LAW OFFICES
BURKE, WILLIAMS & SORENSEN, LLP
3403 TENTH STREET, SUITE 300
RIVERSIDE, CALIFORNIA 92501-3629
Tel: (909) 788-0100
Fax: (909) 788-5785
www.bwslaw.com

LOS ANGELES OFFICE
611 WEST SIXTH STREET, SUITE 2500
LOS ANGELES, CALIFORNIA 90017-3102
Tel: (213) 236-0600
Fax: (213) 236-2700

ORANGE COUNTY OFFICE
18301 VON KARMAN AVENUE, SUITE 1050
IRVINE, CALIFORNIA 92612-1009
Tel: (949) 863-3363
Fax: (949) 863-3350

SAN DIEGO OFFICE
402 WEST BROADWAY, SUITE 810
SAN DIEGO, CALIFORNIA 92101-3553
Tel: (619) 615-6672
Fax: (619) 615-6673

SAN FRANCISCO OFFICE
450 SANSOME STREET, SUITE 1200
SAN FRANCISCO, CALIFORNIA 94111-3320
Tel: (415) 955-1160
Fax: (415) 982-0824

VENTURA COUNTY OFFICE
2310 EAST PONDEROSA DRIVE, SUITE 25
CAMARILLO, CALIFORNIA 93010-4747
Tel: (805) 987-3468
Fax: (805) 482-9834

City Attorneys Department

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Julie Hayward Biggs
of Burke, Williams & Sorensen, LLP
City Attorney for the City of Hemet,
City of Laguna Woods, and City of Goleta

CREATING EFFECTIVE GOVERNMENT: A High Wire Act

By Julie Hayward Biggs of Burke, Williams & Sorensen, LLP

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I. INTRODUCTION

As professionals working in local government, City Managers and City Attorneys balance their performance on a daily basis by sorting through questions of duty and obligation, principle and practicality, truth and justice, leadership and submission to direction from elected officials. The dynamic tension associated with this balancing act is significant and is directly affected by the governmental structures in which it occurs.

The relationship between City Managers and City Attorneys, both of whom serve the same masters, and their collective and independent relationship with the executive and legislative bodies they serve, is dependent in part upon the jurisdiction's governmental structure as well as on personalities and agendas that must be served. To achieve a better understanding of the working relationships that may evolve from particular governmental structures, a review of those structures in the context of some specific communities may be of assistance.

II. GENERAL LAW CITIES

A. Basic General Law City Structure

In California, the governmental structure of cities formed under the general laws is usually comprised of a city council of at least five members elected at large from the community as a whole and a city clerk, city treasurer, chief of police, fire chief and other subordinate officers (Government Code § 36501). The council elects one of its members as mayor, and another as mayor pro tempore or as vice mayor (Government Code § 36801). The mayor and vice mayor have no greater powers than the other members except as to ceremonial functions and when presiding over the council meetings. In general law cities that have not established a council-manager form of government, the city council appoints the police chief and appoints the city attorney, a superintendent of streets, a civil engineer, and such other subordinate officers or employees as it deems necessary (Government Code § 36505). Most general law cities, however, have adopted a council-manager form of government and, except for appointment of the city attorney, all subordinate employees, including the chief of police, are appointed by the city manager.[1]

B. Alternative Forms Of General Law City Structure

There are essentially four alternative forms of government that are statutorily called out for general law cities. Under the provisions of Government Code §34870 a city may submit to the voters in the community an ordinance that provides for any of the following:

[1] City clerk and city treasurer may, however, be elective positions. (Government Code § 34856).

1. Election of members of the city council *by* five, seven or nine districts. This means that each district elects its own representative to the city council.

2. Election of members of the city council *from* five, seven or nine districts. This means that members live in separate districts but are elected by the city at large.

3. Election of members of the city council *by* districts in four, six or eight districts with an elective mayor. This means that each district elects its own representative to the city council.

4. Election of members of the city council *from* districts in four, six or eight districts with an elective mayor. This means that members live in separate districts but are elected by the city at large.[2]

The effect of a city's selecting one of these alternative forms of government is to give deference and power to sub-communities within the city. Where districts are established, whether officials are elected "by" or "from" a district, the district itself may become a greater focus of the elected official than the city as a whole. Conversely, the costs of election to public office may drop dramatically because smaller constituencies are involved. In any event, cities that are divided into districts have a different dynamic in play than those where officials are all elected at large.

In addition to the issue of election by or from districts, the direct and separate election of the mayor has a definite effect on the relationship among the city manager, city council and city attorney. A mayor who is elected at large in a community that is divided into districts becomes the only member of the legislative body who speaks for the entire community. That lends power to the position that other members on the council do not share. The effect is not so great in cities where all members are elected at large, but there is still a distinction associated with being a mayor elected by the people instead of by the city council.

III. THE COUNCIL-MANAGER FORM OF CITY GOVERNMENT

A. The Role Of The City Manager

In California, the most common structure of city government is the Council-Manager system. Established by statute (Government Code § 34851 *et seq.*), the council-manager form of government is used in both general law and charter cities throughout the state. Essentially, this form of government allows a city to establish by

[2] Although it is not specified in the alternative form of government statute, cities may also have a council with four members elected at large and the mayor elected directly and separately from the remaining councilmembers. (Government Code §34900).

ordinance the position of City Manager who is statutorily imbued with specific powers and duties under the general law.[3] The law provides as follows:

1. A city may establish a council-manager form of government by enacting an ordinance to that effect or by submitting the question to the electorate.[4]

2. After enacting a city manager ordinance, the city appoints a city manager who need not be a city resident.

3. The city manager is empowered under the statute to appoint and dismiss the chief of police and other subordinate appointive officers and employees, except the city attorney.

4. Where the city clerk and the city treasurer are appointive, as opposed to elective offices, the city council retains the appointive power unless a specific delegation of that power to the city manager is made by ordinance.

5. The terms of subordinate officers over whom the city manager has power of appointment and removal cease upon appointment of the city manager unless the city manager reappoints them.[5]

Government Code § 34852 permits a city to enumerate the powers and duties of the city manager by ordinance, and to fix the salary for that position as well. In practice, many city managers are appointed pursuant to a contract, however, and the terms and conditions of employment are set forth in that document. Generally, the powers and duties of a city manager include the following:

1. The power and duty to implement policies established by the city council;

2. The power and duty to appoint, discipline and remove all officers and employees of the city (subject to any civil service or other personnel rules) except the city attorney;

---

[3] Charter law cities are not bound by the provisions of Government Code § 34851 *et seq.*, but generally follow the structure outlined there with some modifications to powers and duties where changes are made.

[4] Ordinarily, as new cities form, an election is made at the time of formation with regard to the council-manager form of government and the formation election validates that structure.

[5] Although this provision may initially appear to suggest that every time a city appoints a new city manager the entire staff is subject to termination, that is probably too broad a reading of the statute. The better interpretation is that the statute relates solely to the initial establishment of a city manager form of government not to the subsequent appointment and re-appointment of individuals to the position of city manager.

3. The duty to see to the efficient administration of all aspects of city business;

4. The duty to enforce all ordinances and law within the jurisdiction;

5. The duty to attend all meetings of the city council;

6. The duty and power to recommend measures and ordinances for adoption;

7. The power to investigate the affairs of the city or any department or any contract of the city to assure proper performance of any obligation due the city;

8. The duty to prepare an annual budget and to keep the council informed as to financial matters;

9. The duty to submit bills to the city for payment on a monthly basis;

10. The duty to devote full time to the position;

11. The duty to perform such other duties as the council may prescribe by action, resolution or ordinance.[6]

B. The Relationship Of The City Manager, The City Attorney And The City Council In A General Law City

In fulfilling these duties, a city manager must, of course, deal with the city council and staff, but he must also deal with the city attorney. Because the city attorney is the only other officer who reports directly to the city council, the city attorney and the city manager have co-valent powers that act as checks and balances on one another. The city manager must perform his duties in a manner that is consistent with the law. The city attorney must advise on matters of law and refrain from promoting particular policy determinations. Normally, these powers and duties are somewhat overlapping and work well to assure that when a city council receives a matter to act upon, it can do so with confidence knowing that the proposed action furthers an identified city goal and falls within in the legal regulations that apply.

Because both the city manager and the city attorney report to the city council, the city council, as final arbiter of policy and action, can resolve any disagreement or discord. The structure discourages disagreement and discord, however, because both the city manager and the city attorney share an interest in reaching a decision that will

[6] For example, general law cities may enact an ordinance authorizing the city manager to sign contracts and conveyances—powers only granted to the mayor without such an ordinance. (Government Code § 40602).

be approved by the city council. Accordingly, there is an incentive to resolve differences before the matter moves forward to the city council for final action. Thus the city manager form of government aligns professional staff in a positive way.

In fact, the city manager form of government has worked effectively for most general law cities in California for many years.

C. Going Bare

At least one community in recent years determined that the City Manager form of government was unsuccessful in achieving council-initiated community goals. In 1993, Baldwin Park's city council, after some tumultuous and divisive wrangling, determined that it would abolish the city manager form of government. The City established what was called an "Executive Team" (the E-Team) comprised of all city department heads and no city manager or city administrator.

Although the City was initially quite pleased with the program, touting it as "unique," in 1998, the City established the position of Chief Executive Officer to act as the administrative head of the E-Team. The powers and duties delegated to the CEO bear a strong resemblance to those ordinarily given to city managers (see Exhibit A).

One of the factors leading to return to a more standard structure was the need for constant council involvement in the workings of management. While there is a relatively constant chafing between councils and staff with regard to management issues, in the absence of a single point person through whom the council communicates its policy directives, communication with staff necessarily requires direct contact with elected officials. This is anathema to most city government administrators and staff. Even where, as in Baldwin Park, an intentional and novel approach is taken to avoid vesting management decisions in a single professional, it is clear that the logistics are simply impossible. Accordingly, even a community committed to trying something new, was essentially compelled to return to a more traditional structure.

D. Micro-Management Concerns

No discussion of governmental structures and the relationships among the city manager, city attorney and city council would be complete without a discussion of circumstances that encourage or discourage "micro-management" by the city council. Elected officials usually deny that they ever engage in micro-management, and professional managers usually contend that they always do. There is truth in both positions.

Virtually all city manager ordinances, and the provisions of Government Code § 34851 *et seq.* provide that the city manager is the conduit for communication by the city council to staff and that the city council may not direct staff but may only contact staff for purposes of inquiry. Thus, a councilmember who wants to check on the progress being

made on street repairs may not direct staff to do the work, but may ask staff what is happening on a project that is underway.

Recently in the City of Santa Monica, a classic case arose where a citizen complained to the Mayor about the size of a playhouse on an adjacent parcel of land (*City of Santa Monica v. Levy* (2002, 2nd Dist.) ___Cal. App. 4th ___. The Mayor then contacted the city staff by e-mail inquiring as to whether the playhouse in fact violated the city code. Some follow-up e-mails occurred and city staff ultimately concluded that the playhouse did violate the building standards. The owner of the playhouse was notified of the violation. The owner then filed suit contending that the Mayor had violated the city charter by asking staff to resolve an issue of concern contrary to the provision limiting contact between members of the council and staff to matters of inquiry.

The city filed a motion to strike under the "anti-SLAPP" law (Code of Civil Procedure § 425.16) to attempt to kick the case out of court and that motion is on appeal. If the charter violation claim is upheld, it could set off alarms in a great number of communities where elected officials pursue remedies to constituent complaints directly with staff, contrary to the legal requirement that they deal only with the city manager on such matters.

IV. CHARTER CITIES

A. General Considerations

California law provides a means for cities to establish their own charters and in doing so to gain greater control over some municipal functions (Government Code § 34450 *et seq.*). Adopting a city charter always involves extensive community action, either in support of a measure presented by the people or in response to one proposed by a city council. As such, it is a time consuming process that may galvanize or divide a community.

Attached to this paper is an excellent and comprehensive comparison of charter city governmental structures and general law requirements prepared by Elise Traynum of Meyers, Nave, Riback, Silver & Wilson in Oakland (see Exhibit B). Those observations will not be repeated here. Suffice to say that a charter city has significant opportunities to structure city government with innovation. The attached reports from the San Diego Grand Jury (2001-2002) (Exhibit C) and the Charter Review Committee of the City of Fresno (1992) (Exhibit D) provide further analysis regarding the kinds of structures that a city may create by means of a charter.

The Institute for Local Self-Government (ILSG) at Hastings College of Law provides extensive information in this regard at its website (http:www.ilsg.org.) for those who are interested in exploring alternatives beyond those provided by the general law. In reviewing various cities that have recently considered or adopted charters, the

key factor underlying these efforts seems to be a perceived ability to obtain greater local control. Specific purposes in recent years have included the following:

1. Greater control over schools (Fremont)

2. Elimination of prevailing wage requirements (Kingsburg, San Marcos, Truckee)

3. Control over mobile home parks and rental rates (San Marcos)

4. Establishment of a public utility (San Marcos)

5. Local control (Port Hueneme, Fremont, Kingsburg, San Marcos, Truckee)

As set forth in the attached listing, 105 charter cities currently exist (See Exhibit E). Exhibit F sets forth a listing of some cities noting their specific points of difference from general law cities. For purposes of analyzing the effect of governmental structure on the city manager, city attorney, mayor and council relationship, however, only the structure of one charter city will be discussed here.

B. Charter Warfare

The variety of possible organization of cities under charters is virtually unlimited. For purposes of this paper, a recent "charter war" in a mid-sized Southern California City provides an outstanding illustration of how the power structure imposed by charter may affect the delivery of both administrative and legal services. Because the lessons to be learned are generic in nature, the name of the city has been omitted from this discussion. The case presented, however, is real and recent.

In this particular city, which we will call "Metropolis" in honor of that great American, Superman, the governmental structure is predicated on a constitutional model with executive and legislative branches of government and an elected city attorney.

1. The Common Council and the Mayor

The Common Council is comprised of seven members. The Common Council has the power to adopt its own rules of procedure, compel the attendance of witnesses at its proceedings, judge the qualification and election of its members, punish members by a fine of not more than $50.00 for disorderly or contemptuous conduct, and expel a member or a city officer appointed by the Mayor and Common Council for neglect of duty or willful violation of any penal law or the charter. Finally, the Common Council may override a Mayor's veto upon a two-thirds vote of the body.

With the Common Council, the Mayor has the power to purchase and sell property, establish police and sanitary regulations, address nuisances, impose license taxes, establish and maintain fire and police departments and generally manage the city the way a general law city council and mayor do.

Unlike a general law city, however, the Mayor in Metropolis is the Chief Executive Officer and essentially holds all the responsibilities ordinarily transferred to a city manager. In addition, the Mayor has veto power over the Common Council. The Mayor's position is a full-time position and compensation is accordingly substantially more than nominal.

2. The Elected City Attorney

Several cities have an elected city attorney. The City of Los Angeles, for example, has an elected City Attorney as does the City of Huntington Beach. Government Code § 3608-36210 specifically provides that a city, whether general law or charter, may make the office of city attorney, or other appointive offices, elective.

In the City of Metropolis, however, the charter provisions relating to the powers of the City Attorney became something of an issue, precipitating a charter reform commission recommendation to either abolish the position of the elected city attorney or to greatly reduce the power of the office. As it turned out, the electorate defeated that charter reform measure, but the political discussion that it sparked highlights quite clearly how significant the structure of local government can be in promoting either harmony or discord among elected officials.

3. The Story

Over a period of time, the Mayor of Metropolis came to the conclusion that it would be appropriate to obtain legal advice from private attorneys retained by the City. While that is common in many jurisdictions, even those where an in-house city attorney is in place, the City Attorney in Metropolis asserted that the city's charter prohibited the Mayor and Common Council from seeking such advice. The City Attorney relied on the following provision of the Charter for that position:

> "The City Attorney shall be the chief legal officer of the city: he or she shall represent and advise the Mayor and Common Council and all City officers in all matters of law pertaining to their offices; he or she shall represent and appear for the City in all legal actions brought by or against the City, and prosecute violations of City ordinances, and may prosecute violations of State law which are misdemeanors or infractions and for which the City

> Attorney is specifically granted the power of enforcement by State law without approval of the District Attorney, or those violations which are drug or vice related; he or she shall also act and appear as attorney for any City officer or employee who is a party to any legal action in his or her official capacity; he or she shall attend meetings of the City Council, draft proposed ordinances and resolutions, give his or her advice or opinion in writing when requested to do so in writing by the Mayor or Common Council or other City official upon any matter pertaining to Municipal affairs; and otherwise to do and perform all services incident to his or her position and required by statute, this Charter or general law."[7]

In what became open warfare between the City Attorney and the Mayor, the question of the extent of the City Attorney's authority to compel the Mayor and Common Council to limit their requests for legal review of issues to review by the City Attorney only, became paramount. The City Attorney, viewing himself primarily in the role of watchdog for the taxpayers, essentially prevented the council from even seeking independent legal advice on the correctness of his position under threat of prosecution for violation of the City Charter. In part because of this conflict and controversy, the charter review commission recommended making the position of City Attorney appointive rather than elective.

The amendment was defeated, in part by a coalition formed between the City Attorney and union representatives who had an interest in defeating a provision that would have eliminated a guarantee of median placement for salary purposes. Given the conflict between the City Attorney and the Mayor in this instance, it appears that a governmental structure that politicizes both the administration of city government and the legal advice rendered to that government is counterproductive.

A local columnist analyzed the issue with a great deal of clarity just before the election that defeated the proposed amendment stating as follows,

> "Until recently, I did not support the proposed revision to Metropolis's city charter. I still don't think it goes far enough in reforming the city's antiquated form of government.
>
> But today, although I still have some serious reservations about Measure M, I now support the ballot measure because I believe it is needed to break the political gridlock choking City Hall.
>
> . . . .
>
> This acrimony is extremely destructive, and the city can ill-afford it at a time when it is struggling with terrible blight and a lagging economy.

[7] Metropolis City Charter, Section 55(d).

I have said before that it is wrong to rewrite a city charter on the basis of the current office-holders. I still believe that, and members of the charter revision committee assured me that is not what they did. They studied the charters of many cities and selected the best aspects to recommend for Metropolis's. . . . .

In fact, a committee member told me, they kept in mind a hypothetical, future "idiot mayor," and incorporated checks and balances on mayoral powers to compensate. I am still concerned about the charter revision making Metropolis's strong mayor even stronger.

The mayor would appoint and dismiss the city attorney, and appoint the city administrator, with council confirmation. [The Mayor] could fire the city administrator at will and even write his job description. [The Mayor] would also appoint the commission that recommends the salaries of the mayor and council. And that's just a sampling.
. . . .

Too much power in the hands of an ineffectual mayor is troublesome. If the leader lacks vision, a city fails to progress. Too much power in the hands of a demagogue is an open invitation to autocracy.

If [the] Mayor wanted to modernize the city, I wondered, why didn't the charter committee recommend replacing the strong-mayor system with the council-manager form used by almost all other California cities?

The idea was discussed early on, but no one advocated it so it was dropped, committee members told me. Until recently, I supported having an independently elected city attorney. But now I see that a city attorney at war with the mayor and council can bring a city to its knees.

[The City Attorney's] opposition to Measure M is easy to understand: It would make his office appointed rather than elected, as is the case in most California cities. And he isn't likely to be [the Mayor's] appointee.

His recent series of raids on parolee housing is clearly timed to rally public support for his office, helping defeat Measure M. If the tactic works, I'm afraid the citizens of Metropolis are destined to watch their city continue to decline while political bickering prevails."[8]

[8] "Measure M isn't perfect, but it's needed," Cassie MacDuff, The *Press-Enterprise*, October 31, 2000, page B 1.

C. The City Attorney as Watchdog

It is certainly true, that in a situation where a city attorney is unwilling to give an opinion deemed essential by a city council, the city attorney is at risk. Similarly, a city manager who refuses to follow the city attorney's legal advice is also potentially at risk if the action taken is legally challenged. In either case, however, the intrusion of politics, whether from the perspective of the League of Women Voters or from public employee unions, provides an unnecessary complication to an already difficult situation. A city attorney as watchdog has public appeal, but it makes governing by the legislative body difficult at best.

The contrasting view, of course, is that a city attorney who does whatever a legislative body directs may violate ethical principles and the law. The recent controversy with regard to the state insurance commissioner's office which resulted in a proposed new ethical rule for attorneys highlights this issue.

In June of 2000, Cindy Ossias, senior attorney with the California Department of Insurance, revealed wrongdoing on the part of then Insurance Commissioner Chuck Quackenbush by "leaking" confidential documents to the State Legislature relating to insurers claims-handling practices after the Northridge earthquake. The documents reflected a pattern of misconduct that resulted in the ouster of Quackenbush. The ethical dilemma that Ms. Ossias's actions posed were the source of considerable question at the time. As an officer of the court, Ms. Ossias had a duty to report illegal activity and to refrain from engaging in it - as an attorney for the insurance commission, she had a duty to hold her clients' confidences inviolate. As a result of Ms. Ossias's actions, disciplinary proceedings were instituted but resolved in her favor.

This incident sparked state bar action and legislation delineating the duties and protections afforded public agency attorneys (See Exhibit G). The California Supreme Court, however, rejected the State Bar's recommendation in this regard in May of 2002, on the grounds that it was in conflict with the provisions of Business and Professional Code Section 6068(e). (See Exhibit H). Accordingly, the Legislature is processing AB 363 which will add Section 6068.1 to the Business and Professions Code to address this issue[9]. At the time of the writing of this article (August 28, 2002), the language of that proposed new section reads as follows:

> "6068.1. (a) If in the course of representing a governmental organization, an attorney learns of improper governmental activity, the attorney may take one or both of the following actions:

[9] See Exhibit G for an analysis of the currently pending legislation and the State Bar analysis of the proposed rule as of July 2001.

(1) Urge reconsideration of the matter while explaining its likely consequences to the organization.

(2) Refer the matter to a higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest internal authority that can act on behalf of the organization.

(b) Notwithstanding subdivision (e) of Section 6068, if the attorney has taken both actions as described in paragraphs (1) and (2) of subdivision (a) without the matter being resolved, or if the attorney reasonably believes that the highest internal authority that can act on behalf of the organization has directly or indirectly participated in the improper governmental activity, or if the attorney reasonably believes that taking the actions described in subdivision (a) are futile, the attorney may refer the matter to the law enforcement agency charged with responsibility over the matter or to any other governmental agency or official charged with overseeing or regulating the matter if all of the following exist:

(1) The referral is warranted by the seriousness of the circumstances and is not otherwise prohibited by law.

(2) The improper governmental activity constitutes the use of the organization's official authority or influence to commit a crime or perpetrate fraud.

(3) Further action is required in order to prevent or rectify substantial harm to the public interest or to the governmental organization resulting from the improper governmental activity.

(c) An attorney's conduct in making a referral under subdivision (b) shall not be a cause for disbarment, suspension, or other discipline if the attorney has acted reasonably and in good faith to determine the propriety of making a referral and to identify the appropriate governmental agency or official as described in subdivision (b) and to cooperate with the agency or official in the execution of the oversight or regulatory responsibilities of the agency or official regarding the referral. However, once an attorney has made the referral, this subdivision shall not apply to any further affirmative conduct outside of the scope of subdivision (b) or this subdivision that is initiated by the attorney to address the improper governmental activity.

(d) An attorney may, but has no affirmative duty to, take action pursuant to this section.

> (e) As used in this section, "improper governmental activity" means conduct by the governmental organization or by its agent that comes within one or more of the following:
>
> (1) Constitutes the use of the organization's official authority or influence by the agent to commit a crime, fraud, or other serious and willful violation of law.
>
> (2) Involves the agent's willful misuse of public funds, willful breach of fiduciary duty, or willful or corrupt misconduct in office.
>
> (3) Involves the agent's willful omission to perform his or her official duty.
>
> (f) This section shall not be construed to require that the improper governmental activity subject to its provisions be related, directly or indirectly to the matter for which the attorney was engaged as outside counsel by the governmental organization.

The State Assembly has approved this legislation, but it is still in the Senate Committee review process, facing a third reading before being sent to the Senate for approval. Presumably, once the legislation is enacted, the Rules of Professional Conduct will be amended to conform to the proposed standard. It will be interesting to see whether this rule will lead to more cases where public agency attorneys confront their clients with regard to potential wrongdoing. If it does, it will surely have an effect on the relationship among the city manager, city attorney and legislative body.

V. CONCLUSION

The governmental structure, and legal framework, for local governmental entities has an effect on the working relationship among the city manager, city attorney, mayor and city council and therefore on the effectiveness of government itself. Some structures encourage members of the city council to help manage the city, while others discourage that conduct. Similarly, some structures can pit administrative management against legal guidance. To the extent that governmental structures can be altered by adoption of a city manager ordinance, or by electing to create an alternative general law city or charter city, the effect of those structures should be carefully considered by policy makers.