

## SEPARATION OF POWERS IN UTAH MUNICIPAL GOVERNMENT

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The Utah Supreme Court has defined legislative powers as policymaking powers, while executive powers are policy execution powers. Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty to make such enforcement. The latter are executive functions. They are the act's necessary to carry out legislative policies and purposes and are deemed act of administration. The form of municipal government, unless established by a charter, and all of the governing powers of the municipalities are derived from the Legislature which traditionally vested those powers (both executive and legislative) in a single governing body consisting of either a board of commissioners, or mayor and council, depending upon the classification of the municipality.

In the traditional form of government it is government by committee. The committee is called the "governing body." In most Utah cities the governing body is a council of six members one of whom is the mayor. In a town the governing body is a council of five members one of who is the mayor. The governing body holds all of the legislative and executive power of the municipality. The mayor is a member of the governing body. The mayor chairs the body and presides at all its meetings. The mayor also votes as a member of the governing body. In third, fourth and fifth class cities the mayor votes only in cases of tie votes and on the hiring or firing of a city manager. In towns the mayor can always vote.

The concept of governing body creates confusion about who runs the day to day affairs of the city or town. This confusion is compounded by the references to "legislative body" in the Utah code. In a traditional form city or town the legislative body is the city council of which the mayor is a member and should in most instances be considered synonymous with the term governing body. The administrative powers and duties in a city or town, by state statute, belong to the mayor. They are not part of the powers of the governing body as a whole. However, the governing body may establish rules and procedures for the administration of the city or town<sup>1</sup> including the powers and duties of all officers and employees of the city or town.

In the traditional forms the mayor, as an individual, is given the position of chief executive officer to whom all employees are to report and is to carry out the policy of the governing body. The mayor has the authority to run the day to day operations of the municipality within the general operating guidelines established by the governing body.

Many mayors do not have the time, inclination, or talent to administer the city or town by them. There are options to solve this problem and that take two general forms. First the mayor may voluntarily give some of the administrative powers to members of the council. No one can require the mayor to make these assignments. It is an option available to the mayor. If the mayor does wish to assign council members to administrative positions the mayor must do so with the advice and consent of the council and the mayor cannot change the administrative assignment without a the concurrence of the majority of the council. The general administrative powers of these council members and the system of administration changes from municipality to municipality. It is usually established by tradition and is not written down in any ordinance or resolution. This method of administering cities and towns is still the most common method in the smallest cities and towns which lack staff and employees.

Once a mayor decides to delegate the administrative authority to the council members the mayor loses some control over the administration. The mayor cannot have it both ways. He or she may not both delegate the responsibility and remain in control. If a problem does arise concerning the scope of the powers and duties of these council members/administrators the governing body as a group, which has the statutory authority to establish a general system of administration, decides what each council member/administrator's duties are.

A more difficult problem arises when the mayor either does not want to delegate the administration to the council members or the council members refuses to become administrators. If the council feels that the mayor has the ability to administer the municipality there will be no problem. If the council does not trust the mayor to be able to do the job it has options. It can create and budget for the position of administrative assistant to the mayor and thus enable the mayor to have a professional city administrator's help. If they do this the mayor has sole authority to appoint the administrator.

Councils in the traditional form cities and towns also have the authority to create the position of city manager and delegate to the manager some or all of the mayor's administrative and executive powers. The council cannot delegate to the manager the mayor's legislative or judicial powers or the chair of the governing body. If the council does create the position of city manager it must do so by ordinance and by either ordinance or resolution describe the manager's powers duties. This form of administration is significantly different from the previously discussed administrative assistant to the mayor. First, this takes authority from the mayor, with or without the mayor's cooperation. Second the city manager is not appointed by the mayor but is hired or fired by the governing body. The mayor has a vote on this matter but not power to appoint or a veto. If a council does create this form of administration, the mayor is no longer the chief executive or administrative officer of the city or town. The city manager does not answer to the mayor individually but to the whole council (which includes the mayor). This is the most common form of administration in Utah's larger third class cities.

Not all mayors are the same. The position of mayor will change with the form of government. In all municipalities operating under the traditional form of government, the mayor is the chair of the council and presides at the meetings of the governing body. The mayor of a non-optional council-mayor form municipality (discussed below) does not have the power to veto any act of the city council.

The administrative powers, authority, and duties in traditional form cities and towns are vested in the mayor.

The mayor:

- (1) is the chief executive officer to whom all employees of the municipality shall report;
- (2) is to keep the peace and enforce the laws of the city or town;
- (3) may remit fines and forfeitures and may release any person imprisoned for violation of any municipal ordinance;
- (4) must report any remittance or release to the council at its next regular session;
- (5) is to perform all duties prescribed by law, resolution or ordinance;
- (6) is to ensure that all the laws and ordinances and resolutions are faithfully executed and observed;
- (7) may, at any reasonable time, examine and inspect the books, papers, records, or documents of the city or town or of any officer, employee or agent of the city or town;
- (8) is to report to the council the condition of the city or town and recommend for council consideration any measures as deemed to be in the best interests of the city or town;
- (9) is to, when necessary, call on the residents of the city or town over the age of 21 years to assist in enforcing the laws of the state and ordinances of the municipality; and
- (10) appoints, with the advice and consent of the council, persons to fill municipal offices or vacancies on commissions or committees of the municipality. This power of appointment does not include the power to appoint managers hired by the council under Section 10-3-830 of the Utah Code (managers by ordinance).

The traditional form of municipal government has persisted since territorial times and it was not until 1959 that the Legislature provided for a substantial departure from it. It did so by an act entitled Strong Mayor Form of Government which enabled the larger cities to adopt, at their option, a strong Mayor form of government. That legislation was significantly innovative since it not only vested municipal government in a mayor and a board of commissioners, it also expressly separated the executive and legislative powers by vesting the former in the Mayor, as chief executive officer and by vesting the latter in the board of commissioners.

In 1975 the Legislature repealed the Strong Mayor Form of Government Act and enacted substantially similar provisions in what is now known as the Optional Forms of Municipal Government Act. The Act provided for optional forms of government known as council- mayor and council- manager forms and made them available to all municipalities, regardless of their classification. A municipality adopting the council- mayor form vests the executive and legislative powers in the Mayor and the municipal council. The Act designated the municipal council as the legislative body and it expressly defined its powers and duties as being passing ordinances, appropriating funds, reviewing municipal administration, and performing all duties that may be required by law. It further expressly placed limitations upon the authority of the council members as follows: “No member of the council shall direct or request, except in writing, the appointment of any person to, or his removal from office or to interfere in any way with the performance by the officers of their duties. The council shall not give orders to any subordinate of the Mayor or manager either publicly or privately, but may make suggestions and recommendations. Nothing in this section shall prevent the council from appointing committees of its own members for citizens to conduct investigations into the conduct of any officer, department, or agency of the municipal government, or any matter relating to the welfare of the municipality, and delegating two these committees such powers of inquiry as the council making necessary.” Utah code annotated 10-3-1217.

The optional form of government known as the council-mayor form vests the government of a municipality which adopts this form in two separate, independent, and equal branches of municipal government— the executive branch consisting of a mayor and the administrative departments and officers; and the legislative branch consisting of a municipal council. There is a complete separation of powers with the executive powers vested in the mayor and the legislative powers vested in the city council. This is contrasted to the non-optional form of government where there is no separation of powers and the executive and legislative is all contained in a governing body consisting of the mayor and council.

In a municipality organized under the optional council-mayor form of government, the municipal council, by a majority vote of its members, selects one of its number as chair. The mayor does not chair the council. The mayor, unlike other mayors, is not a member of the council.

In municipalities organized under the council-mayor optional form of government, every ordinance or tax levy passed by the council must be presented to the mayor for his or her approval or disapproval. If the mayor approves the ordinance or tax levy, it is signed and recorded and thereafter is in force. If the ordinance is an appropriation ordinance, the mayor may veto all or any part of the appropriation. If the mayor vetoes an ordinance, tax levy, or appropriation, he or she returns it, with a statement of the objections, to the council within fifteen days and the council must, at its next meeting, reconsider the ordinance, tax levy, or appropriation item. The council can override the veto if it again passes by a vote of at least two-thirds of all council members. If any ordinance, tax levy, or appropriation item is not returned by the mayor within fifteen days after presentation to the mayor, it is recorded and thereafter shall be in force.

In the optional form of government known as the council-mayor form, the mayor is elected for a term of four years. The mayor is the chief executive and administrative officer of the municipality. This authority cannot be delegated to a city manager by the city council.

The mayor in the council mayor optional form has the power and duty to:

- (1) enforce the laws and ordinances of the municipality;
- (2) execute the policies adopted by the council;
- (3) appoint and remove administrative assistants, including a chief administrative officer, and with the advice and consent of the council, appoint department heads, all statutory officers, commissions, boards, and committees of the municipality, except as may otherwise be specifically limited by law;
- (4) remove department heads and officers and employees, commissions, boards, and committees;
- (5) exercise control of all departments, divisions, and bureaus within the municipal government;
- (6) attend all meetings of the council, with the right to take part in all discussions and the responsibility to inform the council of the condition and needs of the municipality and make recommendations and freely give advice to the council. The mayor does not have the right to vote in council meetings;
- (7) appoint a budget officer to serve in place of the mayor for the purpose of conforming to the requirements of the Uniform Municipal Fiscal Procedures Act and in all other respects fulfill the requirements of that act;
- (8) appoint with the advice and consent of the council a qualified person to each of the offices, in cities, of recorder, treasurer, engineer and attorney and, in towns, town treasurer and clerk; create any other offices as may be deemed necessary for the good government of the municipality, and make appointments to them; and regulate and prescribe the powers and duties of all other officers of the municipality, within the general provisions of law and ordinance;
- (9) furnish the municipal council with a report, periodically as determined by ordinance, setting forth the amounts of all budget appropriations, the total disbursements to date from these appropriations, and the amount of indebtedness incurred or contracted against each appropriation (including disbursements and indebtedness incurred and not paid) and the percentage of the appropriations encumbered to date, which reports shall be made available for public inspections;
- (10) execute agreements within certified budget appropriations on behalf of the municipality, or delegate by written executive order the power to execute such agreements to executive officials, subject to the procedure described in Section 10-6-138 of the Utah Code; and
- (11) perform such other duties as may be prescribed by state law or ordinance.

The mayor in the optional form called the council-manager form is not the city's chief executive officer. The mayor is a member of the legislative branch of government. The mayor is elected at large for a four-year term. The mayor presides at all meetings of the council. The mayor has a vote in all council proceedings. The Mayor is the chief ceremonial officer of the municipality. The Mayor represents the municipality in all its external relationships. The powers and duties of this mayor are only those duties given the position by the state code outlining the council-manager optional form of government. The mayor in this form of government does not have the executive and administrative role that other mayors have. Those powers are given by state statute to the hired city manager.

The city manager in the optional form is the chief executive officer of the city and has the power and duty to:

- a) faithfully execute and enforce all applicable laws, ordinances, rules, and regulations, and see that all franchises, leases, permits, contracts, licenses, and privileges granted by the municipality are observed;
- b) carry out the policies and programs established by the council;
- c) organize and direct the management of the executive affairs of the municipality in a manner consistent with this act and with municipal ordinances;
- d) appoint a budget officer for the purpose of complying with the requirements of the Uniform Municipal Fiscal Procedures act;
- e) appoint, with the advice and consent of the council, a qualified person to each of the offices in cities of recorder, treasurer, engineer, and attorney, and, in towns, town treasurer and clerk; create any other offices as may be deemed necessary for the good government of the municipality; and regulate and prescribe the powers and duties of all other officers of the municipality, except as provided by law or by ordinance;
- f) examine and inspect the books, records, and official papers of any office, department, agency, board, or commission of the municipality, and make investigations and require reports from personnel;
- g) appoint, subject to the provisions of state law and of the municipal administrative code, and with the advice and consent of the council, suspend, and remove heads of municipal offices, departments, and agencies, and all appointive officers of boards and commissions;
- h) establish standards, qualifications, criteria, and procedures to govern the appointments, by heads of offices, departments, and agencies, or by other authorized officers, of divisional officers, assistants, deputies, and employees within their respective organizational units, subject to any applicable provisions of the merit system and municipal administrative code;
- i) submit to the council plans and programs relating to the development and needs of the municipality, and annual and special reports concerning the financial, administrative, and operational activities of municipal offices, departments, agencies, boards, and commissions, together with his evaluation and recommendations relating to them;
- j) attend all meetings of the council and take part in its discussions and

deliberations, but without the right to vote;

k) appoint, with approval by majority vote of the full membership of the council, an acting municipal manager to serve in his absence or temporary incapacity to perform the powers and duties provided for in this part; and discharge any other duties specified by statute or imposed by the council.