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Twenty-Five Years of the Council-Mayor Governance of New York City: A History of the Council's Powers, the Separation of Powers, and Issues for Future Resolution

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Future Resolution

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TWENTY-FIVE YEARS OF THE COUNCIL-MAYOR GOVERNANCE OF NEW YORK CITY

I. INTRODUCTION

New York City is a metropolis larger than life, with towering buildings and a bustling economy, known worldwide for its food, fashion, finance, industry, commerce, culture, and serious study. It is a destination for tourists from around the globe, and it is home to a diverse population spread throughout its five famous boroughs. The city's population has grown from 3.4 million residents when it became one consolidated city in 1898¹ to more than 8 million people today.² The city's budget, \$68 billion in fiscal year 2013, is larger than that of many nations, and larger than all but four state governments in the United States.³ The city's public sector workforce is bigger than the populations of Newark or Buffalo,⁴ and the New York Police Department is close in size to the Belgian armed services.⁵

Due to its size and complexity, New York City's finances and tax structure are what one would expect of a national or state government. Still, New York City is very much a local government, a creature of state law, and it is governed in the same manner as many other municipalities. It has a Mayor and a legislature that divide the governing powers. Today, based on state law and the New York City Charter as it was amended in 1989, the local legislature, the New York City Council, is charged with passing laws for the city, adopting the budget, and approving major land use

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1. See *Total and Foreign-Born Population: New York City, 1790–2000*, NYC.gov, http://www.nyc.gov/html/dcp/pdf/census/1790-2000_nyc_total_foreign_birth.pdf (last visited Aug. 31, 2013) (explaining that New York City expanded to its current geographic dimensions in 1898, and showing that two years after the consolidation, in 1900, the total population of New York City was 3,437,202).
 2. See *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2012: New York City*, New York, U.S. CENSUS BUREAU, http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2012_PEPANNRES (last visited Aug. 31, 2013) (estimating the July 1, 2012 population for New York City at 8,336,697).
 3. The four states with higher budgets than New York City are California, Florida, Texas, and the State of New York. See State Budget Information for California, Florida, Texas, and New York, BALLOTEDIA, http://ballotpedia.org/wiki/index.php/Main_Page (search “California state budget,” “Florida state budget,” “Texas state budget,” and “New York state budget” for the respective budget information) (last visited Aug. 31, 2013) (finding that California's budget is \$92.1 billion for fiscal year 2013; Florida's budget is \$69.9 billion for fiscal year 2013; Texas's budget is \$80.6 billion for fiscal year 2012–2013; and New York's budget is \$132.6 billion for fiscal year 2013).
 4. See *Working for NYC*, NYC.gov, <http://www.nyc.gov/portal/site/nycgov/menuitem.62e273bb0ef1f307a62fa24601c789a0/> (last visited Aug. 31, 2013) (New York City employs over 300,000 people); *State and County Quickfacts: Newark, New Jersey*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/34/3451000.html> (last visited Aug. 31, 2013) (estimating Newark's 2012 population at 277,727); *State and County Quickfacts: Buffalo, New York*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36/3611000.html> (last visited Aug. 31, 2013) (estimating Buffalo's population at 259,384).
 5. See *NYPD Frequently Asked Questions*, NYC.gov, http://www.nyc.gov/html/nypd/html/faq/faq_police.shtml (last visited Aug. 4, 2013) (“The NYPD's current uniformed strength is approximately 34,500.”); *General Information on the Belgian Armed Forces*, EPICOS, <http://www.epicos.com/EPCompanyProfileWeb/GeneralInformation.aspx?id=18327> (last visited Oct. 9, 2013) (“The Belgian Armed Forces have about 41,000 active troops.”).

matters.⁶ The Mayor is the chief executive of the city, and implements the laws and manages the city's government.⁷

This article reviews the history of the City Council's current legislative, budget, and land use powers, and the contests the Mayor and the Council have had over the past twenty-five years in testing the limits of their respective powers. In Part II, we discuss the powers of the Council, including the sources of these powers, and the 1989 Charter Revision Commission, which made the Council a co-equal partner with the Mayor in governing the city. In Part III, we discuss areas in which the Mayor and the Council have disagreed about the scope of the Council's legislative powers and the jurisprudence that has delineated the parameters of those powers. In Part IV, we review the goals of the 1989 Charter Revision Commission in extending new budget powers to the Council and how battles over the fiscal year 1999 budget revealed unresolved issues over the Council's and Mayor's budgetary authority. In Part V, we examine the Council's relatively new and effective role over major land use decisions. Finally, in Part VI, we reflect on the overall success of the 1989 Charter Revision Commission's work to create a balanced system of government in New York City.

II. THE POWERS OF THE NEW YORK CITY COUNCIL

The New York City Council is the legislative body for the City of New York. It derives its power from the New York State Constitution,⁸ the New York State Statute of Local Governments and the Municipal Home Rule Law,⁹ and the Charter of the City of New York.¹⁰ The modern-day City Council, a body of fifty-one Council Members charged with authority to enact local laws, adopt the city budget, and review major land use matters for the city, is a far cry from the local legislature of yesteryear. The state constitutional provisions and statutes setting the parameters for local governmental rule have remained relatively stable over time.¹¹ However, the City Charter has rearranged those powers quite dramatically, producing the City Council that, together with the Mayor, governs the city today.

New York City, like all other localities in New York State, derives its authority from article IX of the New York State Constitution. The constitution sets forth a bill of rights for local governments. It requires that, to achieve effective local self-government and intergovernmental cooperation, "[e]very local government, except a county wholly included within a city, shall have a legislative body elective by the

6. See generally N.Y.C. CHARTER chs. 2, 8, 10 (2013).

7. See generally *id.* ch. 1.

8. See generally N.Y. CONST. art. IX.

9. See generally N.Y. STAT. LOCAL GOV'TS LAW (McKinney 2013); N.Y. MUN. HOME RULE LAW (McKinney 2013).

10. See generally N.Y.C. CHARTER (2013).

11. See generally, e.g., James D. Cole, *Constitutional Home Rule in New York: "The Ghost of Home Rule"*, 59 ST. JOHN'S L. REV. 713, 713-15 (explaining the general history of the relationship between the local power to govern and the level of restriction on the state legislature from intruding in local matters).

people thereof. Every local government shall have power to adopt local laws as provided by this article.”¹² It empowers every local government to: (1) adopt or amend local laws relating to its “property, affairs or government” which are not inconsistent with the provisions of the constitution or of any general law; and (2) adopt or amend local laws, not inconsistent with the constitution or any general law, relating to ten enumerated subjects, whether or not they relate to its “property, affairs or government” subject, however, to the power of the legislature, under section 2(b)(3), to restrict the adoption of such a local law not relating to property, affairs, or government.¹³

The New York State Constitution further requires the New York State Legislature to enact a “statute of local governments granting to local governments powers including but not limited to those of local legislation and administration.”¹⁴ The State Legislature has done that in the form of the Statute of Local Governments (SLG) and the Municipal Home Rule Law (MHRL). Section 10 of the MHRL confers the powers already enumerated in the constitution and in the SLG, and authorizes local governments to: (1) collect local taxes authorized by the legislature; (2) provide for the protection and enhancement of the physical and visual environment; (3) apportion their local legislative bodies; (4) provide for the protection, order, conduct, safety, health, and well-being of persons or property therein; and (5) set assessments for local improvements.¹⁵ Section 23 of the MHRL further restricts the adoption by the Council of laws that infringe upon the power of other elected officials by requiring that any local law that “abolishes, transfers or curtails the power of an elected official” be subject to referendum.¹⁶ This sets parameters on local laws to keep a local legislature from usurping the power of other local elected officials.

Utilizing its authority to self-govern, the City of New York has over time adjusted the allocation of these governing powers among different officials and agencies, including the Mayor, the City Council, and the now-abolished Board of Estimate. The City Charter is the organizing document, serving as the local constitution for city government. It apportions the powers and responsibilities involved in setting policy for and running the city government.

The first New York City Charter encompassing the five boroughs was the Greater New York Charter enacted by state law in 1897.¹⁷ Since the enactment of the Greater New York Charter, the City Charter has been amended more than one hundred times—by referendum, by the State Legislature, and by local law.¹⁸ The

12. N.Y. CONST. art. IX, § 1(a). Notably, while the New York State Constitution requires that every local government have a “local legislative body,” there is no parallel requirement that local governments have executives.

13. *Id.* § 2(c).

14. *Id.* § 2(b)(1).

15. N.Y. MUN. HOME RULE LAW § 10.

16. *Id.* § 23(f) (McKinney 2013).

17. *See* LAWS OF 1897, ch. 378; N.Y.C. CHARTER (1899).

18. N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT OF THE 2010 NEW YORK CITY CHARTER REVISION COMMISSION, at xiv (2010), available at <http://www.nyc.gov/html/charter/downloads/pdf/>

most recent changes to the Charter were adopted by referendum following the proposal from a Charter Revision Commission in 2010. However, the most significant overhaul of the City Charter since 1897 occurred almost twenty-five years ago in 1989.

The 2010 Charter Revision Commission Report describes the New York City Charter as the blueprint for New York City government.

First adopted in 1897, the New York City Charter is the basic document that defines the organization, power, functions, and essential procedures and policies of city government. It sets forth the institutions and processes of the City's political system and broadly defines the authority and responsibilities of city agencies and elected officials—the Mayor, the City Council, the Comptroller, Borough Presidents, and the Public Advocate—while, for the most part, leaving the details of operation to local law and agency rulemaking.¹⁹

The legislative body in earlier City Charters consisted of the Board of Aldermen. The Board of Aldermen was finally replaced by the City Council in the Charter proposed by the Charter Revision Commission of 1937²⁰ and over time, leading up to 1989, the relative powers of the Mayor, the Board of Estimate, and the City Council underwent various adjustments.²¹ Before 1989, the City Council played a limited role in city government. It was the legislative body, responsible for passing local laws, but its powers were limited.²² As Frederick A.O. Schwarz, Jr. and Eric Lane, the Chair and Executive Director, respectively, of the 1989 Charter Revision Commission, summed up in their article *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, “the Council sometimes did historically seem to see its role as a junior partner of the mayor Among the reasons for the

final_report_2010_charte_revision_9-1-10.pdf (“[T]he Charter has been amended over 100 times since 1989 by local law and a number of times by referendums and by state law.”).

19. N.Y.C. CHARTER REVISION COMM'N, PRELIMINARY STAFF REPORT AND RECOMMENDATIONS TO THE CHAIR OF THE 2010 CHARTER REVISION COMMISSION 7 (2010), available at http://www.nyc.gov/html/charter/downloads/pdf/preliminary_report.pdf.
20. See N.Y.C. CHARTER REVISION COMM'N, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION (1936) (stating the City Council was vested with legislative authority and the Board of Estimate was charged with overall direction of the city's business affairs, the approval of certain local laws, and approval of the city budget).
21. See, e.g., N.Y.C. CHARTER REVISION COMM'N, THE REPORT OF THE CHARTER REVISION COMMISSION OF THE CITY OF NEW YORK (1961); N.Y.C. CHARTER REVISION COMM'N, N.Y.C. CHARTER REVISION COMM'N, FINAL REPORT OF THE STATE CHARTER REVISION COMMISSION FOR NEW YORK CITY (2d ed. 1975); N.Y.C. CHARTER REVISION COMM'N, PROPOSED AMENDMENTS TO THE CHARTER FOR THE CITY OF NEW YORK (1983).
22. See N.Y.C. CHARTER §§ 21, 28 (1976, as amended through 1988); see also 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, 780–81 (1998) (stating the Council had the power to adopt local laws, override the Mayor's veto, amend certain provisions of the Charter, fill vacancies, provide advice and consent on certain appointments, raise property taxes, investigate and oversee certain matters, and shared the power to appropriate funds together with the Board of Estimate).

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historic weakness of the Council was the presence and prestige of the Board [of Estimate], with its jurisdiction over items that normally would be legislative.”²³

However, in 1989, New York City experienced a seismic move towards a more representational government. That year, the U.S. Supreme Court ruled that the governing body of New York City, the Board of Estimate, violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution because it contravened the principle of one-person-one-vote.²⁴ This decision followed in the wake of New York City’s insolvency in the 1970s—a crisis that left many convinced that, to function effectively, New York City needed a strong and accountable Mayor. Hence, the 1989 Charter Revision Commission was charged with drawing up plans for a more representational government, but with central and significant powers vested in the mayoralty.²⁵

A main goal of the 1989 Charter Revision Commission was to make the Council a more representative body and co-equal partner in governing the city, creating a more traditional legislative-executive model for government in New York City.²⁶ According to the 1989 Charter Revision Commission, the new Charter was to “give New York City, for the first time, a legislature with the full powers of a legislature.”²⁷ While the Council had been the city’s “local legislative body,” pursuant to state law, responsible for adopting local laws, the new Charter gave the Council “plenary legislative authority over the budget; the legislative power to set policy with respect to the contract procurement of goods, service, and construction; [and] the power to amend the zoning ordinance and final authority over all proposed land use changes.”²⁸

In particular, the 1989 Charter Revision Commission proposed to expand the Council and make it more representative, set Council procedures to centralize Council power and increase opportunities for public participation, and provide the Council with powers previously assigned to the Board of Estimate. To accomplish this task, the Charter Revision Commission increased the size of the City Council from thirty-

23. Schwarz & Lane, *supra* note 22, at 781.

24. *See* Board of Estimate v. Morris, 489 U.S. 688 (1989).

25. *See* Schwarz & Lane, *supra* note 22, at 723 (providing a comprehensive review of the rationale for changes, and the decisionmaking process behind the 1989 Charter revisions).

26. The 1989 Charter Revision Commission’s report sets forth its goals as follows:

(1)[T]o achieve a more classical legislative/executive mode of government with the opportunity for expanded policy debate in the legislative branch by more and varied people, increased efficiency in the executive branch and the corresponding checks and balances that generally attend such systems, (2) to encourage policy debate at the beginning of the process rather than on a case by case basis at the end, (3) to enhance effective minority group influence in the government, and (4) to provide for additional decentralization in decisionmaking to address the alienation expressed by residents of some parts of the city.

N.Y.C. CHARTER REVISION COMM’N, FINAL REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION: JANUARY 1989–NOVEMBER 1989, at 10 (1990).

27. *See* N.Y.C. CHARTER REVISION COMM’N, COMMENTS ON OBJECTIONS TO PROPOSED AMENDMENTS TO THE NEW YORK CITY CHARTER 26 (1989).

28. *Id.*

five to fifty-one Council Members, and reassigned certain budget, land use, and contract powers of the Board of Estimate to the Council.²⁹

Following the work of the 1989 Charter Revision Commission, the voters approved revisions to the City Charter that gave the Council new powers to modify and adopt the city's budget; approve, modify, or disapprove zoning changes and certain other land use decisions; approve certain mayoral appointments to boards and commissions, and the Commissioner of Investigation; and have broad oversight authority over the executive branch.³⁰

Today, section 21 of the New York City Charter provides the following declaration regarding the City Council:

§ 21. The Council. There shall be a council which shall be the legislative body of the city. In addition to the other powers vested in it by this charter and other law, the council shall be vested with the legislative power of the city. Any enumeration of powers in this charter shall not be held to limit the legislative power of the council, except as specifically provided in this charter.³¹

For the past twenty-five years, the Council has fulfilled its role as New York City's local legislative body with the powers to "adopt local laws which it deems appropriate . . . for the good rule and government of the city; for the order, protection and government of persons and property, for the preservation of the public health, comfort, peace and prosperity of the city and its inhabitants."³² Key legislative enactments have included adoption of major changes to the city's campaign finance law,³³ a ban on smoking in public places,³⁴ protections for tenants from harassment by their landlords,³⁵ and many human rights and environmental protections.³⁶ In addition, the Council has exercised its power to oversee many matters within its jurisdiction relating to the property, affairs, or government of the city, and the obligation to review the activities of the agencies of the city. Council committees regularly hold hearings on issues relating to agency policies and practices, such as the New York Police Department's stop-and-frisk practices, the recovery efforts after Hurricane Sandy, and the Department of Homeless Services' shelter policies.³⁷

29. See N.Y.C. CHARTER REVISION COMM'N, *supra* note 26, at 11–25.

30. See N.Y.C. CHARTER REVISION COMM'N, SUMMARY OF FINAL PROPOSALS 9–10 (1989).

31. N.Y.C. CHARTER § 21 (2013).

32. *Id.* § 28.

33. See N.Y.C. LOCAL LAW 34 (2007).

34. See N.Y.C. LOCAL LAW 47 (2002).

35. See N.Y.C. LOCAL LAW 7 (2008).

36. See N.Y.C. LOCAL LAW 10 (2008) (prohibiting discrimination in housing based on source of income); N.Y.C. LOCAL LAW 54 (2011) (relating to religious freedom in the workplace); N.Y.C. LOCAL LAW 22 (2008) (relating to greenhouse gas emissions); N.Y.C. LOCAL LAW 17 (2008) (establishing the Mayor's Office of Long Term Planning and Sustainability).

37. See, e.g., *Oversight: Analysis of NYPD Stop and Frisk Encounters: Hearing Before N.Y.C. Council Comm. on Public Safety* (Apr. 30, 2009), available at www.legal-aid.org/media/114425/stop-and-frisk.pdf; *Recovery: Managing the City's Housing Needs in the Wake of Hurricane Sandy: Hearing Before N.Y.C. Council Comm. on*

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With respect to the budget, the Council has exercised many of its powers over the budget and its powers to raise or lower property taxes to shape the city's budget and strengthen the fiscal health of the city. Finally, the Council has been a key player on major land use decisions, as was contemplated by the 1989 Charter Revision Commission.³⁸ The Council has approved plans for the rezoning, rebuilding and repurposing of Coney Island, Hudson Yards, and other major rezoning plans that have significantly changed the landscape of the city.³⁹

The Council has also become the diverse body envisioned by the 1989 Charter Revision Commission. A visit to City Hall demonstrates how representative the City Council is today. Hailing from the far reaches of all five boroughs, Council Members reflect the geographic, ethnic, cultural, racial, ideological, and political diversity of the city. Council Members live in the communities they represent, are intimately familiar with the issues that their constituents face, and bring that knowledge to their work on legislation, the budget, land use, and general oversight of city government. It is this knowledge and diversity of the Council Members that was central to the vision of the 1989 Charter Revision Commission in assigning the Council its important role in setting policy for the government.

The 1989 Charter Revision Commission strengthened the Council's power while continuing the significant powers of the mayoralty. Additionally, the Commission maintained with the Mayor "all the powers vested in the city, except as otherwise provided by law."⁴⁰ This broad grant of power has produced a tension between the strong Mayor that the Charter creates and the partnership that the Mayor and Council share in governing the city. However, over time, this potential conflict has also led to consultation and worthwhile compromise.

III. DISAGREEMENTS ABOUT THE COUNCIL'S POWERS TO LEGISLATE

The Council and the Mayor have at times, over the years, disagreed on how far the Council's legislative powers extend or where the Mayor's executive authority begins and ends. In particular, the Mayor has adopted policies that have been struck down as legislating, and the Council has adopted legislation that the courts have said intruded on the Mayor's authority. The doctrine of separation of powers applies not only to the federal and state governments, but to localities that have distinct legislative and executive branches. In light of the changes to the 1989 City Charter, the city has served as a laboratory for separation-of-powers disputes over the past two decades.

Hous. & Bldgs. (Feb. 26, 2013), available at <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1282073&GUID=FDD18F06-EB56-4EBD-930A-A37746B53824&Options=&Search=;Oversight:New+Homeless+Shelter+Eligibility+Process+for+Single+Adults:+Hearing+Before+N.Y.C.+Council+Comm.+on+Gen.+Welfare> (Nov. 9, 2011) (testimony of Seth Diamond, Comm'r, Dep't of Homeless Servs.), available at http://www.nyc.gov/html/dhs/downloads/pdf/testimony/singles_eligibility_11_09_2011.pdf.

38. See N.Y.C. CHARTER REVISION COMM'N, *supra* note 26, at 11–25.

39. See, e.g., N.Y.C. Council Resolution Nos. 2132–38 (July 29, 2009) (adopting Land Use Proposal Nos. 1136–42, related to Coney Island); N.Y.C. Council Resolution Nos. 759, 782–91 (Jan. 19, 2005) (adopting Land Use Proposal Nos. 323–29, 334–36, 357, related to Hudson Yards).

40. N.Y.C. CHARTER § 8 (2013).

New York State courts have weighed in on a number of separation-of-powers issues—both before and since the adoption of the 1989 Charter revisions. In particular, courts have examined whether the Mayor overstepped his executive authority in creating programs to advance certain policy objectives through the contracting process⁴¹ and whether the Council overstepped its legislative and policymaking functions in setting up a board that had executive functions but a Council role in the appointment process.⁴²

In 1980, Mayor Koch issued an executive order mandating that ten percent of all construction contracts in the city be set aside for “locally based enterprises.”⁴³ Plaintiff, the Subcontractors Trade Association, sued the city, arguing that the Mayor had misappropriated the role of the legislature. Plaintiff argued that the Mayor’s executive order established a policy in the absence of statutory authorization. The Court of Appeals agreed, holding in *Subcontractors Trade Association v. Koch* that the executive order “represents an unconstitutional usurpation of legislative power.”⁴⁴ While the court took note of the Mayor’s broad powers, including the Mayor’s power to enter into contracts on behalf of the city, it found that the creation of a policy to allocate a percentage of contracts to a certain category of recipients went “beyond his function of implementing general Charter-conferred powers. Such action constitutes an exercise of legislative power.”⁴⁵ The court went on to state that in order for the Mayor to implement such a program, “the legislature must *specifically* delegate that power to him and must provide adequate guidelines and standards for the implementation of that policy.”⁴⁶

Similarly, Mayor Koch issued an executive order, also in 1980, prohibiting discrimination by city contractors on the basis of sexual orientation. The Court of Appeals held in 1985 that the Mayor, in issuing that 1980 executive order, had infringed upon the power of the Council to set policy through legislation.⁴⁷

41. See *Subcontractors Trade Ass’n v. Koch*, 62 N.Y.2d 422, 427–29 (1984); see also *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344 (1985).

42. *Mayor of New York v. Council of New York*, No. 95-001, 1995 WL 478872 (Sup. Ct. N.Y. Cnty. June 28, 1995), *aff’d*, 651 N.Y.S.2d 531 (1st Dep’t 1997); see also *Mayor of New York v. Council of New York*, 721 N.Y.S.2d 39 (1st Dep’t 2001).

43. *Subcontractors*, 62 N.Y.2d at 425–26.

44. *Id.* at 428.

45. *Id.* at 429.

46. *Id.* (emphasis in original).

47. *Under 21, Catholic Home Bureau for Dependent Children v. City of New York*, 65 N.Y.2d 344 (1985); accord, e.g., *Statewide Coal. of Hispanic Chambers of Commerce v. N.Y.C. Dep’t of Health & Mental Hygiene*, No. 653584/12, 2013 WL 1343607 (Sup. Ct. N.Y. Cnty. Mar. 11, 2013), *aff’d*, 2013 WL 3880139 (1st Dep’t July 30, 2013) (holding a Board of Health rule banning sugar-sweetened drinks sold by certain businesses in containers larger than sixteen ounces was invalid as it violated separation-of-powers principles by crossing into the jurisdiction of the local legislative body and was arbitrary and capricious, affirmed on the grounds the Board of Health had exceeded its authority and such power belonged to the legislature). Like Mayor Koch’s executive orders in *Under 21* and *Subcontractors*, the sugary soda ban was found to be policymaking, falling within the domain of the Council. On Aug. 5, 2013, the City filed a motion for leave to appeal to the Court of Appeals.

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There are also instances in which the courts have found that the Council has usurped, or infringed upon, an executive power in adopting a local law, in the absence of a referendum.⁴⁸ In particular, the Council adopted legislation in 1995, in the absence of a referendum, authorizing the Council to appoint certain officers to an Independent Police Investigation and Audit Board.⁴⁹ The New York Supreme Court, affirmed by the Appellate Division, First Department, struck down the law, ruling that the Council was seeking to exercise executive functions. The court stated that the legislation “vests the Board with powers which are essentially executive in nature so as to curtail the Mayor’s executive prerogatives.”⁵⁰ Also, when the Council adopted, without referendum, legislation in 1993 that gave it the ability to approve applications by companies to operate commuter vans, a court again held that the local law curtailed mayoral authority.⁵¹ The court stated that “the City Council’s role is to create generalized standards while the Mayor’s or his appointee’s role, inter alia, is to enforce those standards in making individualized determinations while carrying out standards and policies established in city ordinances.”⁵² By enacting a local law that left these individual administrative decisions to the Council, the Council had usurped the Mayor’s executive power.

All of these cases have helped delineate the parameters of what types of legislative actions result in the curtailment of the power of an elective officer and what types of legislative actions—albeit dictative, the actions of an elective officer—do not result in a curtailment and therefore may be adopted by the Council in the absence of a voter referendum.

Then, in 2007, the New York Court of Appeals, very specifically addressed curtailment in *Mayor of New York v. Council of New York*, a case concerning the Council’s ability to amend local collective bargaining procedures, articulating a comprehensive and useful framework in which to view the question of when Council legislative action goes beyond policymaking and curtails executive powers.⁵³ In this case, the state’s highest court examined the differences between (1) local legislative enactments that changed the way the Mayor or members of the executive branch must act, but which nevertheless did not constitute curtailment of executive authority and were therefore not subject to referendum, and (2) those legislative actions that did constitute curtailment of the Mayor’s powers and could only be enacted pursuant

48. See, e.g., *Mayor of New York v. Council of New York*, Nos. 402354, 95-001, 95-003, 1995 WL 478872 (Sup. Ct. N.Y. Cnty. June 28, 1995), *aff’d*, 651 N.Y.S.2d 531 (1st Dep’t 1997).

49. See N.Y.C. LOCAL LAW 13 (1995).

50. *Mayor of New York v. Council of New York*, 1995 WL 478872, at *5; see also *Mayor of New York v. Council of New York*, 721 N.Y.S.2d 39, 40 (1st Dep’t 2001) (holding that where Council created a police investigatory board by legislation, without a referendum, and reserved to itself the right to designate two members of a five-member board, giving the Mayor the right only to either approve or disapprove these designations, the “mayor’s discretion to appoint board members is circumscribed to a limited universe of applicants designated by the Council, thereby curtailing his power of appointment.”).

51. *Giuliani v. Council of New York*, 688 N.Y.S.2d 413 (Sup. Ct. N.Y. Cnty. 1999).

52. *Id.*

53. 9 N.Y.3d 23 (2007).

to a referendum.⁵⁴ The Court of Appeals held that a local law that required the Mayor to bargain separately with unions representing certain employees “merely regulates the operations of city government” and did not constitute “a curtailment of an officer’s power.”⁵⁵ In reaching this conclusion—about a specific change to a collective bargaining procedure that gave the Mayor less flexibility in how he or she negotiated with certain unions—the court addressed the broader issue of when a restriction on executive action contained in local law constitutes a curtailment.⁵⁶ The court stated that “the kind of limitation on the Mayor’s freedom of action” involved in the change to the collective bargaining laws “is not the sort of curtailment of power that triggers a mandatory referendum.”⁵⁷ It continued, stating:

A great many local laws limit the actions the Mayor or another elected official may take. A local law requiring the recycling of solid waste prevents the Mayor from ordering the sanitation department to dispose of such waste less expensively; a local law suspending alternate side of the street parking on certain holidays prevents the Mayor from enforcing it on those days; a local law requiring an office to be open at certain hours prevents the Mayor from closing it. But the Municipal Home Rule Law and the City Charter cannot sensibly be read to subject all local laws of this kind to a mandatory referendum. If they were, there would be more referendums than any community could well manage.⁵⁸

The court concluded, stating:

The requirement of a referendum for legislation that “curtails any power of an elective officer” must be read as applying only to legislation that impairs a power conferred on the officer as part of the framework of local government. For example, a local law limiting the power of New York City’s Mayor to appoint commissioners, or to prepare a budget or to create or abolish positions within his executive office would require a referendum. But as a general rule, a law that merely regulates the operations of city government, is not a curtailment of an officer’s power.⁵⁹

Thus, it is the Mayor’s *role*, as the executive officer in charge of implementing policy, that cannot be curtailed absent a referendum, not the *manner* in which, or the policies in furtherance of which, he or she carries out those functions.⁶⁰

54. *Id.*

55. *Id.* at 33.

56. *Id.*

57. *Id.* at 32.

58. *Id.* at 32–33.

59. *Id.* at 33.

60. In a case, not directly relating to the curtailment or the underlying powers assigned to the Council under the Charter, the Court of Appeals, in *Council of New York v. Bloomberg*, 6 N.Y.3d 380 (2006), ruled on the Mayor’s obligations as executive when faced with implementing a law he or she believes is invalid. The court held “[w]here a local law seems to the Mayor to conflict with a state or federal one, the Mayor’s obligation is to obey the latter as the Mayor has done here.” The Mayor argued that he

All of these cases together, and most particularly the 2007 *Mayor v. Council* case, establish the guiding jurisprudence on the doctrine of separation of powers and, in the context of local laws adopted by the Council, what constitutes curtailment of another elective officer’s powers within the context of the MHRL and the New York City Charter. The Mayor and the City Council now use this framework in working together on policies, legislation, and governance.

IV. BUDGET CONFRONTATIONS UNEARTH STILL-TO-BE-RESOLVED QUESTIONS OF AUTHORITY

The 1989 Charter Revision Commission was adamant that it sought to ensure that the Council was an effective counterweight to the Mayor in the budget process. The Commission did not, however, recommend substantial changes to the Council’s budget powers. Instead, the Commission recommended a number of measures to ensure that the city’s budgeting practices and the budget documents provided the Council with a true opportunity to set policy priorities.⁶¹ That goal has not been fully realized. There are a number of reasons why this is the case and the experience of the past twenty-five years shows that there is still an opportunity for greater Council participation at the programmatic level of the budget.

The framers of the 1989 Charter had two clear, though not entirely consistent, goals in distributing budget powers between the Mayor and the Council. One goal was to fully empower the Council. The Charter Revision Commission accomplished this by giving the Council plenary power to adopt the city budget, and in that process to set spending policy.⁶² The second goal was to keep the Mayor responsible and accountable for the city’s fiscal health—particularly in light of the city’s then-recent budget woes.⁶³ These two admirable goals have, in certain respects, come into conflict and the budget process has not changed as much as the 1989 Commission anticipated.

The building blocks of the city’s budget are the units of appropriation, each of which is defined as an amount of funds for “personal service [salaries] or for other than personal service [everything except salaries] for a particular program, purpose, activity or institution.”⁶⁴ This definition of a unit of appropriation preceded the 1989 Charter revisions. The definition of unit of appropriation as an item corresponding to a particular program or activity in turn allows the Council to set policy at the programmatic level for each agency. It makes meaningful the Council’s authority to adopt the budget and “increase, decrease, add or omit any unit of appropriation,”

could not implement local legislation that prohibited the selection of contractors who failed to provide domestic partners with benefits equal to those provided to spouses because, in doing so, he would violate state law requirements to contract with the lowest responsible bidder. The court held that the Mayor was not required to implement the local law. Thus, in these circumstances, it would be incumbent upon the Council to sue for an order declaring the law valid.).

61. See Schwarz & Lane, *supra* note 22, at 846–49.

62. See N.Y.C. CHARTER REVISION COMM’N, *supra* note 27, at 26, 29.

63. See Schwarz & Lane, *supra* note 22, at 837.

64. N.Y.C. CHARTER § 100(c) (2013).

providing the Council an important function in reviewing each program and deciding whether it merits funding and at what levels.⁶⁵

The 1989 Charter Revision Commission was aware that, under then-existing budgetary practices, the Mayor was not identifying programs, purposes, activities, and institutions in separate units of appropriation in the preparation of the proposed budget given to the Council. The 1989 Commission proposed two new requirements to ensure that a programmatic budget would become a reality: *first*,

that a single unit of appropriation for personal service or a single unit of appropriation for other than personal service may represent the amount requested for more than one particular program, purpose, activity or institution if the council has adopted, on the recommendation of the mayor, or if the council has adopted on its own initiative and the mayor has approved, a resolution setting forth the names, and a statement of the programmatic objectives, of each program, purpose, activity or institution to be included in such a single unit of appropriation;⁶⁶

and, *second*, that

[e]ach proposed unit of appropriation . . . shall be accompanied by a statement of the programmatic objectives of the program, purpose, activity or institution involved.⁶⁷

At a public meeting of the 1989 Charter Revision Commission, the staff characterized the Commission's work on the units of appropriation as seeking to find a middle ground between the overly broad units of appropriation the Commission believed were being used in the budget process, and a line-item budget which would lay out expenditures for every supply and position in the budget.⁶⁸ Staff further stated that

if the units of appropriation were complying with the Charter, each unit of appropriation for a purpose, activity, program or institution existed, and if it had the statement of purpose as we discussed earlier, that it would lay more of the groundwork without going completely to a line item budget.⁶⁹

The Chair of the Commission agreed, stating, "We have already agreed to make the items, units of appropriation more meaningful That gives a measure of control."⁷⁰

For the most part, the units of appropriation never changed to become more programmatic, notwithstanding the changes to the City Charter. At a public meeting of the 1989 Commission, a staff member presented an example of an overly broad unit of appropriation. The example used was the Department of Juvenile Justice, which had just one personal service unit of appropriation for all of its programs and

65. *Id.* § 254(a).

66. *Id.* § 100(c).

67. *Id.* § 100(d).

68. Minutes of N.Y.C. Charter Revision Comm'n Meeting 245–48 (May 10, 1989).

69. *Id.* at 247–48.

70. *Id.* at 248.

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activities.⁷¹ However, almost twenty-five years later, the New York City Department of Juvenile Justice continued to include all of its salaries for programs and activities in one personal service unit of appropriation.⁷² To comply with the new Charter requirements, the Mayor would have had to submit, or the Council would have had to adopt, a resolution allowing for the continued use of broad units of appropriation without regard to the new Charter requirement. No such resolution has ever been submitted by the Mayor or adopted by the Council. Yet, the Mayor has nonetheless continued to use broad, multi-programmatic units of appropriation. As a result, the Council has not wholly exercised its “measure of control” in setting budget policy as was contemplated by the 1989 changes to the Charter. Simply stated, in order for the Council to fully exercise the budgetary powers contemplated by the 1989 Charter Revision Commission, and set budgetary policy and priorities, the Mayor must provide specific programmatic units of appropriation as required by the Charter so that the Council can determine levels of funding for each agency program.

In 1998, the Council adopted its own budget over the veto of the Mayor. The Giuliani administration argued that the Council was diverging from the budget procedure outlined in the Charter by directing “that certain funds within a given unit of appropriation be spent on one or more programmatic purposes narrower than that set forth in such unit of appropriation, effectively subdividing and/or redefining the existing unit of appropriation.”⁷³ The accusation itself was an acknowledgement of both the inadequacy of the administration’s own budget practices and the fact that the administration’s budgets regularly encompassed multiple “programmatic purposes,” in single units of appropriation contrary to the language of the Charter.⁷⁴ In the end, the Mayor and the Council agreed to modify the adopted budget, which avoided a more serious confrontation over budget powers but left unanswered some of these issues.⁷⁵

Separately, in its attempt to adopt its own budget, the Council ran into the obstacles of two other mayoral budget powers: the power to estimate revenues⁷⁶ and

71. See Schwarz & Lane, *supra* note 22, at 844; see also N.Y.C. Charter Revision Comm’n Hearing Transcript 80–81 (March 15, 1989).

72. See N.Y.C. OFFICE OF MGMT. & BUDGET, ADOPTED BUDGET FISCAL YEAR 2012, at 138E (2011), available at http://www.nyc.gov/html/omb/downloads/pdf/erc6_11.pdf; see also Press Release, N.Y.C. Admin. for Children’s Servs., Mayor Bloomberg Signs Legislation Merging the Department of Juvenile Justice into the Administration for Children’s Services (Dec. 7, 2010), available at http://www.nyc.gov/html/acs/html/pr_archives/pr10_12_07.shtml (reporting the Department of Juvenile Justice was subsequently merged into the Administration for Children’s Services).

73. N.Y.C. OFFICE OF MGMT. & BUDGET, ADOPTED BUDGET FISCAL YEAR 1999.

74. *Id.*

75. 2 PROCEEDINGS OF THE COUNCIL OF THE CITY OF NEW YORK 3518–27 (July 15–Dec. 17, 1998) (A communication from the Mayor’s Office of Management and Budget regarding the transfer of funds between various city agencies in fiscal year 1999 to implement changes in the city’s expense budget pursuant to section 107(b) of the New York City Charter.).

76. N.Y.C. CHARTER § 1515(a) (2013); see also N.Y.C. CHARTER REVISION COMM’N, CHARTER OF THE CITY OF NEW YORK, PROPOSED BY THE NEW YORK CITY CHARTER REVISION COMMISSION 58-7 (1989); Schwarz & Lane, *supra* note 22, at 838–40 (While maintaining the power to estimate revenues with the Mayor, the 1989 Charter Revision Commission did add a provision to the Charter requiring the Mayor

the power to impound funds,⁷⁷ both considered by the 1989 Commission to be essential tools for the Mayor to have in order to protect the city's fiscal well-being.⁷⁸

The 1989 Commission was very clear that it intended the Mayor to have the power to estimate revenues and impound funds during the year.⁷⁹ While it was clear from the discussions on these powers that the Commission expected the Mayor to exercise these powers to maintain budget balance, the Commission did not expressly limit the conditions under which the Mayor could use this authority.⁸⁰ The Charter is silent, however, on how the Mayor may estimate, and when or under what circumstances the Mayor can impound funds.⁸¹ In June 1998, when the Council was on the verge of taking the historic step of adopting its own fiscal year 1999 budget, the Mayor responded by lowering the revenue estimate in an attempt to derail the budget adoption.⁸² The Council then adopted a budget, with additional funds from a reserve fund, over the veto of the Mayor. In the new fiscal year, the Mayor refused to spend funds in accordance with the Council-passed budget—setting up a showdown that was resolved through a compromise reached between the administration and the City Council in the form of a budget modification.⁸³ It could be argued that neither the Mayor's revenue estimate nor impoundment powers should be able to be used by the Mayor to thwart the ability of the Council to set budget priorities. The City Council's report to the 2010 Charter Revision Commission proposed changes to the Charter to guard against this use of the final revenue estimate and impoundment

to "consider any alternative estimate of revenues" submitted if such statement was submitted in accordance with the new Charter requirements and contained a statement of the assumptions and methodologies used).

77. N.Y.C. CHARTER § 106(e); *see also* N.Y.C. CHARTER REVISION COMM'N, *supra* note 76, at 6-16; Schwarz & Lane, *supra* note 22, at 840-41 (The 1989 Charter Revision Commission added "sunshine" provisions in this section for notification and explanation as to the reasons for the impoundment).
78. *See* Schwarz & Lane, *supra* note 22, at 837-41.
79. *Id.* at 837-41 (citing Minutes of N.Y.C. Charter Revision Comm'n Meeting 184 (May 10, 1989) (relating to mayoral power to estimate revenues); Minutes of N.Y.C. Charter Revision Comm'n, Meeting 252 (May 13, 1989) (relating to mayoral power of impoundment)).
80. Indeed, the 1989 Charter Revision Commission took the position that the Mayor could not impound funds for policy reasons "because such authority would conflict with the state constitutional requirement that every local government have a directly elected legislative body responsible for initial policy making." *See* Schwarz & Lane, *supra* note 22, at 840-41 (citing N.Y. CONST. art IX, § 1(a)).
81. *See* N.Y.C. CHARTER § 1515(a)-(d) ("statement and estimate by the mayor"); *id.* at § 106(e) ("expense budget administration").
82. *See* N.Y.C. EXECUTIVE BUDGET FISCAL YEAR 1999, SUMMARY OF THE EXPENSE BUDGET AND THE REVENUE BUDGET (1999); 1 PROCEEDINGS OF THE COUNCIL OF THE CITY OF NEW YORK 2295 (Jan. 7-June 24, 1998) (A communication from the Mayor submitting the required statement of probable amounts and sources of revenue (other than real property tax) for fiscal year 1999, pursuant to section 1515 of the New York City Charter.); Conversation with Thomas L. McMahon, former Finance Director, N.Y.C. Council (Sept. 20, 2013).
83. *See* 2 PROCEEDINGS OF THE COUNCIL OF THE CITY OF NEW YORK, *supra* note 75, at 3518-27. The transmittal letter indicates that the budget modification "will implement changes to the expense budget that have remained outstanding since June and are a result of discussions with the City Council." *Id.* at 3518.

powers. These recommendations were: (1) that the Mayor produce the revenue estimate annually by May 25 so that it could not be lowered if he or she does not like the way the final budget adoption negotiations are going; and (2) that the impoundment power be explicitly limited to cases of a significant and sudden decline in revenue.⁸⁴ Minor changes such as these, which are only meant to effectuate the intent of the 1989 Charter Revision Commission and leave these powers entirely with the executive, would serve to allow the Council to fulfill its Charter-given power as the branch of government responsible for setting funding priorities through its adoption of the budget.⁸⁵

V. COUNCIL ASSUMES THE ROLE AS FINAL ARBITER OF MAJOR LAND USE DECISIONS

Over the past twenty-five years, the Council assumed major new powers to approve, disapprove, and modify certain zoning and land use decisions in the city. While the Mayor and the City Council have disagreed over particular land use projects, the record is largely one of cooperation, negotiation, and progress. The Charter Revision Commission faced significant opposition to its proposal to extend land use powers to the City Council.⁸⁶ Many were skeptical of the Council's ability to handle these broad new powers, which the Charter Revision Commission proposed to transfer from the former Board of Estimate to the Council. Critics of the Charter Revision Commission's proposal in 1989 argued that the Council would politicize the decisionmaking process and create opportunities for misdeeds, miscreants, and corruption.⁸⁷

However, the record has proved otherwise. Over the past twenty-five years, the Council has worked closely with the Mayor and the City Planning Commission to approve major zoning changes, development projects, and other uses of land in New

84. N.Y.C. COUNCIL, REPORT TO THE NEW YORK CITY CHARTER REVISION COMMISSION 13, 18 (2010), available at http://council.nyc.gov/downloads/pdf/June_2010_Charter_Report.pdf.

85. Indeed, in their law review article on the 1989 Charter, the Chair and Executive Director of the 1989 Charter Revision Commission wrote of the Mayor's power to estimate revenues: "Of course, in leaving in place the final authority with the Mayor, our assumption was that mayoral power to estimate revenues would be exercised only on a good faith, professional basis and not as a tactical ploy in a potential battle with the City Council." Similarly, in discussing the Mayor's impoundment "if the commission had been acting based on a record of impoundment abuse, the Commission would have gone on to wrestle with trying to devise substantive limitation." See Schwarz & Lane, *supra* note 22, at 840-41.

86. *See id.* at 859-66.

87. PETER F. VALLONE, LEARNING TO GOVERN: MY LIFE IN NEW YORK POLITICS FROM HELL GATE TO CITY HALL 138 (Paul De Angelis ed., 2005) (writing in his book, the author and former Speaker of the City Council states "I knew the disappearance of the Board [of Estimate] would pose its own challenges, especially for us who supported transferring most of its powers to the council. Our job was now to show that we were capable of handling vastly increased responsibilities. The most controversial of these, besides the power of the budget, involved zoning and land use. Many thoughtful people were afraid that the 'not-in my-backyard' tendencies of local communities might turn such decisions into drawn-out nightmares and infinite delay. They also feared that placing land use decisions before the council might *increase* rather than decrease corruption . . .").

York City. These include zoning of adult-entertainment establishments,⁸⁸ the rezoning of Downtown Brooklyn,⁸⁹ as well as Hudson Yards and Coney Island rezoning and redevelopment.⁹⁰ Moreover, the Council and the Mayor have addressed policy disputes through negotiation and compromise. For example, proposed developments and the rezoning of Hudson Yards and Greenpoint/Williamsburg were revised to incorporate more affordable housing to address Council concerns.⁹¹ Infrequently, the Council has raised concerns that have gone right to the essence of a project, rendering it impossible to reach a compromise. In these cases, the proposed development did not move forward. This was the case with Mayor Giuliani's proposal to zone certain areas for big-box retail stores. There, the proposal was disapproved by the Council.⁹² More recently, an economic development project at the Kingsbridge Armory was disapproved. In that case, many Council Members feared the project would bring low-wage jobs to an area of the Bronx that needed better employment opportunities.⁹³

VI. THE SEPARATION-OF-POWERS ROAD FROM HERE

Frederick A.O. Schwarz, Jr. and Eric Lane, respectively the Chair and Executive Director of the 1989 Charter Revision Commission, described their decision to expand and empower the City Council as "the most important decision" the Commission made after the decision to eliminate the Board of Estimate.⁹⁴ In their seminal article reviewing the history of the 1989 Charter Revision Commission, they wrote:

For a legislature to balance and check the executive branch is the American norm. For all the messiness of legislatures, for all the criticism of them, the basic concept is readily understood and reasonably accepted. Much of the focus of City government is on the delivery of services Underlying these efforts is the legislative function of establishing what services ought to be delivered and at what level of expenditure. These decisions are political in the best sense of the word; that is they require processes that maximize public input and deliberation. To accommodate this we needed to focus on the legislative branch of City government.⁹⁵

88. See N.Y.C. Council Resolution No. 1322 (Oct. 25, 1995) (adopting Land Use Proposal No. 1322); N.Y.C. Council Resolution No. 2096 (Oct. 31, 2001) (adopting Land Use Proposal No. 1112).

89. See N.Y.C. Council Resolution Nos. 448–66 (June 28, 2004) (adopting various Land Use Proposals for rezoning Downtown Brooklyn).

90. See N.Y.C. Council Resolution Nos. 2132–38 (July 29, 2009) (adopting various Land Use Proposals for rezoning Coney Island); N.Y.C. Council Resolution Nos. 759, 782–91 (Jan. 19, 2005) (adopting various Land Use Proposals expanding the Number 7 Subway line and rezoning Hudson Yards).

91. See N.Y.C. Council Resolution No. 783 (Jan. 19, 2005) (adopting Land Use Proposal No. 324 for rezoning Hudson Yards); see also N.Y.C. Council Resolution No. 962 (May 11, 2005) (adopting Land Use Proposal No. 424 for rezoning Greenpoint/Williamsburg).

92. N.Y.C. Council Resolution No. 2066 (1996) (relating to Land Use Proposal No. 1027).

93. N.Y.C. Council Resolution No. 2297 (Dec. 21, 2009) (relating to Land Use Proposal No. 1258).

94. See Schwarz & Lane, *supra* note 22, at 776–77.

95. *Id.* at 777.

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The 1989 Charter Revision Commission came up with a plan that was a grand compromise to avoid the fiscal mismanagement of the 1970s—and correct the constitutional frailties of the Board of Estimate system. Twenty-five years later, the Mayor and Council are still flexing muscles to see where power lands—but the Council has shown it will use its power responsibly and has principally done what it should do by pushing the envelope as much as possible to secure and protect its powers. The Council has made great strides toward becoming a fully empowered legislative body. Through the enactment of legislation in a wide range of areas affecting the property, affairs, and government of the city and with the recognition by the courts of the Council's role as the policymaker for the city, the Council has laid claim to its legislative powers. Contrary to skeptics in 1989, the Council has fulfilled its new role as arbiter of major land use decisions in a professional and largely apolitical manner. In the area of the city budget, the 1989 Charter Revision Commission intended to make the City Council responsible for setting budgetary policy. However, disagreements over specific budgetary powers have hindered the Council's ability to fully realize its potential. Relatively minor changes to the Charter to more explicitly articulate the 1989 Commission's intent could greatly aid the Council in fully achieving its authority as the branch responsible for setting budgetary policy.

The next chapter in New York City governance will be written by the next Mayor and a City Council composed of many new members. Perhaps there will be more combat, but, with the notable exception of the respective budget powers of the Mayor and the Council, many issues are resolved. Disputes are therefore more likely to take the form of policy differences rather than uncertainties about legal powers.