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Reflections on the 1989 Charter Revisions

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REFLECTIONS ON THE 1989 CHARTER REVISIONS

I. INTRODUCTION

When the 1989 revisions of the New York City Charter were adopted by the voters nearly twenty-five years ago, the *New York Times* called these revisions “the most thorough overhaul” of our city government since the city itself was created a century earlier.¹ This symposium, *Process, Powers and Lessons for the Future: 25 Years of New York City Charter Revisions*,² poses a fundamental question: Does the revised Charter work, and to what extent, if any, should it be changed?

To answer this question, I will draw upon my more than eleven years of experience as Corporation Counsel of New York City and head of the city’s Law Department—a position, incidentally, that I truly believe to be the best legal job in America. Pursuant to the Charter, the Law Department represents and advises the Mayor, City Commissioners, the City Council, the Comptroller, and other institutional bodies,³ a role that every day requires us to interpret the Charter and deal with its allocation of powers—subject, of course, to judicial review. This Charter-mandated role of the Law Department, together with the counsel provided to Charter Revision Commissions by many present and former Assistant Corporation Counsels (including New York Law School Dean and President Anthony W. Crowell), gives us a unique perspective on how the Charter has worked in practice over the last twenty-five years.

In the last decade, the Bloomberg administration has achieved a number of successes, and has encountered occasional failures, in its efforts to make New York City a better place to live and work. The successes have not been easy. As we can see in Albany, and particularly in Washington, it can be difficult for government to get anything done these days. We need to give credit where it is due: first, to the people who make things happen, day in and day out, through their creativity, hard work, and leadership; and second, to the political framework that allows talented individuals to accomplish their goals. Of course, this framework includes the processes and institutions put in place or further refined by the 1988 and 1989 Charter Revision Commissions.

It is my view that the 1989 Charter, and by that I refer to the ultimate document as amended by the 1988 and 1989 Charter Revision Commissions, works well to meet the needs of our ever growing, changing, and increasingly diverse city. This is a tribute to the judgment and foresight of the members and staff of those Commissions, as well as to Mayor Edward I. Koch, who appointed the Commissions’ members.

As Frederick A.O. Schwarz, Jr., one of my distinguished predecessors and Chair of the 1989 Charter Revision Commission, wrote after the voters approved the 1989 revisions, “The new Charter is not a perfect document; no Charter can be . . . [but]

1. Alan Finder, *The 1989 Elections: Overhaul of New York City Charter is Approved, Polls Show*, N.Y. TIMES, Nov. 8, 1989, <http://www.nytimes.com/1989/11/08/nyregion/1989-elections-charter-overhaul-new-york-city-charter-approved-polls-show.html>.

2. Symposium, *Process, Powers and Lessons for the Future: 25 Years of New York City Charter Revisions*, 58 N.Y.L. SCH. L. REV. 11 (2013–2014). A video of this symposium, held at New York Law School on February 8, 2013, is available at <http://www.youtube.com/watch?v=OHkcyagQ4A>.

3. N.Y.C. CHARTER § 394(a) (2013).

it does lay a foundation for City government that will be responsive to all our needs, represent us better, and give us greater opportunities to influence the decisions that affect our lives.”⁴ I believe that the 1989 Charter “works” because it provides: first, a workable structure for government to get things done; second, a process that allows things to get done that is also transparent, provides for participation and dissent, holds its players accountable, and legitimizes its outcomes; and third, a system that protects the public’s trust by ensuring that the elected and appointed individuals who make up the government are properly selected and held to a high level of integrity.

This balancing act—between results on the one hand, and process and trust on the other—can also be seen in the Charter revision process itself. Unlike federal or state constitutions, our City’s governing instrument is not a static document, but one that can be—and has been—amended in a number of different ways: by local law enacted by the city Council,⁵ by appointment of a Charter Revision Commission,⁶ by voter petition,⁷ or by state legislation.⁸ This flexibility allows the Charter to be a living document, responsive to the challenges of the day and to the desires of a wide universe of stakeholders.

Although there is much more to be said about the way the city may amend its Charter, this article will be limited to the substance of the 1989 Charter and the amendments that have been made since then. In my view, the 1989 Charter works because it continues to provide for the central role of the Mayor while providing for appropriate checks and balances, by the Council in particular, but also by the courts, the Comptroller, and other officials.⁹

I will illustrate this balancing of powers by discussing three significant areas of policymaking for the city: land use, procurement, and the budget—areas that Mr. Schwarz and Eric Lane, counsel to the 1989 Commission, identified when they reflected on the 1989 Charter a decade later in their seminal article.¹⁰ In each of these areas the 1989 Commission put into place a framework that allows things to get done, together with strong institutional checks on a traditionally mayor-dominated system. I will also discuss the ways in which the 1989 Charter improved upon processes to help ensure the integrity of these political players. Finally, I will

4. Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City’s 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 1012–13 (1998); *see also* Frederick A.O. Schwarz, Jr., *Twenty-Five Years Later: Reflections on New York City’s 1989 Charter Revision Commission, and on Charter Commissions in General*, 58 N.Y.L. SCH. L. REV. 95 (2013–2014).

5. N.Y. MUN. HOME RULE LAW §§ 20, 21 (McKinney 2013); *see also* N.Y.C. CHARTER §§ 33–37 (2013). A referendum is required or authorized for certain local laws enacted by the Council. N.Y. MUN. HOME RULE LAW §§ 23, 24; N.Y.C. CHARTER § 38.

6. N.Y. MUN. HOME RULE LAW § 36.

7. N.Y. MUN. HOME RULE LAW § 37; *see also* N.Y.C. CHARTER § 40(2).

8. N.Y. CONST. art. IX, § 2.

9. For further discussion of using citywide officers as a check on the Mayor, *see infra* Part III.

10. Schwarz & Lane, *supra* note 4.

REFLECTIONS ON THE 1989 CHARTER REVISIONS

briefly address a few areas of the Charter that might be re-examined as we look ahead to future Charter revisions.

II. HOW THE CHARTER “WORKS”

The journey we look back upon starts with *Board of Estimate v. Morris*, in which the U.S. Supreme Court ruled that the Board of Estimate’s composition was an unconstitutional violation of the principle of “one person, one vote,” thereby necessitating a rewriting of the city’s constitution.¹¹ The major challenge facing the 1988 and 1989 Commissions was whether to retain the Board of Estimate in some form; and, if not, how to reallocate the Board of Estimate’s substantial executive and legislative powers. The 1989 Commission decided to abolish the Board of Estimate and reallocate its powers mostly to the Mayor and the City Council¹²—a fundamental decision that, in large part, still governs the city today.

A. Land Use

The first area in which we see the Charter working for the city is in land use decisions, many of which lie at the heart of the tension between the need both for outcomes and process, and for centralized strategic planning together with community input. In the area of land use, the 1989 Commission made significant changes to a process that dated back to the 1975 Charter revisions and, in some areas, decades earlier. The Commission eliminated the central role previously played by the Board of Estimate, and placed the Council in the Board of Estimate’s role of giving the final up or down vote on many land use decisions.¹³ The new Charter also formalized or retained participation by Community Boards, the Borough Presidents, and Borough Boards.¹⁴ Most importantly, the 1989 Charter amended the process known as the Uniform Land Use Review Procedure (ULURP), retaining the concept of, and providing for, specific time frames to govern the entire land use process from beginning to end.¹⁵

Despite the fears of many that this arrangement would lead to land use paralysis—the parochial concerns of individual Council Members being thought to potentially outweigh rational planning—the process has worked well. Over the last eleven years, the city government, advised by the Law Department, has spurred economic development through a number of projects, including the High Line, whose popularity among locals and tourists has exceeded all wildest expectations; Hudson

11. *See* Bd. of Estimate v. Morris, 489 U.S. 688, 690–92 (1989).

12. *See* Schwarz & Lane, *supra* note 4, at 853–56 (discussing how the 1989 Commission reached this decision).

13. N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION: JANUARY 1989–NOVEMBER 1989, at 19–20 (1990) [hereinafter 1989 CHARTER REVISION COMM’N REPORT].

14. *See, e.g.*, N.Y.C. CHARTER § 197(a) (1989).

15. *See id.*

Yards, the rezoning of which will allow for the expansion of both the High Line and the Number 7 subway into Midtown West; and the redevelopment of the Greenpoint and Williamsburg waterfronts. Each of these projects, and scores of others, have revitalized communities, generated jobs and private investment, attracted businesses and residents to new neighborhoods, and created public spaces for all.

We even see the Charter working when projects are not realized, such as Mayor Bloomberg's proposal to redevelop Kingsbridge Armory as a retail mall.¹⁶ Here, the opponents of the project persuaded the Council not to approve it, a decision we believe to have been incorrect. But this example illustrates the Charter's checks-and-balances system in operation, and demonstrates that the mandated land use time frames in the Charter have allowed policymakers, following the timely objection to the initial proposal, to expeditiously move on to new ideas for the site.¹⁷

The bottom line is that the 1989 Charter put into place a process through which the Mayor has been able to obtain approval for a number of key revitalization projects, while allowing for appropriate checks on his initiatives by the community and the Council, all within the mandated time frames that require land use decisions to be made one way or the other, instead of being allowed to languish.

B. Procurement

We can also see the 1989 Charter working when it comes to procurement, the day-to-day, but essential process through which the city makes its purchases, which last year totaled almost \$15 billion in over 55,000 separate transactions.¹⁸

The 1989 Commission faced a procurement system that a state commission had labeled "highly fragmented, complex and opaque," chaotic, and—at times—corrupt.¹⁹ Under the previous system, the Board of Estimate voted on contracts not competitively bid on, leading to a lack of accountability. If something went wrong, each Board of Estimate member could disclaim individual responsibility and instead point a finger at the others.²⁰

In response, the 1989 Commission made the executive branch primarily responsible for procurement.²¹ One person—the Mayor—was made ultimately accountable for most of the city's procurement decisions, subject to checks like the

16. See Sam Dolnick, *Council Overrides Veto, Blocking Plan for Armory Mall*, N.Y. TIMES, Dec. 21, 2009, <http://www.nytimes.com/2009/12/22/nyregion/22armory.html>.

17. Mayor Bloomberg has since announced plans to develop the Armory into the world's largest indoor ice skating center. See Jennifer H. Cunningham, *Kingsbridge Armory Ice Rink Plan Caps Years of Contentious Debate on Site's Future, Brings Mayor and Boro Prez Together*, N.Y. DAILY NEWS, Apr. 25, 2013, <http://www.nydailynews.com/new-york/bronx/kingsbridge-armory-house-world-largest-ice-skating-center-article-1.1326481>.

18. *About Procurement*, N.Y.C. MAYOR'S OFFICE OF CONTRACT SERVS., <http://www.nyc.gov/html/mocs/html/procurement/procurement.shtml> (last visited July 22, 2013).

19. Schwarz & Lane, *supra* note 4, at 880–81.

20. *Id.* at 882.

21. 1989 CHARTER REVISION COMM'N REPORT, *supra* note 13, at 25.

REFLECTIONS ON THE 1989 CHARTER REVISIONS

Procurement Policy Board, which develops comprehensive rules for all contracts,²² and the Comptroller, who can decline to register a contract on certain limited grounds.²³ Although the system has not worked perfectly, having these clear lines of accountability has made it easier to pinpoint responsibility, and to enable the city to learn from its past experiences and take steps to reform the procurement process where necessary.

Two cases litigated during my tenure illustrate the checks and balances provided for in the 1989 Charter with respect to procurement. In *Council of New York v. Bloomberg*, the New York Court of Appeals, the state's highest court, rejected the Council's contention that every law it passed, no matter how legally suspect, had to be enforced by the Mayor.²⁴ Instead the court ruled that if the Mayor in good faith believes that a law passed by the Council is invalid, he need not enforce it absent a contrary judicial determination.²⁵

In *Comptroller of New York v. Mayor of New York*, the New York Court of Appeals made clear that the Comptroller's authority under the Charter to register contracts was not unlimited and did not give him the power to refuse to register a contract because he found, despite the Mayor's and the Law Department's contrary certifications, that the legal requirements for registering the contract had not been met.²⁶ At the same time, however, the court rejected the Mayor's contention and ruled that disposition of the city's intellectual property is subject to the Charter's concession review procedures.²⁷ Notably, in support of its conclusions, the court cited the underlying goals of the 1989 Charter revision efforts: "to ensure transparency in the governmental process, and adequate checks and balances."²⁸

These cases, in addition to highlighting the powers of the Comptroller, illustrate the role the courts play in refereeing the various balance-of-power struggles under the 1989 Charter. In this way we can think of the judiciary as still another institutional check on the power of the Mayor.

C. Budget

A third area in which the 1989 Charter and its subsequent amendments have set up a workable framework is the city's budget process, which is inherently political because by its very nature it helps define the city's values, priorities, and choices. The 1989 Commission replaced bicameral approval of the budget by the Board of Estimate and Council, with unicameral approval by the Council alone.²⁹ The 2005 Charter

22. See N.Y.C. CHARTER § 311(b) (1989).

23. See *id.* § 328.

24. *Council of New York v. Bloomberg*, 6 N.Y.3d 380, 388 (2006).

25. *Id.* at 388–89.

26. *Comptroller of New York v. Mayor of New York*, 7 N.Y.3d 256, 267 (2006).

27. *Id.* at 263–65.

28. *Id.* at 267.

29. 1989 CHARTER REVISION COMM'N REPORT, *supra* note 13, at 19.

Revision Commission, whose proposals were approved by the voters, continued these reforms by codifying in the Charter key state law reforms stemming from the city's fiscal crisis of the 1970s, such as mandating the preparation of both a balanced budget that complies with generally accepted accounting principles and a four-year financial plan, and further restricting the city's ability to issue short-term debt.³⁰

Today, the city spends money in accordance with a transparent appropriations process involving both the Mayor and the Council, who have combined in every year of the Bloomberg administration to produce budgets that are balanced and generally on time. In other words, as a result of the reforms put in place by the 1989 Commission and subsequent Charter Revision Commissions, the city is generally living within its means and regularly engaging in a discussion over how to continue to do so as fiscal conditions and the city's needs evolve. Contrast this ongoing collaborative effort with the political brinksmanship at the federal level during the fiscal cliff debate, or even the budgetary woes of our city's own checkered past, and we can appreciate how rare and valuable this budgetary reform has been.

D. Government Integrity

Another essential element in determining whether the Charter works is the integrity of the people who make up the government. In this area, the 1989 Charter, which includes the changes proposed by the 1988 Commission, marked a watershed moment in government ethics and elections, elevating the prominence of these issues and setting an example for the entire country. First, the 1988 Commission replaced the former Board of Ethics with the Conflicts of Interest Board (COIB),³¹ an independent city agency charged with enforcing the Conflicts of Interest Law³² that all city employees—including the Mayor and all elected and appointed officials—must follow. Substantial penalties result if the COIB, composed of appointees of the Mayor with the advice and consent of the Council, finds that any government official has violated these conflicts laws. The importance of the COIB is illustrated by the recent case of *Rosenblum v. New York City Conflicts of Interest Board*, litigated by the Law Department, in which the New York Court of Appeals, reversing the Appellate Division, First Department, made clear that the reach of the city's Conflicts of Interest Law extends not only to traditional city agency employees, but also to the thousands of pedagogical employees at the New York City Department of Education.³³

Second, the revisions of the 1988 Commission also ratified the earlier creation of, and provided Charter status to, the Campaign Finance Board (CFB), an independent, nonpartisan city agency whose mission is to increase voter participation

30. See *2005 Ballot Questions*, N.Y.C. CHARTER REVISION COMM'N (Aug. 2, 2005), http://www.nyc.gov/html/charter/downloads/pdf/crc_ballot_questions.pdf.

31. See N.Y.C. CHARTER § 2602 (1988).

32. See N.Y.C. CHARTER § 2604 (2013).

33. See *Rosenblum v. N.Y.C. Conflicts of Interest Bd.*, 18 N.Y.3d 422, 432 (2012).

REFLECTIONS ON THE 1989 CHARTER REVISIONS

and reduce the influence of big money in politics.³⁴ The CFB, whose members are appointed by the Mayor and the Council, publishes and disseminates multilingual information on candidates and issues in the New York City Voter Guide, and provides public matching funds for candidates who agree to abide by spending limits and disclose the sources of their contributions.³⁵ The 1989 Charter thus established an active role for municipal government in promoting greater political participation, and paved the way for subsequent Charter Revision Commissions to strengthen the city's campaign finance regulations and, outside of the Charter, for Administrative Code provisions limiting "pay to play," or campaign contributions by persons engaged in business with the city.³⁶

The importance of the CFB's independence, enforcement powers, and administration of public matching funds cannot be overstated, particularly in 2013—a time when the nation is struggling with the aftermath of the unfortunate *Citizens United* Supreme Court decision,³⁷ a case that has generated significant litigation being handled by the Law Department, challenging the constitutionality of various CFB provisions. Getting things done in government requires both willing participants and a workable structure. The COIB and CFB reforms, which were further strengthened by the 2010 Charter Revision Commission,³⁸ promote the integrity of that structure and public confidence in those who participate in it.

III. THE FUTURE OF CHARTER REFORM

Since 1989, several Charter Revision Commissions appointed by Mayor Bloomberg, and earlier Charter Revision Commissions appointed by Mayor Giuliani, have refined the Charter in a few key areas, including the budget, elections, the creation and abolition of certain city agencies, and the structure and processes of administrative tribunals.

But some of the larger questions raised by the 1989 Commission remain. The 1989 Commission, unsure of the untested, newly empowered, unicameral legislature in the form of the City Council, envisioned using other citywide officers, like the Public Advocate and Borough Presidents, as additional checks on the Mayor.³⁹ The Public Advocate, a position that evolved from the citywide elected City Council President, was conceived as a "watchdog" when it came to the delivery of the city's

34. See N.Y.C. CHARTER § 1052 (1988).

35. N.Y.C. CHARTER §§ 1052, 1053 (2013); see also *About Us*, N.Y.C. CAMPAIGN FIN. BD., <http://www.nyccfb.info/about/> (last visited June 24, 2013).

36. See N.Y.C. ADMIN. CODE § 3-703; see also *Doing Business Accountability Project ("Pay to Play" Reform)*, N.Y.C. MAYOR'S OFFICE OF CONTRACT SERVS., http://www.nyc.gov/html/mocs/html/programs/local_law_34.shtml (last visited June 24, 2013).

37. *Citizens United v. FEC*, 558 U.S. 310 (2010).

38. See N.Y.C. CHARTER REVISION COMM'N, FINAL REPORT OF THE 2010 NEW YORK CITY CHARTER REVISION COMMISSION 23, 32 (2010) [hereinafter 2010 CHARTER REVISION COMM'N REPORT].

39. Schwarz & Lane, *supra* note 4, at 816.

services.⁴⁰ Although eliminating the Board of Estimate substantially reduced the powers of the Borough Presidents,⁴¹ they were seen as an important intermediary between those representing the city as a whole, such as the Mayor, and those representing the most local units, such as the Council Members and community boards.⁴²

But the Council has in fact emerged as a strong and capable counterweight to, and at other times as a partner of, the Mayor. At the same time, the usefulness of the roles under the Charter of the Public Advocate and Borough Presidents has been questioned. In fact, the 2010 Charter Revision Commission heard testimony, including from the Public Advocate and Borough Presidents themselves, about the limited nature of their positions, as well as disagreement over how to define their roles with more precision.⁴³ Now may be a good time to revisit the question of whether those positions should be continued, and, if so, how their powers should be redefined.⁴⁴

Another area deserving of potential Charter amendment concerns an issue that emerged after the 1989 Commission had completed its work: the lack of city oversight over community benefit agreements (CBAs). CBAs are private agreements that are usually negotiated between developers and community groups in connection with a community development project, although sometimes the city or a particular elected official or community board does get involved. These agreements have become an increasingly common feature of the land use decisionmaking process, whether formally or informally, as we have seen with the new Yankee Stadium and Columbia University's expansion into Manhattanville. Future Charter Revision Commissions may want to consider whether there is a role for the Charter to regulate CBAs. This could mean incorporating them into existing formal processes such as the ULURP, regulating their subject matter, limiting the participation of city officials in their public capacities, or something else entirely.⁴⁵

IV. CONCLUSION

As we reflect upon the 1989 Charter, it is my judgment that the Charter has, for the most part, served our city well. But, as with any document of this type, experience and the inevitable changes in our society can suggest ways in which it should be changed in the future.

40. *Id.* at 818, 821; see also Lucas Anderson, *Promoting an Effective and Responsive City Government by Returning and Strengthening the Office of the Public Advocate*, 58 N.Y.L. SCH. L. REV. 165 (2013–2014).

41. See Gregory Perrotta, *A Case For and Against the Borough President in Twenty-First Century City Politics*, 58 N.Y.L. SCH. L. REV. 193 (2013–2014).

42. See Schwarz & Lane, *supra* note 4, at 811.

43. 2010 CHARTER REVISION COMM'N REPORT, *supra* note 38, at 80–81, 87–88 (2010).

44. See Perrotta, *supra* note 41, at 207–12.

45. See 2010 CHARTER REVISION COMM'N REPORT, *supra* note 38, at 103–05 (2010).