

## Separation of Powers in Massachusetts Municipalities

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### No Guarantee of “Traditional” Separation of Powers

- Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902)  
“Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.”

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### Separation of Powers in the Commonwealth

- Constitution Article XXX.  
In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them...
- Article XXX is inapplicable to municipalities. See Sciuto v. City of Lawrence, 389 Mass. 939 (1983) (such a challenge, if accepted, would call into question entire forms of municipal government).

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### Amendments to the Commonwealth's Constitution - Article LXXXIX

- Allows citizens of the Commonwealth's cities and towns to adopt, amend or revise their own charters & establishes procedures for accomplishing, supplemented by Home Rule Procedures Act
- Provides thresholds for establishment of cities (12,000) and representative town meetings (6,000)
- Power to self-govern by adoption of by-laws or ordinances available to all municipalities, even if new charter isn't adopted

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### General Powers of Municipalities

- Cities or Towns, through local ordinances or bylaws, may exercise any power or function which the general court has power to confer upon them:
  - not inconsistent with the constitution or General Laws;
  - in conformity with powers reserved to the general court by the Home Rule Amendment to the Constitution; and
  - which is not denied to the city or town by its charter.

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### Home Rule Procedures – c. 43B, § 20

- Any particular local office shall be either elected or appointed
- Members of a board of selectmen shall always be elected
- In towns with open town meeting the town moderator shall always be elected
- In every other case all of the members of the legislative body shall always be elected

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### Home Rule Procedures – c. 43B, § 20

- Any particular local officer or employee shall be appointed by any particular local officer
- Two or more local offices may be merged or consolidated into a single office
- The powers, duties and responsibilities of one local office may be divided and exercised by two or more local offices
- Appointments by a municipal agency may be confirmed

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### Forms of Municipal Government

- No requirement for uniformity in the laws for the executive and administrative functions of cities
- General laws offer six different standard forms of government for the adoption by cities of the Commonwealth
- Other cities operate under their own charters via special acts of the legislature

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### City Government – General Powers

- City councils have the powers of town meetings.
- Boards of aldermen have the powers and perform duties of selectmen, except as to appointments.
- Mayors have the powers and duties of selectmen with respect to appointments, subject to confirmation or rejection by aldermen.
- In cities with a single legislative board other than a board of aldermen, the board may exercise the powers and perform the duties of the board of aldermen.

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### City Government – Mayoral Duties

- Is the chief executive of the city and has general supervision of all departments
- Has the powers and performs the duties of selectmen with respect to appointments, subject to confirmation by aldermen
- Holds certain specific licensing authority
- Is responsible for certain public safety functions, including authority to disburse unlawful or riotous assemblies, and request Governor to deploy National Guard to assist
- Has veto power over ordinances, orders, resolutions or votes requiring mayoral approval (unless provided otherwise by charter)

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### City Government – Mayoral Duties (cont'd)

- May petition the Department of Public Health for the removal of sources of pollution of the city's water supply
- May apply to SJC or Superior Court for injunction against pollution of any pond or stream used as a source of ice or water supply by the city
- Is charged with enforcement of law requiring periodic testing of standard weights, measures and balances within city
- Submits annual budget recommendations to city council

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### City Government – Legislative Branch

- Legislative branch may consist of one (Board of Alderman or City Council) or two (Board of Alderman and Common Council) chambers
- Unless superseded by statute of the City Charter, board of aldermen is the general licensing authority
- May declare dangerous buildings to be a nuisance and dictate disposition or alteration

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 **City Government – Legislative Branch – Board of Alderman**

- May require tax collector to report as to taxes committed and the moneys paid into the treasury
- May approve the laying or repairing pipes conduits under public ways
- May regulate the exercise of the sale or barter of merchandise by hawkers and peddlers
- May grant to a telephone company, after petition and public hearing, the right to erect or construct upon, along, under or across public ways, wires, poles, piers, abutments or conduits necessary for transmission lines, or may direct an increase in the number of wires or cables, or alteration in the location of poles, piers, abutments or conduits, or in the height of wires or cables

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 **City Government – Legislative Branch – Board of Alderman (cont'd)**

- Are responsible for regulation of vehicles for hire and traffic regulations
- May purchase or take by eminent domain for the city (except in Boston) land required for municipal purposes (subject to appropriation)

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 **City Government – Legislative Branch – City Council**

- May vote transfers from the city's reserve fund to provide for extraordinary or unforeseen expenditures
- May appropriate from the stabilization fund of the city
- Must authorize purchase or taking of land by eminent domain with appropriation (2/3 vote)
- May transfer custody and control of land declared surplus by one board or officer to another board or officer for another specific municipal purpose

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**City Government – Legislative Branch – City Council (cont’d)**

- May establish and amend plan establishing minimum and maximum salaries for city employee positions classified by ordinance
- May summon witnesses before it as to matters within its authority

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**Forms of Municipal Government – City Executives & Forms**

<b>Chief Municipal Official</b>	<b>Total</b>
City Manager	1
Mayor	43
Mayor-Manager	3
<b>Organizational Form</b>	<b>Total</b>
Special Acts/Home Rule Charters	15
Plan A	16
Plan B	12
Plan C	0
Plan D	1
Plan E	2
Plan F	1

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**Standard Plans of Municipal Government – Plan A - Executive**

- Executive is Mayor, elected by the voters of the city
- Mayor appoints, without confirmation, all department heads and municipal board members, except school committee
- Mayor may remove department heads or board members he is authorized to appoint by filing statement with city clerk setting forth specific reasons for removal

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### Standard Plans of Municipal Government – Plan A - Legislative

- Legislative body is City Council of nine members elected at large, with one annually elected by its members as president
- Every order, ordinance, resolution and vote must be presented to the mayor for his approval
- Mayor has veto power, which may be overridden by 2/3 vote

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### Standard Plans of Municipal Government – Plan B - Executive

- Executive is Mayor, elected by the voters of the city and is chief executive
- Mayor appoints all heads of departments and members of municipal boards, except the school committee, each (except City Solicitor) subject to confirmation by City Council
- May appoint liquor licensing board without council approval
- Specific appointment powers are subject to the Plan provisions; where appointment by Mayor is authorized, removal of department head must be approved by City Council

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### Standard Plans of Municipal Government – Plan B - Legislative

- Legislative body is City Council of eleven (< 7 wards) or fifteen (> 7 wards) members, with one annually elected as president by its members
- One councilor is elected from each ward, with the remaining members elected at-large

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### Standard Plans of Municipal Government – Plan C - Commission

- Government and general management and control of all of affairs (except public schools) are vested in elected city council
- Council consists of five members:
  - Mayor/Commissioner of Administration;
  - Commissioner of Finance;
  - Commissioner of Health;
  - Commissioner of Public Works; and
  - Commissioner of Public Property
- President (other than Mayor) elected by members

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### Standard Plans of Municipal Government – Plan C - Mayor

- Mayor is the chief executive officer of the city and, ex officio, chairman of the school committee
- Mayor may have other duties and powers as provided by ordinance
- Mayor presides at meetings of the city council, but has no power of veto

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### Standard Plans of Municipal Government – Plan C – Council

- Legislative powers of the city are vested in the Council, which possesses all the powers, rights and duties possessed by the mayor, board of aldermen, common council, and all other boards, commissions and committees of the city, prior to the adoption of the plan
- Council assigns executive and administrative powers, authorities and duties not specifically allocated by Plan C to proper departments through ordinances

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**Standard Plans of Municipal Government – Plan C – Council (cont'd)**

- Each commissioner appoints, subject to council confirmation, the heads of the departments under his jurisdiction
- Commissioners may remove any department head for cause stated in an order of removal
- Department heads may appoint and remove the employees of that department
- Each commissioner must keep a record book of the department(s) under his jurisdiction and must render a full report to the city council on a quarterly basis

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**Standard Plans of Municipal Government – Plan D**

- Government vested in a city council of seven or nine members and a city manager.
- The mayor is the official head of the city for ceremonial purposes, for the purpose of serving civil process and by the governor for military purposes.
- City clerk, auditor, any official appointed by the governor, and any elected trustees of trust funds have the powers and duties according to general law.

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**Standard Plans of Municipal Government – Plan D (cont'd)**

- City council elects mayor and a vice-chairman from its own membership.
- Mayor, in cases of public danger or emergency and with consent of city council, may take command of the police and take necessary action to maintain order and enforce the laws.
- Mayor is chairman of the city council and of the school committee, with the right to vote but without the power of veto.

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**Standard Plans of Municipal Government – Plan D – City Manager**

- City manager is the chief administrative officer
- Is appointed by the city council based only upon administrative and executive qualifications
- No sitting city council member or person who, within the past 2 years, was an elected official in the commonwealth may be city manager
- Powers and duties are the same held by the mayor, board of aldermen, common council and all other boards, commissions and committees (except school committee) prior to the adoption of the charter
- Supervises the administration of the city's affairs and faithful execution of ordinances, resolutions and regulations

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**Standard Plans of Municipal Government – Plan D – City Manager (cont'd)**

- Makes recommendations to the council and informs as to the city's financial condition.
- Prepares annual city budget and submits to city council. May obtain financial estimates from all departments, commissions, boards and offices.
- Has appointment and removal powers in the departments under his control; may delegate to department heads. Must report appointments and removals to city council.
- City council cannot direct appointment or removal in departments.
- City council has no control items under city manager purview, and cannot direct any of the city manager's subordinates.

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**Standard Plans of Municipal Government – Plan E**

- City council consists of seven or nine members.
- Council elects a mayor and a vice-chairman from its own membership.
- Mayor presides at meetings and may vote; the vice-chairman presides in absence.
- The mayor is the official head of the city for ceremonial purposes, for the purpose of serving civil process and by the governor for military purposes.
- Mayor has no powers of appointment, except for employees of his own office.

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**Standard Plans of Municipal Government – Plan E – City Manager**

- City manager is the chief administrative officer
- Is appointed by the city council based only upon administrative and executive qualifications
- Supervises the administration of the city's affairs and faithful execution of ordinances, resolutions and regulations; is charged with keeping the peace.
- City council may set, limit, or accord wide discretion to city manager.
- Reports to council on affairs of city and as to the city's financial condition and needs.
- Prepares city's budgets for submission to council and may require estimates from all city departments.
- Has duty to act in city's best interest on contracts.

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**Standard Plans of Municipal Government – Plan E – City Manager**

- Makes all appointments and removals of personnel in departments under his control and performs other duties as required by ordinance; may delegate to department heads.
- Must report appointments and removals to city council.
- All appointments are made on basis of training and experience (unless subject to the civil service law).
- Has supervisory authority over officers and employees, under general regulations of city council.
- City council has no control items under city manager purview, and cannot direct any of the city manager's subordinates.

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**Standard Plans of Municipal Government – Plan F**

- Government vested in mayor and city council.
- Mayor is chief executive officer of the city.
- Legislative powers are vested in city council which annually elects one of its members as president.
- All department heads and members of municipal boards, (except school committee, officials appointed by the governor, and assessors if elected), are appointed by the mayor, without confirmation by the city council.
- Mayor may remove any person whom he is authorized to appoint.
- Every order, ordinance, resolution and vote adopted or passed by city council is subject to mayor's approval.
- Veto by mayor may be overridden if passed by 2/3 vote of council.

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### Town Government – Board of Selectmen

- Selectmen are the "town agents".
- Control all real or personal property of the town not under control of a board, officer or department.
- Have control over tax possessions but may designate custodian
- May purchase, or select and lay out, land within their town, necessary for the construction, repair or improvement of public ways.
- May enter into contracts on behalf of the town when authorized by statute or town meeting action.

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### Town Government – Board of Selectmen (cont'd)

- Prepare and produce annual town report
- May summon witnesses to testify and to produce records, at hearing on matters within board's authority.
- May investigate conduct and operation of any town department and submit report to clerk.
- Where not separately established may act as sewer and water board, water commissioners, water and municipal light commissioners, municipal light board, sewer commissioners, park commissioners, board of public works, board of health, assessors, or commission of public safety, park commissioners, planning board or finance board.

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### Town Government – Board of Selectmen (cont'd)

- May petition Governor for National Guard or other organization aid in preserving order
- May petition the Department of Public Health for the removal of sources of pollution of the town's water supply
- May apply to SJC or Superior Court for injunction against pollution of any pond or stream used as a source of ice or water supply by the town
- Investigate allegations of vicious, dangerous, or excessively noisy dogs and make necessary orders.
- May hold hearings on nuisance properties and order abatement or request intervention by State Dept. of Public Safety.

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**Town Government – Board of Selectmen (cont’d)**

- Enforce laws relating to: weighing or measuring devices & storage of fireworks.
- Approve urban redevelopment projects or modifications.
- Upon request of the Secretary of the Commonwealth, investigate and report on proposed incorporators or officers of a charitable corporation.
- May examine books and records of persons engaged in lending money on collateral or of persons selling alcoholic beverages

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**Town Government – Board of Selectmen – Appointment Powers**

- Are general appointing authority and may be authorized (by town vote) to appoint cemetery commissioners, assessors, superintendent of streets, chiefs of police and fire departments or board of health.
- May designate and employ building inspector or commissioner and electrical inspector if authorized by vote or by-law
- Where locally accepted, may appoint board of assessors
- May be authorized to appoint accountant, purchasing agent, executive secretary, town administrator and/or veteran’s agent

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**Town Government – Board of Selectmen – Appointment Powers (cont’d)**

- Appoints board of registrars or wardens, clerks and inspectors if wards are applicable
- Where authorized appoint health commissioner or health inspector
- Where authorized may appoint public safety commissioner who may appoint deputies as chiefs of police and fire departments
- May organize police force, or where authorized, create police department
- May appoint, train and equip volunteer, unpaid auxiliary firemen, police and civil defense units
- May appoint superintendent of streets (unless highway surveyor is elected, wherein surveyor has exclusive control of ordinary repair of public ways)

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### Town Government – Board of Selectmen – Appointment Powers (cont'd)

- Where authorized, may appoint town counsel, constables, board of cemetery commissioners, tree warden, superintendent of water or sewer dept.
- May establish fire department under the control of a chief in accordance with statutory scheme (when locally accepted) or through appointment of engineers, firewards and forest warden
- Appoint weighers, measurers or surveyors of goods or commodities.
- No person may be authorized to act on behalf of board of selectmen unless appointment and removal is subject to the board.

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### Town Government – Board of Selectmen – Licensing Authority

- Are licensing authority for innholders and common victuallers
- May be authorized to license sale of food and beverages, coffee houses, lodging houses, lunch carts, used car sales, pawn brokers, bowling alleys and pool halls, arcades, dancing schools, skating rinks, use or rental of boats, transient vendors and charitable or veteran’s organizations for sale of flags, badges, flowers, souvenirs, etc.

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### Town Government – Board of Selectmen – Finance

- Must approve the payment of all bills or payrolls
- Must sign all warrants for the payment of money by the treasurer.
- Approve interest rate obligations of the town bear.
- Must countersign bonds and notes issued by the town.
- Must provide detailed budget estimates of departments under their jurisdiction to the town accountant or, appropriation, advisory or finance committee.
- Report recommendations of appropriations to town.

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**Town Government –  
Town Manager; Town Administrator;  
Executive Secretary**

- Town Manager – administrative responsibilities and authority is vested in professional manager (not provided for in MGL, but available through charter provisions)
- Town Administrator, Executive Secretary, et al.
  - Appointed and may be removed by Selectmen where authorized by town
  - Duties are defined by Selectmen
  - May hold other town office(s) concurrently with position, as determined by Selectmen

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**Forms of Municipal Government -  
Towns**

<b>Chief Municipal Official</b>	<b>Total</b>
Admin. Asst.	11
Admin. Coord.	1
Chief Admin. Officer	2
Chief Admin./Finance Officer	1
Executive Asst.	3
Executive Dir.	1
Executive Sec'y	10
General Manager	1
Munic. Admin.	1
Selectmen	41
Town Admin.	157
Town Coord.	11
Town Manager	64

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**Separation of Powers**

- Panelist Commentary

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## Separation of Powers – Conflicts

Collins v. Selectmen of Brookline, 325 Mass. 562 (1950): Plaintiff, elected member of Brookline Housing Authority challenged removal by Selectmen acting on statute, which allowed mayor or selectmen to receive written charges against and after hearing, remove member of appointed or elected housing authority, stating that statute encroached on judicial power contrary to Article XXX. SJC held that power of removal of public officer is executive or administrative in nature and there is no encroachment in Legislature authorizing such action.

Young v. Mayor of Brockton, 346 Mass. 123 (1963): Plaintiff, appointed by city manager to Brockton liquor licensing board under Plan D charter, but not confirmed by city council, challenged purported removal by mayor under subsequent Plan B charter. SJC held that appointments were governed by c. 138 § 4, regardless of grant of confirmation power to city manager under c. 43.

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## Separation of Powers – Conflicts

City Council of Boston v. Mayor of Boston, 383 Mass. 716 (1981): Council passed ordinance limiting number and makeup of mayoral staff. Court held that executive powers vested in Mayor through state statutes which form the City Charter and indicate legislative intent that Mayor could determine the size and salary level of his staff and that the Council was prohibited by the charter from taking part in City's executive or administrative business.

City Council of Boston v. Mayor of Boston, 24 Mass.App.Ct. 663 (1987): Mayor vetoed ordinances: abolishing Insp. Svc's Dept. and establishing Building Dept. under control of City Council; and establishing Commission on Women in Mayor's office's which reserved Council the right to rescind adopted rules and reg's. Court looked to statutes which provided that city council with mayoral approval could reorganize, consolidate or abolish depts and found that language required Mayor and Council to act together. Deference given to "strong mayor" nature of City's gov't and inability of Council to make unilateral organizational changes in the executive branch.

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## Separation of Powers – Conflicts

Mayor of New Bedford v. City Council of New Bedford, 13 Mass.App.Ct. 251 (Mass.App.Ct. 1982): Council passed ordinance over Mayoral veto changing appointment of clerk of committees from Mayor subject to Council confirmation, solely to council. Court found that while Plan B provides for mayoral appointment of department heads, clerk of committees was not head of a dept. within the meaning of c. 43, § 60 and upheld the ordinance. Court gave deference to legislative nature of clerk position.

Whalen v. City of Holyoke, 13 Mass.App.Ct. 446 (Mass.App.Ct. 1982): Bd. of Alderman passed ordinance over Mayoral veto providing number of fire department members. Mayor submitted budget which cut dept. numbers. Court held that despite power of aldermen to prescribe number of fire personnel, under municipal finance act mayor was not bound by ordinance purporting to limit his prerogatives in formulating budget.

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## Separation of Powers – Conflicts

Doherty v. Mayor of Everett, 13 Mass.App.Ct. 202 (Mass.App.Ct. 1982): “Quinn Bill” accepted by city council over mayoral veto. Mayor refused to make appropriation recommendation citing conflict with mayoral executive powers under charter to determine earnings of a class of city worker. Court held that votes of city council may have financial consequences, but do not impinge on the executive functions of the mayor.

Doherty v. City of Woburn, 345 Mass. 523 (1963): City council, over mayoral veto, passed ordinance raising wages of public works dept. Mayor contended such infringed on executive power granted under City charter to employ labor and make contracts. Court held that fixing of salaries was power frequently exercised by legislative bodies and not forbidden by charter.

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## Separation of Powers – Conflicts

Opinion of the Justices to the Senate, 429 Mass. 1201 (1999): Over mayor’s veto, council submitted home rule petition amending Gloucester city charter. Court looked to home rule amendment which required petition be filed by the mayor and city council and held that council’s override of veto could not be read as mayor’s assent.

Opinion of the Justices to the House of Representatives, 375 Mass. 843 (1978): Cambridge Mayor refused to sign petition for special legislation amending City charter. Home rule amendment provides that General Court may act on petition filed or approved by: voters of a city; or the mayor and city council; or other legislative body of a city. Court held that while a Plan E mayor is the official head of the city, he is a member of the city council, has an equal voice with other members. Further, the Mayor has no approval or veto power over measures adopted by the city council and possesses no legislative powers apart from those held as a council member. As such Plan E Mayor’s approval is not required.

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## Separation of Powers – Conflicts

Town Council of Agawam v. Town Manager of Agawam, 20 Mass.App.Ct. 100 (Mass.App.Ct. 1985): After acceptance of charter granting Town Manager with power to appoint all, except school, officers and employees, Town Council voted to reserve power of confirmation under GL c. 39. Court held that Home Rule Charter enacted in accordance with c. 43 superseded c. 39 requirements.

Atkinson v. Town of Ipswich, 34 Mass.App.Ct. 663 (Mass.App.Ct. 1993): Question as to whether “strong” fire chief or town manager had control of fire department. “Strong” chief legislation locally accepted in 1962. New charter accepted in 1967 by special act, gave town manager general powers to appoint, supervise, direct and administer all departments, board and offices not specified in charter. Court looked to charter provisions and found that where fire chief was not mentioned and charter repealed all inconsistent laws, town manager had control of chief and dept.

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## Separation of Powers – Conflicts

Opinion of the Justices to the Senate, 365 Mass. 655 (1974): Proposed act required petitions for legislation from towns with council form of government be approved by both council and town administrator. Court held that § 8 of Home Rule Amendment prescribed which legislative body may act instead of the voters and did not contemplate non-members such as the town administrator or manager participating in filing or approval of petitions.

Gabriel v. Mayor of Fitchburg, 14 Mass.App.Ct. 984 (Mass.App.Ct. 1982): City council passed ordinance over Plan B mayor veto providing that chief of police, at request of solicitor shall designate officer to assist solicitor in investigations. Mayor asserted ordinance infringes on his charter power to appoint and remove personnel and his executive power under GL c. 43 § 58. Court held that mayoral authority did not extend to subordinate officers.

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## Separation of Powers

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