



July 26, 2021

The Honorable Gretchen Whitmer
Governor
State of Michigan
111. S. Capitol Ave., 2nd Floor
Lansing, Michigan 48933

Re: City of Lansing Resolutions 2021-149 and 2021-150
Proposing Implementation of Ranked Choice Voting

Dear Governor Whitmer:

I represent Rank MI Vote Ballot Question Committee ("RMV"). RMV was formed for the purpose of promoting the use of Ranked Choice Voting ("RCV") in Michigan.

On behalf of RMV, I am writing in support of the request by the City of Lansing for your approval, pursuant to Home Rule City Act ("HRCA") § 22, MCL 117.22, of the ballot language in City of Lansing Resolutions 2021-149 and 2021-150. These resolutions propose to present to the voters amendments to the Lansing City Charter implementing Ranked-Choice voting for City of Lansing elections.¹ Resolution 2021-149 proposes to implement what it describes as "ranked-choice/instant run-off" voting for the positions of mayor, city clerk and city council. Resolution 2021-150 proposes to eliminate the primary election for these positions. These proposals are tie-barred.

This letter sets forth my analysis of the Michigan Constitution and existing statutes, including the Home Rule City Act, MCL 117.1 *et. seq.* and the Michigan Election Law, MCL 168.1 *et. seq.*, regarding the authority of Home Rule Cities to implement RCV for elections for city offices.

The 1963 Michigan Constitution and relevant statutes clearly establish that Home Rule Cities may amend their charters to implement RCV for city offices. State law clearly defers to city charters with respect to elections for city offices. Therefore, we request that, pursuant to Home Rule City Act Section 22, MCL 117.22, you approve submission of these ballot questions to the City of Lansing voters at the November 2021 General Election.

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The 1963 Michigan Constitution and The Home Rule City Act

The 1963 Michigan Constitution grants broad authority to the Legislature to regulate the “time, place and manner” of elections. Article 2, §4(2) provides:

§ 4 Place and manner of elections.

Sec. 4. (2) Except as otherwise provided in this constitution or in the constitution or laws of the United States *the legislature shall enact laws to regulate the time, place and manner of all nominations and elections*, to preserve the purity of elections, to preserve the secrecy of the ballot, to guard against abuses of the elective franchise, and to provide for a system of voter registration and absentee voting. No law shall be enacted which permits a candidate in any partisan primary or partisan election to have a ballot designation except when required for identification of candidates for the same office who have the same or similar surnames. (Emphasis added)

The Constitution also grants broad self-governance authority to Home Rule Cities. Article 7, §22 provides:

§ 22 Charters, resolutions, ordinances; enumeration of powers.

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 and village shall have power to adopt resolutions and ordinances relating to its 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.* (Emphasis added)

The Legislature has delegated to Home Rule Cities the power to establish the time, place and means of conducting elections for city offices. Section 117.3 of the HRCA, MCL 117.3(a) provides the following:

117.3 Mandatory charter provisions.

Sec. 3. Each city charter shall provide for all of the following:

(a) The election of a mayor, who shall be the chief executive officer of the city, and of a body vested with legislative power, and for the election or appointment of a clerk, a treasurer, an assessor or board of assessors, a board of review, and other officers considered necessary. The city charter may provide for the selection of the mayor by the legislative body. *Elections may be by a partisan, nonpartisan, or preferential ballot, or by any other legal method of voting...*

.....

(c) The time, manner, and means of holding elections and the registration of electors, subject to section 26² and other applicable requirements of law. (Emphasis added).

The Michigan Election Law recognizes the autonomy of Home Rule Cities with respect to the selection of the appropriate manner to elect city officials. Michigan Election Law Section 321(1), MCL 168.321(1) provides:

168.321 City officers; qualifications, nomination, election, appointment, term, and removal; list of candidates; quorum; election or appointment of successor.

Sec. 321. (1) Except as provided in subsection (3) and sections 322, 327, 641, 642, 644e, 644f, 644g, and 646a [*none of which are relevant to this situation*], **the qualifications, nomination, election, appointment, term of office, and removal from office of a city officer must be in accordance with the charter provisions governing the city.** (Comment and emphasis added)

Additionally, Michigan Election Law Section 323, MCL 168.323, provides:

168.323 Board of city election commissioners; preparation of ballots, canvass of returns, conduct of primary and election; provisions governing.

Sec. 323. It is the duty of the board of city election commissioners to prepare the primary ballots to be used by the electors. The returns shall be canvassed by the board of county canvassers and the results certified to the board of city election commissioners, who shall prepare and furnish ballots for the ensuing election. The printing and distribution of ballots, equipment, and supplies, **the conduct of the primary and election, the canvass and certification of the returns, and all other particulars shall be in accordance, as nearly as may be, with the provisions of this act governing general primaries and elections.** (Emphasis added)

This last sentence in Section 323 recognizes that “[s]tate law defers to local rule in the sphere of city elections.” *Barrow v. City of Detroit Election Commission*, 305 Mich. App. 649, 664; 854 N.W. 2d 489 (2014). Therefore, implementation of RCV does not require strict compliance with Michigan Election Law.

The City of Lansing has the authority pursuant to the Michigan Constitution and the Home Rule City Act to amend its charter to implement RCV for elections to city offices. Michigan Election Law recognizes the supremacy of the city charter over its provisions. If the voters of the City of Lansing choose to adopt Resolutions 2021-149 and 2021-150, any provisions of Michigan Election Law that would inhibit the ability of the City to implement RCV are unenforceable.

Bureau of Elections Objections to the Implementation of RCV

The Michigan Department of State, Bureau of Elections, has maintained that RCV cannot be implemented under current Michigan law. This was expressed recently in an affidavit filed by the Director of Elections, Jonathan Brater.³ We are also aware of a more recent letter from

Mr. Brater to Assistant Lansing City Attorney Lisa Hagan dated July 22, 2021. A copy of this letter is attached.

There is no question that with respect to elections for all other public offices except for city offices, RCV cannot be implemented. However, Mr. Brater's conclusion with respect to Home Rule Cities, is erroneous. It appears to be based on the premise that the Michigan Election Law supercedes all other statutes and relevant provisions of the Michigan Constitution.

Michigan Election Law specifies that candidates for all offices except for city offices are elected based on plurality voting; i.e., the candidate receiving the most votes is declared to be duly elected. For example, MCL 168.51 regarding the election of the Governor and Lieutenant Governor, states:

168.61 Governor and lieutenant governor; certificate of determination by board of state canvassers.

Sec. 61. The board of state canvassers shall determine which candidates for governor and lieutenant governor have received the greatest number of votes and shall declare such candidates to be duly elected. The said board shall forthwith make and subscribe on its statement of return a certificate of such determination and deliver the same to the secretary of state. (Emphasis added)

Similarly, for county offices, MCL 168.201 provides:

168.201 County officers; certificate of determination by board of county canvassers.

Sec. 201. The board of county canvassers shall determine which candidates for the offices named in section 191 of this act received the greatest number of votes and shall declare such candidates to be duly elected. The said board shall forthwith make and subscribe on its statement of returns a certificate of such determination and deliver same to the county clerk within 14 days following the date of the election. (Emphasis added)

Similar provisions exist for every other election except for the election of city officials. See Michigan Election Law Chapters 4 – 14, and 16-24A.

As noted above, Chapter 15 regarding City elections does not state that the candidate receiving the greatest number of votes is “declared” to be “duly elected.” Instead, Section 321(1), MCL 168.321(1), provides that:

...the qualifications, nomination, election, appointment, term of office, and removal from office of a city officer must be in accordance with the charter provisions governing the city.

And Section 323, MCL 168.323 provides:

...the conduct of the primary and election, the canvass and certification of the returns, and all other particulars shall be in accordance, as nearly as may be, with the provisions of this act governing general primaries and elections. (Emphasis added)

In other words, the City Charter is the primary determinant of the manner of electing city officials, not the Michigan Election Law.

Moreover, RCV has been successfully implemented in Michigan in the City of Eastpointe. While this occurred in the context of a federal consent decree settling a Voting Rights Act lawsuit in the case *U.S. v. City of Eastpointe, et.al.* U.S. District Court, Eastern District of Michigan, Civil Action No. 4:17-CV-10970 (2019), the Eastpointe experience illustrates the feasibility of implementing RCV for elections for city offices.

The Consent Decree in *Eastpointe* addressed three specific concerns apparently raised by the Elections Bureau regarding conflicts between the implementation of RCV and Michigan Election Law. These sections of the Michigan Election Law are:

- MCL 168.691: Prohibition of listing a candidate's name in more than one column on the ballot for the same office:

168.691 Official ballots; names of candidates; identification numeral; compliance.

Sec. 691. (1) Each board of election commissioners shall have printed on the ballot, or on ballot labels or slips to be placed on a voting machine, when used, the names of the candidates certified to that board under this act. *A candidate's name shall not be placed or printed in more than 1 column on the ballot for the same office.* A board of election commissioners for a county or city may arrange the ballots with an identification numeral placed in the same space with the name of each of the candidates. That identification numeral shall be rotated with the name of the candidate, and when rotated, shall appear in the same space with the same candidate regardless of where the candidate's name appears on the ballot.⁴

The Consent Decree stated that “Defendants may use a ranked choice ballot that lists a candidate’s name in more than one column on the ballot for the same office.

- MCL 168.736b-736f: Restrictions on instructions on ballot security sleeves:

168.736b Secrecy sleeve; primary election; instructions.

Sec. 736b. Each ballot secrecy sleeve used at a primary election must either contain the following ballot *marking instructions printed on the front of the ballot secrecy sleeve or must have a clear plastic pocket on the front of the ballot secrecy sleeve that contains a printed copy of the following ballot marking instructions....* [remainder of section spells out the specific ballot language required; it does not include or allow for instructions on RCV]

Similar language is contained in sections 736c [general elections], 736d [nonpartisan elections], 736e [special elections], and 764 [absent ballot instructions].

168.736f Ballot marking instructions; limitation.

Sec. 736f. The ballot marking instructions as provided in sections 736b, 736c [general election], 736d [non-partisan], 736e [special elections], and 764 [absent ballot instructions], are the only written ballot marking instructions that shall be provided to an elector.⁵

The Consent Decree stated that “Notwithstanding Section 736f of the Michigan Election law, Mich. Comp. Laws §168.736f, Defendants may provide ballot marking instructions compatible with ranked choice voting to electors.”

- MCL 168.795(1)(c): Voting for multiple candidates for the same office:

168.795 Electronic voting system; requirements; method for rendering electronic tabulating equipment inoperable; equipping each polling place with accessible voting device.

Sec. 795. (1) An electronic voting system acquired or used under sections 794 to 799a shall meet all of the following requirements:

.....

(c) Permit each elector to vote at an election for all persons and offices for whom and for which the elector is lawfully entitled to vote; to vote for as many persons for an office as the elector is entitled to vote for; and to vote for or against any question upon which the elector is entitled to vote. Except as otherwise provided in this subdivision, the electronic tabulating equipment must reject all choices recorded on the elector's ballot for an office or a question if the number of choices exceeds the number that the elector is entitled to vote for on that office or question. Electronic tabulating equipment that can detect that the choices recorded on an elector's ballot for an office or a question exceeds the number that the elector is entitled to vote for on that office or question must be located at each polling place and programmed to reject a ballot containing that type of an error. If a choice on a ballot is rejected as provided in this subdivision, an elector must be given the opportunity to have that ballot considered a spoiled ballot and to vote another ballot. (emphasis added)

The Consent Decree stated: “Notwithstanding Section 795(1)(c) of the Michigan Election Law, Mich. Comp. Laws §168.795(1)(c), in tabulating a voter’s ballot for an office elected using ranked choice voting, the voter’s first preference will be counted by Defendants even if the voter has overvoted on subsequent preferences. Similarly, a voter’s second or third preference may be counted by Defendants...even if the voter has overvoted on subsequent preferences.”

Mr. Brater’s July 22, 2021 letter raises other issues expressing other additional concerns. If the voters of the City of Lansing adopt Resolutions 2021-149 and 2021-150, it may be necessary for the City to enter into a Memorandum of Understanding (“MOU”) or similar

agreement with the State to assure the accuracy and integrity of elections implementing RCV. But the Eastpointe experience shows it is feasible to do so. The provision of the Michigan Constitution, the Home Rule City Act and Michigan Election Law, cited in this letter, mandate that the Elections Bureau allow for implementation of RCV for Home Rule Cities.

Furthermore, none of the issues raised in the Eastpointe Consent Decree, or Mr. Brater's letter, invalidate the substantive right of Home Rule Cities to implement by RCV. Pursuant to MCL 168.323, these provisions cannot be strictly enforced to prevent the City of Lansing voters from adopting RCV, should they choose to do so.

Judicial Decisions Addressing RCV

There is little judicial analysis of the validity of the implementation of RCV in Michigan. The only relevant judicial opinion I found that has been issued since the adoption of the 1963 Constitution is a circuit court opinion in the case *Stephenson v. City of Ann Arbor* (Washtenaw County Circuit Court Case No. 10166-AW, 1975). A copy of this case is attached. This case addressed a challenge to a form of RCV (which it called Majority Preferential Voting) in the Ann Arbor City Charter at that time, that is substantially the same as what is being proposed in Lansing Resolution 2021-149.

The plaintiff challenged the use of RCV in Ann Arbor City Mayor's race, alleging it violated the Equal Protection clause of the 14th Amendment of the U. S. Constitution, and Article 1, Section 2 of the Michigan Constitution of 1963. The Court upheld the use of RCV, though it did not specifically address whether the use of RCV conflicted with the Michigan Election Law.

The *Stephenson* decision cited two older cases that addressed the constitutionality of RCV in the context of the 1850 and 1909 Michigan Constitution, *Maynard v. Board of District Canvassers*, 84 Mich 228; 47 NW 756 (1890) and *Wattles v. Upjohn*, 211 Mich 514, 173 NW 335 (1920). However, as the Circuit Judge noted in *Stephenson*, those cases address voting systems that were significantly different from the RCV, or "preferential," voting methods implemented by Ann Arbor; and, thus, are distinguishable from what is now being proposed for the City of Lansing. Also, those cases predate the addition of the language in Art. 7, §22 in the 1963 Constitution, and thus are of questionable validity in addressing this issue.

Conclusion

The implementation of RCV is clearly and explicitly authorized by the 1963 Michigan Constitution Article 2, §4(2) and Article 7, §22, and §117.3 of the HRCA. Section 321 and 323 of Michigan Election Law clearly provides that any provisions in the Michigan Election Law contrary to this conclusion cannot be strictly enforced.

State law clearly defers to local charters with respect to elections for city offices. Therefore, we request that, pursuant to Home Rule City Act Section 22, MCL 117.22, you approve submission of these ballot questions to the City of Lansing voters at the November 2021 General Election.

Respectfully,

LANCASTER ASSOCIATES, PLLC



James R. Lancaster

Cc: The Lansing City Council
Hon. Andy Schor
Hon. Barb Byrum
Mark Totten
Jonathan Brater
Ron Zimmerman
Jim DeLine

¹ A copy of Lansing City Clerk Chris Swope's letter to you dated July 12, 2021, and the two resolutions are attached as Exhibit A.

² Home Rule City Act Section 26 provides:

117.26 Elections; general provisions; applicability of MCL 168.641.

Sec. 26. (1) All elections held under this act shall be paid for by the locality where held. Except as otherwise provided by law or ordinance, the legislative body of the city shall determine the publication and notice of the election.

(2) Notwithstanding another provision of this act or a charter provision, an election under this act is subject to section 641 of the Michigan election law, 1954 PA 116, MCL 168.641[relating to the dates for elections] .

³ *Bailey v Antrim County and Benson*, 13th Judicial Circuit Court (Antrim County) File No. 20-9238-CZ (Judge Kevin Elsenheimer). This lawsuit received national attention as it was filed by parties supporting former President Trump, claiming that the Presidential Election results in this county were invalid due to improprieties in the Dominion vote tabulation equipment. It was determined that the mistakes that occurred in initial vote tabulations were result of a programing error by the County Clerk. The case was recently dismissed. However, in this lawsuit Director Brater filed an affidavit which stated, in relevant part:

“Ranked Choice Voting is not authorized by the Michigan Election Law for use in federal or state-level elections.”

In a footnote to this sentence, the Affidavit states:

“Due to a consent decree it entered with the Department of Justice in 2019, the City of Eastpointe in Macomb County is the only jurisdiction in Michigan that uses ranked choice voting to elect city officers. *United States v City of Eastpointe*, Case No. 4:17-cv-10079, E.D. Mich. Notably, the voting system used in Macomb County is not Dominion, but Election Systems and Software (ES&S).”