

Resolution to County Council seeking independent legal review of apparent violations of the Charter and Code of Whatcom County, and advice on remedies

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To: Whatcom County Council

From: Whatcom County Charter Review Commission

We are concerned about possible breaches of the Charter and ordinances as detailed in the accompanying resolution. As these affect the separation of powers and the independent investigative authority of the legislative branch, we recommend independent legal counsel and judicial resolution of these issues essential to 1) upholding your legislative powers; 2) ensuring public transparency; and 3) clarifying reforms we may need to recommend.

Resolution to County Council seeking independent legal review of apparent violations of the Charter and Code of Whatcom County, and advice on remedies

Whereas public trust in local government requires robust oversight, transparency, and adherence to established governance principles;

Whereas recent events have raised serious concerns about practices that appear inconsistent with the County Charter, potentially compromising our governance system;

Whereas the Charter Review Committee actively safeguards this foundational document, ensuring it remains an effective framework for county governance while adapting to evolving community needs;

Whereas the Charter reflects the shared vision of Whatcom County residents, requiring all public servants to uphold its principles faithfully;

Whereas we must identify and understand what is broken in order to fix it. Almost a year later, the Council, Charter Review Commission, and public lack a full accounting for allegations of mishandling of a sexual harassment claim disclosed by an April 2024 [Cascade PBS investigative report](#), and related issues regarding the Charter and Code of Whatcom County described below that are relevant to this commission's purpose;

Whereas Section 8.13 of the County Charter specifies that the Charter Review "Commission may also make recommendations to the County Council";

Whereas, as Charter Review Commissioners, we took an oath of office, solemnly swearing or affirming to "support ... the Charter and ordinances of Whatcom County", an oath likewise taken by all other county elected officials;

Whereas Section 1.5 of the County Charter, **Separation of Powers and Cooperation of Branches**, states, "There shall be separation of powers into two branches of government: executive and legislative. Both branches are to dutifully fulfill their responsibilities *and refrain from overextending their authority*, as defined in this Charter." [emphasis added];

Whereas Section 3.05.020 A of the County Code, **Settlement authority for tort claims**, states, "authority is delegated to the county prosecuting attorney, with the approval of the county executive, for settlement of all tort claims where the amount to be paid in the settlement is more than \$5,000 but less than \$25,000. *All other settlements require council approval.*";

Whereas, it says “all other settlements,” *with no qualifiers or exceptions*, such as “directly from county funds.”

Whereas, under authority of this section, the county prosecuting attorney, with the approval of the county executive, authorized payment of a settlement of \$225,000 out of a risk pool *without council approval, and without even notifying the council*, thereby not only failing to comply with the county code but assuming a function reserved to the legislative branch, breaching the separation of powers section of the County Charter;

Whereas the settlement payment was ~~made~~ authorized on November 2, 2023, following receipt of a letter by the prosecuting attorney’s office on October 24, 2023 from an attorney representing a plaintiff alleging improper handling by the county executive of a sexual harassment complaint, and ~~that date was two weeks prior to~~ both dates, and the intervening decision period, preceded the November 7 election in which the county executive was seeking reelection, and disclosure could have affected the outcome;

Whereas it is incumbent for public officials to always be open and transparent with the county council and public, especially in the weeks prior to an election so that the public can make fully informed choices;

Whereas, the county prosecuting attorney is also the attorney to the county executive and to the county council, he had a legal responsibility to advise the county executive of the latter’s obligation to inform the council, so that the council could perform the duties reserved to them;

Whereas the county prosecuting attorney’s office argued that submitting the payment for approval by the county council would jeopardize the legal agreement with the risk pool. That raises a couple of questions. Does the contract explicitly prohibit submitting for council approval before requesting payment? In that case, council action could determine whether the contract violated the county code, and was entered into illegally.

Whereas, if there is no such clause in the contract, by County Code 3.05.020 council approval would be required before submission to the risk pool;

Whereas even if there were a clause in the contract barring submitting for approval by the county council, it is a fundamental legal standard to adhere to the principle of “out of abundant caution” (*Ex abundanti cautela*) to ensure that actions are transparent and fully accountable. This would mean informing the council ahead of the settlement payout, with an explanation of the county prosecuting attorney’s office argument for not needing council approval;

Whereas Section 3.05.030, **Public disclosure of tort claim settlements**, specifies “No settlements of any lawsuit to which the county is a party shall be made except with full public disclosure of the total settlement amount either paid by the county directly or paid on the county’s behalf.”;

Whereas payment by the risk pool was “paid on the county’s behalf,” and we are unaware of any evidence of the required public disclosure. It came to light when the risk pool itself complied with its own legal obligation to disclose, bringing the discrepancy to the attention of Cascade PBS, that then filed a public documents request. Local compliance would have allowed the county council to know that their prior approval was not sought under Section 3.05.020;

Whereas the deputy prosecuting attorney who handled the settlement on behalf of the county executive was also attorney for the county council while it addressed this issue; Whereas county council members raised the question of conflict of interest that could hamper the council’s effort to exercise its charge under Section 2.21 of the County Charter to “make investigations into the affairs of the County and the conduct of any County department, office or agency.”;

Whereas it is a fundamental principle of law that no one may judge a case in which they have an interest (*Nemo iudex in causa sua*);

Whereas the county prosecuting attorney, in response to council members concerns over conflict of interest, stated that there was no conflict of interest, and he is their only legal counsel;

Whereas only an independent authority such as a superior court judge can rule on the legality of what occurred in conformity with the principle that you don’t judge your own case (*Nemo iudex in causa sua*);

Whereas [RCW 36.32.200](#) enables the county council, with approval of a superior court judge, and without requiring approval from the prosecuting attorney, to hire its own attorney for the aforementioned purpose with a contract of no more than two years;

Whereas the public, including the County Council, and the Charter Review Commission, has a right to clarity about any violations of the Charter and ordinances by elected officials, and such clarity would help ensure future accountability; and

Whereas these circumstances have raised questions about the balance of power between the executive and legislative branches, as well as future potential conflicts of interest when the prosecuting attorney acts as both counsel for the executive and legislative branches; now, therefore, be it

Resolved, that the Whatcom County Charter Review Commission:

1. Urges the County Council to address these matters essential to maintaining public trust and to ensuring the separation of powers envisioned by the Charter, including hiring fully independent legal counsel to advise the council on, and pursue judicial resolution of, the aforementioned legal issues;
2. Invites the county council, or members thereof, to propose Charter amendments that could help ensure compliance with the Charter and ordinances of Whatcom County moving forward; and
3. Invites the county council, or members thereof, to propose Charter amendments that would help the council better fulfill their intended co-equal role in the separation of powers.