

MEMORANDUM OF THE CHICAGO COUNCIL OF LAWYERS
 (RE PROPOSALS TO ESTABLISH A CIVILIAN OVERSIGHT COMMISSION
 FOR THE CPD AND RELATED AGENCIES)
SEPTEMBER 24, 2020

The Chicago Council of Lawyers (the “Council”) contributes this memorandum as our review and comment on two alternative pending ordinances that would establish a Civilian Oversight Commission with certain powers concerning the Chicago Police Department (the “CPD”) and those City agencies that investigate and decide on complaints alleging misconduct by Chicago police. These agencies include the Civilian Office of Police Accountability (“COPA”) and the Chicago Police Board.

The Council appreciates the significant efforts and recognizes the different perspectives of the community groups involved in the two competing proposals. The value of this work and these perspectives cannot be overstated, and the Mayor’s Office and the City Council would be wrong to ignore or dismiss them. Now is the time to establish the long-ago promised Civilian Oversight Commission.

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I. BACKGROUND

Chicago Police Officer Jason Van Dyke's shooting of LaQuan McDonald in 2014 (and the subsequent 2016 Task Force Report) revealed to the City of Chicago a vital need to improve its oversight of the CPD. In response, the City Council of Chicago agreed to an oversight structure to be comprised of three distinct parts, each critical to the goal of improved policing in the City and its communities: (1) improvements to COPA, the agency which investigates most police misconduct complaints, including use of excessive force; (2) creation of the position of Deputy Inspector General for Public Safety within the City's Inspector General Office, with responsibility for monitoring and reporting on patterns of conduct and operations of the CPD; and (3) creation of a Civilian Oversight Commission to assist in overseeing the operations of the CPD, COPA and related agencies. The City Council enacted in 2016 the details for the first two parts of the reform structure, but it deferred creating a Civilian Oversight Commission for the purpose of giving community groups time to submit their own proposals for the oversight commission. The 2017 Department of Justice Report further confirmed and emphasized the need for reform and improved police oversight.

The City Council's purpose for postponing the creation of the oversight commission no longer exists. Community groups in the City have devoted themselves to this important issue, and two community groups have produced alternative proposals for a Civilian Oversight Commission.¹ The Chicago Alliance Against Racist and Political Repression offered an ordinance to create a "Civilian Police Accountability Council." This proposed ordinance, the Chicago Alliance, and the Accountability Council are widely referred to as "CPAC". Subsequently, the Grassroots Alliance for Police Accountability offered its own ordinance, which, along with the Grassroots Alliance, is widely referred to as "GAPA"²

Four years have passed since the City Council committed itself to creating the Civilian Oversight Commission. The City Council recognized this commission is an integral component of improved police oversight when it agreed to the three part reform structure. The Commission should now be created.

The Council does not endorse either of the two proposed ordinances in their entirety. The Council does endorse some aspects of the GAPA proposal, such as the provisions related to the qualification and disqualification required of potential Commission members, the Commission's role in oversight of CPD policies, the relationship between the Commission and COPA, and the degree of power sharing with the Mayor and City Council on decisions such as the selection and firing of the Chicago Police Department Superintendent and Police Board members. In contrast, the Council does not endorse the corresponding provisions of the CPAC proposal. On other matters, including the manner of selecting members of the Commission, the Council has not endorsed either of the competing proposals. We are sympathetic to the concerns of those who claim

¹Allies of then Mayor Emmanuel also proposed two separate ordinances that would have created oversight commissions. Those two ordinances do not appear to be under any continued contemplation, and the Council has not included them in this analysis.

² We understand that the GAPA ordinance that we discuss was circulated to Aldermen in late February or early March, 2020, but not introduced.

that the Commission needs expanded rights to serve its purpose. However, given the untried nature of such an oversight commission for the City and the potentially competing powers of the Mayor and the City Council, each of which are elected to represent City residents, the Council thinks it is essential that these changes be pursued with caution. It is also essential that the Mayor and the City Council be willing to revisit the extent of the Commission's powers if it should prove ineffectual.

The Council recognizes and respects that much of the plan for the Civilian Oversight Commission should come from those most directly affected by CPD actions—i.e., the communities being policed. At the same time, the charter for and formative powers granted to such an oversight commission, including its authority and who may serve as commissioners, present many fair and challenging concerns about the commission's role vis-à-vis the Mayor's office, the City Council, CPD officers, and members of the public. Experience both in Chicago and in other cities shows that establishing an oversight commission can be difficult. The experiences of other cities, including those with governing structures similar to Chicago, also confirm that it can be done. Moreover, it is also likely that experience with what works and what does not work for our City will prove essential in adjusting the responsibilities of such a commission. However, that work cannot begin until such a commission is at last established. One should not reasonably expect the commission to be perfect at the start; but it is time for the Mayor's office and the City Council to create it.

We divide our analysis of the GAPA and CPAC ordinances into two parts. First, we summarize how each ordinance addresses key provisions that any Civilian Oversight Commission charter should include, and we give the Council's analysis of and position on these provisions. Second, we make recommendations on the substantive powers that the GAPA and CPAC ordinances give to the Commission.

II. COUNCIL'S POSITIONS ON KEY ORDINANCE TERMS

A. SELECTION PROCESS OF COMMISSION MEMBERS

CPAC

Members of the Civilian Oversight Commission created by the CPAC ordinance would be directly elected every four years from eleven areas each of which consists of two contiguous police districts. (CPAC Secs. 2-83-020(a) and (b) and 2-83-030).

GAPA

The GAPA ordinance establishes three-member district councils who will be elected in each of Chicago's 22 police districts. (GAPA Sec. 2-80-070 (b) and (c)) The councils in turn nominate members of a seven-person Civilian Oversight Commission, who would be selected by the Mayor and confirmed by the City Council. (GAPA Sec.2-040-c.) Commissioners would serve for four-year terms. (GAPA Sec. 2-80-040 (a))

COUNCIL COMMENTS

The Council finds both of the proposed procedures raise questions but claims no expertise in deciding on the best procedure for democratically selecting members of the Commission. The Council, accordingly, expresses no opinion or preference for either of the two proposed selection methods.

B. QUALIFICATIONS OF COMMISSION MEMBERS

GAPA

Section 2-80-040(b) of the proposed GAPA ordinance specifies the qualifications required of a candidate for the Commission. They include: at least five years' experience in law, public policy, social work, psychology, mental health, law enforcement, community organizing, civil rights, advocacy on behalf of immigrants and undocumented people or advocacy on behalf of LGBT people; reputation for integrity, professionalism and judgment; history of leadership and community involvement; ability to engage with other persons with a stake in policing; and history of working collaboratively in groups.

CPAC

Section 02-83-030(iv) of the proposed CPAC ordinance provides that a candidate must have two years of experience representing the rights of 1) young people, African Americans or Latinxs; 2) immigrants; 3) LGBTQ people; 4) people in Muslim communities; 5) disabled people in their interactions with police; 6) homeless people; or 7) victims of police misconduct or brutality.

COUNCIL COMMENTS

The Council supports the GAPA ordinance provision as to qualifications. The GAPA ordinance defines qualifications broadly, while the CPAC ordinance requires that every Commission member must be a person who has experience representing members of a minority group. The Council believes that the broader pool of potential Commission members is likely to result in a more representative cross-section of the City's residents.

C. DISQUALIFICATIONS OF COMMISSION MEMBERS

GAPA

The GAPA ordinance provides that no Commission member shall have worked for CPD, IPRA, COPA or the Police Board in the last 3 years. (GAPA Sec.2-80-040(b)(9).)

CPAC

The CPAC Ordinance provides that a candidate for the Commission must not have served as a "law enforcement officer," and must not have or had any of 26 types of family members who ever worked in such a position (CPAC Sec.2-83-030 v (1).)

COUNCIL COMMENTS

The Council supports the GAPA ordinance provision as to disqualifications. We believe the CPAC disqualification provision is potentially overbroad. The phrase “law enforcement officer” is not defined in the CPAC ordinance. For example, it could be reasonably interpreted to include a person who issues parking tickets or inspects restaurants. There is neither any limit to where a person served as a law enforcement officer nor is there any limit as to how far back in time this condition applies. As drafted, it could be reasonably read to disqualify a person whose grandparent enforced building codes decades ago in a far away jurisdiction.

D. BUDGET

GAPA

The GAPA proposal does not specify anything about the Commission’s budget, other than setting salaries for Commission members and local representatives in Police Districts.

CPAC

The CPAC proposal requires that the Commission have a guaranteed budget equal to 0.5% of the annual CPD budget (CPAC Sec. 2-83-200). (The CPD budget generally runs between \$1 billion and \$2 billion dollars.) The CPAC proposal also would authorize the Commission to review, assess and make any suggested changes to the proposed budget for the CPD and submit those proposed changes to the City Council directly. (CPAC Sec.2-83-040(k)). The CPAC ordinance also proposes to pay members of the Commission and their local assistants significantly higher salaries than are provided for in the GAPA proposed ordinance.

COUNCIL COMMENTS

In light of uncertainty about the necessary size of the Commission’s budget, the Council expresses no opinion on whether it should have a guaranteed budget floor and, if so, what the appropriate amount should be. Nor does the Council express any opinion on the appropriate salaries for any Commission members or their local assistants.

III. COUNCIL’S POSITIONS ON SPECIFIC POWERS OF THE CIVILIAN OVERSIGHT COMMISSION

A. OVERVIEW OF COMMISSION POWERS

The CPAC ordinance grants the Commission complete control over the policies and leaders of CPD and COPA, with minimal involvement of the Mayor, the City Council, or other parts of City government. The GAPA ordinance, in contrast, grants the Commission fewer and more limited powers. The GAPA ordinance has the Commission performing more in conjunction with with the powers of the Mayor, the City Council, and other parts of City Government. Both ordinances call for more transparency in policing and police oversight and more sharing of information regarding the operations of the CPD and COPA, and both give the Commission similar powers in this regard, which the the Council wholeheartedly endorses.

CPAC

The CPAC ordinance gives the Civilian Oversight Commission the power to:

- (a) Hire, supervise and fire the Police Superintendent, and to make and approve CPD policy and rules. (CPAC Secs.2-83-040 a – e).
- (b) Appoint members of the Police Board, adopt policies and procedures for it, and decide if cause exists to terminate a Police Board member. (CPAC Secs. 2-83-040 f – h).
- (c) Hire, supervise and terminate the Chief Administrator of COPA. (CPAC Sec.2-83-040 j).
- (d) Suggest to the City Council changes in the CPD budget and oversee contract negotiations between the City and the Police unions. (CPAC Secs.2-83-040 k and p).

GAPA

The GAPA ordinance gives the Civilian Oversight Commission the power to advise the Mayor on the performance of the CPD Superintendent, the COPA Chief Administrator, and Police Board members; to recommend to the Mayor candidates for Police Superintendent, the COPA Chief Administrator, and Police Board members; and to collaborate with CPD and COPA on development of new or amended policies. (GAPA Secs. 2-80-50(e), (h) and (k)). The Commission would also have the power to elevate some disagreements to the Mayor for resolution. (GAPA Secs. 2-80-100(b)(3)&(c)(3)).

COUNCIL COMMENTS

In general, as we alluded to above, the Council believes the best approach is to grant the Commission certain powers, while acknowledging and respecting the powers of the Mayor, the City Council, and other City officials and agencies that are also responsible for public safety. In the remainder of this Section, we provide our comments and recommendations regarding some of these specific powers.

B. HIRING AND FIRING OF THE CHICAGO POLICE DEPARTMENT SUPERINTENDENT

Under the Chicago Municipal Code, the Chicago Police Board has the power to nominate three candidates for the CPD Superintendent (when there is a vacancy in that position) and submit them to the Mayor for selection. (MC Sec.2-84-030(1)).

GAPA

The GAPA ordinance would transfer that power to nominate candidates for Superintendent to the Commission, with the final selection by the Mayor. (GAPA Sec.2-80-080).

CPAC

The CPAC ordinance would give the Commission the power to hire and fire the CPD Superintendent. (CPAC Sec. 2-83-040(a)).

COUNCIL COMMENTS

We support the GAPA position, which retains a role for the Mayor. Given that the Mayor is usually held politically responsible for the performance of CPD and the Superintendent, we believe it is important for the Mayor to remain involved in the process of hiring the Superintendent.

Because the Police Superintendent is one of the most important officials in the City government, we also believe that the Mayor should have the power to set goals for, evaluate and fire the Police Superintendent for whatever reason he or she chooses. A Police Superintendent must aggressively fight crime while upholding the United States Constitution. If the Mayor is not satisfied with how the Superintendent balances those goals, the Mayor should be able to terminate the Superintendent without demonstrating just cause.

We also believe that the Commission should have the power to make a recommendation to the Mayor if it believes the Superintendent should be fired.

C. ADOPTING AND AMENDING CHICAGO POLICE DEPARTMENT POLICIES

GAPA

The GAPA ordinance gives the Commission power to collaborate with CPD in the development of CPD policies, but the primary responsibility for drafting and adopting the policies remains with the CPD. (GAPA Secs.2-80-50(h) and 2-80-100).

CPAC

The CPAC ordinance would give the Commission the responsibility and power to adopt or amend CPD policies, with input from the Superintendent. (CPAC Sec. 2-83-040(d)).

COUNCIL COMMENTS

We believe that, because of the complexities of law enforcement in a large city, the CPD should have the primary responsibility initially to draft its own policies. (Such a process is also more likely to improve buy-in and more adherence to such policies by the officers that must carry them out.) The Commission, however, should have the power to:

(a) propose a written rule or policy to the Police Superintendent, who must either accept it, or provide a written explanation within 60 days of why (s)he does not accept it; and

(b) comment in writing on CPD's draft policies and rules, within 30 days of their proposal, during which time they would not go into effect, unless the Commission states that it has no comment.

The CPD should be required to respond within 30 days to the Commission's policy comments and proposals. Both proposed ordinances would give the Commission the ability to exercise the above powers.

We also note that the Consent Decree regulates and requires changes in many CPD policies. As a result, during the term of the Consent Decree, the Commission's comments on or proposals for CPD policies that are regulated by that Decree must also be coordinated and consistent with that decree (which contains approximately 800 separate provisions).

D. HIRING AND FIRING OF THE COPA CHIEF ADMINISTRATOR

The existing COPA ordinance describes the manner for appointing and removing the COPA Chief Administrator. (MC Secs. 2-78-115 and 155). Under this ordinance, the Mayor appoints the Chief Administrator with approval of the City Council. (MC Sec. 2-78-115). The Chief Administrator serves a four-year term and is eligible for reappointment.

Section 155 of the COPA ordinance establishes that the City may remove the Chief Administrator from office prior to the conclusion of his or her four-year term only for cause. (MC Sec. 2-78-155). Section 155 provides that the Mayor must first notify the Chief Administrator of the reasons for the proposed removal, and that the Chief Administrator may request a hearing before the Public Safety Committee of the City Council. The Section concludes, "Removal of the Chief Administrator for cause after the hearing shall require the affirmative vote of a majority of the members of the City Council."

Both the GAPA and CPAC ordinances would change the procedures for hiring and firing of the Chief Administrator. Both ordinances would also provide the Commission with a role in supervising the Chief Administrator.

GAPA

The GAPA proposal provides, when there is a vacancy in the position of Chief Administrator, the Commission would engage a nationally recognized organization with expertise in government oversight to identify 10 candidates for the position. The Commission would narrow that to a list of three finalists. The Mayor would then be obliged to appoint one of those three, subject to City Council approval. (GAPA Secs. 2-80-080(b) & (d)). The GAPA ordinance would retain the procedure in the current COPA ordinance described above for removing the COPA Chief Administrator.

CPAC

The CPAC ordinance would transfer all responsibility for hiring, firing, and supervising the Chief Administrator to the Commission. (CPAC Secs. 2-83-40(i) & (j)).

COUNCIL COMMENTS

The Council recommends adoption of the GAPA proposal. We believe that it is proper for the Mayor and the City Council to have direct interaction with the Chief Administrator and for the Chief Administrator to have responsibility to them.

Both proposals provide the Commission with a substantial role in setting goals for the Chief Administrator, and evaluating and supervising the Chief Administrator on at least an annual basis. We think these powers are necessary for the Commission and agree that they should be included in the Commission's charter.

E. ADOPTING AND AMENDING COPA POLICIES.

GAPA

Section 2-80-100 of the GAPA ordinance provides that COPA shall submit any proposed policy to the Commission for review and adoption. The Commission can also initiate its own proposals for COPA policies. If COPA and the Commission disagree, the disagreement is elevated to the Mayor for resolution. (GAPA Sec. 2-80-100(c)(3)).

CPAC

The CPAC ordinance would give the Commission complete power over the COPA policies. (CPAC Sec. 2-83-40(j)(4)).

COUNCIL COMMENTS

The Council supports the GAPA proposal. We believe that the Commission should be able to comment on any policies proposed by COPA and also to propose policies that it believes COPA should adopt. COPA should be required to respond within 60 days to the Commission's policy comments and proposals. However, COPA should have the responsibility for initial adoption of its own policies, subject to Commission review.

We also note that, as with CPD policies, the Consent Decree regulates many COPA policies. (At least 92 paragraphs in the Consent Decree relate to COPA's operations and policies.) As a result, during the term of the Consent Decree, the Commission's comments on or proposals for COPA policies regulated by that decree must be coordinated and consistent with that decree.

F. APPOINTING AND REMOVING OF MEMBERS OF THE CHICAGO POLICE BOARD

Sections 2-84-020 and 2-84-030 of the Chicago Municipal Code establish the Chicago Police Board. The Mayor appoints each member of the nine-member board, subject to the Chicago City Council approving the proposed appointee. (MC Sec.2-84-020(a)). The Mayor is authorized to remove a member for just cause. (MC Sec.2-84-020(c)). We note that the Board has the power to adopt rules and regulations for the Chicago Police Department. (MC Sec.2-84-030(2)). However, the Board's primary role historically has been to review disciplinary actions where suspension for more than 30 days or discharge is sought. (MC Sec.2-84-030(3)).

GAPA

The only change the GAPA ordinance would make is to require that the Commission screen new potential members of the Police Board when there is a vacancy, and provide the Mayor with a list of three finalists from which the Mayor would have to choose. (GAPA Sec. 2-80-080(c)).

CPAC

The CPAC ordinance would transfer all responsibility for hiring, firing and supervising of the Police Board members to the Commission. (CPAC 2-83-040(f),(g) &(h)).

COUNCIL COMMENTS

The Council supports the GAPA proposal with respect to the appointment and dismissal of Police Board members. The Police Board essentially functions primarily as an appellate panel in serious discipline cases. Because of their elected and political roles, we think that the Mayor and City Council should control final decisions on appointing and dismissing of Board members. We do think the GAPA proposal that has the Commission offering potential Board members to the Mayor is an appropriate power for the Commission.

G. SUPERVISING AND SETTING POLICY FOR THE POLICE BOARD

Since its inception decades ago the Board has largely set its own policies.

GAPA

The GAPA proposal would leave drafting of Police Board policies to the Board, with input and oversight from the Commission. (GAPA Secs. 2-80-050(a)(3)&(g)).

CPAC

The CPAC proposal puts the Commission in charge of Police Board policy and gives it more power over the Board. (CPAC Secs. 2-83-040(g)).

COUNCIL COMMENTS

The Police Board has had problems over much of its history because of a lack of transparency and a perceived reluctance to uphold serious discipline and dismissals of Chicago Police Officers, except in the most egregious cases. However, in the past few years, Board membership has changed significantly, and the Board has performed in a better, more transparent manner and has been more willing to uphold serious impositions of discipline and dismissals. In light of this, the Council endorses the current GAPA proposal defining the relationship between the Board and the Commission.

In general, the Council is concerned about due process issues if the Commission would seek to intervene in individual cases. However, if any Board member shows a pattern of acting in conflict with the law or being unfair or arbitrary in their decisions, the Council thinks that the

Commission should have the right to recommend removal of such member and to refer the matter to the City Council for a hearing and resolution. Specifically, the Commission should have the power to adopt a resolution of no-confidence in a Board member upon deciding that there is just cause. The Commission should be required to notify the member of its decision and allow the Board member an opportunity to respond. If the Commission adopts a no-confidence resolution, the Public Safety Committee of the City Council should hold a hearing to consider whether to recommend that the Board member be terminated for just cause. If the Public Safety Committee so recommends, then the City Council should have the power to terminate the Board member by a majority vote.

If the Commission is given power to remove Board members, the Council thinks the law requires that it should only have the power to do so for just cause. Further, the Commission should be prohibited from removing a member because of his or her vote on only one specific case.

Finally, we believe the Commission should have the power to set annual goals for the Board and to annually evaluate the President and other members of the Board. Both offered ordinances provide that the Commission may play such a role.

H. POWERS OF LOCAL DISTRICT REPRESENTATIVES

GAPA

The GAPA ordinance would create a three member “District Council” in each of the City’s 22 Police Districts. (GAPA Sec. 2-80-070). Residents of each district would elect by popular vote their respective members of this Council for four-year terms. The District Councils would serve as intermediaries between the Commission and the local district residents and district command officers. Each elected District Member would be paid \$500 per month. One member of each District Council would constitute a member of a Nominating Committee that would have the responsibility to vet candidates for positions on the Commission and supply the Mayor with a list of two recommended nominees for each of the seven Commission positions. The Mayor would have to appoint one of the recommended nominees as a Commission member to fill any position or vacancy on the Commission. The original seven members of the Commission would also be nominated in a similar manner. (GAPA 2-80-040(c)). Once appointed, Commission members could only be removed for just cause by the Mayor by a two thirds vote of the Public Safety Committee and the City Council. (GAPA Sec. 2-80-040(d)). Commission members would be paid an annual salary of \$12,000; provided that, the president of the Commission will receive an annual salary of \$15,000.

CPAC

The CPAC ordinance provides for the popular election of eleven Commission members. Residents in eleven electoral districts, which are each composed of two contiguous and combined Chicago Police Districts, would elect the Commission member for their electoral CPAC district. (CPAC Secs. 2-83-020 and 030). Each Commissioner serves a four-year term and is to be paid the same base salary as a Chicago Alderman. Each Commissioner has the power to appoint two deputies, one for each of the Police Districts represented. (CPAC Sec. 2-83-040(r)). Each of these CPAC district deputies would be paid the same base salary as a Chicago Police officer. The

deputies would perform community outreach and liaise with the Commission in a manner similar to the GAPA District representatives. However, the CPAC district deputies appear to have significantly greater power over, and engagement with, the CPD officers in their CPAC district, with the right to address those officers about CPAC regulations, attend roll calls, sit in on officer performance evaluations, facilitate restorative circles, mediate disputes between members of the public and the CPD, facilitate station adjustments, divert people from formal arrests, encourage officers to reduce unnecessary arrest and instead direct referrals to community resources, and monitor and report on all surveillance equipment and programs in the district. (CPAC Secs. 2-83-040(r)(i) through (xiv)).

COUNCIL COMMENTS

The Council believes that it is appropriate for the Commission to have local representatives in each of the police districts for the purposes of encouraging better community relations and community dialogue. However, the powers proposed in the CPAC ordinance for such district representatives seem overbroad and likely to potentially significantly interfere both with investigation of misconduct by COPA and with internal operations of the CPD. The Council endorses the GAPA proposal for the power to be granted to district representatives.

I. COMMISSION AUTHORITY TO MAKE INQUIRIES TO GATHER INFORMATION

The Commission should have power to periodically, or more frequently with good cause, question and request reports from the CPD Superintendent, the COPA Chief Administrator, the Police Board President, and the Deputy Inspector for Public Safety. Likewise, the Commission should have power to periodically, or more frequently with good cause, call the CPD Superintendent, the COPA Chief Administrator, the Police Board President, and the Deputy Inspector for Public Safety to a public meeting “on a reasonable basis” where the Commission can ask such questions and request such reports, which each of the questioned officers are obligated to answer.

The Commission should also have the power to require the CPD, COPA, and the Police Board to issue annual or semi-annual reports “on any matter of public importance,” as well as on their operations over the preceding period.

Both proposals authorize the Commission to perform these actions, and the Council endorses those provisions.