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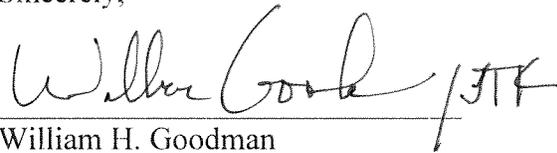
**Re: In the Matter of The Request for Removal of Kwame M. Kilpatrick from the
Office of Mayor of the City of Detroit, No. EO-2008-004-LO**

Dear Governor Granholm,

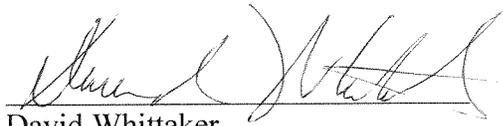
On May 20, 2008 the Detroit City Council submitted a petition and charges to you requesting that you take action to remove Mayor Kwame M. Kilpatrick from elective office for official misconduct pursuant to MCL 168.327. In that letter, we stated to you that the city was in a state of "constitutional crisis." Since the date of that letter, the crisis continues to grow.

Today, we submit for your determination Council's Motion for a Hearing on the Merits pertaining to this matter. We believe our motion and the supporting documents thereto, state a clear and compelling basis for your Honorable to proceed with a hearing on the merits of Council's request.

Sincerely,



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STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

**In the Matter of the Request for the
Removal of Kwame M. Kilpatrick from
the Office of Mayor of the City of Detroit**

**No. EO-2008-004-LO
Hon. Jennifer M. Granholm**

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**PETITIONER DETROIT CITY COUNCIL'S
MOTION FOR HEARING ON THE MERITS IN THE
MATTER OF THE REQUEST FOR REMOVAL OF KWAME M. KILPATRICK**

NOW COMES the Petitioner DETROIT CITY COUNCIL ("Council") by and through its attorneys, Special Counsel WILLIAM H. GOODMAN and Co-Special Counsel DAVID D. WHITAKER, and hereby brings this Motion, pursuant to MCL §168.327, requesting that the removal hearing on the merits of Detroit City Council's *Petition and Charges Against Honorable Kwame M. Kilpatrick*, currently tentatively scheduled for September 3, 2008, go forward without delay, based on the following findings:

- A. That the *Petition and Charges Against Honorable Kwame M. Kilpatrick* is properly before this Honorable Governor;

- B. That a stay of proceedings is inappropriate; and
- C. That the charges submitted are sufficient to warrant a hearing on the merits of Council's removal request.

In support of this Motion, Petitioner states as follows:

1. On May 13, 2008, the Council passed a *Resolution To File A Charge With Governor Jennifer M. Granholm Seeking Removal Of Mayor Kwame M. Kilpatrick From Office*, by a majority vote of 5-4, after conducting investigative hearings arising from the Mayor's role in the circumstances surrounding the settlement of the *Brown/Nelthrope/Harris* cases, following the disclosure of evidence that Mayor Kwame M. Kilpatrick has engaged in conduct that constitutes "official misconduct," within the meaning of MCLA §168.327, thus meriting removal for cause from elective office.

2. On May 20, 2008, Council submitted a *Petition and Charges to the Office of the Governor* pursuant to MCL §168.327, requesting that Mayor Kwame Kilpatrick be removed from elective office for acts of official misconduct, along with several supporting exhibits.

3. On June 3, 2008, Kelly Keenan, Legal Counsel to the Governor contacted the parties by letter, stating that "the parties should be provided with the opportunity to raise and brief any preliminary legal issues relating to the charges submitted..."

4. On June 11, 2008, counsel of record for the Detroit City Council in this matter, William H. Goodman, responded by urging the Governor to move the process forward expeditiously because of the urgency posed by the crisis that faces the City of Detroit. In the letter, he further advised that the City Council would be prepared to file a brief responding to the apparent position of Mayor Kilpatrick that the allegations contained in the *Petition and Charges*, if proven, do not constitute "official misconduct" under MCL § 168.327.

5. On June 23, 2008, Sharon McPhail, the Mayor's counsel of record in this matter, submitted a letter, in response to the June 3 letter from the Governor's office, by letter, wherein she haphazardly argued the merits of several preliminary legal issues, to wit:

- a. That the petition filed is "defective on its face and thus, is not properly before the Governor" because the resolution "would have to have the votes of two-thirds of the elected members of Council;"
- b. That the Council is never shown confidentiality agreements when Council's consent to settlements is sought and, as a consequence, there was no "official misconduct;" and
- c. That the Governor should issue a stay pending the resolution of the criminal charges filed by the Wayne County prosecutor.

6. On July 1, 2008, Mr. Goodman briefly responded to Ms. McPhail's letter. On the same date, Governor Granholm established a briefing scheduling, including an August 1, 2008 deadline for the submission of motions and briefs addressing preliminary legal issues in advance of a hearing on the merits of the removal request; response and reply briefs by August 22 and September 5, respectively. At that time, there was no date set for a hearing on the merits.

7. On July 28, 2008, the Governor notified the parties that she had concluded that it is in the public interest to accelerate the briefing schedule in this matter and to set a definite date for a hearing should one be determined necessary.

8. On July 30, 2008, at 4:57 p.m., Ms. McPhail submitted a request on behalf of the Mayor for a 60-day extension the schedule, including the August 1 preliminary briefing deadline (which had been established since July 1 without any objection).

9. On July 31, 2008, Governor Granholm declined the requested extension because

Mayor Kilpatrick's counsel failed to establish good cause for it and because the public interest requires that this matter be resolved fairly but without undue delay. The Governor did, however, grant a brief extension. Therefore, preliminary motions are now due by August 6; response briefs by August 20; and reply briefs by August 25. The hearing date tentatively scheduled for September 3, 2008 remains intact.

10. The resolution supporting the Petition was adopted pursuant to Section 4-108 of the Detroit City Charter and is therefore valid.

- a. Section 4-108 of the Detroit City Charter, entitled "voting" states: "Except as otherwise provided by this Charter, no action of the city council shall be effective unless adopted by *at least a majority* of city council members present." (Emphasis added)

11. There is no legal basis for the claim the vote required a two-thirds majority of the elected members of council.

12. The pending criminal charges against the Mayor do not necessitate a stay of these proceedings. Generally, civil proceedings need not wait for the resolution of coincidentally related criminal charges when the civil matter is only coincidentally related to the criminal trial. Therefore, the charges against Mayor Kilpatrick are ripe for adjudication and should not be delayed.

13. In fact, a stay would unnecessarily prolong the current paralysis on the City's ability to effectively conduct business and would inflict further harm on the citizens of Detroit and of Michigan.

14. The charges alleged in Petitioner Council's *Petition*, along with the supporting documents and transcripts, set forth clear and sufficient grounds for removal based on "official

misconduct” within the meaning of MCL §168.327. As such, this action is properly before Governor Granholm:

- a. The Governor is authorized, pursuant to the 1963 Michigan Constitution, Article VII Section 33, as codified by MCL §168.327, to remove any elected city officer “...when the governor is satisfied from sufficient evidence submitted to the governor that the officer has been guilty of official misconduct.”
- b. “Official misconduct” is defined as any “...unlawful behavior by a public officer in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law” *Krajewski v City of Royal Oak*, 126 Mich App 695, 697 (1983). It is conduct which “...in a material way affects the rights and interests of the public.”
Id.

15. In its *Petition* and supporting documents attached thereto, Council has identified and detailed a deliberate and malicious string of actions by the Mayor which culminated in his use of his public office to obtain settlement approval of the *Brown/Nelthrope/Harris* cases from the City Council, which, in truth and unbeknownst to Council, was hush money designed to avoid personal embarrassment and possible criminal liability, all of which was in his personal and private interest and did not benefit the public interest. In so doing, he committed “official misconduct” of the most egregious kind.

WHEREFORE, the Detroit City Council respectfully requests Governor Granholm grant the following relief:

- A. Order that the removal hearing on the merits of Detroit City Council’s *Petition and Charges Against Honorable Kwame M. Kilpatrick*, currently tentatively

scheduled for September 3, 2008, go forward without delay, based on the following findings:

1. That the *Petition and Charges Against Honorable Kwame M. Kilpatrick* is properly before this Honorable Governor;
2. That a stay of proceedings is inappropriate; and
3. That the charges submitted are sufficient to warrant a hearing on the merits of Council's removal request.

B. Grant all other relief on behalf of Detroit City Council that is reasonable and appropriate.

Respectfully submitted,



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Dated: August 06, 2008

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR

**In the Matter of the Request for the
Removal of Kwame M. Kilpatrick from
the Office of Mayor of the City of Detroit**

**No. EO-2008-004-LO
Hon. Jennifer M. Granholm**

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**BRIEF IN SUPPORT OF PETITIONER DETROIT CITY COUNCIL'S MOTION FOR
HEARING ON THE MERITS IN THE
MATTER OF THE REQUEST FOR REMOVAL OF KWAME M. KILPATRICK**

Petitioner Detroit City Council fully appreciates the seriousness of the situation presently before you. Council further understands that the invocation of the Governor's statutory power to remove an elected official is an extraordinary measure, one not to be taken lightly. The matter currently pending before you is indeed extraordinary, one that requires immediate action. Unless resolved fairly and swiftly by the statutory power of this Honorable office, the crisis confronting the City of Detroit will continue to seriously threaten this community and this State.

Mayor Kilpatrick is using several tactics to delay and forgo any action against him in order to retain his position of power. He contends that the Detroit City Council's Petition requesting that Governor Granholm remove him from office is invalid because the Council's Resolution to bring

these charges was not adopted pursuant to a two-thirds “supermajority” vote. He implores the Governor to not take any action until the conclusion of his criminal proceedings, which can (and by all indications will) endure for years. And he states that Council’s Petition alleges no “official misconduct” that would warrant his removal pursuant to the Governor’s statutory and constitutional authority.

The Detroit City Council (“Council”) hereby submits this brief addressing these matters, which were nebulously and informally raised in the June 23, 2008 (and to a lesser extent in the July 30, 2008)¹ letters to Kelly Keenan, the Governor’s Counsel, from Sharon McPhail, General Counsel to Mayor Kilpatrick’s counsel of record. In the interest of expeditious resolution of these solemn and important proceedings, this brief is submitted prior to the submission by the Mayor of any formal motions. Of course, Council fully intends to respond to any and all other arguments contained in motions filed by the Mayor in this matter, and will do so within the time frame provided by the Governor’s Order dated July 31, 2008.

PROCEDURAL HISTORY

On May 13, 2008, the Council passed a *Resolution To File A Charge With Governor Jennifer M. Granholm Seeking Removal Of Mayor Kwame M. Kilpatrick From Office*, by a majority vote of 5-4. **[Exh. A]** On May 20, 2008, Council submitted a *Petition and Charges to the Office of the Governor* pursuant to MCL §168.327, requesting that Mayor Kwame Kilpatrick be removed from elective office for acts of official misconduct, along with several supporting exhibits. **[Petition and Charges of the Detroit City Council Against Honorable Kwame M. Kilpatrick Seeking His Removal for Acts of Official Misconduct, Exhs. A-L attached thereto,**

¹ With respect to Ms. McPhail’s most recent letter, dated July 30, 2008, (but apparently delivered on August 1, 2008), it has been and continues to be Council’s position that her correspondence to the Governor are fraught with false, inconsistent and exaggerated statements, none of which are supported by references to any legal or factual authority, and as such are entirely inappropriate. The extent to which these statements are included in the motions/briefs filed by the Mayor with the Governor, Council will respond in detail.

(May 20, 2008) (Governor’s Website, “Documents Regarding the Honorable Kwame M. Kilpatrick, Doc. #1)²] On June 3, 2008, Governor Granholm’s office sought suggestions and comments from counsel for the parties regarding the timing and structure of the removal proceedings, such as a proposed schedule for the briefing of preliminary legal issues prior to the Governor’s determination of whether the materials submitted to her are sufficient to warrant a hearing. **[Letter From the Governor Regarding Designation of Counsel, (May 21, 2008) (Doc. #2)]**

On June 11, 2008, counsel of record for the Detroit City Council in this matter, William H. Goodman, responded by urging the Governor to move the process forward expeditiously because of the urgency posed by the crisis that faces the City of Detroit. **[Letter From Kelly Keenan regarding Detroit City Council Memorandum, (June 11, 2008) (Doc. #10)]**. In the letter, he further advised that the City Council would be prepared to file a brief responding to the apparent position of Mayor Kilpatrick that the allegations contained in the Petition and Charges, if proven, do not constitute “official misconduct” under MCL § 168.327. **[Id.]**

On June 23, the Mayor’s counsel of record in this matter, Sharon McPhail, responded to the letter from the Governor’s office with a letter that haphazardly argued the merits of numerous preliminary legal issues. **[Letter from Sharon McPhail in response to 6-3-08 letter, (June 23, 2008) (Hereinafter Doc. #13)]**.

On July 1, 2008, Mr. Goodman briefly responded to Ms. McPhail’s letter. **[Letter from William Goodman in response to McPhail's June 23 letter, (July 1, 2008) (Doc. #14)]**. On the same date, Governor Granholm established a briefing scheduling, including an August 1, 2008 deadline for the submission of motions and briefs addressing preliminary legal issues in advance of a hearing on the merits of the removal request; response and reply briefs by August 22 and

² Hereinafter, all references to the Governor’s Website documents shall be referred to as “Doc. #”.

September 5, respectively. [**Letter from Kelly Keenan to re schedule (July 1, 2008) (Doc. #15)**].

The Governor advised that a hearing would be scheduled, if warranted, following the resolution of any such preliminary motions, without specifying a date. [**Id.**] On July 28, 2008, the Governor notified the parties that she had concluded that it is in the public interest to accelerate the briefing schedule in this matter and to set a definite date for a hearing should one be determined necessary. [**Letter from Kelly Keenan re accelerated schedule, (July 28, 2008) (Doc. #17)**]. Thus, the August 1 deadline for preliminary motions remained intact, the dates for response and reply briefs were accelerated, and a hearing date of September 3, 2008 was set.

On July 30, 2008, at 4:57 p.m., Ms. McPhail submitted a request on behalf of the Mayor for a 60-day extension the schedule, including the August 1 preliminary briefing deadline (which had been established since July 1 without any objection). [**Motion for Extension of Time from Counsel Sharon McPhail, (July 30, 2008) (Doc. #18)**]. On July 31, 2008, Governor Granholm declined the requested extension because Mr. Kilpatrick's counsel failed to establish good cause for it and because the public interest requires that this matter be resolved fairly but without undue delay. [**Order Granting in Part Respondent's Request to Extend Schedule (July 07, 2008) (Doc. #19)**] The Governor did, however, grant a brief extension. Therefore, preliminary motions are now due by August 6; response briefs by August 20; and reply briefs by August 25. The hearing date tentatively scheduled for September 3, 2008 remains intact.

ARGUMENT

This brief addresses three issues, all of which are raised in Ms. McPhail's letter of June 23, 2008, (and reiterated in her letter dated July 30). A close examination of these issues, based on the applicable legal standards and the facts presented, strongly support Council's assertions that this matter is properly before the Governor, that it should proceed without delay, and that the

allegations if proven support a finding of “official misconduct” within the meaning of MCL §168.327. The issues are:

1. **Whether this matter is properly before the Governor.** Mayor Kilpatrick claims that the Detroit City Council’s Petition and Charges seeking his removal from office is “defective on its face,” because it was filed pursuant to an official resolution that was passed by a majority of Council Member votes, rather than a supposed “requisite supermajority.” This is entirely without merit. Given that a request for removal under MCL §168.327 requires only one person to file a charge, as explicitly conceded by Ms. McPhail in her June 23 letter, [**Doc. #14, p. 2**], whether or not a simple majority or a “supermajority” voted in favor of requesting the Governor to exercise her authority under the statute is therefore beside the point. More important, however, as argued in full below, at pp. 6-10, a “supermajority” vote for this resolution was not required as a matter of law. A simple majority is all that is required for Council to pass a resolution of this kind.

2. **Whether the Governor should stay the removal proceedings pending resolution of Mayor Kilpatrick’s criminal proceedings.** Mayor Kilpatrick has requested that the Governor issue a stay of this matter pending the resolution of the criminal charges against the Mayor that are currently languishing in the court system. As argued below, at pp. 10-13, this argument too must fail. The requested “stay” of proceedings is not only entirely unnecessary, but also would prolong the current paralysis on the City’s ability to effectively conduct its business and would inflict further harm on the citizens of Detroit and this great State.

3. **Whether the charges submitted are sufficient to warrant a hearing on the merits of Council’s removal request.** Mayor Kilpatrick claims that Council’s allegation that he deliberately concealed material terms and conditions of the proposed *Brown/Nelthrope/Harris* settlements when seeking Council’s consent to those settlements is not sufficient to constitute “official misconduct” within the meaning of MCL §168.327. In short, Ms. McPhail’s June 23 letter contends that the Mayor Kilpatrick’s knowing and intentional concealment from Council of the

real and improper reason that he sought Council's approval of the taxpayer's payment of 8.4 million dollars, even if proven, does not fall within the statute's definition of "official misconduct." As argued in full below, pp. 13-16, Council's Petition states clear and sufficient grounds for removal based on official misconduct; the Petition alleges that Mayor Kilpatrick performed acts in abuse of his official powers, in a false, destructive, and improper way, to the great and continued detriment of the City of Detroit. These allegations are the epitome of official misconduct.

I. THE RESOLUTION BY WHICH THE DETROIT CITY COUNCIL DECIDED TO SEEK THE REMOVAL OF MAYOR KILPATRICK FROM OFFICE BY THE GOVERNOR IS NOT DEFECTIVE. THE REQUISITE MAJORITY OF COUNCIL MEMBERS VOTED IN FAVOR OF THE RESOLUTION. A "SUPERMAJORITY" WAS NOT REQUIRED.

On May 13, 2008 the Detroit City Council passed a resolution, by a vote of 5-4, seeking the removal of Mayor Kilpatrick from office by Governor Granholm ("resolution"). **[Exh. A, Resolution to File a Charge with Governor Jennifer M. Granholm Seeking Removal of Mayor Kwame M. Kilpatrick from Office]** The resolution was adopted by the Council pursuant to Section 4-108 of the Detroit City Charter ("Charter"), which states, in relevant part:

Sec. 4-108 Voting.

Except as otherwise provided by this Charter, no action of the city council shall be effective unless adopted by at least a majority of city council members present.

Section 4-108 of the Charter thus directs the Council's voting protocol for the adoption of a resolution such as the one resulting in the charges presented to the Governor. In opposition to Council's action, Mayor Kilpatrick contends that the resolution is invalid because it was not adopted pursuant to a two-thirds vote of the Council. Not so.

A. A Two-Thirds Vote Is Not Required For The Council To Act In This Matter.

As quoted above, Section 4-108 of the Detroit City Charter clearly states that only a majority vote of Council members present at the time of a vote is necessary to make an action of the Council effective, “[e]xcept as otherwise provided” in the Charter. Nonetheless, in an effort to sidestep Section 4-108, Mayor Kilpatrick has argued, through various counsel, that Council has to suddenly adopt a new “supermajority” voting protocol now that his personal interests are at stake, simply has no basis in law. His counsel has offered no valid support for that empty assertion, other than to cite Roberts Rules of Order (“Roberts Rules”).

1. The City Council Is Not Bound By Roberts Rules

There is no legal basis for the assertion that the City Council is bound by Roberts Rules, especially for the passage of a resolution such as this. On the contrary, the Detroit City Charter and the Home Rule City Act, Public Act 279 of 1909, specifically allow the Detroit City Council to determine its own rules and procedures.

Sec. 4-105 and Sec. 1-102 of the 1997 Detroit City Charter states:

Sec. 4-105 Rules and Journal.

The City Council shall determine its own rules and order of business and shall provide for keeping a journal of its proceedings in the English language. The journal shall be a public record. (emphasis added).

Sec. 1-102 General Powers.

The city has the comprehensive home rule power conferred upon it by the Michigan Constitution, subject only to the limitations on the exercise of that power contained in the Constitution or this Charter or imposed by statute. The City also has all other powers which a city may possess under the Constitution and laws of this state. (emphasis added).

In other words, the Council is bound by recognized rules of law. Roberts Rules do not have the effect of law and therefore cannot supersede the legislative provision of Section 4-108 of the Charter. As such, they are not legally binding on the Council. The Charter clearly denotes “a

majority of city council members present” (Sec. 4-108) as Council’s voting protocol. With equal clarity, the Charter explicitly sets forth the very limited kinds of actions that *do* require a two-thirds vote of Council to be effective. For example:

- A two-thirds majority vote is required for Council to give immediate effect to an ordinance. See Detroit City Charter Section 4-116³;
- A two-thirds vote is also required for Council members to override the Mayor’s veto of an ordinance or resolution. See *id.* at Section 4-119.⁴

The matter voted on here is a resolution, not an ordinance and not an override of a veto. A majority vote thus suffices to pass the resolution.

The Mayor’s counsel drastically takes “Roberts Rules” out of its appropriate context, promoting a non-binding reference source in order to build a doctrinal straw man for the purpose of protecting the Mayor’s interest. The Detroit City Council adopted the “Rules of Order”, *Rules of Order for the Detroit City Council, Passed February 28, 2007*, as an internal guide to “assist the Council in the orderly conduct of City business.” *Rules of Order, Rule 2.0.* **[Exh. B, Rules of Order]** As such, it is purely procedural. Within the *Rules of Order, Rule 10.14* specifically addresses “parliamentary procedure.” The preamble to Rule 10.14 states: “[t]he most recent edition of Robert’s Rules of Order *will govern the procedures* of the Council in all situations *not otherwise provided for* by statute, *charter*, ordinance, or the adopted rules of this body.” **[Exh. B, Rules of Order, Rule 10.14.]** Roberts Rules are *only* addressed in the Rules of Order, not within the Charter or other statute that govern the legal bases for Council’s action. Council’s Rules of

³ Section 4-116 states, “A two-thirds (2/3) majority of city council members serving may give immediate effect to any ordinance. An ordinance given immediate effect shall become effective upon publication or at any later date specified therein.

⁴ Section 4-119 states in part, “A two-thirds (2/3) majority of city council members serving may pass the ordinance or resolution over the mayor’s veto.”

Order are thus clearly intended to oversee only the perfunctory tasks of parliamentary procedure, and to ensure the orderly conduct of Council members and its audience during public meetings of the Council.

Under no circumstances does Roberts Rule 44 apply here. Under Rule 44, a two-thirds vote is required *only* for any vote that actually “takes away membership or office,” and only from the voting assembly, i.e. from the City Council, not the Mayor. This thus applies only to other members of the Council, not the Mayor. *Roberts Rules, Rule 44, Two-Thirds Vote, lines 15-25.* Moreover, the Council’s passage of the May 13 Resolution did *not* remove Mayor Kilpatrick from office.

Thus, the City Council was fully authorized to pass by a simple majority the resolution that resulted in the filing of this *Petition for Removal* with the Governor.

In addition, in arguing that the Council’s resolution to seek his removal by the Governor is analogous to an impeachment, or that it constitutes an undemocratic overruling of the “vote of the people,” the Mayor, by either ignorance or deliberateness, tangles the distinct and separate functions of the Council and the Office of the Governor. To wit,

- Council made a proper request pursuant to MCL § 168.327, which does not even require that a removal request be submitted by a body corporate pursuant to resolution or otherwise, much less by a two-thirds majority of such a body. Indeed, this point is conceded by the Mayor’s counsel McPhail in her June 23 letter. **[Doc. #14, p. 2]** The statute is designed to protect the citizens of the state from abuses of power in government, not to insulate the elective office of an individual.
- Council adopted a *resolution to seek* Mayor Kilpatrick’s removal by the Governor. The resolution is a formal decision to ask the Governor to remove him from elective office pursuant to § MCL 168.327. It is *not* itself the commencement of removal proceedings. A majority vote of the Council has not caused the *removal* of the Mayor from office. It has, rather, effectuated a resolution to file a Petition seeking the commencement of statutorily and constitutionally authorized removal proceedings by the Governor.
- Council’s adoption of a resolution is not analogous to an impeachment proceeding.

The resolution makes for the Governor to exercise the sole gubernatorial removal power pursuant to MCL § 168.327; Council makes no determination on this action as opposed to its own forfeiture proceedings (which also have no bearing to impeachment).

II. THE GOVERNOR SHOULD NOT STAY THIS REMOVAL PROCEEDING PENDING THE RESOLUTION OF MAYOR KILPATRICK'S CRIMINAL TRIAL.

The Mayor has further asserted that a stay of this removal proceeding should be granted pending the resolution of the criminal charges against him. Apparently, the argument is that the Mayor cannot adequately present his position in this proceeding without testifying and thereby implicating Fifth Amendment issues.

The Mayor's official misconduct, the evidence of which is discussed below, at pp. 13-16, has thrown Detroit into an unprecedented constitutional crisis. The Detroit City Council resolved to file charges with the Governor and seek the removal of Mayor Kilpatrick to protect the public and rebuild city government. The Council seeks Kilpatrick's removal *not* for the criminal charges levied against him, but for his official misconduct in subverting the legal process through which settlements are approved and finalized under the Detroit City Charter. It is imperative to bring an end to the crisis facing the City of Detroit and the ever-growing ripple effect that this crisis is having upon the entire State. The time is ripe for Governor Granholm to determine whether Mayor Kilpatrick committed official misconduct and must be removed from office. The public interest requires prompt, swift action, as the Governor *explicitly* recognized in her office's July 28, 2008 letter announcing her decision to *accelerate*, not *stay* this matter.

MCL § 168.327 guides how the Governor shall proceed in removal actions. Under the statute, once the charges have been exhibited to the Governor in writing and verified by affidavit, the Governor is empowered to act. The Governor must then give the officer charged with misconduct the opportunity to be heard in his or her defense. Conspicuously absent from the statute is any requirement to give deference to any other pending legal matter that the officer is

involved in, including any other criminal, civil, or administrative proceeding.

Moreover, generally, civil proceedings need not wait for the resolution of coincidentally related criminal charges. *See generally, DeVita v. Sills*, 422 F.2d 1172, 1178-80 (3rd Cir. 1970) (Fifth Amendment does not require postponement of civil proceedings whenever related criminal charges are pending). A stay of a civil case is an extraordinary remedy that should be granted only when justice so requires. *See, Pelzer v. City of Pa.*, No. 07-0038, 2007 WL 1377662, at *2 (E.D. Pa. May 7, 2007); *Crawford & Sons, Ltd. v. Besser*, 298 F.Supp.2d 317, 319 (E.D.N.Y. 2004); and *Sec. & Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980) [“In the absence of substantial prejudice to the rights of the parties involved, [] parallel [criminal and civil] proceedings are unobjectionable under our jurisprudence.”]

In *Hart v Ferris State College*, 557 F. Supp. 1379 (D.C. Mich. 1983), the college brought a disciplinary proceeding against the appellee under the misconduct and discipline policy. The appellee argued that if disciplinary proceedings occurred before related criminal charges were resolved, he would be deprived of due process. The Court disagreed, stating:

[I]nstitutions have both a need and a right to formulate their own standards and enforce them; such enforcement is only coincidentally related to criminal charges and the defense against them. To hold otherwise would, in our view, lead logically to the conclusion that civil remedies must, as a matter of law, wait for determination until related criminal charges are disposed of . . . [w]e are unwilling to reach such a result.

Id. at 1384.

Surely, if, under *Hart*, Michigan colleges can hold disciplinary proceedings before coincidental criminal charges are resolved, then the Governor can hold removal proceedings before Mayor Kilpatrick’s coincidental criminal charges are resolved.

The criminal charges pending against Mayor Kilpatrick are based upon his conduct during the *Brown* and *Nelthrope* trial. The charges against Mayor Kilpatrick include perjury, conspiracy

to obstruct justice, obstruction of justice and misconduct in office, among others. As has been noted, *supra*, the Detroit City Council has asked Governor Granholm to remove Mayor Kilpatrick for official misconduct related to the *settlement* of the *Brown, Nelthrope*, and *Harris* lawsuits, and *not* for his actions during the *Brown* and *Neltrope* trial. Thus, as in *Hart*, the Governor's removal proceeding is only *coincidentally related* to the criminal trial. See also *Metzler v. Bennett*, 1998 WL 187454, at *6 (N.D.N.Y. Apr. 15, 1998) [observing that “[i]f there is no overlap (between the criminal and civil proceedings), then there would be no danger of self-incrimination and no need for a stay.”]

Further, the *Hart* case is instructive regarding any difficulties the Mayor may have in providing a robust defense. In *Hart*, the appellee had the right to remain silent before the College's disciplinary board and his silence could not be used against him. Thus, any testimony he proffered would be voluntary. While the Court recognized the difficulty in choosing whether to testify, the choice did *not* place the appellee “between the rock and the whirlpool.” *Hart, supra* at 1385. The Court held that the appellee

...can, if he wishes, stay out of the stream and watch the proceedings from dry land. But, if he does so, he forfeits any opportunity to control the direction of the current. Appellee must decide whether or not to testify at the hearing with the knowledge that, if he does, his statements may be used against him in the criminal case. *Although the choice facing him is difficult, that does not make it unconstitutional.*

Hart, supra at 1385. (Emphasis added).

Mayor Kilpatrick also has the right to remain silent during the Governor's proceedings. Any testimony proffered by Mayor Kilpatrick would be voluntary and the product of how the Mayor chooses to defend himself. Even though the Mayor's choice to testify presents him with difficulties, *they are no reason to delay the Governor's hearings*. This issue of Mayor Kilpatrick's misconduct is ripe for adjudication. The people of the City of Detroit, indeed the State of

Michigan, deserve to have this crisis resolved once and for all, as the law so provides.

III. THE ALLEGATIONS ARE SUFFICIENT TO WARRANT A HEARING ON THE REMOVAL REQUEST AND THE EVIDENCE SUPPORTS REMOVAL.

In seeking the removal of Mayor Kilpatrick from office, the Detroit City Council asserts that the Mayor purposefully authorized, and subsequently ratified, a scheme to deliberately prevent the Detroit City Council from obtaining knowledge of critical confidentiality and secret terms and conditions of the *Brown/Nelthrope/Harris* settlement. He thus undertook an official act -- seeking and procuring Council's consent to a settlement -- in a false, wrongful, and terribly damaging way. The Mayor's intentionally dishonest performance of an official act, which was deliberately designed to prevent the Council from meaningfully exercising its authority to consent to or reject a proposed settlement under Section 6-403 of the City Charter, constitutes "official misconduct."

In addition, he so acted for personal reasons: to prevent disclosure of *his false testimony*; to prevent disclosure of his *personal relationship with his Chief of Staff*; and to prevent disclosure that *public funds* were expended to accomplish the concealment of *private* matters, which is prohibited under Section 2-106 of the Charter. Therefore, the *purpose* behind the Mayor's official misconduct, namely, *private gain*, also itself constitutes "official misconduct." By using public resources to conceal his private indiscretions, Mayor Kilpatrick has committed acts of official misconduct which have all but crippled the ability of the City government to function, and he must be swiftly removed by the Governor to restore a functioning government to the City of Detroit.

The Mayor claims that the deliberate concealment from Council of material terms and conditions of the proposed *Brown/Nelthrope/Harris* settlements does not constitute "official misconduct" within the meaning of MCL § 168.327. This claim is based on the remarkably cynical theory that there can be no "official misconduct" when the Mayor acts dishonestly and to the great detriment of his constituents in his official capacity if Council has "no procedure in

place” to check and verify that the Mayor is conducting himself honestly and in the best interest of the City.

Official misconduct is any “unlawful behavior by a public officer in relation to the duties of his office, willful in its character, including any willful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law” *Krajewski v City of Royal Oak*, 126 Mich App 695, 697 (1983). It is “something which in a material way affects the rights and interests of the public.” *Id.*, citing *State ex rel Hart v Common Council of Duluth*, 55 NW 118 (Minn. 1893).

The *Bajis v City of Dearborn*, 151 Mich App 533, 537-539 (1986), provides guidance as to the kind of conduct that constitutes “official misconduct.” There, a firefighter was discharged for placing obscene telephone calls from the city telephone. He requested a hearing under the Michigan veteran’s preference act, MCL § 35.401, which, in marked similarity to the language of MCL § 168.327, provides that no veteran falling under the act shall be removed or suspended except for “official misconduct, habitual serious or wilful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency.” The Mayor of Dearborn adopted the hearing officer's finding that the telephone calls constituted “official misconduct” and “wilful neglect of duties” as a firefighter.

The firefighter appealed to the Circuit Court, claiming that there was insufficient evidence that the phone calls constituted “official misconduct.” The court agreed. The Michigan Court of Appeals, however, reversed and stated:

This case . . . does not require a review to determine whether the decision [to discharge] is supported by competent, material and substantial evidence. The facts herein are basically undisputed. Given the fact that plaintiff placed the obscene and harassing telephone calls, the question is whether such action constituted “official misconduct” or “wilful neglect in the performance of duty” as is required for termination under the veterans preference act. Because the facts are undisputed, this appeal involves purely a question of law as to the meaning of those terms and application of

the law to the facts. We find that plaintiff's actions constituted both official misconduct and wilful neglect in the performance of his duties. Therefore, the circuit court erred in reinstating plaintiff as a probationary firefighter.

Plaintiff was a sworn officer of the Dearborn Fire Department entrusted with the responsibility of protecting public safety and welfare in times of emergency. He serves as a role model and authority figure to many youths. His conduct is also controlled by rules of the department. The placement of obscene phone calls while on duty and through the unauthorized use of a city telephone is egregious conduct which is in direct contravention of department orders and inconsistent with his responsibilities to the public for their safety and welfare. Plaintiff's actions constitute official misconduct.

Id. at 538-539.

Similarly, Mayor Kilpatrick is the chief executive of the city and, as provided by the City Charter, has control of and is accountable for the executive branch of city government. *See* Detroit City Charter Section 5-101. This includes the Law Department and the requirement under the Charter that “[n]o civil litigation of the city may be settled without the consent of the city council.” *Id.*, at Section 6-401. The Mayor thus is entrusted with the responsibility of conducting himself with honesty, making material disclosures (and certainly not withholding them or instructing members or agents of the Law Department to withhold them), when the City Council is asked to consent to a settlement. The Mayor is the leader of the City.

In its Petition, Council has detailed a deliberate and malicious string of actions by the Mayor that were executed to deceive this body and the citizens of Detroit. Mayor Kilpatrick, as a public official, used his public office to obtain settlement approval from the City Council, which, in truth and unbeknownst to Council, was hush money designed to avoid personal embarrassment and possible criminal liability, all of which was in his personal and private interest and did not benefit the public interest. **[See Doc. #1, ¶¶ 7-25, and Exhibits attached thereto.]** This is egregious conduct which is wholly inconsistent with the Mayor's responsibilities to the public as

the chief executive of the City of Detroit.

His actions as alleged by Council and supported by the evidence clearly constitute “official misconduct” under the law. Although his wrongful conduct emanates from and is part and parcel of the Mayor’s violations of specific provisions of the City Charter, a finding of “official misconduct” is separate and apart from the violation of any specific provision of the City Charter. It has long been held by the Michigan Court of Appeals, the scope of “official misconduct” is “broad enough to include any willful malfeasance, misfeasance, or nonfeasance in office. The term may, indeed in its common acceptation does, imply any act, either of omission or commission, on the part of an officer, by which the legal duties imposed by law have not been properly and faithfully discharged.” *People v Coutu*, 235 Mich.App. 695, 706; 599 N.W.2d 556 (1999). The Governor is thus mandated under MCL § 168.327 to hold a hearing and determine whether Mayor Kilpatrick committed official misconduct as a public officer, independent of, but not restricted to, Council’s finding of specific Charter violations.⁵

Accordingly, Council’s *Petition and Charges* provide a more than sufficient basis on which to move forward with gubernatorial removal proceedings, contrary to the Mayor’s assertion that the charges, if true, do not constitute official misconduct.

CONCLUSION

The circumstances surrounding the *Brown/Nelthrope/Harris* settlement, and all that has

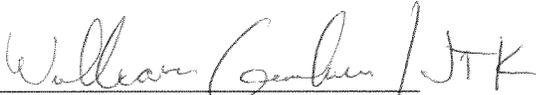
⁵ It is noteworthy that the Mayor in his failed attempt to veto the Council’s resolution, [**Exh. C, Mayor Kilpatrick’s Veto Message of Council’s Resolution to Seek His Removal, May 27, 2008**], relied on the argument that Section 2-107(2) (B) does not authorize the City Council to initiate forfeiture proceedings against him. This is both incorrect and entirely beside the point for this proceeding. As the Mayor conceded in his “Veto Message” [**Exh. C, p.4**], the Governor has independent statutory authority to remove an elective officer for “official misconduct” under MCL 168.327, which has nothing to do with the Council’s independent authority to determine whether said officer has “violate[d] any provision of the Charter punishable by forfeiture.” Section 2-107(2)(B)

flowed from it, have thrown this City into an unprecedented “constitutional crisis.” Failure to address that crisis can only make things far worse. For all the reasons set forth in its Motion, this Brief, the exhibits attached hereto, and the documents already presented, Petitioner Detroit City Council hereby requests that the Governor act pursuant to her Constitutional and statutory power, and that the removal hearing, currently tentatively scheduled for September 3, 2008 go forward on the merits without delay, based on the following findings:

1. That the *Petition and Charges Against Honorable Kwame M. Kilpatrick* is properly before this Honorable Governor;
2. That a stay of proceedings is inappropriate; and
3. That the charges submitted are sufficient to warrant a hearing on the merits of Council’s removal request.

Council further requests whatever other relief deemed appropriate and reasonable under the circumstances. Council further reserves the right to respond to any and all motions and other arguments filed by the Mayor, and will do so within the time frame provided by the Governor’s Order dated July 31, 2008.

Respectfully submitted,


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DATED: August 06, 2008

CERTIFICATE OF SERVICE

DAVID D. WHITAKER certifies that on the 6th day of August, 2008, he hand delivered a copy of the MOTION FOR HEARING ON THE MERITS IN THE MATTER OF THE REQUEST FOR REMOVAL OF KWAME M. KILPATRICK, the BRIEF IN SUPPORT, and this CERTIFICATE OF SERVICE upon counsel of record at the address listed above.

I declare that the statement above is true to the best of my information, knowledge and belief.



David D. Whitaker

JOURNAL OF THE DETROIT CITY COUNCIL – MAY 13, 2008

RESOLUTION TO FILE A CHARGE WITH GOVERNOR JENNIFER M. GRANHOLM SEEKING REMOVAL OF MAYOR KWAME M. KILPATRICK FROM OFFICE

By ALL COUNCIL MEMBERS:

WHEREAS, Act 116 of 1954 of Michigan Compiled Laws, the Michigan Election Law, MCL 168.327 et seq. states the Governor shall remove a city officer chosen by the electors of a city when the Governor is satisfied from sufficient evidence submitted to the governor that the officer has been guilty of official misconduct; and

WHEREAS, Section 327 of the Michigan Election Law also states that the governor shall not take action upon any charges made to the Governor against a city officer until the charges have been exhibited to the governor in writing, verified by the affidavit of the party making them that he or she believes the charges to be true; and

WHEREAS, On January 29, 2008, the Governor declined to remove from office a Kalamazoo County Drain Commissioner, one William French, because Mr. French had *already* been convicted of public extortion and therefore Mr. French could not be removed from office since the office was *already* vacant. The matter, involving Mayor Kwame M. Kilpatrick, is completely different from the French case, in that the Mayor has neither been convicted nor is there likely to be any resolution of his criminal charges for many months; and

WHEREAS, On April 8, 10, and 11, 2008 this Honorable Body held Legislative Hearings regarding settlements in the *Brown, Nelthorpe and Harris vs. City of Detroit, et al* lawsuits; reviewed numerous documents; heard testimony from John E. Johnson, Jr. Corporation Counsel; Valerie Colbert-Osamuede, Senior Assistant Corporation Counsel; Wilson Copeland, Outside Special Counsel for City of Detroit; Samuel McCargo, Outside Special Counsel for the Mayor and Michael Stafani, Attorney for Plaintiffs, as well as from experts on ethics, public policy and litigation matters; and retrieved and reviewed a critical document from Mr. Stafani's hard drive that had previously been deleted; and

WHEREAS, On May 5, 2008, the Detroit City Council's Special Counsel submitted to this Honorable Body a Report of Findings regarding the Legislative Hearings, which outlines numerous acts of official misconduct by the

Section 2-106. Standards of Conduct

The use of public office for private gain is prohibited.

Section 6-403. Civil Litigation

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

Section 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. and

WHEREAS, The Special Counsel's Report makes significant factual findings that this Honorable Body believes constitute sufficient evidence of official misconduct meriting the filing of a charge with the Governor to seek removal of Mayor Kilpatrick from office pursuant to Section 327 of the Michigan Election Law; and

WHEREAS, On March 18, 2008, this Honorable Body passed a resolution seeking the resignation of Mayor Kilpatrick; and

WHEREAS, On May 13, 2008, this Honorable Body passed a resolution censuring and condemning Mayor Kilpatrick; NOW, THEREFORE, BE IT

RESOLVED, That the Detroit City Council hereby directs Special Counsel to prepare the appropriate written charges and affidavit for Council's signature pursuant to the Michigan Election Law. The written charges will detail the Mayor's official misconduct, as set forth above and will also ask the Governor to remove Kwame M. Kilpatrick from the office of Mayor of the City of Detroit, pursuant to MCL 168.327. These written charges will attach the Special Counsel's Report, Transcript of Proceedings on April 8, 10 and 11, 2008, City Council's Resolution of March 18, 2008, seeking the resignation of Mayor Kwame M. Kilpatrick, and City Council's resolutions of May 13, 2008, adopting the Special Counsel's Findings of Fact and censuring and condemning the actions of Mayor Kwame M. Kilpatrick.

Adopted as follows:

Yeas — Council Members S. Cockrel, Jones, Kenyatta, Watson, and President K. Cockrel, Jr. — 5.

Nays — Council Members Collins, Reeves, Tinsley-Talabi, and Conyers — 4.

TRUE COPY CERTIFICATE

Form C of D—16-CE

STATE OF MICHIGAN, }
City of Detroit } ss.

CITY CLERK'S OFFICE, DETROIT

I, Janice M. Winfrey, City Clerk of the City of Detroit, in said State, do hereby certify that the annexed paper is a TRUE COPY OF resolution adopted (passed) by the City Council at session of

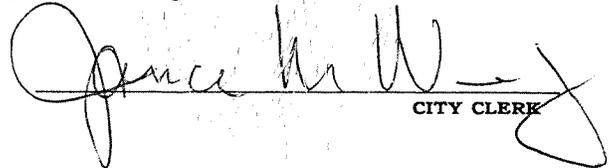
May 13, 19 2008

as appears from the Journal of said City Council in the office of the City Clerk of Detroit, aforesaid; that I have compared the same with the original, and the same is a correct transcript therefrom, and of the whole of such original.

In Witness Whereof, I have hereunto set my hand and affixed the corporate seal of said City, at

Detroit, this 5th

day of August A. D. 19X 2008


CITY CLERK

PROPOSED RULES OF ORDER
FOR THE
DETROIT CITY COUNCIL

FINAL VERSION

**Passed by resolution on February 28, 2007:
effective September 1, 2007.**

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1 **1.0 COMPOSITION OF COUNCIL**

2
3 The Detroit City Council is the city’s legislative body composed of nine (9) Council
4 Members who are elected at-large and serve a four-year term.
5

6
7 **2.0 AUTHORITY**

8
9 Pursuant to the authority set forth in Section 4-106 of the 1997 Detroit City Charter, City
10 Council shall be reorganized from a Committee of the Whole dominant structure into a
11 Standing Committee Structure. Accordingly, these procedural rules of the Detroit City
12 Council are adopted pursuant to the authority set forth in Section 4-105 of the Detroit
13 City Charter in order to assist the Council in the orderly conduct of City business.
14

15
16 **3.0 ASSEMBLIES**

17
18 The Detroit City Council shall perform its duties and conduct its business through Formal
19 Sessions, Committee of the Whole, Standing Committees, and Special Committees.
20 Official actions by City Council are taken at the Formal Session of City Council. All
21 official actions of City Council shall be by motion in the form of an ordinance or
22 resolution.
23

24 **3.1 Committee of the Whole:** Committee of the Whole shall mean the sub-committee of
25 the City Council, which membership consists of all members seated.
26

27 **3.2 Formal Session:** Formal Session shall mean the regular weekly meeting of the City
28 Council. Formal Session shall be the time when the City Council takes formal action on
29 any item on their agenda. The formal actions of City Council shall be recorded in the
30 Journal of the City Council.
31

32 **3.3 Adjourned Session:** Shall mean a Formal Session that is a continuation of the
33 immediately preceding Formal or Special Session
34

35 **3.4 Special Session:** Shall mean a meeting of the City Council held at a time different
36 from that of any regular meeting, and convened only to consider one or more items of
37 business specified in the call of the meeting. The reason for a special session is to deal
38 with important matters that may arise between Formal Sessions or during Council’s
39 recess period and that require urgent action by the Council before the next Formal
40 Session.
41

42 **3.5 Sub-Committees:** Except for the Committee-of-the-Whole, shall mean a committee
43 composed of a portion of the City Council Members serving.
44

45 **3.5.1: Standing Committees:** A sub-committee that meets on a regular basis and
46 is a major vehicle through which the City Council performs its duties.

1 **10.13.9 Consent Agenda:** Includes testimonial resolutions and ordinances that
2 require amendments due to Scribner's error or any non-controversial items
3 received from the Standing Committees.

4
5 **10.13.10 New Business:** Includes procedures for placing items on the agenda that
6 did not make it to the Clerk.

7
8 **10.13.11 Member Reports:** Council Members shall be permitted to make
9 announcements or provide Council Members with information from their offices.
10 Statements shall be limited to two minutes per Council Member.

11
12 **10.13.12 Adoption Without Committee Reference:** The Council may consider
13 items for immediate adoption without reference to committee that are presented to
14 the President by the Mayor at the previous week's Formal Session. The President
15 shall inquire whether any Council Members wish to discuss or object to any of the
16 items presented. If so, then the item shall be referred to the Committee of the
17 Whole.

18
19 **10.13.13 Communications From The Clerk.**

20
21 **10.13.14 Report Of The Approval Of The Proceedings By The Mayor.**

22
23 **10.13.15 Testimonials and Special Privilege:** Council Members shall be
24 permitted to present testimonial resolutions and ask for special privilege.

25
26 **10.14 Parliamentary Procedure:** The most recent edition of Robert's Rules of Order
27 will govern the procedures of the Council in all situations not otherwise provided for by
28 statute, charter, ordinance or the adopted rules of this body.

29
30 **10.14.1 No Second Required:** Seconds to motions, resolutions or ordinances
31 cannot be required and no proposal can be ruled out of order for want of a second,
32 except a motion to suspend the rules which must be seconded.

33
34 **10.14.2 Motion Of Reconsideration:** Any Council Member may move that a
35 vote be reconsidered. The vote on any main motion, whether carried or lost, can
36 be reconsidered at the same meeting except when an action was taken, as a result
37 of the vote, which cannot be undone. If the meeting has already adjourned, the
38 member wishing to reconsider shall adhere to the following procedure: Prior to
39 4:00 PM of the fourth business day after the vote was taken, the member wishing
40 to reconsider shall file a notice of intention with the City Clerk. A motion to
41 reconsider a vote on any question shall not be in order after one Formal Session
42 has intervened between the decision and the motion for reconsideration.

43
44 **10.14.3 Votes Required For Reconsideration:** The same number of votes shall
45 be required to reconsider any action as was required to pass or adopt the same.
46

MEMO

2008 MAY 27 PM 5:01

To: Honorable City Council
From: Robbie Jean Jabtecki, City Clerk's Office
Subject: Resolution to File a Charge with Governor Jennifer M. Granholm seeking removal of Mayor Kwame M. Kilpatrick
Date: May 27, 2008

This is to advise that His Honor, the Mayor has **Vetoed** the resolution to file a charge with Governor Jennifer M. Grahnlm seeking removal of Mayor Kwame M. Kilpatrick from office, adopted at the Regular Session of May 13, 2008.

The Mayor's veto message is being provided for your convenience.





KWAME M. KILPATRICK, MAYOR
 CITY OF DETROIT
 EXECUTIVE OFFICE

COLEMAN A. YOUNG MUNICIPAL CENTER
 2 WOODWARD AVE., SUITE 1126
 DETROIT, MICHIGAN 48226
 PHONE 313-224-3400
 FAX 313-224-4128
 WWW.CI.DETROIT.MI.US

May 27, 2008

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

2008 MAY 27 P 09
 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;

* * * * *

Detroit City Council

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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:

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.

* * * * *

Detroit City 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.

(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

Detroit City Council

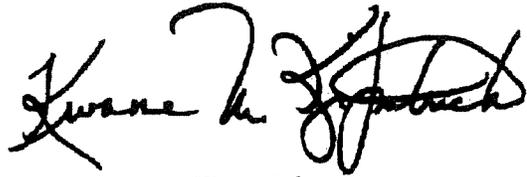
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proposed Council's Removal Resolution under Sections 2-106(1), 6-403, and 8-303 of the 1997 Detroit City Charter do not articulate any official misconduct for purposes of Section 327 of Michigan Election Law, being MCL 168.327.

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