

October 16, 2013

Re: Public Legal Opinion Regarding the Validity of a Vote Taken by City Council

Mayor and Council:

The Council by resolution has requested that I provide a public legal opinion on whether the confirmation of Al McWilliams to the DDA on September 16, 2013 is valid. As a legal matter, the confirmation vote is valid, as the confirmation motion received six votes in favor of the motion to confirm Mr. McWilliams, which was placed before the Council by the Mayor, moved and seconded. The vote was six to confirm and five against confirmation. The Clerk declared the motion carried. The Mayor, as Chair, made no contrary declaration.

The entire Council, as a matter of procedure and law, implicitly agreed, at the time of the vote and immediately after the vote, that the motion to confirm on September 16, 2013, was the subsequent confirmation of a previously noticed nomination that required only six votes, and carried with six votes.

No Councilmember raised a point of order either before or after the vote objecting to the timing of the motion, objecting to the declared outcome of the vote, or claiming that eight votes were required to confirm. Had such an objection been timely raised, the Mayor, as presiding officer, would have decided whether six votes or eight votes were required under the applicable Council rule. Had he ruled that six votes were required, then that would have been the vote requirement as a matter of procedure and law. Absent an appeal, the Mayor's ruling would have been binding. Had an appeal been taken of the Mayor's ruling, then a six vote majority of the Council would have made the determination. Had a six vote majority of Council determined that six votes were required, then that would have been the vote requirement as a matter of procedure and law. That determination would have been binding and final.

What this means is that the Council either implicitly agreed that six votes were required for the confirmation or waived any (unraised) objections to the six vote requirement. In either scenario, six votes were enough for the confirmation motion to pass.

Interpretation of the Council Rules can only be done by the procedure outlined above. That is a parliamentary issue, not a legal issue. However, the validity of a completed vote is a legal issue, and because the confirmation motion received six votes it is legally valid. It cannot be challenged as invalid after the fact by any Councilmember.

A more complete factual background and analysis is set forth below.

## **Background**

The Charter of the City of Ann Arbor provides that the Mayor shall be the presiding officer of the Council and shall have the obligation to appoint persons to boards and commissions as provided in the Charter or by Council. Charter of Ann Arbor, Section 4.2. The appointment process for the board of the Downtown Development Authority is set forth in City Code Section 1:155: "The members shall be appointed by the mayor subject to approval by the council."

Council Rule 6 states that nominations or appointments to boards, which require the confirmation or approval of Council, "shall not be confirmed or approved before the next regular meeting of the Council except with the consent of eight of the members of the Council." Council Rules are part of the "rules of order" that the Council has agreed to and adopted to govern internal Council procedures. In addition to the Council Rules, Council Rule 19 states that the rules of parliamentary practice, comprised in Robert's Rules of Order, shall govern the Council.

A motion for the confirmation of Mr. McWilliams was brought by the Mayor at the September 16, 2013 regular meeting of Council:

Mayor: I would like to request confirmation of the following nomination which was placed on the table for your consideration two meetings ago and then it was withdrawn so that we could do some exploration of some issues that were brought up and that is the nomination of Al McWilliams to the Downtown Development Authority, moved by Councilmember Teall, seconded by Councilmember Taylor.

The nomination of Mr. McWilliams was brought forth initially at the August 19, 2013 regular meeting of Council. The Mayor then requested confirmation of Mr. McWilliams at the September 3, 2013 regular meeting of Council:

Mayor: I do have communications. I would like to request confirmation of the following appointments which were placed on the floor for your consideration at the August 19, 2013 regular session. ... Filling a vacancy at the Downtown Development Authority, Al McWilliams, replacing Newcombe Clark. ... Moved by Councilmember Taylor, seconded by Councilmember Briere.

At that meeting the Council did not vote on the confirmation motion:

Mayor: I would, if it is friendly, I would ask the mover and seconder to allow me to withdraw this nomination tonight to allow me to explore some of these issues and come back with answers. But, is that friendly? So I will withdraw it tonight.

A motion to confirm Mr. McWilliams' appointment was brought back by the Mayor to the Council on September 16, 2013, and the Council voted on the confirmation motion before it.<sup>1</sup> When this motion was brought forward, the Mayor did not announce that this motion was a "one step" eight vote item (it has been his practice to do so when he believes that is required under the Council Rules).

No Councilmember raised a point of order prior to, or after, the confirmation vote requesting clarification that this was a "one step" motion. Finally, no Councilmember raised a point of order objecting to the result after the vote was taken and the Clerk announced that the motion carried. There also was no contrary declaration by the Mayor.

### **Analysis**

The Council, as a body, voted on the motion to confirm Mr. McWilliams on September 16, 2013 – a motion that the Mayor presented as, and the Council treated as, the confirmation of a nomination that had been previously placed before them and therefore required six votes. Council, as a body, did not act in a manner that was consistent with a "one step" confirmation motion that needed eight votes.

By adopting the Council Rules, Council has agreed to the process by which objections are raised, including, under Council Rule 19, the parliamentary rules of order set forth in Robert's Rules of Order. Under Robert's Rules of Order, 11<sup>th</sup> edition (RRO), when a Councilmember believes that there is a violation of the rules of the Council, a Councilmember can raise a question of procedure (called a "point of order"). RRO Section 23, p. 247. A point of order "must be raised promptly at the time the breach occurs." RRO Section 23, p. 250. Ordinarily the time to raise a point of order is when the chair states the motion: "After debate on such a motion has begun—no matter how clearly out of order the motion may be—a point of order is too late." RRO Section 23, p. 250. Points of order regarding the conduct of a vote may also be raised "immediately following the announcement of the voting result." RRO Section 23, pp. 250-51.

The Mayor, as Chair, then makes a ruling on any points of order raised. (The chair can, in his discretion, refer the issue to the whole body if he is in doubt.) Such a ruling may be appealed, but the appeal must also be timely: "[T]he appeal must be made at the time of the ruling. If any debate or business has intervened, it is too late to appeal." RRO Section 24, p. 257.

Of key importance here is that, even after the vote on confirmation was taken and the result announced, no Councilmember raised a point of order claiming that this needed to be a "one step" confirmation requiring eight votes. If any Councilmember actually

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<sup>1</sup> Earlier in the meeting, at Communications from Council, the Mayor commented: "I would note one thing that I didn't see on the agenda - that the nomination of Al McWilliams to the DDA was postponed and I will be bringing that forward when it comes time for the Mayor's Communications."

believed at the time that eight votes were required, a point of order to object should have been raised at that time, as required by the Council's adopted parliamentary rules.

The Mayor's actions on September 3, 2013 do not have any legal bearing on the validity of the confirmation vote. The confirmation motion was before the Council on September 3, 2013 and not acted upon. Council Rule 6 does not specifically address the effect of a "withdrawal" of either a confirmation or nomination. However, no point of order was raised at the September 3, 2013 meeting to clarify the status of the motion.

The Mayor brought to Council on September 16, 2013 a motion to confirm Mr. McWilliams. The entire Council behaved, by its vote and lack of any objection, as though the motion was the second step of the confirmation process requiring only six votes. Had a point of order been raised, the Mayor would have made a ruling on the interpretation of the Council Rule under these circumstances.

Moreover, even if the nomination and confirmation of Mr. McWilliams had come to the Council in the following manner, the confirmation vote would still be valid: 1) the nomination and confirmation had come to the Council for the very first time on September 16, 2013 (which is obviously not the case here), 2) the Council voted with six votes in favor of confirmation, 3) the motion was declared carried, 4) no contrary declaration by the Mayor was made, and 5) no objection that eight votes were required was timely raised by the required procedure. Any subsequent objection would be deemed untimely and waived, as the Council has agreed that such objections are untimely. In other words, the inaction by the Council to raise a timely point of order about a Council Rule would act as consent to the process taken.

Robert's Rules of Order recognizes only five exceptions to the general rule that a point of order must be made at the time of the breach or is waived. Such exceptions only arise in connection with breaches that are of a continuing nature, in which case a point of order can be made at any time during the continuance of the breach. The application of these exceptions is not primarily a legal issue, but a parliamentary issue dealing with rules of order that, if raised, would be decided by the Mayor as Chair. To the extent that these exceptions may raise legal issues, none of the exceptions applies to this case. In the context of these exceptions, it is important to note that Council Rule 6 is a "rule of order" that Council has adopted only for the internal procedure of the Council—it is not a procedural rule of law or other legal requirement, it is not a fundamental principle of parliamentary law, and it is not the type of rule that cannot be suspended (the Council Rules make clear that all Council Rules can be suspended). RRO Section 23, p. 251; Council Rule 20.

## **Conclusion**

The motion for confirmation of Mr. McWilliams was approved by six members of the Council. The motion for confirmation was declared carried by the Clerk and the Mayor did not make any contrary declaration. It is legally valid.

At the time of the decision, no Councilmember raised a point of order claiming that eight votes were needed. Had this been done, it would have been up to the Mayor to decide whether six or eight votes were needed based on the circumstances. Had the Mayor then ruled that six votes were required (which is likely given that he brought the motion as the subsequent confirmation of a person initially nominated two meetings prior), that ruling would have been binding unless altered by six votes of the Council on appeal. The facts of this matter do not fall into any of the exceptions to the general requirement that such a point of order must be brought at the time of the motion. Therefore, an after-the-fact objection is not timely.

For those who may assert now that eight votes were required for the confirmation of Mr. McWilliams on September 16, 2013, it is important to understand that at the time of the vote, the Council, as a body, proceeded as though they were confirming a nomination previously put before them. There is nothing legally invalid or void about the Council proceeding in this manner.

Finally, it is important for the integrity of Council process that duly passed motions of Council are deemed valid and that interpretations of the Council Rules are made by the Mayor, or presiding officer, when those issues are timely raised.

A copy of this opinion has been filed with the City Clerk.

Respectfully submitted,

Stephen K. Postema  
Ann Arbor City Attorney