MEMORANDUM

To: **Mayor and Council**

From: **Stephen K. Postema, City Attorney**

Date: **May 3, 2021**

Subject: **Public Memo Concerning Removal of Council Appointees from Boards and Commissions and Committees.**

Introduction

The Council has requested that I provide some general information about the power to remove Council Members that they each have appointed to City Boards and Commissions, Council Committees and other outside bodies. Generally, the City Council has such power. This power derives not only from the City's own Charter and Code but also is inherent under state and federal law.

Further, the due process requirements of both the federal and state constitutions are generally not applicable when there is a removal of a Council Member from a committee, board, or commission. In any case, adequate "procedural due process" protections are provided through removal by resolution at a City Council meeting. In addition, removal from such bodies would likely not amount to retaliation under the First Amendment.

Finally, it is important to note that a Council Member removed as a member of a committee, board or commission has the right to attend that committee, board or commission meeting as they are public meetings. Further, to the extent that a board is one created under City Charter 5.17(a), a Council Member has a right to attend the meetings "and to take part in its discussions" by virtue of being a Council Member.

Law and Analysis

I. General Removal Principles.

The City Council has the general authority to remove Council Members it has appointed to City Boards and Commissions, Council Committees, and other bodies in the absence of any specific provision in the City Charter, City Code, or other law that constrains this authority or provides otherwise.

Indeed, the City Charter provides that "[t]he City shall have all powers possible for a city to have under the Constitution and laws of Michigan as fully and completely as though they were specifically mentioned in this Charter. The mention of particular powers in this Charter shall not be construed as limiting in any way the general powers stated in

this section."[1] Further, the Charter provides that "all powers of the City shall be vested in and exercised by the Council."[2]

Moreover, under both Michigan and federal law, a City Council has the inherent power to regulate the conduct of its own members.[3] This inherent power includes the power to remove individuals, including its own Council Members, from boards, commissions, and committees. Again, this power is recognized by both and Michigan[4] and federal[5] law.

Further, as set forth in more detail below, the City Charter and City Code also provide for a more specific power of removal in some cases. Where those specific provisions do not govern, however, the general inherent power of removal discussed above applies. The applicable powers of removal, both general and specific, are set forth in more detail below with respect to each type of board, commission, or committee at

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[1] City Charter, Chapter 3, Section 3.1; Under this important provision of the City Charter, the City has incorporated all powers permitted under the Home Rule City Act, including the following: M.C.L. § 117.4j(e)("each City may in its charter provide: (3) For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinance relating to its municipal concerns subject to the constitution and general laws of this state").

[2] City Charter, Chapter 4, Section 4.1(b).

[3] *Whitener v. McWatters*, 112 F.3d 740 (4th Cir. 1997)("Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men. This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives"). Federal case law is made by district court opinions, opinions of the U.S. Court of Appeals, and the U.S. Supreme Court. This case is a case out of the 4th Circuit, which is is not directly binding on jurisdictions in Michigan, but is nonetheless indicative of the law. The 6th Circuit Court of Appeals decisions are binding in Michigan.

[4] *Hawkins v. Common Council of City of Grand Rapids*, 192 Mich. 276, 283; 158 N.W. 953 (1916)(A municipality's "power to remove their officers is, and was long before the adoption of our Constitution, inherent in municipal corporations*"); Wilson v. Council of City of Highland Park*, 284 Mich. 96, 99; 278 N.W. 778 (1938). It is important to note that this case stands for the proposition that a city has the power to remove its elected officials from elected office under Michigan law. Thus, it can be inferred that removal from appointment to boards and commissions is a lesser, included inherent power of a city.

[5] See *Blair v. Bethel School Dist*, 608 F.3d 540, 542-43 (9th Cir. 2010)(School board's removal of one of its members as their vice president in response to his criticism of superintendent was constitutional—the board had a right to replace the member with someone who they believed represented the majority view of the board); *McKinley v. Kaplan*, 262 F.3d 1146, 1151-52 (11th Cir. 2001)(county commission's removal of appointed and unpaid committee member was constitutional); *Whitener v. McWatters*, 112 F.3d at 740 (county board's vote to strip member of committee assignments in response to use of abusive language and uncivil behavior toward board members was within board's power and constitutional).

issue for the removal a Council Member from those boards, commissions, and committees.

II. Removal From City Commissions and Boards.

The removal of a Council Member from City Boards and Commissions is authorized generally by the City Charter, City Code, and by state and federal law. For the specific removal resolution at issue, 21-0752, the Boards and Commissions involved include the Council of the Commons, the Brownfield Plan Review Committee and the Park Advisory Commission.

The City Charter and Code provide City Council with the authority to create certain boards and commissions including the power to appoint members.[6] Specifically, with respect to boards and commissions, Chapter 8 of the City Code sets forth the various boards and commissions and their respective appointing authority which most commonly is the City Council and/or Mayor.[7] The City Code and Charter also set forth City Council's power to remove individuals it has appointed to those boards and commissions.[8] The City Code provides that "[t]he appointing authority may remove any member of any board or commission for cause" which is a non-arbitrary reason not otherwise prohibited by law, i.e. not discrimination.[9] This removal provision applies to "all boards and commissions of the City."[10]

Moreover, as set forth above, even in the absence of the specific removal provision in Section 1:171(3) discussed above, the City Council has the power to remove Council Members it has appointed because the power of removal is implicit in and incident to the power of appointment. [11]

III. Removal From Council Committees.

Removal of a Council Member from a Council Committee by the Mayor is likely authorized by the City Charter. For the specific removal resolution at issue, 21-0752, the Council Committees involved include the Council Audit Committee and Liquor License Review Committee.

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[6] City Charter, 5.17; City Code, Chapter 8.
[7] See City Code, Chapter 8, Sections 1:175; 1:189; 1:191; 1:193; 1:195; 1:197; 1:201: 1:207; 1:209(1); 1:214: 1:221; 1:235; 1:236; 1:237(2)(a); 1:238(2)(A); 1:239(2)(a).
[8] The City Charter allows the City Council to create certain boards and commissions and, among other things, to "prescribe . . . the terms of office, the method of appointment of members, the board officers and their selection . . . ." City Charter, Chapter 5, Section 5.17.
[9] City Code, Chapter 8, Section 1:171(3).
[10] *Id.* at Section 1:171.
[11] For example, *Carlucci v. Doe,* 488 U.S. 93; 102 L.Ed.29 395, 411 (1988)(The Supreme Court "has held, as a matter of statutory interpretation, that, absent a "specific provision to the contrary, the power of removal from office is incident to the power of appointment")(quoting *Keim v. U.S.*, 177 U.S. 290, 293-94 (1900)).

The City Charter authorizes the Mayor to make appointments to Council Committees: "the Mayor shall . . . appoint all Council Committees and be a member thereof and make other appointments as provided in this Charter or by the Council."[12] But unlike City boards and commissions set forth above, there is no specific additional removal provision for Council Committees in the Charter or Code. [13] Nevertheless, the Mayor has the inherent power to remove his appointees to Council Committees because, as set forth above, the power of removal is implicit in and incidental to the power of appointment.

Robert's Rules of Order,[14] however, also sets forth a process for the removal of "committee members" that likely applies to Council Committees and that likewise affirms the authority to remove a member from a committee.[15] According to Robert's Rules of Order, the removal process set forth in Section 50:14 applies if the "bylaws or other governing rules" do not expressly provide that the committee members shall serve "until their successors are chosen" or for a fixed period. If that is the case, removal may be carried out in the manner of appointment (in this case, the Mayor with approval of Council) with a majority vote.[16] In this case, the Council Committee appointments at issue do not have bylaws or other governing documents that provide for terms for a fixed period or "until their successor is chosen."[17] The Resolutions creating each Council Committee at issue are not "bylaws or other governing rules," nor do they create terms for a fixed period or "until their successor is chosen." Thus, the process in Robert's Rules of Order, Section 50:14 is applicable to removal from Council Committees, which again, provides that such removal may be carried out in the manner of appointment (in this case, the Mayor with approval of Council) with a majority vote.[18]

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[12] City Charter, Section 4.2(b).

[13] City Charter, Section 12.12 concerning Mayoral removal likely does not apply to Council Members appointed to Council Committees. This section only applies to the extent members of a Council Committee are considered "officers" appointed by the Mayor as defined by City Charter, Section 12.1(b). It is likely that members of a Council Committee are not "officers." Similarly, 117.5(1)(d) does not apply.

[14] Robert's Rules "govern the Council in all cases to which they are applicable, provided they are not in conflict with these rules or the Charter of the City. Council Rules, Rule 20. But Robert's Rules can be waived by a majority of the Council under Council Rule 19.

[15] See Robert's Rules of Order, Section 50:14; Section 61.22. Because part of this rule would be in conflict with the Charter of the City, it could also be argued that this entire rule is inapplicable.

[16] Roberts Rules of Order, Section 50:13(a), (b), (c) (d), and (e) and Section 50:14.

[17] Although the appointments at issue are entitled "2021 Appointments," there is no resolved clause that sets forth an expiration date for the appointment or a definite duration for each term. Further, the resolutions that create the each of the bodies at issue do not contain specific time period for such terms. It should also be noted that the Council of the Commons affirming resolution provides for a fixed term of appointment for one year, but this resolution was not in effect at the time of the appointment at issue. The resolution in effect at that time did not provide for any fixed term.

[18] If such "bylaws or other governing rules," however, provide that committee members shall serve "until their successors are chosen" or for a fixed period (which they do not in this case), under

IV. Removal From External Boards, Commissions, Committees.

Removal of a Council Member from Boards, Commissions, Committees or other bodies that are not City Boards, Commissions or Committees, i.e. external bodies, is authorized by the same general removal power from state and federal law principles as set forth above. For the resolution at issue, 21-0752, the non-City Boards or Commissions at involved include the Washtenaw Metro Alliance and the Huron River Watershed Council. Thus, under the general removal authority of the City Council under both state and federal law, described in detail above, the City Council has the authority to remove a Council Member from appointment to those outside bodies.

V. Due Process Protections.

Removal from the bodies discussed above likely would not result in any due process issues under either the state or federal constitutions.[19] There are two components of due process: (1) procedural due process and (2) substantive due process.

A. Procedural Due Process.

Removal from the bodies discussed above likely would not result in any procedural due process issue. The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law."[20] "In order to establish a procedural due process claim, a person must show that (1) he had a life, liberty, or property interest protected by the due process clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest."[21]

1. There is No Property or Liberty Interest in an Appointment to a Board, Commission, or Committee.

Here, there is no protected property or liberty interest in a City Council Member's appointment to a board, commission or committee. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[22] Similarly, "[a] liberty

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Robert's Rules of Order, a separate removal process applies under the Rule. But that separate removal process is incompatible with the Charter and therefore cannot be applicable to the City: specifically a process that an investigation and trial be conducted in secret is inconsistent with the requirements of state law, which are incorporated into the Charter under Section 3.1.

[19] "Michigan's due process guarantee is construed no more broadly than the federal guarantee." *Syntex Laboratories v. Dep't of Treasury*, 233 Mich. App. 286, 292; 590 N.W.2d 612 (1998).

[20] U.S. Const. amend. XIV, § 1.

[21] *Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2006).

[22] *Id.*

interest may arise from the Constitution itself, by reason of guarantees implicit in the word liberty, or it may arise from an expectation or interest created by state laws or policies."[23]

Michigan law explicitly *does not* confer a property interest in any public office which includes appointments to boards, commissions and committees. Indeed, the United States Sixth Circuit Court of Appeals (which governs Michigan) has held that a member of a city planning commission (who was removed for bad behavior) did not have a property interest in his position on the commission under Michigan law.[24] The Court turned to Michigan law, noting that courts have repeatedly held that there is no property interest at all in public office.[25] Accordingly, the Court held, a City Council Member's appointment to a board did not implicate any property interest whatsoever.

Nor does an appointment to a board, commission or committee implicate a liberty interest. This Office can find no authority which confers a liberty interest in an elected official's appointment to a board, commission or committee either through the Constitution or state law. Indeed, it is well established that an individual has no property or liberty interest in an elected office.[26]

In summary, because there is no life, liberty, or property interest implicated by a City Council Member's appointment to a board, commission, or committee, the due process clause does not apply to the removal from such bodies.

B. Adequate Due Process Protections Are Afforded.

Even if the due process clause applied to this removal (which it does not), there is likely adequate due process protection. The basic due process requirement is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner."[27] Beyond that, "the Due Process Clause is flexible and provides different levels of protection depending on the particular situation and circumstances of the deprivation."[28] Removal from such bodies by resolution provides both notice of the removal, i.e. a resolution which is placed on the meeting agenda, and an opportunity to be heard a meaningful time and in a meaningful manner, i.e. the City Council meeting where the resolution is discussed. On this basis, this removal process provides adequate due process.

B. Substantive Due Process.

Removal from the bodies discussed above also likely would not result in any substantive due process issues. The substantive component of due process "bar[s] certain government actions regardless of the fairness of the procedures used to

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[23] *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005).
[24] *Kulak v. City of Birmingham*, 139 Fed. Appx. 694, 696-97 (6th Cir. 2005).
[25] It should also be noted that the Sixth Circuit Court of Appeals specifically rejected the Plaintiff's claim that the Home Rule City Act, MCL 117.5(d) created a property interest in public office *Id.*
[26] *Taylor v. Becham*, 178 U.S. 548, 577-78 (1900*); Snowden v. Hughes*, 321 U.S. 1, 7 (1944); *Burks v. Perk*, 470 F.2d 163, 165 (1972).
[27] *Garcia v. Fed. Nat'l Mortg. Ass'n*, 782 F.2d 736, 741 (6th Cir. 2015).
[28] *Puckett v. Lexington-Fayette Urban Cnty. Gov't*, 833 F.3d 590, 606 (6th Cir. 2016).

implement them."[29] Accordingly, substantive due process claims are generally divided into two categories: (1) deprivations of a particular constitutional guarantee and (2) actions that "shock the conscience."[30] Neither type of claim is implicated by removal from the boards, commissions, and committees discussed above.

1. Removal Does Not Involve the Deprivation of a Fundamental Right.

The substantive due process component protects only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[31] The list of fundamental rights and liberties is "short" and "includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to terminate one's pregnancy, and possibly the right to refuse unwanted lifesaving medical treatment."[32] The right to an appointment to a commission, board, or committee is not among the "short" list of rights deeply rooted in this Nation's history and tradition set forth above, and thus, such appointments and removal from them, do not implicate substantive due process concerns.

2. Removal Does not "Shock the Conscience."

Nor does removal from such an appointment (particularly under these circumstances) "shock the conscience" so as to violate the substantive due process component. Substantive due process protects against "arbitrary and capricious government action that shocks the conscience and violates the decencies of civilized conduct."[33] "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."[34] At the same time, to "shock the conscience," the alleged abuse of power must have been "so brutal and offensive that it did not comport with traditional ideas of fair play and decency."[35] In general, "shock the conscience" claims do not apply to cases that do not involve physical force.[36]

Indeed, this standard "sets a high bar" and is difficult to meet.[37] Accordingly, the removal of a Council Member from his appointment on a board, commission, or committee, particularly here where there is "cause," is neither "arbitrary and capricious" nor "shocks the conscience" within the meaning of the substantive component of due

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[29] *Guertin v. Michigan*, 912 F.3d 907, 918 (6th Cir. 2019).
[30] *Pusey v. City of Youngstown*, 11 F.3d 652, 656 (6th Cir. 1993).
[31] *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997).
[32] *Seal v. Morgan*, 299 F.3d 567, 574-75 (6th Cir. 2000).
[33] *Guertin*, 912 F.3d at 918.
[34] *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998).
[35] *Id.* at 847.
[36] See *Cassady v. Tackett*, 938 F.2d 693, 698 (6th Cir. 1991).
[37] *Pearson v. City of Grand Blanc*, 961 F.2d 1211, 1216 (6th Cir. 1992

process. Thus, substantive due process is not implicated by removal from the bodies discussed above.

VI. First Amendment Retaliation.

Removal from these boards, commissions, or committees, even if in response to speech, would likely not amount to First Amendment retaliation, as our office previously described in a public memorandum dated March 18, 2021.[38] As you will recall, we advised that a majority of federal courts have concluded that legislative bodies may take certain actions in response to member speech, so long as the action does not prevent the member from carrying out their *elected* duties.[39] This is because elected officials are required to endure more action taken in response to their speech than the ordinary citizen.[40]

This includes the removal of elected officials from appointed positions, which is permissible, so long as the appointment is not part of the officials' *elected* duties.[41] Removal from the boards, commissions, and committees at issue would likely not prevent a Council Member from carrying out their elected duties. There is no right or duty of any particular Council Member, by their election alone, to be appointed to any board, commission, or committee. Further, neither the City Charter nor the City Code prescribe that any particular Council Member must hold any position on any board, commission, or committee at all.[42] Thus, an appointment to a board, commission or committee is not part of a Council Member's elected duties and consequently, removal from such bodies would likely not constitute retaliation under the First Amendment.

Conclusion

In the absence of a charter or ordinance provision or other law that expressly prescribes a procedure for removal of a Council member from a committee or other appointment, the decision to remove likely remains in City Council's discretion as an inherent power of the Council. Further, removal of a Council Member from a board,

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[38] While the case law generally concludes that removal from boards, commissions, and committes does not violate the First Amendment, there is some contrary authority. The Fifth Circuit Court of Appeals in *Wilson v. Houston Community College System* concluded that a reprimand against an elected official for speech was an actionable First Amendment Claim. 955 F.3d 490, 499 (5th Cir. 2020). But the law in this area is always changing as this Office has previously discussed. Indeed, on April 26, 2021, the United States Supreme Court granted a petition for writ of certiorari to hear this case. See *Houston Community College System v. Wilson*, ___ S. Ct. ___, 2021 WL 1602636 (S. Ct. April 26, 2021). Thus, we expect to have some additional guidance on this issue from the Supreme Court by next fall at the earliest.

[39] See Legal Advice Memorandum dated March 17, 2021 pp. 17-24.

[40] *Mattox v. City of Forest Park*, 183 F.3d 515, 522 (6th Cir. 1999).

[41] *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119 (5th Cir. 1996); *McKinley v. Kaplan*, 262 F.3d 1146, 1151-52 (11th Cir. 2001); *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997).

[42] City Charter, Section 4.1; City Charter, Section 5.17; City Code, Sections 1:171-1:239.

commission, or committee neither implicates the due process protections of the state or federal constitution nor does it amount to First Amendment retaliation.