presidents' Day holiday may have thrown off the schedule.

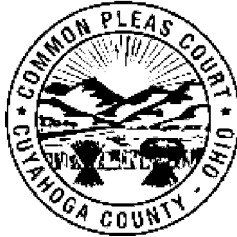
Kanter has since filed another lawsuit against the city alleging a violation of Ohio's "Sunshine Law" governing public meetings over executive sessions held to discuss appointments to the city's new 25-member Racial Justice Task Force.

This time around, he is seeking penalties that include a civil forfeiture of \$500, court costs and attorney's fees.

Read more from the Sun Press.

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APPENDIX C



NAILAH K. BYRD
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1200 Ontario Street
Cleveland, Ohio 44113

Court of Common Pleas

MOTION Electronically Filed:
December 4, 2015 16:54

By: KEVIN P. ROBERTS 0062736

Confirmation Nbr. 611772

GARRY KANTER

CV 15 853953

vs.

CITY OF CLEVELAND HEIGHTS

Judge:

JOSEPH D. RUSSO

Pages Filed: 32

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

STATE OF OHIO ex rel.	)	CASE NO. CV-853953
GARRY KANTER,	)	
	)	JUDGE JOSEPH D. RUSSO
Relator,	)	
	)	
v.	)	<u>MOTION TO DISMISS RELATOR'S</u>
	)	<u>COMPLAINT</u>
CITY OF CLEVELAND HEIGHTS CITY	)	
COUNCIL,	)	
	)	
Respondent.	)	

Pursuant to Civ.R. 12(B)(6), Respondent City of Cleveland Heights City Council ("Respondent"), by and through the undersigned counsel, moves this Honorable Court to dismiss the *Verified Complaint in Mandamus for Injunction* ("Complaint") of Relator Garry Kanter ("Relator") in its entirety with prejudice on the following grounds:

1. As to Counts One and Two, Respondent, as a chartered municipality, has operated and does operate under its Home-Rule authority;
2. As to Count One, Respondent is not bound by R.C. 121.22(C) with respect to Council committee meetings; and
3. As to Count Two, Respondent has not been operating contrary to Sec. 107.04 of the Codified Ordinances of the City of Cleveland Heights.

A brief and Appendix A in support of this motion is attached hereto and incorporated as if fully set forth herein.

Respectfully Submitted,

s/Kevin P. Roberts

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City Council*

BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Relator Garry Kanter (“Relator”) filed this action against Respondent City of Cleveland Heights City Council¹ (“Respondent”), requesting an injunction at Count One pursuant to R.C. 121.22(I) of Ohio’s Sunshine Law and simultaneously requesting a writ of mandamus at Count Two to compel Respondent to follow Sec. 107.04 of the Codified Ordinances of the City of Cleveland Heights (“Cod. Ord.”) in a manner Relator alleges should be followed. Both of these counts concern the same salient issue: whether Respondent is bound to record minutes of Council committee meetings and, particularly, whether Council Committee of the Whole meetings require recorded minutes.

Both counts alleged by Relator fail to state a claim upon which this Honorable Court can grant relief insofar as Respondent operates under the exercise of the sovereign power of local self-government, or Home Rule, provided to the City of Cleveland Heights by charter and the Ohio Constitution. This Home Rule authority, as Relator concedes, allows for Respondent to determine its own rules and order of business. Where its local rules or provisions differ or are contrary to the state’s general laws, such as the Sunshine Law here, then the local rule or provision will prevail.

Relator’s action is fundamentally flawed with a misreading of Cod. Ord. Sec. 107.04. Contrary to Relator’s position, Cod. Ord. Sec. 107.04 provides that recording of committee

¹ Relator only named Respondent as a party and “[a] city council is not *sui juris* and therefore cannot sue or be sued in its own right, absent statutory authority.” *Cuyahoga Falls v. Robart* (1991), 58 Ohio St.3d 1, 6, 567 N.E.2d 987, 992. Moreover, “[t]here is no language in R.C. 121.22 specifically authorizing suits against city councils.” *Mollette v. Portsmouth City Council*, 169 Ohio App.3d 557, 565, 2006-Ohio-6289. The City of Cleveland Heights reserves its right, if necessary, to raise this argument and all others by laws defenses as permitted should this Civ.R. 12(B)(6) motive be denied.

meeting minutes is at the discretion of Council by stating that minutes “may be recorded.” The City’s local ordinance prevails over R.C. 121.22(C) insofar as the statute may provide otherwise.

As a result, the City’s Home Rule authority does not require Council committee meeting minutes to be recorded. Therefore, Relator’s *Complaint* must be dismissed as a matter of law.

II. LAW AND ARGUMENT

A. Statement of the Case

For the purposes of this motion, Respondent states that it acts under the Home Rule Authority of Ohio’s Constitution, the Charter of the City of Cleveland Heights and the Codified Ordinances of the City². Specifically, Respondent outlines this authority as follows:

1. Ohio Constitution, Art. XVIII, Sec. 3, governs the respective legislative roles of the state and its municipalities and in matters of local self-government, grants Home Rule Authority to charter municipalities if a portion of a municipal charter expressly conflicts with a parallel state law, the charter provisions prevail;
2. Ohio Constitution Art. XVIII, Sec. 7, allows municipalities to frame and adopt or amend a charter for its government and may, subject to the provisions of Sec. 3 above, exercise thereunder all Home Rule powers of local self-government;
3. Cleveland Heights’ Charter, at Art. II, provides that the City “shall have all powers of local self-government now or hereafter granted to municipalities by the Constitution and laws of Ohio;”
4. Cleveland Heights Charter, Art. III, Sec. 8, provides that the City’s “Council shall determine its own rules;”
5. Cleveland Heights Codified Ordinance at Sec. 107.04(a) provides that Council “shall” record the minutes of “all regular, special and emergency meetings of Council,” but, by contrast, Council “may” record “[m]inutes of Council committee meetings;”
6. Cleveland Heights Codified Ordinance at Sec. 111.01 through Sec. 111.03 defines “regular,” “special,” and “emergency” meetings of Council, respectively; and

² Pursuant to Civ.R. 44.1(A)(2), Respondent has attached at appendix A, as certified by affidavit of the Clerk of Council, both the City’s Charter and the referenced sections of its Codified Ordinances. Additionally, and Relator references this authority, “[m]aterial incorporated in a complaint may be considered part of the complaint for purposes of determining a Civ.R. 12(B)(6) motion to dismiss.” *State ex rel. Crabtree v. Franklin Cty. Bd. of Health* (1997), 77 Ohio St.3d 247, 249, fn.1, 673 N.E.2d 1281.

7. Cleveland Heights Codified Ordinance at Sec. 111.11, in contrast to and separate from the meetings of Council defined above, provides for committees of Council, which, contrary to Relator's assertion, are separate and distinct from regular, special and emergency meetings of Council, a distinction that is expressly set forth in Sec. 107.04.

B. Standard of Review

A motion to dismiss for failure to state a claim upon which relief can be granted is procedural and tests the sufficiency of the complaint. *Assn. for the Defense of the Washington Local School Dist. v. Kiger* (1989), 42 Ohio St.3d 116, 117, 537 N.E.2d 1292, 1293. The standard for reviewing the sufficiency of a mandamus complaint was stated in *State ex rel. Alford v. Willoughby* (1979), 58 Ohio St.2d 221, 223-224, 390 N.E.2d 782, 785:

In construing a complaint upon a motion to dismiss for failure to state a claim, the material allegations of the complaint are taken as admitted [citation omitted]. Then, before the court may dismiss the complaint, ' * * * it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to recovery. * * * ' *O'Brien v. University Community Tenants Union* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.

To establish a claim in mandamus there must exist, proven by Relator, a clear legal duty to act on the part of a public officer or agency and that Relator has no plain and adequate remedy in the ordinary course of the law. *State ex rel. Pressley, v. Indus. Comm.* (1967), 11 Ohio St.2d 141, 228 N.E.2d 631, paragraph one of the syllabus; *see State ex rel. Hanson v. Guernsey Cty Bd. of Comm.*, 65 Ohio St.3d 545, 1992-Ohio-73. Here, Relator must establish a clear legal right to have minutes recorded of Council Committee of the Whole meetings, a clear legal duty on the part of Respondent to provide such minutes, and the lack of an adequate remedy at law. *See State ex rel. Fenley v. Kyger* (1995), 72 Ohio St.3d 164, 165, 648 N.E.2d 493, 494.

As a matter of law, Relator does not meet that burden.

C. Relator's Complaint fails to state a claim upon which relief can be granted.

1. As to Counts One and Two of the Complaint, Respondent, as part of a chartered municipality, has operated and does operate under its Home Rule authority.

Where R.C. 121.22(C) conflicts with Cod. Ord. Sec. 107.04, Relator's Home Rule Authority prevails, and Cod. Ord. Sec. 107.04 governs. The State of Ohio Attorney General supports this principle in the 2015 Ohio Sunshine Laws Manual in pertinent part as follows:

A charter municipality has the right to determine by charter the manner in which its meetings will be held. Charter provisions take precedence over the Open Meetings Act where the two conflict. If a municipal charter includes specific guidelines regarding the conduct of meetings, the municipality must abide by those guidelines.

(from p. 99 of the *Ohio Sunshine Laws 2015: An Open Government Resource Manual*, published by the Office of Mike DeWine, Attorney General, State of Ohio; numerous citations omitted; the *Manual* can be found via the following link:

<http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/Sunshine-Law-Publications/2015-Sunshine-Laws-Manual.aspx>.)

The Ohio Constitution permits chartered municipalities to operate under Home Rule, or self-government, powers and a chartered municipality has the right, as in this case, to determine the manner in which its meetings will be held. *State ex rel. Inskip v. Staten*, 74 Ohio St.3d 676, 1996-Ohio-236; *Hills & Dales, Inc. v. City of Wooster* (1982), 4 Ohio App.3d 240, 448 N.E.2d 1634. The manner in which meetings are conducted and when minutes are to be recorded has been precisely and expressly set forth by the City and is controlling over contrary general law provisions. *State ex rel. Lightfield v. Village of Indian Hill* (1994), 69 Ohio St.3d 441, 633 N.E.2d 524.

As the Ohio Supreme Court has stated, the Home Rule Amendment to the Ohio Constitution, under, Art. XVIII, Sec. 3, governs the respective legislative roles of the state and its municipalities, and in matters of local self-government, if a portion of a municipal charter expressly conflicts with a parallel state law, the charter provisions will prevail. *Fenley*, 72 Ohio

St.3d at 165; *State ex rel. Bardo v. Lyndhurst* (1988), 37 Ohio St.3d 106, 108-109, 524 N.E.2d 447, 450-451, *citing* Sections 3 and 7 of Art. XVIII, Ohio Constitution. Section 7 of Art. XVIII complements Sec. 3 by stating, “Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.” *See Walker v. City of Toledo*, 143 Ohio St.3d 420, 423, 2014-Ohio-5461. Further, Section 3 empowers municipalities to: “ * * * exercise all powers of local self-government * * * .” *See Hills & Dales, supra*; Art. III, Sec. 8 of the City’s Charter.

As stated almost a century ago, in *Froelich v. Cleveland* (1919), 99 Ohio St. 376, at 391, 124 N.E. 212: “The constitution authorizes the city to exercise part of the sovereign power, and in the proper exercise of that part it is immune from general laws.” Therefore, “the constitutionally granted power of local self-government reigns supreme” over Ohio’s “Sunshine Law” at R.C. 121.22. *Hills & Dales*, 4 Ohio App.3d at 242, where the court held (at 242-243) that a charter municipality, in the exercise of its sovereign powers of local self-government as established by Section 3 of Article XVIII of the Constitution of Ohio, need not adhere to the strictures of R.C. 121.22.

The City’s Charter at Art. II (“Powers”) provides that the City “shall have all powers of local self-government now or hereafter granted to municipalities by the Constitution and laws of Ohio, and such further powers as may now or hereafter be granted by the laws of Ohio; and all such powers shall be exercised in the manner prescribed by this Charter or by ordinances of the Council created hereby.” Further, Art. III, Sec. 8 of the Charter provides that “Council shall determine its own rules and order of business...” As such, the Charter, together with the Codified Ordinances, provides the City with the powers of local self-government.

City Council implements its Home Rule Authority through the ordinances, detailed below.

Relator's *Complaint* does not recognize the City's prevailing Home Rule authority and fails to recognize that Cod. Ord. Sec. 107.04 governs in the situation, as a matter of law.

Therefore, Relator's *Complaint* fails to state a claim upon which relief can be granted pursuant to Civ.R. 12(B)(6) and, as the City's local rule must prevail when it conflicts with the state's general law, Relator's *Complaint* must be dismissed. *Fox v. City of Lakewood* (1988), 39 Ohio St.3d 19, 528 N.E.2d 1254.

2. As to Count One, Respondent is not bound by R.C. 121.22(C) with respect to committee meetings.

In Count One, Relator alleges that the lack of minutes by the Council Committee of the Whole constitutes a violation of R.C. 121.22(C) of the Sunshine Law.³ Relator reasons that because R.C. 121.22(C) is not contradicted by the City's Charter or by its Codified Ordinances, the Council Committee of the Whole is subject to its requirements. ¶11 of *Complaint*. Specifically, Relator alleges that R.C. 121.22(C) is not superseded by Sec. 107.04. *Id.* This is incorrect.

The City's Charter at Art. III, Sec. 8, establishes that City Council determines its own procedural rules. Art. III, Sec. 8 ("The Council shall determine its own rules and order of business..."). This section is controlling under the Home-Rule doctrine. *Fenley*, 72 Ohio St.3d at 165-166. Under its Home-Rule authority, Sec. 107.04, "Minutes of Meetings," establishes that minutes of Council committee meetings, including the Committee of the Whole meetings,

³ Relator cites to the City's Youth Advisory Commission and Architectural Board of Review in his Statement of Facts; however, the allegations in Relator's two counts and prayer do not address these two bodies and do not affect Respondent's *Motion to Dismiss*. Nevertheless, Respondent notes that the City has previously provided to Relator all minutes recorded from meetings of these two bodies in response to his Public Records Act requests and each meeting that was convened has corresponding minutes.

“may be recorded in writing.” Section 107.04(a). Contrast this permissive language with the mandatory language found at R.C. 121.22(C), which establishes that the minutes of all public bodies “shall be promptly prepared, filed, and maintained.” R.C. 121.22(C). In other words, the plain language of R.C. 121.22(C) and Sec. 107.04(a) is in conflict with each other. While the use of the term “shall” in R.C. 121.22(C) dictates that minutes are required, Sec. 107.04 sets a different standard by the use of the term “may.” The City ordinance establishes a discretion, not a requirement, of the Council to record minutes of its committee meetings, including the Council Committee of the Whole meetings.

Furthermore, that the permissive meaning of “may” was intended by its drafters can be inferred based on the use of “shall” in preceding sentence of Section 107.04(a), which establishes that regular, special, and emergency meetings of Council “shall” be recorded in writing. Sec. 107.04 (a). “When certain language is used in one statute and wholly different language in another, ‘it will *** be presumed that different results were intended.’” *State ex rel. Fink v. Registrar, Ohio Bur. of Motor Vehicles* (Sept. 14, 1998), 12th Dist. No. CA98-02-021, 1998-WL-634707, *quoting Metro. Securities Co. v. Warren State Bank* (1927), 117 Ohio St. 69, 76, 158 N.E. 81; *see State ex rel. Cordray v. Court of Claims of Ohio*, 2010-Ohio-4437, ¶ 27, 190 Ohio App. 3d 161, 172, 941 N.E.2d 93, 101-02, *aff’d sub nom. State ex rel. DeWine v. Court of Claims of Ohio*, 2011-Ohio-5283, ¶ 27, 130 Ohio St. 3d 244, 957 N.E.2d 280. It is also instructive to compare that meetings of Council and meetings of committees of council are distinguished from each other and addressed separately under the Codified Ordinances. *See* Sec. 111.01-03 and Sec. 111.11 attached at Appendix A.

This Honorable Court must presume that, by using different terms, the City intended⁴ a difference between “shall” and “may.” See *Cordray*, at ¶ 27, citing *State v. Carder*, 8th Dist. No. 83801, 2004-Ohio-5598. Fundamentally and under general statutory construction, the use the term “shall” makes the provision mandatory and the use of the term “may” makes the provision permissive or discretionary. *Dennison v. Dennison* (1956), 165 Ohio St. 146, 149, 134 N.E.2d 574, 576. Additionally, these terms should not be used interchangeably or synonymously. *State ex rel. Wendling Bros. Co. v. Bd. of Edn.* (1933), 127 Ohio St. 336, 338, 188 N.E. 566, 567.

The foregoing demonstrates that R.C. 121.22(C) is indeed in conflict with the City’s code and, pursuant to its Home Rule authority, Respondent is not bound by it with respect to minutes of Council committees. Therefore, Count One of the *Complaint* fails to state a claim upon which relief can be granted.

3. As to Count Two, Respondent has not been operating contrary to Cod. Ord. Sec. 107.04 of the Codified Ordinances of the City of Cleveland Heights.

Respondent incorporates its argument above with respect to how Cod. Ord. Sec. 107.04(a) must be read as if fully set forth herein. Relator alleges in Count Two that Respondent has been in direct violation of Cod. Ord. Sec. 107.04 by not recording minutes of the Council Committee of the Whole. Relator again is incorrect. As the foregoing establishes, Respondent has Home-Rule authority to determine its own meeting procedures and, specifically, the discretion whether Council committee meetings will have minutes recorded. Under that discretion, minutes of Council committees need not be recorded, which demonstrates that Respondent has not been operating in direct violation of any duty under Cod. Ord. Sec. 107.04.

⁴ It should be noted that “a court will not substitute its judgment for legislative discretion unless there has been a clear and palpable abuse of power.” *Wilson v. City of Cincinnati* (1976), 46 Ohio St.2d 138, 142, 346 N.E.2d 666, 669, citing *Allion v. Toledo* (1919), 99 Ohio St. 416, 124 N.E. 237.

Any obligation of Respondent to record minutes of the Council Committee of the Whole is under the City's Home-Rule pursuant to Sections 3 and 7 of Art. XVIII of Ohio's Constitution and Respondent must act in accordance with its Charter and its Codified Ordinances. It must also act under the general laws of Ohio, including the Sunshine Law, to the extent that the general laws are not inconsistent with its local laws and provisions. *See State ex rel. The Fairfield Leader v. Ricketts* (1990), 56 Ohio St. 3d 97, 98-99, 564 N.E.2d 486, 489. There is no question that as a matter of law the "may" provision with respect to Council committee meeting minutes and the corresponding "shall" provision in the Sunshine Law are inconsistent, which leaves Respondent with the authority, under the controlling Cod. Ord. Sec. 107.04(a), to choose whether Council Committee of the Whole meetings will carry recorded minutes.

Further, in contrast to the R.C. 121.22(I) injunction sought in Count One, Relator seeks a writ of mandamus in Count Two. But as a matter of law, the two remedies cannot be sought together. *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 50, 2001-Ohio-130. However, and assuming *arguendo* that both can be sought from this Honorable Court, Relator cannot meet his burden to establish that a writ should be granted. As detailed in the Standard of Review above, a court can only grant the extraordinary remedy of a writ of mandamus if Respondents here have a clear legal duty to record and make available minutes of Council Committee of the Whole meetings. *Fenley, supra*. Since there is no such clear legal duty by Respondents under the Charter or Codified Ordinances, then Relator's mandamus action cannot be sustained. *See Fairfield Leader*, 56 Ohio St.3d at 98 (a court "must [first] decide if respondents have a clear legal duty to prepare and make available...minutes").

Under the similar analysis above with respect to Count One, Count Two of the *Complaint* also fails to state a claim upon which relief can be granted.

III. CONCLUSION

Relator's *Complaint* fails to state on various levels a claim upon which any relief can be granted to him. Moreover, Relator cannot meet the standard to prevail on a mandamus action – the City's Home Rule authority permits it to decide whether minutes are recorded for Council Committee of the Whole meetings and R.C. 121.22(C) is inapplicable. Therefore, the City, on behalf of Respondent, requests that this Honorable Court dismiss Relator's *Complaint* with prejudice.

Respectfully Submitted,

s/Kevin P. Roberts

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*Attorneys for Respondent City of Cleveland Heights
City Council*

CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2015, the *Motion to Dismiss Relator's Complaint* has been filed electronically *via* the e-Filing System of the Cuyahoga County Common Pleas Court. Notice of this filing will be sent to all parties by operation of the Court's Notice of Electronic Filing (NEF) system to which parties can freely access. Any party without access to the NEF system will be mailed a copy by regular U.S. Mail.

s/Kevin P. Roberts

KEVIN P. ROBERTS (0062736)

*Attorney for Respondent City of Cleveland Heights
City Council*

APPENDIX A

AFFIDAVIT

STATE OF OHIO)
) ss:
COUNTY OF CUYAHOGA)

I, Tom Raguz, being duly sworn according to law and based on my personal knowledge, state as follows:

1. I am the Clerk of Council of the City of Cleveland Heights;
2. As Clerk of Council, I am able to authenticate the records that constitute the rules and procedures that govern the City of Cleveland Heights and its Council; and
3. The attached records are true and accurate copies of the following:
 - a. The Charter of the City of Cleveland Heights, Ohio, Article II and Article III, Section 8;
 - b. Chapter 107 – “Public Meetings” of the Codified Ordinances of the City of Cleveland Heights; and
 - c. Chapter 111 – “Council” of the Codified Ordinances of the City of Cleveland Heights.

Further Affiant sayeth naught.



Tom Raguz

SWORN TO and subscribed before me, a Notary Public in the State of Ohio, this 4th day of December, 2015.



Notary Public
L. JAMES JULIANOS, JR.
NO EXPIRATION DATE

ARTICLE III THE COUNCIL

SECTION 1. POWERS, NUMBER AND TERM.

The legislative power of the City, except as limited by this Charter, and such additional powers as may be expressly granted by this Charter, shall be vested in a Council of seven members elected at large. The terms of the members of the Council shall begin the first day of January next following their election, and they shall serve for a term of four years or until their successors are chosen and qualified, except that the three members elected at the first election by the lowest votes shall serve for two years only.

SECTION 2. QUALIFICATIONS.

To serve as a member of the Council, a person shall be a resident and elector of the City of Cleveland Heights at the time for submitting his or her nominating petition to the election authorities as required under the terms of this Charter, and shall continue to reside therein during his or her term of office. No person shall be a member of Council who holds any employment with the City of Cleveland Heights, the Cleveland Heights/University Heights School District, or the East Cleveland School District, or who holds any elected public office other than that of precinct committee person or State central committee person.

(Amended 5-6-86.)

SECTION 3. REMOVAL.

The Council shall be the judge of the election and qualifications of its own members. It may expel any member for gross misconduct, or malfeasance in or disqualification for office, or for conviction of a crime involving moral turpitude while in office, or violation of its charter, or persistent failure to abide by the rules of the Council; provided, however, that such expulsion shall not take place without the concurrence of five members nor until the accused member shall have been given a written copy of the charges against him and an opportunity to be heard, with not less than ten days' notice of the time and place of hearing.

(Amended 11-7-72.)

SECTION 4. VACANCIES.

Any vacancy in the Council, except as otherwise provided in this Charter, shall be filled by appointment by a majority of the remaining members of the Council. Such appointee shall hold office through December 31 following the next regular municipal election taking place more than sixty days after such vacancy occurs; provided, however, that the term of a member shall not be lengthened by his resignation and subsequent appointment. The term of the person chosen at such election to succeed such appointee for any unexpired term shall begin the first day of January next following his election and he shall serve the remainder of such unexpired term.

(Amended 11-7-72.)

SECTION 5. SALARIES.

Council may, by ordinance passed biennially in odd numbered years, fix the salaries of the Mayor and all members of the Council for the two-year period commencing on January 1 of the second year following the year that this section shall become effective; provided that any such ordinance must be adopted at least sixty days prior to the filing date for the regular municipal election to be held in the year of adoption; and provided further that Council may, in the year in which this section shall become effective, pass an ordinance fixing, but not increasing, the salaries of the Mayor and all members of Council for the two-year period commencing on January 1 of the first year following the year in which this section shall become effective. This section shall become effective January 1, 1983. (Amended 11-2-82.)

SECTION 6. APPOINTEES.

The Council shall appoint a City Manager.

Unless otherwise provided by ordinance of the Council, the Director of Finance shall serve as ex officio Clerk of the Council, and shall have the duty of keeping Council's records and performing all other duties required by this Charter and by the Council. The Council may also appoint and employ such other officers and employees of its body as it deems necessary, all such officers and employees to hold office at the pleasure of the Council.

The Council may create and establish any other offices and positions which it may deem necessary in connection with the administration of the City affairs and which are not herein otherwise provided for.

Neither the Council nor any of its members or committees shall dictate the appointment of any person to office or employment by the City Manager, nor in any manner interfere with or prevent the City Manager from exercising his own judgment in the appointment of officers and employees in the administrative service. Except for the purpose of inquiry, the Council and its members shall deal with the administrative service solely through the City Manager and neither the Council nor any member thereof shall give orders to any of the subordinates of the City Manager.

In its employment practices, the City is and shall continue to be an equal opportunity employer. At least once each year, the City Manager shall submit a report to the Council for review concerning the carrying out of this policy. Council shall make this report public.

This section shall become effective January 1, 1983. (Amended 11-2-82.)

SECTION 7. MEETINGS.

The Council shall meet for the purpose of organization on the first Monday in January following each regular municipal election. In the event such first Monday is a legal holiday, Council shall meet the following day. Thereafter the Council shall meet at such times and at such public places within the City of Cleveland Heights as may be prescribed by ordinance or resolution. Four members shall constitute a quorum.

(Amended 11-7-72.)

SECTION 8. GENERAL PROVISIONS.

The Council shall determine its own rules and order of business, provide for special meetings and keep a journal of its proceedings. The Council may by general ordinance provide: for legislative procedure; the form and method of enactment of ordinances; a simplified procedure for levying assessments; the method and manner of giving public notice of passage of ordinances or resolutions of a general or permanent nature; the advertisement and sale of bonds and notes; and the advertisement and awarding of public contracts. Such general ordinances, when once adopted, shall not be repealed or amended except by vote of five members of the Council or by the people.

SECTION 9. FRANCHISES.

No measure making a grant, renewal or extension of a franchise or other special privilege, or regulating a rate to be charged for its service by any public utility, shall ever be passed as an emergency measure.

SECTION 10. INTEREST IN CONTRACTS.

No member of the Council, nor the City Manager, nor any other officer or employee of the City shall be directly or indirectly interested in any contract, job, work, or service with or for the City; nor in the profits or emoluments thereof; nor in the expenditure of any money on the part of the City; and any contract with the City in which any officer or employee is or becomes interested may be declared void by the Council.

SECTION 11. MAYOR AND VICE MAYOR.

The Council shall, at the time of organizing, and every two years thereafter, elect one of its members as President, who shall also have the title of Mayor, and another as Vice President, who shall also have the title of Vice Mayor. In the event of a vacancy in either the office of Mayor or Vice Mayor, or in the event the Council shall determine by at least four of its members that either the Mayor or Vice Mayor is unable to fulfill the duties of his respective office, the Council shall immediately proceed to elect one of its members to serve in such office.

The President, and in his absence the Vice President, shall preside at all meetings of the Council and shall have a voice and vote in its proceedings, but no veto. Except as the same are otherwise disposed of or provided for herein, the Mayor, or in the event he is unavailable, the Vice Mayor, shall exercise all powers and discharge all duties imposed upon Mayors of municipalities by the general laws of the State, which are not inconsistent with the provisions of this Charter; but nothing herein provided shall be construed as conferring upon him any administrative or executive functions herein conferred upon other officers.

(Amended 11-7-72.)

CHAPTER 107 Public Meetings

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| <p>107.01 Public meetings; executive sessions.</p> <p>107.02 Public notification.</p> <p>107.03 Personal notification.</p> | <p>107.04 Minutes of meetings.</p> <p>107.05 Validity of Council action.</p> |
|--|--|

CROSS REFERENCES

Ohio Public Meetings Act – see Ohio R.C. 121.22
Meetings of Council – see ADM. Ch. 111

107.01 PUBLIC MEETINGS; EXECUTIVE SESSIONS.

(a) All meetings of Council, Council committees, commissions, boards, citizen advisory committees of Council, and other public bodies of the City shall be open to the public unless an executive session is authorized under the applicable provisions of this chapter. Nothing herein contained shall mandate that any public body of this City permit public participation in such open meetings unless specifically required by the provisions of the City Charter or these Codified Ordinances.

(b) Unless otherwise provided in the Codified Ordinances, all meetings of Council, boards and commissions, and other public bodies of the City shall be held at the Cleveland Heights City Hall, or at other public buildings or properties within the City. Meetings held in executive session may be held at locations other than the City or school properties so long as proper notice of such meeting is given in the manner provided by Section 107.02.

(c) The Council, Council committees, commissions, boards, citizen advisory committees of Council, and other public bodies of the City may meet in executive session for all or a portion of any meeting for the consideration of any of the matters outlined immediately below:

- (1) To consider the appointment, employment, dismissal, discipline, promotion, demotion or compensation of any public employee or public official, the investigation of charges or complaints against a public employee, official, licensee or contractee of the City or one who seeks to be an employee, licensee or contractee of the City.

- (2) To consider the terms of purchase or lease of real or personal property for public purposes, or the terms of sale or lease of City owned real or personal property.
- (3) To discuss with an attorney for the public body, claims or disputes involving the public body that are the subject of pending court action, or in the judgment of such attorney, appear likely to be the subject of a future court action or claim.
- (4) Preparing for, conducting or reviewing negotiations or bargaining sessions with public employees or their representatives concerning such employees compensation or other terms and conditions of their employment.
- (5) Meetings required to be kept confidential by applicable Federal, State or local law or regulations.
- (6) Discussions of security arrangements in existence, or plans for future security arrangements, dealing with the public safety, where such discussions might reveal information that could be used for the purpose of committing crimes or avoiding detection or prosecution for violations of the law.
- (7) To consider the proposed terms of a contract between the City and a contractee or proposed contractee of the City, where the discussions of the terms or proposed terms of such contract in the judgment of an attorney for the City, might give an unfair competition advantage to such contractee, or be a detriment to the position of the City in securing contract terms.
- (8) Where Council or a board or commission of the public body, is sitting to decide an issue or matter in a quasi-judicial proceeding, but only after all of the evidence to come before such body has been heard.
- (9) Not more than four (4) times during each calendar year, Council or a board or commission of the City may meet in retreat to discuss general plans for the future, or general issues before the City.

(d) No vote of any kind may be taken of the members of a public body during an executive session of such body.
(Ord. 105-1986. Passed 11-3-86.)

107.02 PUBLIC NOTIFICATION.

(a) Regular Meetings. The time and place of all regular meetings of Council, Council committees, commissions, boards, citizen advisory committees of Council, and other similar public bodies of the City shall be noted in a calendar of monthly meetings. The monthly calendar shall be made public according to one (1) of the two (2) procedures set out below:

- (1) Posted at City Hall and at the following public libraries prior to the first day of the month in which such meetings will be held:

Cleveland Heights-University Heights Public Library
2345 Lee Road

Cleveland Heights-University Heights Public Library
2800 Noble Road

Cleveland Heights-University Heights Public Library
1925 Coventry Road

East Cleveland Public Library - Caledonia Branch
960 Caledonia Road; or

- (2) Published in a newspaper of general circulation at least five (5) days prior to the first day of the month in which such meeting will be held.

Amendments to the monthly calendar shall be posted only at the City Hall not less than twenty-four (24) hours prior to any meeting added to the calendar, except in the case of emergency meetings.

(b) Special Meetings. Notice of the time, place and purpose of special meetings of Council, Council committees, commissions, boards, citizen advisory committees of Council, and other similar public bodies of the City shall be given at least twenty-four (24) hours before such meeting is to be held. Such notice shall be posted at the locations listed in subsection (a)(1) hereof. In addition, notification of any special meetings of public bodies of the City shall be given to any news media requesting such notification twenty-four (24) hours prior to the time of the meeting. This notification shall include the time, place and purpose of the special meeting.

(c) Emergency Meetings. In the event of an emergency meeting, notice of such emergency meeting shall be communicated to the news media that have requested notification of the time, place and purpose of the emergency meeting and the time and place of such meeting shall be posted at the City Hall as soon as the time for the emergency meeting is set.
(Ord. 105-1986. Passed 11-3-86.)

107.03 PERSONAL NOTIFICATION.

(a) Any person, organization or group of persons is entitled to mail notice of the calendar of monthly meetings. To obtain this notice, such persons are required to fill out a form provided by the Clerk of Council for such purposes and provide a self-addressed stamped envelope for the number of calendars requested or pay a fee of fifty cents (\$.50) per calendar requested.

(b) Any requesting person, organization or group of persons shall receive advance notice of all meetings at which any specific type of business will be discussed and/or acted upon. To obtain this notice, such persons are required to fill out a form provided by the Clerk of Council for such purposes and provide a self-addressed stamped envelope for the number of notifications requested, or pay a fee of fifty cents (\$.50) per notification.
(Ord. 105-1986. Passed 11-3-86.)

107.04 MINUTES OF MEETINGS.

(a) Recordation. The minutes of all regular, special and emergency meetings of Council, shall be promptly recorded in writing and open to the public for inspection. Minutes of Council committee meetings may be recorded in writing. Minutes of executive sessions of public bodies need only reflect the general subject matter of discussion in such executive sessions.

(b) Location of Minute Books. The Clerk of Council shall keep a minute book for meetings of Council and any other board or commission which regularly meets and records minutes. The minute books shall contain the minutes of all meetings of each public body submitted to the Clerk of Council. The public may inspect the minute books at all reasonable times.
(Ord. 105-1986. Passed 11-3-86.)

107.05 VALIDITY OF COUNCIL ACTION.

Notwithstanding the requirements of this chapter, no action of Council, Council committees, commissions, boards, citizens advisory committees of Council and other public bodies of the City shall be invalidated by any technical or other violation of this chapter unless it can be affirmatively shown that the public body met and voted on a specific issue or measure knowing it was, at that time, violating the specific terms of this chapter.
(Ord. 105-1986. Passed 11-3-86.)

TITLE THREE – Legislative
Chap. 111. Council.

CHAPTER 111
Council

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|--------|--|--------|--|
| 111.01 | Regular meetings. | 111.18 | Amendments. |
| 111.02 | Special meetings. | 111.19 | Required number of copies of proposed legislation. |
| 111.03 | Emergency meetings. | 111.20 | Reading of ordinances and suspension of rules. |
| 111.04 | Quorum. | 111.21 | Voting. |
| 111.05 | Adjournment. | 111.22 | Authentication of ordinances and resolutions. |
| 111.06 | Meetings and records are public. | 111.23 | Publication of ordinances and resolutions. |
| 111.07 | Organization. | 111.24 | Robert's Rules of Order. |
| 111.08 | President. | 111.25 | Amendments of rules. |
| 111.09 | Absence of President. | 111.26 | Dispensation of rules. |
| 111.10 | Clerk. | 111.27 | Exception to majority vote. |
| 111.11 | Committees. | 111.28 | Resignations. |
| 111.12 | Business of Council. | 111.29 | Codification of ordinances. |
| 111.13 | Action of Council. | 111.30 | Authorized expense expenditures. |
| 111.14 | Enacting clause of ordinances or resolutions. | | |
| 111.15 | Subject and title of ordinances and resolutions. | | |
| 111.16 | Preparation of ordinances and resolutions. | | |
| 111.17 | Reference of proposed ordinances and resolutions to committee. | | |

CROSS REFERENCES

Organization and general provisions – see CHTR. Art. III
Powers of Council – see Ohio R.C. 731.05, 731.47
Ordinances and resolutions – see Ohio R.C. 731.17 et seq.
Public meetings – see ADM. Ch. 107

111.01 REGULAR MEETINGS.

Regular meetings of Council shall be held in the City Hall on the first and third Mondays of each month, at 7:30 p.m., except when any such Monday is on a legal holiday, Council shall meet in regular session on the following day.

Council, by motion duly adopted, may authorize a meeting of Council at some other public building located within the City of Cleveland Heights.
(Ord. 8-1976. Passed 2-17-76.)

111.02 SPECIAL MEETINGS.

A special meeting of Council may be called by the President of Council or by any two (2) members thereof, or by the City Manager, upon at least twenty-four (24) hours personal telephone notice or by written notice served personally upon each member or left at his usual place of residence. Such notice shall state the subjects to be considered at the special meeting and no other subject shall be considered at that meeting, unless all members are in attendance and give unanimous consent to the consideration of other matters at such special meeting.

Special meetings may also be called by a majority vote by a resolution passed at any regular meeting, and an absentee at such regular meeting shall be notified thereof as hereinbefore provided.

111.03 EMERGENCY MEETINGS.

In the event of an emergency requiring immediate official action, an emergency meeting of Council may be called by the President of Council or by any two (2) members thereof, or by the City Manager, upon at least four (4) hours personal telephone notice or by written notice served personally upon each member or left at his usual place of residence. Such notice shall state the subjects to be considered at the emergency meetings, and no other subject shall be considered at that meeting.

111.04 QUORUM.

Four (4) members shall constitute a quorum of Council to do business and a less number may adjourn from day to day and compel the attendance of absent members in such manner and under such penalties as may be prescribed by ordinance.
(Ord. 2400. Passed 1-3-22.)

111.05 ADJOURNMENT.

By resolution concurred in by a majority of all members of Council present, any meeting may be adjourned to a later date prior to the date of the next regular Council meeting. The adjourned meeting shall be considered a special meeting, and public notice thereof shall be given pursuant to Section 107.02(b). Any absentee member of Council shall be notified personally, by telephone or by written notice, served personally or at his regular place of residence, at least twenty-four (24) hours prior to the date and hour of the adjourned meeting.

111.06 MEETINGS AND RECORDS ARE PUBLIC.

Except as otherwise provided in the Codified Ordinances, all meetings of Council shall be public and any citizen shall have access to the minutes and records thereof at all reasonable times.

111.07 ORGANIZATION.

At its first regular Council meeting in January following each municipal election, Council shall organize and, by vote of at least four (4) members thereof, shall elect one (1) of its members as President and another as Vice President to serve for a period of two (2) years thereafter. If a vacancy occurs or if Council determines by at least four (4) members that the President or Vice President is unable to fulfill the duties of his respective office, Council shall immediately proceed to elect one (1) of its members to serve in such office.

111.08 PRESIDENT.

The President shall preside at all meetings of Council and shall have a voice and vote in its proceedings but no veto. He shall preserve order and decorum, prevent personal reflection and confine members in debate to the question. He may, in common with any other member, call any member to order who violates any of the rules, and when in the chair, shall decide all questions of order subject to an appeal to Council on demand of two (2) members. On such appeal there shall be no debate but each member making the appeal may briefly state his reason for the same and the presiding officer shall have the same right to a similar brief statement.
(Ord. 2400. Passed 1-3-22.)

111.09 ABSENCE OF PRESIDENT.

In the absence of the President, the Vice President shall discharge the duties and be clothed with all the powers of the President. In the absence of both the President and Vice President, the Councilmen present may choose one (1) of their members as President pro tem., who during such absence, shall discharge the duties and be clothed with all the powers of the President.
(Ord. 2400. Passed 1-3-22.)

111.10 CLERK.

The Clerk of Council shall keep its records and perform such other duties as may be required by ordinance or resolution.
(Ord. 2400. Passed 1-3-22.)

111.11 COMMITTEES.

Council may provide from time to time by resolution for such standing and special committees as the business of Council may require. The President, by virtue of his office, shall be a member and chairman of all committees whenever he attends their meetings and desires to so act. In the absence of provision to the contrary, the President shall appoint members of the committees and the member first named shall act as chairman of the committee when the President does not attend and act. A majority of the appointed members shall constitute a quorum. Vacancies in committee membership shall be filled by like appointment.
(Ord. 24-1949. Passed 3-21-49.)

111.12 BUSINESS OF COUNCIL.

The business of all regular meetings of Council shall include the following:

Roll call.

Reading and disposal of journal.

Reports and communications from the City Manager and department heads.

Communications from residents.

Reports of committees.

Consideration of ordinances, resolutions and motions.

Miscellaneous business.

111.13 ACTION OF COUNCIL.

Council shall act by ordinance or resolution duly adopted at a regular, special or emergency meeting. Each ordinance, resolution and motion shall require the concurrence of at least four (4) members of Council for its passage or adoption, and the vote upon its passage or adoption shall be taken by "ayes" and "nays" and entered on the journal.

111.14 ENACTING CLAUSE OF ORDINANCES OR RESOLUTIONS.

The enacting clause of all ordinances and resolutions passed by Council shall be "Be it ordained (resolved) by the Council of the City of Cleveland Heights, Ohio". The enacting clause of all ordinances submitted to popular election by the initiative shall be "Be it ordained by the People of the City of Cleveland Heights, Ohio". (Ord. 2400. Passed 1-3-22.)

111.15 SUBJECT AND TITLE OF ORDINANCES AND RESOLUTIONS.

Each proposed ordinance or resolution shall be introduced in written or printed form and shall not contain more than one (1) subject which shall be clearly stated in the title. However, related subjects may be grouped in one (1) ordinance or resolution and the legislation relating to the installation of public improvements in different streets may be consolidated so that the various ordinances and resolutions in connection therewith may contain provisions for all of the streets. General appropriation ordinances may contain the various subjects and accounts for which money is to be appropriated. (Ord. 2400. Passed 1-3-22.)

111.16 PREPARATION OF ORDINANCES AND RESOLUTIONS.

The Director of Law, upon the request of any member, shall draft the form of any proposed legislation desired by such member, and any legislation not prepared by the Director of Law shall be referred to him for approval as to form and have his approval endorsed thereon before adoption. Each resolution or ordinance when introduced shall have the name of the member introducing the same endorsed thereon and have a number assigned to it by the Clerk of Council and shall thereafter be referred to by number. (Ord. 40-1950. Passed 6-5-50.)

111.17 REFERENCE OF PROPOSED ORDINANCES AND RESOLUTIONS TO COMMITTEE.

Each resolution or ordinance upon introduction shall be referred to the appropriate committee or committees by the presiding officer and, except in an emergency, no resolution or ordinance shall be acted upon by Council until it has been so referred and reported upon by such committee or committees.
(Ord. 40-1950. Passed 6-5-50.)

111.18 AMENDMENTS.

No resolution or ordinance shall be changed or altered by a committee, but any committee may recommend in writing either amendments or a substitute resolution or ordinance and any member of Council may, at any time, introduce in writing an amendment to or substitute for a pending piece of legislation which shall be subject to the same approval as to form by the Director of Law as legislation originally introduced.
(Ord. 40-1950. Passed 6-5-50.)

111.19 REQUIRED NUMBER OF COPIES OF PROPOSED LEGISLATION.

Legislation when introduced and any amendment or substitute therefor shall be submitted in at least three (3) copies, one (1) of which shall be filed with the presiding officer, one (1) with the Clerk of Council and one (1) with the Director of Law and it shall be the duty of the Clerk of Council to furnish sufficient copies for the consideration of Council and its committees. Upon adoption, all legislation of the character referred to in Section 111.20 or relating to the administration of any administrative department shall forthwith be reproduced in printed form or by other process of duplication. One (1) copy thereof shall be furnished to each member of Council, to the Director of Law, to the Director of Finance and to the City Manager, and it shall be the duty of the City Manager to furnish copies to the proper subordinates in any of his departments. The Clerk of Council shall also have in his office such quantity of additional copies as seems to him necessary for the information of the public.
(Ord. 40-1950. Passed 6-5-50.)

111.20 READING OF ORDINANCES AND SUSPENSION OF RULES.

No ordinance of a general or permanent nature, or granting a franchise, or involving the expenditure of money, or the levying of a tax, or for the purchase, lease, sale or transfer of property shall be passed until it has been read at two (2) regular meetings, or the requirements for such reading have been dispensed with by a vote of at least five (5) members of Council. This provision, however, shall not apply to an emergency measure. Where there is a series of ordinances and resolutions required to provide for any public improvement including the raising of money therefor, the above rule shall apply only to the first ordinance or resolution in the series, and all subsequent ordinances and resolutions required in such series, may be passed on their first reading by the concurrence of four (4) members of Council.
(Ord. 2400. Passed 1-3-22.)

111.21 VOTING.

Every member present shall vote on any question on the call for the "ayes" and "nays", unless excused by the unanimous consent of the other members present, and any member not being so excused who fails or refuses to vote on any question when the "ayes" and "nays" are being taken shall be counted as voting in the affirmative.

(Ord. 2400. Passed 1-3-22.)

111.22 AUTHENTICATION OF ORDINANCES AND RESOLUTIONS.

Any ordinance or resolution passed by Council shall be signed by the President or other presiding officer and by the Clerk.

(Ord. 2400. Passed 1-3-22.)

111.23 PUBLICATION OF ORDINANCES AND RESOLUTIONS.

Pursuant to Section 8 of Article III of the City Charter, the method and manner of giving public notice of passage of ordinances and resolutions of a general and permanent nature shall be as follows: the title and either an abstract thereof prepared by the Director of Law or the full text thereof, as may be directed by Council in a section of such ordinance or resolution, or by separate resolution shall be published. Provided, further, that if such ordinance or resolution is a printed publication, it need not be published otherwise. Such publication shall be by notice or advertisement printed once in one (1) newspaper of general circulation in the City.

(Ord. 104-1949. Passed 12-27-49.)

111.24 ROBERT'S RULES OF ORDER.

In the absence of any rule upon the manner of business, Council shall be governed by the current edition of Robert's Rules of Order.

111.25 AMENDMENTS OF RULES.

These rules may be repealed, amended or altered or new rules adopted by a vote concurred in by five (5) members of Council on the report of a committee to which the subject has been referred at a previous meeting.

111.26 DISPENSATION OF RULES.

These rules or any of them may be temporarily suspended at any meeting of Council by a concurrent vote of five (5) members.

111.27 EXCEPTION TO MAJORITY VOTE.

If applicable, when any provision of the City Charter, or any provision of this Administrative Code or any ordinance hereafter passed requires the concurrence of more than the majority of members of Council in order to legally adopt an ordinance or resolution, the provision of the Charter or the provision of this Administrative Code or such subsequent ordinance shall govern, and the rule set forth in Section 111.20 shall be subject thereto.

111.28 RESIGNATIONS.

The resignation of a member of Council shall not take effect until the resignation has been accepted by vote by a majority of Council members exclusive of the person tendering the resignation.
(Ord. 2400. Passed 1-3-22.)

111.29 CODIFICATION OF ORDINANCES.

Notwithstanding any of the provisions of this chapter, Council may at any time revise, rearrange and codify the general ordinances of the City by the following procedure:

- (a) An ordinance may be adopted pursuant to the procedure of this chapter determining in general terms to amend, revise, rearrange, renumber and codify the general ordinances of the City. The determining ordinance shall set forth in a skeleton form a general plan of the recodification with appropriate titles, chapters and other subdivisions. Such determining ordinance need not be published.
- (b) At any time after the adoption of the determining ordinance provided for in the foregoing subsection, Council may proceed as follows:
 - (1) It may by one (1) codifying ordinance adopt in toto all general ordinances of the City so amended, revised, rearranged, renumbered and codified according to the general plan; or
 - (2) It may by a series of separate codifying ordinances and from time to time adopt one (1) or more chapters of the general plan. A chapter shall contain those of the general ordinances which Council may determine to properly belong in such classifications and which have been amended, revised, rearranged, renumbered and codified according to the general plan.
- (c) Any codifying ordinance offered pursuant to subsection (b) hereof shall be submitted in typewritten form and shall contain in full all the ordinances proposed to be codified by the codifying ordinance. Such codification ordinance need not be read in Council except as hereinafter provided. Such codifying ordinance shall be referred by the Mayor to a committee consisting of Council as a whole, City Manager and Director of Law. It shall be the duty of the committee to study the codifying ordinance and make such changes therein as the committee believes proper and to report to Council. If, and when, such committee reports its final draft of the proposed codifying ordinance with the recommendation that it be adopted, the codifying ordinance as so reported may be passed by a vote of three-fourths (3/4) of all members elected to Council. The proposed ordinance as recommended by the committee need not be read in Council except by title, provided, however, that any member of Council may request the reading of all or any part thereof in which case all or the part requested shall be read.

- (d) Such codifying ordinance need not be limited in its scope strictly to amending, revising, rearranging, renumbering and codifying the present general ordinances of the City, but may contain new matter or provisions covering subjects not now embodied in existing ordinances.
- (e) Any codifying ordinance shall specify whether or not the particular chapters so codified shall be published or printed and, if the same is to be published, may provide that the same may be published in sections and shall recite when such codifying ordinance shall take effect and be in force and shall provide for the repeal of all existing ordinances so codified.
(Ord. 42-1939. Passed 11-6-39.)

111.30 AUTHORIZED EXPENSE EXPENDITURES.

The City Manager may approve the expenditure of funds for meals, lodging and miscellaneous expense of Councilmen when they work through the meal hour in town at meetings on City business or when out of town on City business.