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Via Email
Detroit Charter Review Commission
c/o Lamont Satchel, General Counsel
7737 Kercheval Street,
Detroit Michigan 48214

RE: Comments on Draft Revised Charter

Dear Mr. Satchel:

You have requested comments on the December 21, 2020 version of the Draft Revised Charter (DRC) prepared by the 2018 Charter Revision Commission (CRC). There are a number of specific, proposed charter provisions that appear to violate state or federal law, federal court orders, or binding contracts. In this response, the specific concerns are broken down by proposed section number and the legal problem we see.

There is also a fundamental flaw in the overall structure of the DRC. The Home Rule Cities Act provides three, different legally recognizable forms of government for any city charter in Michigan. The draft of this charter fails to adopt any one of the three, illegally mixing and matching elements of the three options. This analysis begins with the general, and then addresses the specific issues.

A. Home rule cities must choose a legally recognizable form of government.

Under the Home Rule Cities Act, charters must provide for certain city officers and bodies. This includes the election of "a body vested with legislative power." It also includes the separate "election of a mayor," or, at a minimum, the selection of a mayor "by the legislative body." In either case, the mayor is "the chief executive officer of the city."[1]

The requirements permit a charter commission to select from one of three legally recognizable forms of city government, explained clearly in the Michigan Municipal League's Charter Revision Handbook:

1) **Council/Manager Option.** Administrative authority is vested in a city manager. The legislative body appoints a professional manager to conduct the day-to-day

[1] MCL 117.3(a).

administration of government.[2] Many cities, like Clawson, Hamtramck, and Novi, use this type of structure.

2) **City Commission Option.** Administrative and legislative authority is combined in a single branch of government. The mayor is elected as a member of the legislative branch and is chosen from the members of an elected legislative body. The city administrators report directly to a unified branch of government that exercises both legislative and administrative functions. The City Commission form of government is most often used by Michigan's smaller cities.[3]

3) **Separate Executive and Legislative Branches: A strong mayor form of government.** Administrative and legislative authority are fully separated between the mayor and City Council. The mayor is elected directly by the voters and is responsible for the administration of the executive branch, including the delivery of city services.[4] The City Council's duties include traditional legislative responsibilities such as passing ordinances and resolutions, adopting the city budgets, approving contracts, and providing traditional legislative oversight.[5]

B. The Draft Revised Charter fails to choose a legally recognizable form of government.

Under the Home Rule Cities Act, the Charter Commission could propose a Council/Manager form of government or a City Commission form of government. Under either option, the Charter Commission could propose merging executive and legislative powers under the City Council.

However, the DRC does not include provisions for a Council/Manager or a City Commission form. Moreover, when a charter commission chooses a form that separates the executive and legislative branches, those powers must be kept separate. The executive powers and duties must be exercised by the mayor, and the legislative powers and duties must be exercised by City Council. Under a charter with a separation of powers, for example, the charter cannot provide that the mayor can adopt ordinances or approve zoning changes. It is not legally permissible to vest legislative authority to the mayor, because of the need for a separation of powers. Likewise, it is not legal to vest executive authority in the legislative branch under the strong mayor form of government in which the powers of those branches are separate.

With some significant exceptions discussed below, the DRC generally respects the statutory separation of powers inherent in a strong mayor form of government under the Home Rules Cities Act.[6] The proposed revised charter states, the mayor, "has control of and is

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[2] Michigan Municipal League, Charter Revision Handbook, Structure of Local Government 12–13 (accessed on Feb. 9, 2021), https://www.mml.org/resources/publications/ebooks/charter_revision.htm.
[3] *Id.* at 14–15.
[4] Draft Charter §§ 5-101–102.
[5] *Id.* at §§ 4-115, 8-208, 4-122, 4-113.
[6] *Warda v. City Council of City of Flushing*, 472 Mich 326, 334 (2005) ("We have recognized that the doctrine of the separation of powers applies to municipalities when exercising the powers delegated to them by the Legislature..."); *Dearborn Twp. v. Dail*, 334 Mich 673, 690–92 (1952) (applying separation of powers principles to a local unit of

accountable for the executive branch of City government... directly accountable to the citizens..." It also provides that the executive branch is responsible for the "executive and administrative authority for the implementation of programs, services and activities of city government..."[7] The City Council, relatedly, is prohibited from interfering with the administration of the executive branch, save for "the purposes of inquiries and investigations."[8] All of this hews to the separation of powers inherent in a strong mayor form of government as required by Michigan law.

1. The separation of powers doctrine requires that the mayor must retain administrative and executive power and the City Council must retain legislative powers.

It is no accident that cities with the strong mayor form of government vest their chief executive officer (their mayor) with broad powers over administrative and executive activities. The same set of principles regarding government structure and organization that form the bedrock of the separation of powers doctrine at the federal and state levels also applies at the local level.[9] Still, the requirement that the executive and legislative powers be kept distinct from one another is not absolute. Some overlap is undoubtedly permitted, with the legislative branch, for example, allowed to exercise certain administrative powers, such as managing its support operations.[10] As with all separation of powers issues, the question is whether each branch of government has the necessary authority to carry out the responsibilities for which they were elected.[11]

Where a charter's allocation of power does not unduly hinder the mayor's role as CEO, it may be permissible.[12] However, at a minimum, the mayor must retain the power to appoint, oversee, and remove the administrative heads of executive departments.[13] Although the legislative body is free to pass ordinances that set departmental policy, rules, and procedures,[14] and to act as

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government where division of powers was mandated by statute); see *Moore v. City of Detroit,* 146 Mich App 448, 459–64 (1985), vacated in part, 424 Mich 905 (1986) (recognizing that a city charter can create distinct branches of government controlled by separation of powers principles). This statutory separation of powers should not be confused with the Michigan Constitution's separation of powers clause, which only applies to the state government. *Rental Prop. Owners Ass'n of Kent Cty. v. City of Grand Rapids,* 455 Mich 246, 266–67 (1997).

[7] Draft Charter § 5-101.

[8] *Id.* at § 4-113.

[9] *Detroit City Council v. Mayor of Detroit,* 449 Mich 670, 680–84 (1995) (applying general separation of powers principles in case involving charter); *Castle Inv. Co. v. City of Detroit,* No. 224411, 2005 WL 599748, at *2 (Mich Ct App Mar 15, 2005) (city council approval requirement over administrative rules violated separation of powers inherent in design of city charter).

[10] *Judges for Third Judicial Circuit v. Wayne Cty.*, 383 Mich. 10, 21 (1969), superseded on other grounds, 386 Mich 1 (1971).

[11] *Judicial Attorneys Ass'n v. State,* 459 Mich 291, 296 (1998) ("The power of each branch of government within its separate sphere necessarily includes managerial administrative authority to carry out its operations.")

[12] See *Soap & Detergent Ass'n v. Nat. Res. Comm'n,* 415 Mich 728, 752-53 (1982); *Mistretta v. United States,* 488 US 361, 382 (1989).

[13] *Detroit Fire Fighters,* 449 Mich at 669 (1995) (Mallet, J., concurring); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 US 477, 492, (2010) ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

[14] See *Blank v. Dep't of Corr.*, 462 Mich 103, 114–15 (2000), citing *I.N.S. v. Chadha,* 462 US 919 (1983); Castle, *supra*, 2005 WL 599748, at *2.

a check on the mayor's power to appoint and remove departmental heads, its authority cannot be enlarged at the expense of the mayor's ability to discharge essential executive functions.[15]

2. The Draft Revised Charter unlawfully violates the separation of powers.

In several places, the DRC strips powers from the mayor which are necessary to his/her function as CEO. These include:

Sections 7-802 thru 7-803, and 7-805 thru 7-806. These sections involve the Detroit Police Department (DPD). Whereas the mayor currently appoints (subject to City Council approval) the Chief of Police from a list of candidates provided by the Board of Police Commissioners, the DRC requires the Chief's appointment to be completed by majority vote, split among mayor, Council President, and the Board's nine members.[16] Members of the City Council would be acting in an executive capacity in participating in the appointment of the Police Chief. That would be appropriate in a City Commission form of government, but violates the separation of powers doctrine under the structure proposed by the DRC.

Sections 7-1201 thru 7-1202 contain similar provisions. The administrative leadership of the Detroit Water and Sewerage Department (DWSD) is also responsible for executive functions. Yet, the DRC provides that the DWSD board members are appointed by the Detroit City Council. This reflects the hodgepodge approach of improperly mixing qualities of a City Commission form of government with the strong mayor form of government. Administrative responsibility for the DWSD must remain in the executive branch unless the structure of the charter is changed to a City Commission or Council/Manager form of government.

There are numerous other instances where the DRC reads more like an indirect attempt to adopt a City Commission form of government, where responsibility for administration is decentralized, and there is only one branch of government. Consider the DRC's expansive list of quasi-independent commissions advising on the administration of executive departments. Examples includes a Health Advisory Commission,[17] a Detroit Fire Department Board of Commissioners,[18] an Immigration and Refugee Commission,[19] a Recreation Advisory Commission,[20] an Advisory Transportation Commission,[21] a Disability Justice Commission,[22] and an Environmental Protection Commission,[23] to name just a few.

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[15] See *Local 321, State, Cty. & Mun. Workers of Am., C.I.O. v. City of Dearborn,* 311 Mich 674, 677 (1945); cf *Koeper v. St. Ry. Comm'n of City of Detroit*, 222 Mich 464 (1923) (state statute that vested circuit court with removal power over executive department officers and employees of a city unconstitutional, as removal power could not be given to the judicial branch).

[16] Draft Charter § 7-805.

[17] *Id.* at § 7-202.

[18] *Id.* at § 7-502

[19] *Id.* at § 7-705.

[20] *Id.* at § 7-1002.

[21] *Id.* at § 7-1102.

[22] *Id.* at § 7-1505.

[23] *Id.* at § 7-1606.

To the extent these agencies are purely advisory, they are appropriate to be appointed by the legislative branch. However, the DRC illegally assigns numerous executive functions to legislatively appointed (or partially legislatively appointed) commissions:

§ 4.401 Public Broadband and Technology Commission to create an "action plan" for the city's broadband strategy, a clear violation of separation of powers;

§ 7.202 Health Advisory Commission directed to give assistance to the Health Department in policy and practices;

§ 7.1102 Advisory Transportation Commission directed to assist the Director of Transportation on implementation of the master plan, a purely administrative function;

§ 7.1501 Disability Justice Commission to preselect a list of appointees for the mayor to choose from to run the department of disability affairs, engage in investigation and discipline;

§ 7.1606 Environment Protection Commission with responsibility for plan reviews and provision for City Council investigations which are required to be supported by administrative staff.

Per the Home Rule Cities Act, the executive and legislative powers must be kept separate in a strong mayor form of government, where voters can hold each branch accountable for their respective roles and responsibilities. Voters may want to change to a City Commission form of government, but the CRC cannot impose that change on the City of Detroit without a more explicit authorization. The question of whether to change the form of Detroit's government would have to be posed to the voters directly under the Home Rule Cities Act.[24] Accordingly, the DRC must be dramatically revised to correct the legally impermissible provisions identified above.

ARTICLE 3. ELECTIONS

Sec. 3-107. Elective Officers of the City.

Converting Corporation Counsel to an elective office would place the lawyer in that role in an ethically conflicted position. Both the 2012 Charter and the DRC envision Corporation Counsel as representing "the City of Detroit as a body corporate," and both documents state that the agents and representatives of the City capable of "receiving and directing legal services... shall be the Mayor, City Council and City Clerk." An elected Corporation Counsel would be indebted to the voters who elected him/her, and as such, would find it difficult to serve the City broadly, while taking direction from the "Mayor, City Council and City Clerk."

In Michigan, lawyers are subject to the Model Rules of Professional Conduct (MRPC). With limited exceptions, the MPRC prohibit lawyers from entering "into a business transaction

[24] See MCL 117.18 (permitting advisory vote on change in form of government).

with a client or knowingly acquir[ing] an ownership, possessory, security or other pecuniary interest adverse to a client."[25]

Candidates for election as Corporation Counsel would be inclined to give certain opinions on questions of law and policy during their campaigns, and campaign promises would limit their ability to fulfill their duties as envisioned by the Charter. For example, candidates might feel pressure to declare that the City Charter guarantees all residents a right to free water or free health care, notwithstanding the fact that the City's provision of services is a matter of policy that should be entrusted to elected officials. Views expressed on the campaign trail would garner votes, but they would limit the lawyer's ability to render legal services to and accept direction about legal services from the Mayor, City Council and City Clerk. The office of Corporation Counsel must be able to judge questions of law without being constrained by promises that would bias judgment or create unavoidable, lingering conflicts of interest.

Section 3-114. Local Election Procedure.

Subsection (3) of this proposed section stands in contravention of Section 31(1)(h) of Michigan Election Law, Act 116, Michigan Public Acts of 1954, as amended (the "Election Law")[26], which provides that the Michigan Secretary of State is responsible to "investigate, or cause to be investigated by local authorities, the administration of election laws, and report violations of the election laws and regulations to the attorney general or prosecuting attorney, or both, for prosecution." Further, Subsection (3) of this proposed section authorizes the Election Commission to issue a $50.00 civil fine for violation of this section in contravention of Section 31(1)(h) of the Election Law. Therefore, Subsection (3) of this section improperly delegates enforcement of this section to the Detroit Inspector General and the City Election Commission.

ARTICLE 4. THE LEGISLATIVE BRANCH

Section 4-123. Public Authority Creation; Annual Review; Conflict with Charter.

Section 4-123 of the Draft Charter requires a referendum approving the City's establishment of or participation in "a public authority or public agency of any kind, that requires or allows for use of City funds, assets or resources, or that impacts the City of Detroit's revenue." It further provides that "[a]ll such public authorities and public agencies must be annually evaluated by the Mayor" and that an evaluation report "must be prepared and made publically [sic] available at least sixty (60) days prior to any referendum required under this section."

This provision is legally objectionable in several ways. There are many statutes under which the City may establish or participate in public authorities or public agencies (terms which the Draft Charter does not define) that will impact City revenues, including many related to regional transportation and economic development, as well as management of regional infrastructure assets. These statutes have a wide variety of requirements relating to establishment and participation, and a referendum requirement would conflict with many of those statutory

[25] MRPC Rule 1.8, *Conflict of Interest: Prohibited Transactions*. See also MPRC Rule 1.9, *Conflict of Interest: Former Client*

[26] MCL 168.31(1)(h).

norms. Moreover, intergovernmental authorities, including but not limited to those formed under the Urban Cooperation Act of 1967, Act 7, Michigan Public Acts of 1967, as amended,[27] not only impose statutory incorporation and operation requirements that conflict with the DRC, but also require intergovernmental agreements that impose obligations on the participating entities (including the City) which may conflict with the DRC.

ARTICLE 6. THE EXECUTIVE BRANCH: STAFF DEPARTMENTS

Section 6-146. Residence and Domicile Credits.

Depending on the approach to distance measurement, as applied to certain employees, this provision may conflict with Section 2 of Act 212, Michigan Public Acts of 1999[28] which permits a public employer to require that an employee reside within a distance of 20 miles or more from the public employer's nearest boundary, but requires that the 20-mile distance is to be measured in a straight line between the employee's place of residence and the nearest boundary of the public employer, not based on available routes of public travel.[29]

As applied to fire fighters, the unions would object to this provision, as the City Fire Department currently calls employees in by seniority – a system supported by the Detroit Fire Fighters Association's existing contract. These changes could lead to possible grievances and potential lawsuits. Under any kind of cost-benefit analysis, the proposed change would be abandoned as unjustified in consideration of its consequences.

ARTICLE 7. THE EXECUTIVE BRANCH: PROGRAMS, SERVICES AND ACTIVITIES

Section 7-820. Collective Bargaining.

Under Michigan's Public Employee Relations Act, grievance and arbitration proceedings are mandatory subjects of bargaining. *Detroit Police Officers Ass'n v. Detroit*, 391 Mich 44, 54-56 (1974); *Pontiac Police Officers Ass'n v. Pontiac*, 397 Mich 674, 681 (1976). The law does not permit changes in work conditions to be made without participation by the unions. It does not matter whether the changes are stipulated in the Charter. The CRC is not permitted to renege on the City's promises under contract, and it cannot bypass statutory requirements on bargaining. *Id.*

Section 7-1203. Rate Cap and Lien Relief Under DWSD Powers Provisions

Section 7-1203 establishes a rate cap not to exceed 3% of any household's monthly income. This provision is in clear violation of the Michigan Supreme Court's ruling in the *Bolt v. City of Lansing*[30] line of cases, which have declared that enterprise system rates must be proportionate to the value of service delivered.[31] A cap on certain users' rates will necessarily cause others' rates

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[27] MCL 124.501 *et seq.* The Urban Cooperation Act of 1967 is widely applicable to intergovernmental entities and is often paired with other, more subject matter-specific intergovernmental cooperation statutes.
[28] MCL 15.602.
[29] See *Lash v. City of Traverse City*, 479 Mich. 180 (2007).
[30] 459 Mich. 152 (1998).
[31] See *id.* at 161-162. See also *Jackson County v City of Jackson*, 302 Mich. App. 90 (2013).

to increase artificially in order to subsidize the cap, which may cause the rate structure to be fail the proportionality requirement of *Bolt*. In addition, the provision also conflicts with the city's contractual obligations under the GLWA contracts.

Section 7-1203 also provides that the "lien upon real property due to unpaid charges, interest, or fees for water, drainage, or sewerage services is exempt from levy and sale if the real property is the principal residence of a low-income household[,]" and defines a "low-income household" as "any household with a household income that is at or below 200% of the federal poverty line." This provision is in conflict with Section 21 of the Revenue Bond Act of 1933, Act 94, Michigan Public Acts of 1933, as amended,[32] and the provisions of the General Property Tax Act, Act 206, Michigan Public Acts of 1893, as amended (GPTA),[33] which provide that unpaid water and sewerage rates and fees become a lien on property collectible and enforceable through forfeiture and foreclosure according to the same procedures as delinquent property taxes.

The GPTA was amended in 2020 to provide for temporary relief from the collection of delinquent fees and charges through 2023 for property owners that qualify for a statutory poverty exemption,[34] which is tied to the federal poverty guidelines.[35] Section 7-1203 of the Draft Charter provides a perpetual exemption and a higher poverty threshold, which is unauthorized by state law.

Sections 7-1203 and 7-1204. Powers; Water Rate and Fee Approval

Section 7-1204 shifts water and sewerage ratemaking authority from the Board of Water Commissioners (BOWC) to the City Council. This change violates the provisions of the Great Lakes Water Authority contracts, of which the City is a member. A city cannot violate terms of an existing contract by amending its charter. In addition, this provision would violate the federal orders in the Clean Water Case (defined below), particularly the most recent and relevant order, issued in 2015 which allows the City to maintain ratemaking authority over Detroit Water and Sewerage Department (DWSD). That order—which will control the event of a conflicting charter provision—relied in large part on the BOWC's administrative independence from City Council, particularly in relation to ratemaking authority. A city cannot violate a federal court order by charter amendment.

Capping rates at 3% of household income and/or limiting collection methods (i.e. service interruptions, tax liens) will also jeopardize adherence to the Master Bond Ordinance and rate covenant obligations. DWSD must generate sufficient revenues to meet its obligations under the Leases and Master Bond Ordinance.

[32] MCL 141.121(3).
[33] MCL 211.1 *et seq.*
[34] MCL 211.78g.
[35] MCL 211.78u.

Section 7-1206. Limitation on the Sale of Assets

Subsection 4 relates to the City's membership in an authority under Act 233, Michigan Public Acts of 1955, as amended ("Act 233")[36] and affects the City's participation in GLWA. The establishment of and the City's participation in GLWA were approved by City Council and are the subject of a binding contract and federal court order in *United States v. City of Detroit et. al.* (the "Clean Water Case").[37]

Section 7-1206 assumes that the City has unilateral ability to amend GLWA's incorporating documents, contracts, and bond agreements. A city charter cannot legally amend binding contractual commitments.

Section 7-1701. The Office of Economic and Consumer Empowerment

Congress allocates funding to the U.S. Department of Labor, which in turn disburses to the states based on their share of the workforce and relative unemployment rates. In each of the states, state and local Workforce Development Boards (WDBs) set the funding priorities for their areas. WDBs are required by key workforce development legislation to have representatives from the business community, community colleges, and elected officials to ensure that funding is directed towards those programs that address the needs of the local economy. The proposed structure in this section would make the City ineligible for tens of millions of dollars in workforce development and job training funding.

ARTICLE 8. PLANNING AND FINANCIAL PROCEDURES

Section 8-404. Tax Abatements.

The proposed Charter would reduce the term of any tax abatement to a maximum of five years. This is contrary to the various State of Michigan laws that govern the maximum term of abatements. Since many State of Michigan tax abatements can only be applied for once per project without the possibility of extensions, this would effectively end tax abatements in the City and guarantee that major projects like the FCA Jeep Plant and the Ford train station development will all go to other communities across Michigan or the rest of the country not under the same legal restrictions.

Section 8-405. Tax Increment Financing Accounts.

This provision provides for illegal uses of these accounts. The City currently has four tax increment financing (TIF) entities: The Downtown Development Authority, Local Development Financing Authority and Corridor Improvement Authority, each governed by the Recodified Tax Increment Financing Act, Act 57, Michigan Public Acts of 2018 ("Act 57"),[38] and the Brownfield Redevelopment Authority, governed by the Brownfield Redevelopment Financing Act, Act 381,

[36] MCL 124.281 *et seq.*
[37] Case no. 77-71100 (E.D. Mich.).
[38] MCL 125.4101 *et seq.*

Michigan Public Acts of 1996, as amended ("Act 381").[39] Act 57 and Act 381 contain extensive restrictions on the use of tax increment revenues captured by the various TIF entity-types. Tax increment revenues may be used for various capital and infrastructure improvements, beautification efforts, environmental response activities and certain limited programming, along with administrative costs of the applicable TIF entity.

Neither Act 57 nor Act 381 provides for the expenditure of tax increment revenues on workforce development, and while they do allow for expenditures "necessary and appropriate" to each TIF entity's primary purpose, workforce development costs are not eligible expenditures of a TIF entity pursuant to most tax increment finance plans and Brownfield plans – the triggering mechanisms for tax increment capture under the statutes. This provision would directly conflict with the requirements of Act 57 and Act 381.

ARTICLE 9. MISCELLANEOUS PROVISIONS

Section 9-1301. Community Benefit Agreements.

The inclusion of this proposed text is problematic, as the language conflicts with the language set forth in a duly adopted ordinance. The proper way to implement changes to the ordinance is to amend the ordinance. Adopting the DRC with this proposed section will lead to confusion from conflicting provisions. Further, because the language in the DRC lacks the detail included in the Community Benefits Ordinance (CBO), translating this language into an amended ordinance will be challenging. Finally, including these provisions in the DRC will hinder City Council's ability to make future changes that are informed by experience and changing conditions.

Sincerely,

Lawrence T. García
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City of Detroit

[39] MCL 125.2651 *et seq.*