

**OFFICE OF THE CITY COUNCIL**

**RESEARCH DIVISION**

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**CITY COUNCIL FUTURE OF JEA WORKSHOP MEETING MINUTES**

**Lynwood Roberts Room, 1st floor, City Hall**

 **November 6, 2019**

**11:00 a.m.**

**Location:** Lynwood Roberts Room, 1st floor, City Hall – St. James Building; 117 West Duval Street

**In attendance:** Council Members Michael Boylan (Chair), Danny Becton, Aaron Bowman, Matt Carlucci (arr. 11:39), LeAnna Cumber (arr. 11:45), Randy DeFoor, Garrett Dennis, Rory Diamond, Al Ferraro, Terrance Freeman, Reggie Gaffney, Tommy Hazouri, Joyce Morgan, Sam Newby, Ju’Coby Pittman, Brenda Priestly Jackson, Ron Salem, Randy White, Scott Wilson

**Also**: Jason Gabriel and Peggy Sidman – Office of General Counsel; Kim Taylor, Heather Reber, Jeff Rodda – Council Auditor’s Office; Jeff Clements – Council Research Division; Steve Cassada, Melanie Wilkes and Carol Owens - Council Staff Services; Cheryl Brown – Council Secretary/Director; Sherry Hall – JEA; Carla Miller – City Ethics Officer; Jordan Elsbury – Mayor’s Office

**Meeting Convened**: 11:02 a.m.

Council Member Boylan called the meeting to order and the attendees introduced themselves for the record. President Wilson thanked the council members, the invited speakers, and the audience for their attendance and interest in the work of the council’s workshops. Mr. Boylan said that some changes have been made in the original draft of the schedule to combine and refocus some of the suggested topics.

Public input will be taken at each meeting, with speaking time limits apportioned based on the number of speakers who sign up and the time available. Mr. Boylan asked that comments at each meeting be focused on the topic of that day’s meeting, or pose a question or topic for the Council to consider at a future meeting.

Charles Arnold – senior judge and former General Counsel

Judge Arnold gave historical background about the Office of General Counsel and about previous instances in which the OGC has hired outside counsel to assist the City in various areas. He said that practically everything was a legal question at the dawn of consolidation in 1968 as new issues were sorted out and precedents established when he was an Assistant General Counsel fresh out of law school. One of the reasons the strong Office of General Counsel was formed at consolidation was that the pre-consolidation governments and associated offices and agencies had dozens of attorneys representing a wide variety of interests and often suing each other. The powerful General Counsel was created to act in part as a judge hearing contending viewpoints and issuing binding opinions to settle questions. He noted that the original proposal for consolidation was to combine every entity of the city and county governments (from the city council and county commission to the Beaches and Baldwin governments to the School Board and the constitutional officers) into a single governmental entity, but that total consolidation was dialed back as part of the compromises involved in getting the consolidation referendum passed.

He said has long been troubled by the ramifications of the OGC representing the constitutional officers, but said that current General Counsel Jason Gabriel issued an opinion in 2016 that seems to have settled the issue. He reviewed several types of instances in which the OGC hires outside counsel in areas where the office does not have adequate specialized expertise (bonds, arcane areas of law such as maritime law). He gave the example of a “Chinese wall” arrangement in which two groups of attorneys at a law firm do not speak to each other while representing contending clients, which he believes the OGC has done on occasion.

Judge Arnold said that sometimes the General Counsel has to make hard calls and has been vilified by multiple parties, citing the Westinghouse Tenneco – Offshore Power Systems case and the Jacksonville Jaguars stadium construction deal as examples. In response to a question about past instances of hiring outside counsel, he cited the case of former General Counsel James Harrison allowing the Police and Fire Pension Fund to have its own attorney due to potential conflicts of interest involved in the OGC simultaneously representing the Mayor, City Council and the PFPF Pension Fund board. The 2016 Jason Gabriel opinion cited earlier helped clarify and rein in that previous opinion.

General Counsel Jason Gabriel said he thinks his September 23rd memo appropriately covers the topics related to City Council hiring outside counsel to help in in the JEA privatization process. The selection process for outside counsel is being done by Council President Wilson, Mr. Gabriel and City Ethics Officer Carla Miller and the deadline for law firms to express interest in the work and make proposals was October 25th. Review is underway and will continue this afternoon. President Wilson said the group may choose to interview one or more of the proposers to ask questions and plans to propose legislation to retain one or more firms at the next Council meeting for action as a first-reading emergency.

Council Member Hazouri posed questions about past instances of hiring outside counsel for specific needs. Jason Gabriel noted that City Council has for many years (possibly since consolidation) had the authority to hire legislative counsel for itself. In 2014 an ordinance was passed to implement the Charter’s authority for legislative counsel, but such counsel was never hired. City Council did have a legislative counsel for a few years in the 1980s but abandoned it. Mr. Gabriel could only recall one occasion, in 2013, in which the City Council hired a non-legislative counsel for subject matter expertise.

Council Member Priestly Jackson felt that the size and complexity of the city is tremendously different today from the time of consolidation in 1968 and offered the opinion that if an independent authority merits outside counsel due to the complexity of its issue, then the City Council should have the opportunity to have independent counsel as well. Judge Arnold said that an independent authority hiring outside counsel does not automatically create an adversarial relationship with the City Council, so Council should not necessarily need outside counsel in every instance. The City Council should have complete access to all of the information and advice offered by the outside counsel hired by the authority and should be able to question those outside experts. Ms. Priestly Jackson felt that if the OGC does not have the expertise to assist an independent authority on an issue, there should be a triggering mechanism in the Charter to authorize the City Council to obtain outside counsel on that issue as well.

Jason Gabriel – General Counsel

Mr. Gabriel made a PowerPoint presentation on the relationship between the City Council and the independent agencies and said that the overriding theme is that all roads lead to City Council for ultimate decisions on behalf of the City. He reviewed the hierarchy of the Florida Constitution, the City Charter and the Ordinance Code. He noted that the Consolidated City of Jacksonville is the only and most fully consolidated city/county government in Florida and is therefore unique. The basis of Jacksonville’s consolidation dates back to authorizing legislation passed by the Legislature in 1934 that amended the 1885 Constitution. The 1968 Constitutional revision carried over the 1934 consolidation authorization. In 1967 the voter referendum approved the City Charter that combined all units of government existing at the time into one unified consolidated government, including the constitutional officers who are also municipal officers under Jacksonville’s Charter unlike those officers in any of the other 66 counties in Florida.

The Charter does not have a specific definition of “independent agency” but Sec. 18.07(d) defines who the independent agencies are. The details of each of the agencies and their relationship to the City differ slightly depending on their particular legislative authorization and the nature of their board appointments. The School Board is the most independent of the agencies because it is the only one that has an elected governing body. The JTA is unique in that it exists pursuant to a chapter of the Florida Statutes.

Mr. Gabriel said that the answer to the question “Can the JEA pursue a privatization initiative without asking the City Council’s permission?” is yes it can. He said that there are a number of ways that a JEA privatization could be proposed, either by the JEA, by the Mayor, or by the City Council. He reiterated that final approval of any transaction comes back to the City Council and, pursuant to a recent Charter amendment, is subject to a voter referendum on approving the terms and conditions of such a privatization. Mr. Gabriel reviewed a unique provision in JEA’s charter that permits the City Council to amend almost any provision of that charter with a 2/3 vote, making it the authority most closely tied to the City and most subject to its control. In response to a question from Council Member Ferraro, Mr. Gabriel said that the Council has the power to completely dissolve the JEA and reincorporate its functions into the city government. Council Member DeFoor said that the Council has been kept completely in the dark about what has been asked of the JEA’s outside counsel and what opinions or information they have provided to date. She has read the Charter and does not see any authorization for the JEA to do what it has done with regard to offering itself for sale. Mr. Gabriel said he reads the Charter differently and believes that JEA has authorization to do what it is doing, including using a procurement process as a vehicle to offer itself for sale. He reiterated that City Council is the final authority on making a decision on the future of JEA and has the right to obtain any information the JEA has received from its outside counsel and advisors.

In response to a question from Council Member Carlucci about whether a council member can introduce legislation to stop JEA’s privatization consideration immediately, Mr. Gabriel said it could not since JEA is in the midst of a valid procurement process until that process is completed. JEA’s charter can be changed by Council at any time as discussed above, but not in a way that impacts on a pending procurement process. In response to a question from Council Member Dennis about the practice of requiring people to testify before the Council under oath, Judge Arnold said the Council has that power but should use it very judiciously only in cases where it suspects that persons providing testimony might be inclined to lie to the body. In response to another question from Mr. Dennis about who can file legislation for City Council, Mr. Gabriel said that only the 19 council members can file legislation, but the Code provides that the Council President must introduce legislation when requested by the Mayor or other entities to get their proposals before the Council. In response to question from Mr. Dennis about whether the City has the ability to cut off a procurement process in mid-stream Mr. Gabriel said it does, but has to do so in a manner that is fair to all parties (i.e. rejecting all bids at once).

Council Member Hazouri asked how the City Council could get access to the information being provided to the JEA by its outside counsel. Mr. Gabriel said that a mechanism can be developed to get the Council what it wants and needs without being inundated by a flood of data that it doesn’t want. Council Member Priestly Jackson said that her reading of JEA’s charter does not find any reference to JEA being authorized to sell itself; the only reference to “sale” she interprets to mean the sale of JEA’s products and services, not the entity itself. To her mind, “procurement” means a process to acquire, not to sell. She disagrees with Mr. Gabriel’s interpretation of its authority to initiate a sales process. Mr. Gabriel said that the approval process for sale of more than 10% of the JEA, which is clearly authorized in the Charter, necessarily implies that preliminary work has to take place to value the JEA’s assets and enable it to develop a proposal for the City Council to consider.

Jeanne Miller – Jacksonville Civic Council

Civic Council CEO Jeanne Miller briefly explained the Council’s corporate entity and mission, which is to provide non-partisan research on important public policy issues to help the City make good policy decisions. The Council is at work on an in-depth report on City finances compared to other Florida cities and counties, part of which involved a look at the importance of the JEA contribution to the city budget that subsequently led to the appointment of a subcommittee that has spent over a year studying the JEA’s operations and finances. The recent “sea change” in JEA’s management and strategic plan took the work in a different direction and has added additional complexity and time to the process. Their research finds that it would take $500,000 to $1 million to commission a full-scale appraisal of the value of JEA, which is needed before a good decision could be made. The Civic Council was working with the JEA management on analyzing value and operating projections until the summer of 2019, when the process broke down and JEA shifted its focus to a potential sale. The Civic Council has obtained specialized advisors in the utility and finance fields to help analyze JEA’s current status and future prospects and has several findings. They recommend that the City Council take control of the privatization consideration process and explore all possible options. The JEA is not in a “death spiral” as sometimes reported, but is facing changing business conditions that face all utilities and may need to change the way it does business.

Ms. Miller said that if the fundamental purpose of the privatization process is to generate a large pool of cash, then the City needs to determine how much is needed, for what purpose, and how to appropriately raise the amount of funding desired. In response to a question from Council Member Diamond, Ms. Miller said the Civic Council is not opining on whether or not the JEA should be privatized and has no opinion on what dollar amount of proceeds would make a sale worthwhile or advisable. In response to a question from Council Member Bowman about whether the proposals currently on the table will give the City a good idea of the true value of JEA or whether an independent appraisal is needed, Ms. Miller said there are many different definitions of “value” and it would be incumbent on the City to commission an appraisal of the value of its asset to know what it has and what price it could reasonably expect if a sale was chosen. In response to a question from Council Member Salem, Ms. Miller clarified her earlier remarks about what specific financial information the Civic Council requested from the JEA and what was ultimately received. She said that a process was begun using one set of financial projections, but the JEA changed management and the new management changed the business’ strategic plan and assumptions and the flow of information dried up after that.

In response to a question from Council Member Cumber, Ms. Miller described the Civic Council’s Executive Committee and said that some members of the Council do not agree with the findings of the organization’s Executive Committee. Ms. Cumber asked about recommendations for the City Council going forward and Ms. Miller offered to have their consultant come to a future meeting and talk about what would be a typical utility sale process and what steps the governing body should be taking. Their letter to the Council makes 7 recommendations/observations. Council Member Becton said that the JEA has stated that the ITN process is not about generating a large amount of cash and is instead about determining JEA’s future. Ms. Miller said that her group’s inability to obtain the underlying assumptions behind JEA’s latest operating and financial projections has stymied their ability to examine the utility’s finances to a degree that it needs to be done. Based on the information available to the Civic Council they did not find that JEA was in a “death spiral”, but that data is now over a year old and the JEA has said that it is not good data and another assessment is being done. In response to a question from Council Member Carlucci, Ms. Miller said that at the JEA’s refusal to provide information makes it unclear if the information does not exist of if it does but JEA is withholding it for some reason.

**Meeting adjourned:** 12:59 p.m.

Minutes: Jeff Clements, Council Research Division

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11.13.19 Posted 5:30 p.m.