



KWAME M. KILPATRICK, MAYOR
CITY OF DETROIT
EXECUTIVE OFFICE

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May 27, 2008

Detroit City Council
1340 Coleman A. Young Municipal Center
Detroit, Michigan 48226

2008 MAY 27 P
DETROIT
CITY CLERK

RE: Proposed Resolution to File a Charge with Governor Jennifer M. Granholm Seeking Removal of Mayor Kwame M. Kilpatrick From Office

Honorable City Council:

The City Clerk has forwarded to me for my approval or veto a proposed resolution to file a charge with Governor Jennifer M. Granholm seeking my removal from office (herein after referred to as "Council's Removal Resolution") that was adopted by Your Honorable Body on May 13, 2008. For the reasons stated below, I hereby veto this proposed resolution.

At the same session on May 13, 2008, City Council adopted "Resolution to Charge That Conduct of Mayor Kwame M. Kilpatrick Constitutes Grounds for Forfeiture of Elective Office" (herein after referred to as "Council's Forfeiture Resolution")¹. Both Council's Forfeiture Resolution, which is used as the basis for Council's Removal Resolution, and Council's Removal Resolution are legally deficient.

Council's Removal Resolution is contrary to the Body's past actions to uphold home rule. Previously, City Council has inveighed against the actions of the state leaders who dissolved Detroit Recorders' Court, appointed non-elected persons to serve in the place of the elected Detroit Public School Board, and, on numerous occasions, attempted to seize the Detroit Water and Sewerage System. Today Council has irresponsibly taken a very different stance one that will have far reaching impact beyond the matters we face today. Council's Removal Resolution is an end run around home rule, which, ultimately, may set the stage to deprive the People of the City of Detroit of their right to choose and retain its elected leaders and local control over policy matters that impact its citizens.

Section 2-107 of the 1997 Detroit City Charter, *Dismissal proceedings*, contains two provisions² regarding proceeding for dismissal of elective City officers. The first, under Section 2-107(1), is recall, which is not the subject of Council action or this veto.

¹In accordance with Section 4-119 of the 1997 Detroit City Charter, I am unable to approve or veto that resolution.

²The third, under Section 2-107(3), is removal, which applies only to appointees and is not the subject either of Council's Forfeiture Resolution or of Council's Removal Resolution, or this veto.

The second, under Section 2-107(2), is forfeiture, which provides:

Forfeiture. The position of an elective city officer or an appointee shall be forfeited if he or she:

- a. Lacks at any time any qualifications required by law or this Charter;
- b. Violates any provision of this Charter punishable by forfeiture; or
- c. Is convicted of a felony while holding the office or appointment.

The city council shall be the judge of the grounds of forfeiture of an elective officer or an appointee. A city council member charged with conduct constituting grounds for forfeiture may not participate in the resolution of the charge.

A person charged with conduct constituting grounds for forfeiture is entitled to a public hearing before the city council. Notice of the hearing shall be published in one (1) or more daily newspapers of general circulation in the city at least one (1) week in advance of the hearing. Decisions made by the city council under this section are subject to judicial review in a hearing de novo.

Section 2-107 was carried over from the 1974 Detroit City Charter without change. Section 2-107 originated from Title 3, Chapter 1, Sections 12(a), 12(c) and 15, of the 1918 Detroit City Charter,

Title 3, Chapter 1, Section 12(a) and (c), of the 1918 Detroit City Charter provided:

Legislative powers and duties.

The legislative powers and duties of the council shall be as follows:

- (a) To judge of the election and qualifications of its own members; by a two-thirds vote of the members-elect to expel any of its members as herein provided; and to determine its rules and procedure;

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(c) To prefer charges involves malfeasance or misfeasance in office, or willful neglect of the duties of his office, against any elective or appointive office of the city, except judges of city courts; to institute impeachment proceedings, unless in the case of an appointive officer, the mayor shall remove such officer prior thereto; to hear and determine the same, and if such officer, by a two-thirds vote of all the members-elect to the council, be found guilty of such charges, to remove him from his office;

Title 3, Chapter 1, Section 15, of the 1918 Detroit City Charter provided:

Removals from office.

In all proceedings by the council to expel a member thereof, or to remove from office any elective or appointive officer of the city, the reason for such expulsion or removal shall be entered on the records of the council, with the names and votes of the members voting on the question. No councilman or other officer shall be expelled or removed by the council unless first furnished with a copy of the charges in writing at least ten days in advance of a hearing thereon, and allowed to be heard in his defense, with aid of counsel. If such officer shall neglect to appear and answer such charges, his failure to do so may be deemed good cause for his removal from office.

During the drafting of the 1974 Detroit City Charter, *The Final Report of the Detroit Charter Revision Commission, including The New Detroit Charter with Commentary*, was issued on August 3, 1973. In *Ewing v City of Detroit*, 237 Mich App 696, 703; 604 NW2d 787 (1999), the Michigan Court of Appeals stated:

. . . the Michigan Supreme Court appears to have previously sanctioned the use of official commentary to the Detroit Charter as an interpretative aid by rejecting certain arguments regarding interpretation of that charter "because [those arguments] ignore the language of the city charter and its instructive commentaries." *Detroit v Walker*, 445 Mich. 682, 695; 520 N.W.2d 135 (1994) (emphasis supplied).

When reviewing Title 3, Chapter 1, Sections 12(a), 12(c) and 15, of the 1918 Detroit City Charter, the Commentary by the Charter Review Commission for the 1974 Detroit City Charter provided that:

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Section 2-107 is a revision of several sections of the present charter which make numerous references to various procedures based on different factual grounds for ousting an officer or employee from his position. The purpose of this section is to present all those various procedures in one place.

* * * * *

Subsection 2-107(2) is a revision of several sections of the present charter, principally sections 12(a), 12(c) and 15 of title 3, chapter 1. Several changes have been made. First, section 12(a) of the present charter states that the council may expel 1 of its members by a 2/3 vote. This has been eliminated for reasons analogous to those stated in **Bond v. Floyd** (1966) 385 U.S. 116 and **Powell v. McCormack** (1969) 395 U.S. 486. The **Powell** case held that the Federal Congress had no power to **exclude** from its membership any person who was duly elected and who met the age, citizenship, and residence requirements specified in the constitution.

Second, section 12(c) of the present charter vests in the council the power to "impeach" and remove elective officers as well as appointees serving at the pleasure of the mayor. It is a threat both to the will of the voters and to the separation of powers principle. Further, it is unnecessary. The appointing authority can always remove an appointee, in some cases without cause. The voters can always recall an elective officer. Finally, the governor can remove elective officers for misconduct, neglect, extortion, drunkenness, or a felony. CL 1948 166.327. For these reasons, section 12(c) has been eliminated.

Finally, subsection 2-107(2) introduces the term forfeiture. The council is the judge of whether an elective officer or appointee has incurred forfeiture upon any of grounds stated in this subsection. However, the council's decision is subject to review by the courts in a hearing *de novo*. As used in this subsection, a "hearing *de novo*" means a new trial, rather than a review limited to the record made in the proceedings before the council.

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(Bold contained in text and underlines added.)

This Commentary clarifies that, when determining whether an elective City officer's position should be forfeited, the City Council is limited to the "grounds stated in this subsection." However, if a ground is present, then Section 2-107(2) indicates that the position of the elective City officer "shall be forfeited."

There are three (3) grounds in this subsection. Under the first ground, the City Council is required to determine whether the elective officer "[l]acks at any time any qualifications required by law or this Charter." Section 2-101 of the 1997 Detroit City Charter, *Qualifications for elective and appointive officers*, controls here. It provides:

A person must be a citizen of the United States, a resident and a qualified and registered voter of Detroit, at the time of filing for, and while holding, any elective city office.

A person must be a citizen of the United States, a resident and a qualified and registered voter of Detroit, at the time of assuming the duties of, and while holding, any appointive city office. However, this requirement does not preclude an appointive officer who is assigned to a work location outside the city from using a residence outside of the city.

In the event that an elective City officer does not maintain a qualification that is required under Section 2-101, the City Council would be required to judge whether the ground for forfeiture, under Section 2-107(a), is present.

Under the third ground, the City Council is required to determine whether the elective City officer was "convicted of a felony while holding the office." In the event that an elective City officer is convicted of a felony while holding his or her office, the City Council would be required to judge whether this ground for forfeiture, under Section 2-107(a), is present.

Under the second ground, the City Council is required to determine whether the elective City officer has violated any provision of this Charter punishable by forfeiture. A review of the 1997 Detroit City Charter indicates that the only provisions in "th[e] charter punishable by forfeiture" are in Section 2-107(2)(a), lack of qualifications, and 2-107(2)(c), conviction of a felony. No other provision exists.

Michigan appellate courts have held that the prevailing rules of statutory construction are well established and extend to the construction of home rule city

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charters. *Brady v Detroit*, 353 Mich 243, 248; 91 NW2d 257 (1958). Therefore, Michigan courts are required to construe charter language by its commonly accepted meaning as long as doing so does not result in absurdity, hardship, injustice, or prejudice to the drafters and ratifiers. *Reisman v Regents of Wayne State Univ*, 188 Mich App 526, 536; 470 NW2d 678 (1991). A review of the commonly accepted meaning of the language in Section 2-107(2) of the 1997 Detroit City Charter indicates that the City Council's authority to declare forfeiture of an elective City officer's position is limited to Section 2-107(2)(a), lack of qualifications, and to Section 2-107(2)(c), conviction of a felony.

In both Council's Forfeiture Resolution and Council's Removal Resolution, the Body has determined, by apparent misapplication and misinterpretation, that the following grounds exist for forfeiture under Section 2-107(b):

Sec. 2-106. Standards of Conduct.

The use of public office for private gain is prohibited.

Sec. 6-403. Civil Litigation.

No civil litigation of the city may be settled without the consent of the city council.

Sec. 8-303. Penalties for violation.

Any incurring of obligation or authorization of payment in violation of the provisions of this Charter shall be void and any payment so made illegal; the action shall be cause for removal of any officer who knowingly incurred the obligation or authorized to make the payment, and he or she shall also be liable to the city for any amount so paid and to any criminal sanctions imposed by law or ordinance.

None of these sections have anything to do with forfeiture of office or, in fact, with "official misconduct" under Section 327 of Michigan Election Law, being MCL 168.327.

First, Section 2-106(1) of the 1997 Detroit City Charter provides:

Sec. 2-106. Standards of Conduct.

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(1) The use of public office for private gain is prohibited. The city council shall implement this prohibition by ordinance, consistent with state law. The ordinance shall contain appropriate penalties for violations of its provisions. The ordinance shall provide for the reasonable disclosure of substantial financial interests held by any elective officer, appointee, or employee who regularly exercises significant authority over the solicitation, negotiation, approval, amendment, performance or renewal of city contracts, and in real property which is the subject of a governmental decision by the city or any agency of the city. The ordinance shall prohibit actions by elective officers, appointees, or employees, which create the appearance of impropriety.

This section delineates the requirements for a Charter-mandated Detroit Ethics Ordinance. Council's Forfeiture Resolution and Council's Removal Resolution cite the first sentence: "The use of public office for private gain is prohibited," while ignoring the rest of Subsection (1), which continues "The city council shall implement this prohibition by ordinance, consistent with state law." During June 1996, The Charter Revision Commission published *Proposed 1997 Home Rule Cities Act Charter with Commentary*, which provides charter interpretation for Section 2-106(1):

This is a revision of the former sections relating to conflicts of interest, and requires adoption of an ordinance to more fully address issues of conflicts, disclosure and appearances of impropriety. State law currently preempts cities from regulating some aspects of ethics and conflicts of interest, intending to be the main body of law in this area. If changes in law occur, the city council may provide further, by ordinance for, disclosure or conflicts of interest requirements consistent with the changes.

There is nothing in Section 2-106(1) of the Charter Commentary that speaks to forfeiture of office or "official misconduct." Council has simply isolated a provision from the section as an underpinning of both Council's Forfeiture Resolution and Council's Removal Resolution, which is not supported by the commonly accepted meaning of Section 2-106(1). *Reisman, supra*.

Second, Section 6-403 of the 1997 Detroit City Charter provides in total:

Sec. 6-403. Civil Litigation.

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The corporation counsel shall defend all actions or proceedings against the city.

The corporation counsel shall prosecute all actions or proceedings to which the city is a party or in which the city is a party or in which the city has a legal interest, when directed to do so by the mayor.

Upon request, the corporation counsel may represent any officer or employee of the city in any action or proceeding involving official duties.

No civil litigation of the city may be settled without the consent of the city council.

A complete reading of this section indicates that the provision "No civil litigation of the city may be settled without the consent of the city council," which is cited as a basis both for Council's Forfeiture Resolution and for Council's Removal Resolution is a limitation on the authority of the Corporation Counsel. In fact, Section 6-403 falls under Article 6 of the 1997 Detroit City Charter, *The Executive Branch: Staff Departments* and, in particular, under Chapter 4, *Law Department*. There is nothing in the section that speaks to forfeiture of office or "official misconduct." Once again, Council has simply isolated a provision from the section as an underpinning of both Council's Forfeiture Resolution and Council's Removal Resolution, which is not supported by the commonly accepted meaning of Section 6-403. *Reisman, supra*.

Third, Section 8-303 of the 1997 Detroit City Charter provides:

Sec. 8-303. Penalties for violation.

Any incurring of obligation or authorization of payment in violation of the provisions of this Charter shall be void and any payment so made illegal; the action shall be cause for removal of any officer who knowingly incurred the obligation or authorized to make the payment, and he or she shall also be liable to the city for any amount so paid and to any criminal sanctions imposed by law or ordinance.

Section 8-303 falls under Article 8 of the 1997 Detroit City Charter, *Planning and Financial Procedures* and, in particular, under Chapter 3, *Administration of Budgets*. There is nothing in the section that speaks to forfeiture of office or "official misconduct"

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of any elective City officer. In fact, the section indicates that "the action shall be cause for removal of any officer." Because, under Section 2-106(3) of the 1997 Detroit City Charter "removal" only applies to appointees, Section 8-303 does not apply to elective City officers. Here, Council is using a provision as an underpinning both of Council's Forfeiture Resolution and of Council's Removal Resolution, which does not apply to an elective City officer. It is apparent from the commonly accepted meaning of Section 8-303 that the purpose of the section applies to department directors and deputy directors, as well as agency heads and deputy agency heads, who incur obligations and authorize payments outside the scope of their respective departmental or agency budget. *Reisman, supra.*

Based upon a review of both the 1974 and 1997 Detroit City Charters, both the 1974 and the 1997 Charter Revision Commissions only provided two (2) grounds to declare a forfeiture of an elective City officer's position: lack of qualifications under Section 2-107(2)(a) and conviction of a felony under Section 2-107(2)(c).

Further, based upon the Official Commentary to Section 2-107(2)(b) in the 1974 Detroit City Charter, Section 2-107(2)(b), which remains unchanged in the 1997 Detroit City Charter, only refers to Section 2-107(2)(a) and Section 2-107(2)(c). During the pendency of the 1974 and 1997 Detroit City Charters, neither charter has been amended to add any other provision "punishable by forfeiture."

Along these lines, Council's Removal Resolution cites the language in Section 2-107(2) which provides "The city council shall be the judge of the grounds of forfeiture of an elective officer or an appointee" to mean that the Body can subject the position of an elective City officer to forfeit *under any charter provision*. Once again, this interpretation is contrary to the commonly accepted meaning of acting as "the judge of the grounds of forfeiture," which must be based either upon Section 2-107(2)(a), lack of qualifications, or upon Section 2-107(2)(c), conviction of a felony. *Reisman, supra.*

There is more at stake, here, than the recent events between the City Council and me. More important is the integrity of the 1997 Detroit City Charter and the possibility that either this Council or a future Council may use its misapplication and misinterpretation of Section 2-107 to attempt forfeiture of the office of another Mayor, a Council Member or Members or the City Clerk, or, as in this instance, to request the Governor base removal of a elective City officer on provisions in the Charter, *which neither concern forfeiture nor are the basis of official misconduct.*

Based upon a review and analysis of Section 2-107(2)(b) and its Official Commentary, Your Honorable Body has not articulated any Charter violation, which is applicable to this situation. Therefore, the grounds for removal that are cited in the

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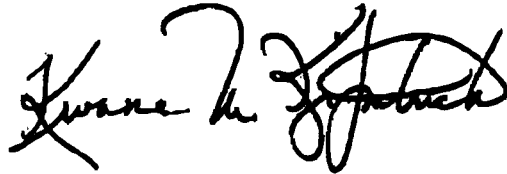
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proposed Council's Removal Resolution under Sections 2-106(1), 6-403, and 8-303 of the 1997 Detroit City Charter do not articulate any official misconduct for purposes of Section 327 of Michigan Election Law, being MCL 168.327.

For all of these reasons, I must veto this proposed resolution.

Respectfully,

A handwritten signature in black ink, appearing to read "Kwame M. Kilpatrick". The signature is stylized and cursive, with a large initial "K" and "M".

Kwame M. Kilpatrick
Mayor