STATE OF MICHIGAN

1-00-CI

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
LANSING, MICHIGAN 48918

August 17, 2000

Mr. Steven Daunt
P.O. Box 882
Perry, Michigan 48872

Dear Mr. Daunt:

This is in response to your request for a declaratory ruling under the Michigan Campaign Finance Act (the MCFA), 1976 PA 388, as amended.

Section 15(2) of the MCFA, MCL 169.215(2), authorizes the Secretary of State to issue a declaratory ruling if the person requesting the ruling has provided a reasonably complete statement of facts. In addition, 1999 AC, R 169.6 provides that a declaratory ruling may be issued as to the applicability of the statute to "an actual statement of facts." Your request does not include a statement of facts that is sufficient to support a declaratory ruling. Accordingly, the Department declines to issue a declaratory ruling but offers the following as an interpretive statement.

The core issue raised by your inquiry is whether section 57 of the MCFA, MCL 169.257, prohibits a city council from passing a resolution endorsing a candidate or ballot question. Section 57 generally prohibits a public body from using public resources to make campaign contributions or expenditures.

Section 57, which was added to the MCFA in 1996 and amended in 1997, had its genesis in numerous Attorney General opinions. Those opinions repeatedly held that school districts and other public bodies could not expend funds to influence the outcome of an election because they had no authority to do so. Section 57 now provides a second basis for reaching this conclusion. However, neither the Attorney General opinions nor section 57 expressly address whether or not a public body, in the exercise of its constitutional and statutory authority, may adopt a resolution endorsing a

candidate or ballot question. It also appears that Michigan courts have not had occasion to rule on this issue.

However, courts in at least two states have approved the endorsement of ballot measures by public bodies. While these cases interpret other state laws, they are useful in providing a framework in which to discuss the issue.

CASE LAW

In *King County Council et al v Public Disclosure Commission*, 93 Wash 2d 559 (Wash, 1980), the Washington Supreme Court reversed a lower court's determination that a county council had violated state law by voting to endorse a statewide anti-pornography ballot measure.

As in Michigan, Washington has a statutory provision that prohibits public officials and employees from using "any of the facilities of a public office or agency . . . for the purpose of assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition." However, the Washington statute did not apply to "those activities which are a part of the normal and regular conduct of the office or agency." Noting that county councils have broad legislative powers, including the authority to make declarations of policy, the Washington Supreme Court held that endorsing a statewide ballot measure was both "normal and regular" and therefore permitted by state law. The statute was subsequently amended to authorize resolutions on ballot propositions.

The California courts have also found that adopting a resolution to support or oppose a ballot measure is proper. In *Choice in Education League v Los Angeles Unified School District*, 17 Cal App 4th 415 (Cal App 2 Dist, 1993), the Los Angeles City Board of Education, at a televised board meeting, adopted a resolution opposing the Education League's attempt to gather enough signatures to place a school funding initiative on the ballot. The League obtained a preliminary injunction enjoining the School District and Board members from using public employees, public funds and other public resources to advocate a position on the proposed initiative.

On appeal from the preliminary injunction, the Court of Appeal reversed the trial court. The appellate court ruled that there was no showing of irreparable harm and that the trial court abused its discretion when it concluded that the League was likely to prevail on the merits of its case. In so holding, the court noted:

> "Respondents appear to concede that the [resolution] was properly part of the agenda in that they acknowledge that appellants could properly go on

> record opposing the Initiative, as long as their actions did not involve a 'genuine effort to persuade the electorate' by appearing 'at public expense on the district's own television station, operated by district employees during their regularly scheduled work time, with one-sided messages opposing the Parental-Choice-in-Education Initiative and urging the public not to sign petitions for the Choice Initiative." (Citation omitted.)

The court later turned to a discussion of principles enunciated by the California Supreme Court in *Stanson v Mott*, 17 Cal 3d 206 (Cal, 1976):

> "The [Stanson] court then discussed the issue of legislative authorization for the instant expenditures and the constitutional questions that are posed by an explicit authorization of public funds for partisan campaigning: '[E]very court which has addressed the issue to date has found the use of public funds for partisan campaign purposes improper, either on the ground that such use was not explicitly authorized [citations] or on the broader ground that such expenditures are never appropriate . . . . Underlying this uniform judicial reluctance to sanction the use of public funds for election campaigns rests an implicit recognition that such expenditures raise potentially serious constitutional questions. A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow on unfair advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office [citation]; the selective use of public funds in election campaigns, of course, raise the specter of just such an improper distortion of the democratic electoral process." *Stanson, supra*, 17 Cal 3d at p 217.

Despite this sweeping statement, the Court of Appeal indicated that passing a resolution did not entail an improper expenditure of public funds, citing *League of Women Voters* v *Countywide Criminal Justice Coordination Committee*, 203 Cal App 3d 529 (Cal App 2 Dist, 1988).

In *League of Women Voters*, the appellate court considered whether county committees and officials had improperly expended public funds for partisan campaign activity. The Countywide Criminal Justice Coordination Committee (CCJCC), comprised of representatives from various governmental units, was formed to promote coordination among elements of the local justice system. CCJCC formed a subcommittee to consider procedural changes in the criminal justice system. Extensive public resources were

devoted to developing, drafting and finding a sponsor for an initiative to ask voters to implement various changes. Several months before the Secretary of State gave notice that the proposed initiative did not qualify for the ballot, the Los Angeles County Board of Supervisors "officially recorded its position supporting the proposed initiative."

The court engaged in an extensive analysis of cases which have held that public resources cannot be used for campaign purposes. The court then determined that the committee's "development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority." When it reached the question of whether the Board of Supervisors could officially record its support for the qualification of the proposed initiative, the court concluded:

> "We adopt the view that the simple decision, made in the regular course of a board of supervisors meeting which is open to the public and thus the expression of citizens views, to go on record with such an endorsement in no event entails an improper expenditure of public funds. While it may be construed as the advocacy of but a single viewpoint, there is no genuine effort to persuade the electorate such as that evinced in the activities of disseminating literature, purchasing advertisements or utilizing public employees for campaigning during normal working hours. By the same reasoning, the use of a regularly scheduled board of supervisors meeting to make such an endorsement would not involve reportable campaign expenditures."

As previously suggested, the Washington and California cases represent interpretations of laws in those states and not section 57 of the MCFA or other pertinent provisions of Michigan law. We turn now to a discussion of that law.

MICHIGAN LAW

A "resolution" is "the form in which a legislative body expresses a determination or directs a particular action. It is of special or temporary character, whereas an ordinance prescribes a permanent rule for the conduct of government." *Duggan v Clare County Board of Commissioners*, 203 Mich App 573 (1994). A city's authority to adopt resolutions is derived from Article 7 of the State Constitution:

> "Sec. 22. Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city or village <u>shall have the power to adopt resolutions and</u>

> ordinances relating to municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section."

As indicated, this grant of authority is subject to state law. Therefore, a resolution cannot be adopted if it violates section 57 of the MCFA.

Section 57 was added to the statute by 1995 PA 264. As originally enacted, it simply prohibited a public body or a person acting for a public body from making a contribution or expenditure. The amendment, which took effect March 31, 1996, generated a great deal of confusion regarding what conduct was prohibited. In a letter to the Department of State's Legislative Director discussing this confusion, Representative Frank Fitzgerald, the chair of the House committee which considered the amendment, stated:

> "As you know, House Bill 5410 (PA 264 of 1995) amended the Michigan Campaign Finance Act to prohibit a public body from making a contribution or expenditure or from providing volunteer personal services that are excluded from the definition of contribution under section 4(3)(a) of the Act. The intent of this provision was to prevent school districts from using public funds to support millage campaigns."

Agreeing that "something needed to be done," Representative Fitzgerald later convened several meetings to discuss amendatory legislation. This resulted in the enactment of 1996 PA 590. The 1996 amendment did two things: first, it clarified that "contribution" and "expenditure" prevented the use of public funds, personnel, office space, property, stationery, postage, vehicles, equipment, supplies, or other resources for campaign purposes; second, it included several subdivisions to ensure that the prohibition did not have a chilling effect on the lawful activities of public officials and employees. At no time did the effort to amend section 57 stray from its primary purpose: to prevent public bodies from using public resources to wage campaigns.

Section 57 now reads, in pertinent part:

> "Sec. 57. (1) A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure . ."

This section does not expressly prohibit a city council from passing a resolution. Rather, a city council is prohibited from passing a resolution if by doing so it uses any of the enumerated items to make a contribution or expenditure.

"Contribution" and "expenditure" are defined in sections 4 and 6 of the MCFA, MCL 169.204 and MCL 169.206, as follows:

> Sec. 4. (1) "Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage, or defeat of a ballot question.
>
> Sec. 6. (1) "Expenditure" means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question.

Significantly, section 57(1)(a) states that the prohibition in subsection (1) does not apply to the "expression of views by an elected or appointed public official who has policy making responsibilities." It is therefore clear that at council meetings individual council members are free to discuss their opposition to or support of a ballot question that relates to "municipal concerns, property and government." Indeed, a city council could devote an entire meeting to a discussion of the ballot question. The council meeting would obviously use city equipment, office space, and other public resources during the course of this discussion. If every council member can use those resources without limitation, it would be absurd to conclude that equipment, office space, and the like have been illegally used by the simple act of raising one's hand. The mere act of voting on a resolution that encompasses matters discussed at a meeting does not constitute a misuse of public resources within the meaning of section 57(1). Similarly, a public body may record that resolution in the meeting minutes, as required by the Open Meetings Act, and produce or disseminate copies of those minutes by a newspaper, magazine, or other periodical or publication in the regular course of publication, as authorized by section 57(1)(c).

A public body may not, however, rely upon section 57(1)(c) to justify the use of public funds or resources to assist or oppose the qualification, passage or defeat of the ballot question. Section 57(1)(c) allows a public body to inform its citizens about meetings and actions of the public body *in the regular course of broadcast or publication.* This means that meeting minutes that include a resolution supporting or opposing a ballot question may be published in exactly the same manner as meeting minutes that do not include any discussion or vote on a ballot question. Any publication that goes beyond the regular provision of factual information regarding the council meeting or any communication regarding the resolution or ballot question must be balanced, fair, and

objective in order to avoid assisting or opposing the ballot question in violation of section 57(1).

The Department acknowledges that this rationale would apply equally to a resolution that endorses a candidate. However, we take no position on whether a city is empowered to adopt resolutions supporting or opposing a candidate.

Sincerely,

Robert T. Sacco

ROBERT T. SACCO
Deputy Secretary of State
Regulatory Services Administration