

TO: Mick Renneisen, Deputy Mayor
FROM: Philippa M. Guthrie, Corporation Counsel
RE: Comments on Councilor Volan's Organizational Plan
DATE: January 8, 2020

I wanted to note something about Councilor Volan's plan that needs correcting, and also make sure everyone is aware that these new committees would be subject to the Open Door Law.

In a section entitled "A mechanism for oversight" on page 3 of his document, "2020 Council Organizational Plan," Councilor Volan notes:

Council is a co-equal branch of Indiana city government with the Mayor. As such, it has authority to oversee all operations of the executive branch (see below; emphasis mine). Two-thirds of Council can impeach a city employee!

Councilor Volan then cites §2.04.200 of the Bloomington Municipal Code ("BMC"):

2.04.200 - Investigatory powers —Removal of officers. The council shall have the power to supervise and investigate all departments, officers, and employees of the government of the city and to remove any officer or employee against whom charges are sustained. Investigations shall be conducted in accordance with the rules and procedures set forth in state law. A vote of two-thirds of the members of the council shall be required to impeach or remove an officer or employee. (Ord. 79-97 § 2 (part) 1979).

This BMC provision has been at least partly overridden by state law and it should be amended. The Council has investigatory powers but has no powers of impeachment or removal except with regard to its own members. (Authority for that removal power is IC 36-4-6-6 and BMC §2.04.190.) In addition, we could find no statutory provisions granting Council supervision of city departments, officers and employees. In fact, that power is granted by state law to the Executive in IC 36-4-9-4.

Impeachment or Removal of Elected Officials

The apparent authority for BMC 2.04.200 is IC 36-4-6-21. However, that statute does not permit impeachment or removal; it only prescribes the investigative powers of the legislative body. (The current code provision is rather long so I've included it at the very end of this memo.) There is one case from 1889, *Muhler v. Hedekind*, 20 N.E. 700 (1889), which held that a Common Council had the authority to impeach and remove an elected or appointed municipal official, but that holding was based on the Indiana Revised Statutes of 1881, which contained a provision expressly authorizing such removal. *See also Howard v. City of Kokomo*, 429 N.E.2d 659 n.1 (1981) (citing IC 18-1-4-2 (later recodified) regarding the powers of a municipal legislative body during "investigation and impeachment proceedings before the common council"). The Indiana Code continued to contain such a provision, most recently IC 36-4-6-22, until that provision was repealed in 1981. Thus, BMC 2.04.200, which was adopted in 1979, has been superseded by

state law which provides the sole means and processes by which state and municipal officials, including elected and appointed officers, may be impeached and/or removed.

IC 5-8-1-1 provides for impeachment of elected or appointed government officers, including “all county, city, town and township officers” by the Indiana House of Representatives for a misdemeanor in office. In addition, IC 5-8-1-35 permits removal of an officer by a court for various reasons such as collecting illegal fees or failing to perform the duties of the office. IC 5-8-1-38 provides for removal for intoxication during business hours, and IC 5-8-1-38 if the officer is convicted of a felony during his/her term. In addition, under IC 36-4-5-8, upon a written statement filed by the president of the city legislative body that the city executive is unable to discharge the powers and duties of his office, a circuit court must convene within 48 hours to decide the question.

Supervision of Executive Appointees and City Employees

We could find no authority under current law for a Council’s power to supervise city departments or remove city officers or employees. Again, it appears that the BMC provision was based on statutes that are no longer valid. There is one case from 1906, *Agar v. Pugin*, 79 N.E.379 (1906), that addressed a City Council’s power to investigate and cited a “an act of the General Assembly ‘concerning municipal corporations’ approved March 6, 1905, Acts 1905, p. 257, c. 129, § 54.” The relevant provision was:

The common councils of every city shall have power to supervise and investigate all departments, officers and employees of the government of such city, and to examine into any charge preferred against them, or any of them, and into the affairs of any corporation, firm or person in which the city may be interested, or with which it may have entered late a contract, or may be about to do so.

This language has similarities to our current Indiana Code provision on the Council’s investigatory powers; however, the language about supervision is no longer in our code.

In fact, under the current code, city departments and agencies are explicitly subject to the authority of the executive. The Council may establish departments, and may eliminate them or change their duties, etc., but only upon recommendation of the city executive:

IC 36-4-9-4 Executive Departments; establishment by city legislative body; administrative functions; termination; transfer of powers, duties, functions, or obligations

(a) The city legislative body shall, by ordinance passed upon the recommendation of the city executive, establish the executive departments that it considers necessary to efficiently perform the administrative functions required to fulfill the needs of the city's citizens.

(b) The head of each city department or agency is under the jurisdiction of the executive.

...

(d) The city legislative body may, by ordinance passed upon the recommendation of the city executive:

- (1) terminate departments established under subsection (c); and
- (2) transfer to or from those departments any powers, duties, functions, or obligations.

Open Door Law

Finally, I just wanted to make sure all are aware that standing committees of the Council would be subject to the requirements of the Open Door Law, e.g. meeting notices and minutes. The Council is the “Governing Body” (as defined in IC 5-14-1.5-2(b)(1)) of a “Public Agency” (as defined at IC 5-14-1.5-2(a)), and a committee appointed by the Council is also a “Governing Body” under IC 5-14-1.5-2(b)(3) to which the Council has delegated authority to take official action. “Official Action” is defined at IC 5-14-1.5-2(d) very broadly to include receiving information, deliberating and making recommendations.

Statute providing investigative powers to a legislative body:

IC 36-4-6-21 Investigative powers of the legislative body

- (a) The legislative body may investigate:
 - (1) the departments, officers, and employees of the city;
 - (2) any charges against a department, officer, or employee of the city; and
 - (3) the affairs of a person with whom the city has entered or is about to enter into a contract.

- (b) When conducting an investigation under this section, the legislative body:
 - (1) is entitled to access to all records pertaining to the investigation; and
 - (2) may compel the attendance of witnesses and the production of evidence by subpoena and attachment served and executed in the county in which the city is located.

- (c) If a person refuses to testify or produce evidence at an investigation conducted under this section, the legislative body may order its clerk to immediately present to the circuit court, superior court, or probate court of the county a written report of the facts relating to the refusal. The court shall hear all questions relating to the refusal to testify or produce evidence, and shall also hear any new evidence not included in the clerk's report. If the court finds that the testimony or evidence sought should be given or produced, it shall order the person to testify or produce the evidence, or both.