

TO: Rep. Frank Hornstein and Sen. Scott Dibble
FROM: Myron Orfield & Will Stancil
DATE: March 21, 2022
RE: American Principles of Local Governance and the Appointed Met Council

In jurisdiction, authority, and purpose, the Metropolitan Council resembles a unique form of local government. It exercises sweeping authority over intrinsically local concerns like land use, infrastructure planning, housing, and transportation systems. It also boasts an operating budget comparable to a large city – \$1.13 billion in 2022.¹ It can levy property taxes and issue bonded debt, and its 2022 capital program includes \$9.00 billion in spending, including \$5.33 billion of authorized spending towards active projects.² This capital spending far exceeds that of Hennepin or Ramsey Counties, Minneapolis, or Saint Paul.

However, at present, the Met Council is governed like a state agency, controlled by appointees of the governor, beholden more to the appointing executive than to the people within the Council’s borders. This structure has undermined the democratic responsivity of the Council. It subjects residents of the Twin Cities, their suburbs, and their exurbs to the decisions of unelected officials over whom voters have only partial, indirect influence. The Met Council’s current governance structure contravenes basic principles of democratic accountability that underlie centuries of United States law. More pragmatically, it sabotages the Met Council itself, by limiting its ability to develop the sort of long-term and highly specialized policy expertise necessary to lead such a complex body. Finally, it arguably creates an inappropriate incentive structure for Council members, offering them little incentive to consider how to effectively and judiciously use the Council’s broad powers, except in circumstances where those powers might be deployed to the benefit of the appointing authority.

Broad Local Governmental Powers in the United States Are Typically Wielded by Elected Officials

In the United States, governmental bodies below the state level can be roughly divided into three types: agencies, general-purpose governments, and special-purpose governments.³

¹ Metropolitan Council, 2022 Unified Budget (Dec. 8, 2021).

² *Id.*

³ For a treatise discussion of the distinction between the two main types of local government, *see* 1 John Martinez, *Local Government Law* § 2:7 Types of Local Government Units (2021).

Agencies are instruments of state executive authority. They are statewide in jurisdiction, and have limited powers that are an extension of state executive authority. Typically, in the United States, agencies are headed by appointees of the executive. Agencies are restricted to a particular field of policy, and their activities are channeled by clear statutory grants of regulatory purpose. Importantly, state agencies typically cannot levy taxes. This is because agencies are an extension of the executive branch, and taxation is a legislative power. Legislative transference of the power of taxation to another coequal branch of government creates separation of powers concerns.

In Minnesota, when state agencies create rules, they are governed by the Minnesota Administrative Procedure Act. Indeed, that act defines “agency” as “any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, *having a statewide jurisdiction* and authorized by law to make rules or to adjudicate contested cases.”⁴ Conformance to administrative procedures is essential because it provides public input into what would otherwise be a system with little democratic accountability.

Special districts merge a state agency’s limited policy purview with a geographically limited jurisdiction. Special district leadership may be elected or appointed some other authority. However, the authority of special districts is typically limited by statute and restricted to a single narrow policy area. Special districts include entities like school boards, water districts, utility districts, or business improvement districts.

Finally, there are general-purpose units of local government. General-purpose units of local government include political Subdivisions of the state and municipal corporations, and comprise entities like counties and cities. For most Americans, these bodies represent the closest and most visible layer of government, responsible for the physical infrastructure that underlies developed communities, as well as the day-to-day policy and land use decisions that determine where people live, work, and recreate. General-purpose local government has broad discretionary taxing power. It also has relatively or completely unchanneled policymaking authority, being empowered to set policy in accordance with the preferences of the governed, rather than some executive mandate promulgated from above. Nearly without exception, in the United States, the leadership of general-purpose units of local government is elected.

The Met Council Most Closely Resembles a General-Purpose Unit of Local Government

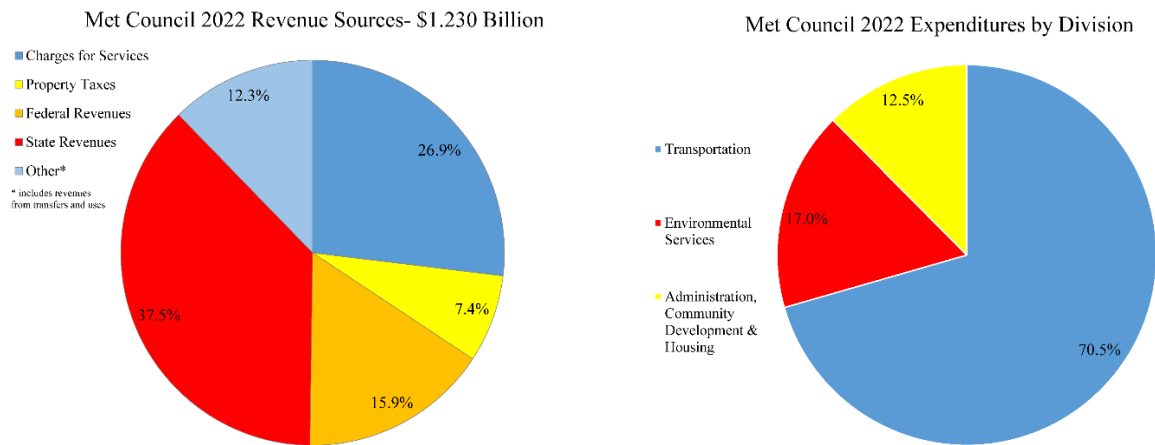
Although the Metropolitan Council fits imperfectly into this taxonomy, its authorities and responsibilities place it much closer to a general-purpose unit of local government than to a special district or state agency.

⁴ Minn. Stat. § 12.02 Subd. 2 (2021) (emphasis added).

Unlike a state agency, the Met Council is not statewide in jurisdiction. Significantly, the Met Council has authority to levy taxes – potentially creating a major separation of powers problem, if it were deemed an agency.⁵ The Council, in its promulgation of a regional master plan, can institute sweeping policy plans without undertaking a formal administrative rulemaking, also placing it outside the ordinary agency structure.⁶

If the Met Council cannot be a traditional agency, it also little resembles a traditional special district. Special districts are created for specific purposes and have a narrow policy authority. However, the Met Council’s policy authority sweeps across multiple subjects.

Most fundamentally, the Met Council merges several disparate functions into a single unit of government, including wastewater planning and construction, transportation planning, public housing and housing assistance, and general regional planning. As a result of these activities, the Met Council manages one of the state’s largest capital budgets, comparable to – but currently exceeding – the largest metropolitan local governments, including Hennepin County and the city of Minneapolis. Its operating budget exceeds one billion dollars. The Council collects tens of millions in revenue from property taxes and spends hundreds of millions of dollars in multiple policy areas.



⁵ Minn. Stat. § 473.249 Subd. 1 (a) (2021) (“The Metropolitan Council may levy a tax on all taxable property in the metropolitan area defined in section 473.121 to provide funds for the purposes of sections 473.121 to 473.249 and for the purpose of carrying out other responsibilities of the council as provided by law.”).

⁶ Minn. Stat. § 473.145 (2021) (“The Metropolitan Council shall prepare and adopt, after appropriate study and such public hearings as may be necessary, a comprehensive development guide for the metropolitan area. It shall consist of a compilation of policy statements, goals, standards, programs, and maps prescribing guides for the orderly and economical development, public and private, of the metropolitan area. The comprehensive development guide shall recognize and encompass physical, social, or economic needs of the metropolitan area and those future developments which will have an impact on the entire area including but not limited to such matters as land use, parks and open space land needs, the necessity for and location of airports, highways, transit facilities, public hospitals, libraries, schools, and other public buildings.”).

Within these governmental functions, the Met Council also possesses a remarkable degree of policy discretion and authority, particularly with regard to its regional planning function. The regional master plan that the Met Council develops must “encompass” the “physical, social, and economic needs of the region” – in short, address virtually all the spheres of everyday life and welfare that are typically the purview of general-purpose units of local government.⁷ The Council is granted a great deal of discretion in making these decisions, as statute requires that the Council itself make a determination of what those “needs” may be.⁸ This broad grant of discretionary authority to make decisions to promote the general welfare of the people within the Council’s jurisdiction closely resembles a general-purpose local government.

Although certain areas for close consideration in metropolitan planning are enumerated to the Met Council, these areas are not sharply limited to single subject as they might be in a special district. Instead, the Council is empowered to consider, in its master plan, developments that will have regional impacts, including but not limited to:

1. land use
2. parks and open space
3. the necessity for and location of airports
4. highways
5. transit facilities
6. public hospitals
7. libraries
8. schools, and
9. other public buildings.⁹

The Met Council can also unilaterally expand this authority by making a determination that a particular development has a regional impact.¹⁰ Its authority is further expanded by a broad clause which empowers it to “exercise all powers which may be necessary or convenient to enable it to perform and carry out the duties and responsibilities now existing or which may hereafter be imposed upon it by law.”¹¹

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Minn. Stat. § 473.173 (2021) (“ Subdivision 1. By rule and statute. The council shall review all proposed matters of metropolitan significance to be undertaken by any private organization, independent commission, board or agency, local governmental unit, or any state agency in accordance with the rules adopted pursuant to this section and the provisions of any other relevant statute. Subd. 2. Rules. The council shall adopt and put into effect rules establishing standards, guidelines and procedures for determining whether any proposed matter is of metropolitan significance, and establishing a procedure for the review of and final determination on such matters in accordance with the powers and requirements set forth in this section. The purpose of these rules shall be to promote the orderly and economical development, public and private, of the metropolitan area.”).

¹¹ Minn. Stat. § 473.128 Subd. 1 (2021).

The Met Council’s authority even allows it to overrule decisions of other units of government, including elected government. The Council is statutorily empowered to suspend the plans of state agencies operating within the metropolitan area in a fashion that is inconsistent with the Council’s plans¹²; it can also suspend local comprehensive plans if inconsistent with the regional planning guide.¹³

In 1967, the Minnesota Attorney General considered the status of the Met Council in an advisory opinion to James Hetland, the Council’s chair at the time.¹⁴ After determining that the Council “has many attributes of a local governmental unit,” the AG concluded that it is “a unique unit of government . . . standing a step above local governmental units and a step below state agencies [and] clothed with certain attributes and powers of each.”¹⁵ However, the AG also firmly concluded that the Council “cannot be considered a ‘state agency’” for the purposes of certain fiscal legislation.¹⁶

Since the AG’s conclusion, the Council has been expanded several times, including in its combination with metropolitan transportation and wastewater boards, and through the extended planning powers granted by the Livable Communities Act of 1995. These changes place the Council at an even greater remove from a traditional agency or special district structure.

The Met Council’s Policymaking Authority Is Inappropriately Broad for an Appointed Agency

To the extent the Met Council can be understood as a general-purpose unit of local government, it is appropriate for its leadership to be elected. Appointed leadership does not provide the degree of democratic responsiveness that US citizens have come to expect over agencies with such broad and flexible policy mandates. Nor does appointed leadership comport with the Council’s authority to levy taxes. The Met Council, of its own volition, can choose to limit or expand metropolitan growth, maintain parks or allow them to deteriorate, build exurban roads or improve central city light rail. It can assign to itself the authority to regulate virtually any significant development in the metropolitan area. It can create additional property taxes. Residents of the Twin City metro currently have little or no direct influence over these broad exercises of general-purpose local power, and are only empowered to set policy priorities through a single four-year vote, for a gubernatorial candidate.

¹² *Id.*

¹³ Minn. Stat. § 473.175 Subd. 1 (2021) (“The council may require a local governmental unit to modify any comprehensive plan or part thereof if, upon the adoption of findings and a resolution, the council concludes that the plan is more likely than not to have a substantial impact on or contain a substantial departure from metropolitan system plans.”).

¹⁴ Letter of Douglas M. Head, Attorney General of Minnesota, to James Hetland, Chairman of the Metropolitan Council (Oct. 3, 1967).

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 13.

From a more pragmatic frame, it is unlikely that the current appointed Council creates strong incentives for responsive, effective, and judicious regional planning. Councilmembers are most directly beholden to the appointing authority, the governor. The governor's policy and political interests may not, in every case, be aligned with the policy and political interests of individual metropolitan communities. For example, if a certain segment of the Council's jurisdiction is not a political priority for a particular governor, he or she has little reason to select a Council appointee that would be responsive to that area's interests. This could lead to, among other outcomes, underfunding and underprioritization of those areas. Likewise, residents of those areas would have little ability to register their frustration or displeasure with those policy choices, beyond voting differently in a broad, statewide election – one that inevitably encompasses many issues far outside the Met Council's purview.

Unelected Council leadership may also reduce the Council's responsivity to other components of the political system, including local leaders and state legislators. With little need to win political support within their own Council districts, the members have little incentive to respond to requests from outside elected officials.

Finally, an appointed Council likely results in a body with a troubling dearth of policy expertise. As previously discussed, the Council's policy portfolio is massive, encompassing land use, wastewater, transportation, housing, long-term planning and growth, and parks. Its enabling statutes are complex and contain many authorities that are poorly understood within the state. The Met Council is a body that benefits deeply from experienced leadership. However, as an appointed body, the Council membership tends to rotate frequently and abruptly, especially after change in gubernatorial leadership. These rotations strip the body of the institutional memory necessary to deftly and skillfully deploy its various authorities. It transfers, in effect, much of the authority in the body to long-term staff, who represent the primary reservoir of institutional knowledge. It also risks empowering special interests, such as private developers, whose experience working with the council is likely to be much longer than the tenure of the council members themselves. Such an arrangement is corrosive to long-term regional planning, which necessarily entails making decisions that have significant political dimensions and requires weighing of competing values and interests. These are difficult decisions that, in the American system of government, are rightfully entrusted to elected representatives of the governed.