

CITY OF KETTERING  
CITY COUNCIL  
WORKSHOP MINUTES  
January 24, 2017

The Council of the City of Kettering, Ohio met in a workshop session on Tuesday, January 24, 2017 in the Kettering Conference Room, 3600 Shroyer Road, Kettering Government Center. The meeting came to order at 6:06 p.m.

Council Members Present included Mayor Patterson, Vice Mayor Scott, Mr. Duke, Mrs. Schrimpf, Mr. Wanamaker and Mr. Klepacz. Mr. Lautar had an excused absence.

Staff Members Present: City Manager Mark Schwieterman, Assistant City Manager Steve Bergstresser, Law Director Ted Hamer, Community Information Manager Stacy Schweikhart and Economic Development Manager Gregg Gorsuch.

There were also five citizens in attendance.

City Council Meeting Agenda Review – Mr. Schwieterman reviewed the Council meeting agenda with the City Council members.

Government Center Roof – Mr. Schwieterman stated the Public Service Department has been working with a consultant regarding a replacement roof for the Government Center. The roof has been tested and another layer can be placed on top of the current layer without removing the current layer. The new roof will include safety features such as tie offs for personnel working on or cleaning the roof. The proposed new roof will have a sealant to make it easier to clean and to keep clean. The roof replacement project will also include gutters and trimming of some existing trees around the Government Center.

Police Department – Mr. Schwieterman stated the Police Department and the Public Service Department are looking at security improvements for the rear parking lot at the Government Center. Staff is looking at making improvements to the lighting, installing fencing/wall and other security measures. Staff will continue to look at the issue and keep Council members informed.

Mrs. Schrimpf arrived at 6:18 p.m.

At 6:21 p.m. Mr. Wanamaker made a motion to enter into executive session pursuant to Ohio Revised Code Section 121.22 to confer with the Law Director regarding pending or imminent litigation the motion was seconded by Mr. Duke. The motion passed by a unanimous roll call vote.

At 6:36 p.m. Council exited the executive session and went back on the public record. Following the executive session the Mayor stated, recently the City's Law Director, Mr. Hamer, received a January 5, 2017 letter from the Chandra Law Firm generally asserting the Kettering Charter requires that City Council declare Council Member Rob Scott's seat vacant because he allegedly vacated the office by serving as an electoral college member in the Presidential election while also serving as a City of Kettering Council Member. The letter demands that after declaring Mr. Scott's seat vacant, council should recover compensation paid to him during the period he served as an elector. The letter was written on behalf of City of Kettering taxpayer, John J. Murphy.

The Law Director requested a legal opinion regarding the issues raised in the letter from outside counsel, Wayne E. Waite. Mr. Waite provided Mr. Hamer with his legal opinion regarding the taxpayer's demands. A complete copy of Mr. Waite's January 20, 2017 opinion to Mr. Hamer was forwarded to each council member, excluding Mr. Scott.

The opinion concluded that the taxpayer's request for City Council to remove Mr. Scott from City Council lacked merit as it was, in Mr. Waite's opinion, not supported by the facts or the law. Outside legal Counsel was also of the opinion that such action would

not only be contrary to law, but would also likely be unconstitutional under the Ohio Constitution.

Mayor Patterson then asked if any member of Council wished to discuss the matter.

Vice Mayor Scott stated he retained his own lawyer who advised him these claims were frivolous and if any similar claim was filed in court, Mr. Scott and his attorney will seek sanctions against the persons responsible.

Mayor Patterson said hearing no further discussion, upon consideration of the matter and the legal opinion from outside counsel, is there a motion that the City Council reject the tax payer's request to declare Robert Scott's seat vacant and further reject the tax payer's request to recover compensation from Mr. Scott?

Mr. Klepacz made a motion to reject the tax payer's request to declare Mr. Scott's seat vacant and to further reject the tax payer's request to recover compensation from Mr. Scott, the motion was seconded by Mrs. Schrimpf.

The Mayor stated all those in favor of rejecting the tax payer's request to declare Robert Scott's seat vacant and to recover compensation from Mr. Scott, please say aye.

All Council members voted aye except for Mr. Scott who abstained.

Mayor Patterson asked, is there a motion to include the opinion as part of the meeting minutes?

Mr. Klepacz made a motion to include the opinion as part of the Workshop meeting minutes, the motion was seconded by Mr. Duke.

Mayor Patterson stated all those in favor of including the opinion as part of the Workshop meeting minutes please say aye.

All Council members voted aye except for Mr. Scott who abstained.

Big Hill Road/South Dixie Drive – Mr. Bergstresser displayed a map showing the property and right of way (ROW) on the north east corner of Big Hill Road and South Dixie Drive. He noted there is a large portion of ROW on the property and the property owner would like the City to vacate the ROW, so she can maintain it and perhaps increase the size of her existing parking area. The proposed ROW vacation will be on the January 30<sup>th</sup> Planning Commission agenda and upon approval by the Planning Commission will be on a future Council meeting agenda for consideration.

Kingswood Drive – Mr. Bergstresser displayed a map showing a 50' right of way (ROW) area (dead end) of Kingswood Drive that staff would like to vacate. The purpose of the road vacation is to eliminate Kingswood Drive as a cut through for potential employees working at businesses that might be located on the Staub property in the future. The proposed ROW vacation will be on the January 30<sup>th</sup> Planning Commission agenda and upon approval by the Planning Commission will be on a future Council meeting agenda for consideration.

School of Advertising Arts (SAA) – Mr. Schwieterman mentioned Mr. Gorsuch had visited the businesses in the Kettering Corporate Center, as directed by Council, and only one of the businesses expressed concern over the potential student housing location. Mr. Schwieterman asked the Council members if they wanted staff to continue discussions with the SAA regarding the rezoning of the property and begin negotiating a price. Mayor Patterson said he feels it is a dangerous precedent to start changing land intended for business and putting multi-family residential in its place. Mr. Duke stated he is in favor of moving forward with negotiating a price for the land and with the rezoning from EDO to multi-family. He feels SAA is growing and doing well, they will bring a lot of positive publicity to the City and they will even be creating some jobs in the process. Mr. Duke feels we need facilities like SAA if Kettering wants millennials to move here and stay here. Mr. Klepacz stated we might need a financial analysis of the project to help make a decision. After discussion it was decided staff should meet with SAA officials and begin negotiations to see if a purchase price could be agreed upon.

Medical Marijuana – Mr. Scott said a committee consisting of Councilwoman Schrimpf, himself and staff members met to discuss the issue. Mr. Scott said at this point the committee is leaning toward not permitting the growing or selling of medical marijuana in the City. Mr. Bergstresser displayed a chart showing the options as they relate to medical marijuana. Mr. Bergstresser mentioned the State still has not released the rules for medical marijuana and until they do it is difficult to determine how the City would want to handle the situation. Mr. Bergstresser stated the committee needs direction from Council at this point. Mr. Duke said he does not want to ban medical marijuana before we even know what the rules and regulations are going to be, he would be OK with an extension of the moratorium but not a complete ban at this time. After discussion the Council members agreed the best thing to do is to extend the moratorium on medical marijuana growing and distribution until December 31, 2017.

The workshop meeting adjourned at 7:27 p.m.

ATTEST:

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DONALD E. PATTERSON  
MAYOR

LASHAUNAH D. KACZYNSKI  
Clerk of Council



January 20, 2017

Theodore Hamer, Director of Law  
City of Kettering  
3600 Shroyer Road  
Kettering, OH 45429

RE: Confidential Attorney-Client Communication

Dear Mr. Hamer:

In response to your request, our firm has conducted an analysis of the issues raised in a certain January 5, 2017 correspondence from the Chandra Law Firm, LLC to you in your capacity as law director. Generally, the correspondence asserts the Kettering Charter mandates City Council declare Rob Scott's seat vacant because he allegedly vacated the office by serving as an Electoral College member. The letter demands that after declaring the seat vacant, Council recover his compensation. Additionally, the letter threatens the City with imminent litigation should Counsel fail to comply with the aforementioned demands. The letter is ostensibly written on behalf of a City of Kettering tax payer, John J. Murphy, who asserts his rights as a City of Kettering tax payer.

The demands are based on the tax payer's assertion that Kettering's Charter Section 3.4 mandates City Council "declare vacant the seat of any of its members who shall cease to be qualified as a member of council" and that council members are barred from holding any other "elected public office." Being a presidential elector in the Electoral College is claimed to be an elected public office.

For purpose of our analysis, we have reviewed the charter of the City of Kettering, Ohio. As you know, Charter Section 3.4 sets forth language pertaining to "removal and vacancies." The first sentence of section 3.4 provides the analytical frame work for this particular issue. Specifically, Charter Section 3.4 states, "[t]he council shall be the judge of election and qualification of its own members." This section of the Charter goes on to state in the "case of persistent failure to abide by the rules of council or absence without justifiable excuse for three (3) consecutive meetings, the seat of any such member may be declared vacant by resolution of council, five members concurring."

In our opinion, it is significant that even when council members miss three consecutive meetings, the Charter calls for the Council to exercise its discretion to evaluate the presence or absence of "justifiable excuse." As a result, in our opinion, the Charter contemplates that the Council must exercise its discretion in construing the parameters and directives set forth in

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Section 3.4 of the Charter. In addition to the prohibition against excessive absences, this section states that Council "shall declare vacant the seat of any of its members who cease to be qualified as a member of council." The Charter then sets forth mandatory criteria. These are set forth below:

1. Council members shall at all times be qualified electors of the City of Kettering.
2. No member of council shall hold any "other elected public office."
3. No member of council shall hold any other city office.
4. No member of council shall hold city employment.
5. No member of council shall hold the position of chief of any political subdivision of Ohio.
6. No member of council shall be a lead executive officer of any political subdivision of Ohio.
- ~~7. No member of council shall be employed by another State or Ohio political subdivision in a position that is mandated by the State.~~
8. No member of council shall be appointed by the governing body of that other political subdivision and requires performing duties prescribed by law.

For purposes of our analysis, the only prohibited position raised in the January 5, 2017 demand by the Chandra Law Firm relates to an allegation that Mr. Scott improperly held "other elected political office" while simultaneously serving as a Council member for the City of Kettering." Accordingly, our analysis focuses on a reasonable interpretation of the phrase "other elected public office."

Even before beginning the analysis, however, it should be noted that the Charter does not prescribe any remedy or required disqualification of a Council member who violates the prohibition of simultaneously engaging in dual positions. In the absence of a specific direction, in our opinion, the most reasonable interpretation of the section would call for the Council to exercise its reasonable discretion regarding the presence or absence of any violation and the remedy for any such violation. This is especially true since "[t]he law does not look with favor upon declaring a forfeiture in an office to which one has been elected in a legal manner. \* \* \* The people, by their votes, determine their choice of officers, and they should not be robbed of the fruits of such choice for slight or insufficient reasons \* \* \*." *State ex rel. Billis v. Summers*, 76 Ohio App. 3d 848, 603 N.E. 2d 410 (Ohio App 6 Dist. 1992). "The message of the established law of Ohio is clear: our citizens must be confident that their vote, cast for a candidate or an issue, will not be disturbed except under extreme circumstances \* \* \*." *Id.*

Returning to our analysis, we must consider the meaning of the words "other elected public office." "If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary." *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.* (1996), 74 Ohio St.3d 543, 545, 660 N.E.2d 463, 465. Moreover, it is well settled that to determine the intent of the General Assembly "[i]t is the duty of this court to give effect to the words used [in a statute], not to delete words used or to insert words not used." (Emphasis sic.) *Bernardini v. Conneaut Area City School Dist. Bd. of Edn.* (1979), 58 Ohio St.2d 1, 4, 12 O.O.3d 1, 3, 387 N.E.2d 1222, 1224, quoting *Columbus-Suburban Coach Lines v. Pub. Util. Comm.* (1969), 20 Ohio St.2d 125, 127, 49 O.O.2d 445, 446, 254 N.E.2d 8, 9.

In order to determine whether Mr. Scott held "other elected public office" while simultaneously serving as a council member, we next turned to Ohio Revised Code Section 3505.39 pertaining to the meeting of "presidential electors." Specifically, this section of the Ohio Revised Code addresses the State's presidential electors. Importantly, for our analysis, Ohio law makes a specific classification for two types of state presidential electors. For example, Section 3505.39 specifically states, "all of the state's presidential electors, both those duly elected who are then present and those appointed as herein provided, shall then meet and organize by electing one of their member as chairman by designated the Secretary of State as ex officio and shall then and there discharge all of the duties enjoined upon presidential electors by the constitution and laws of the United States." (Emphasis added.)

Based upon the plain meaning of this statute, Ohio law differentiates between dually elected "presidential electors" and those presidential electors that are appointed under law. According to the January 5, 2017, letter on behalf of the tax payer, Mr. Scott, on December 19, 2016, assumed the position of presidential elector appointed to substitute for Ohio Representative Christina Hagan. As a result, Mr. Scott was appointed rather than elected. Even the tax payer acknowledges Mr. Scott's appointment. Since Mr. Scott was appointed, he does not meet the definition of one who serves in an "elected public office." For these reasons, we do not believe his role as an appointed elector violates the City of Kettering Charter.

The tax payer asserts Representative Hagan resigned as she faced a lawsuit for removal as an elector because she was violating the Ohio Constitution Article II, Section IV's similar prohibition against general assembly members holding dual public offices. More specifically, the Ohio Constitution at Section IV provides "no member of the general assembly shall, during the term for which he was elected, unless during such term he resigns therefrom, hold any public office under the United States or this state or a political subdivision thereof..."

In our opinion, however, Representative Christina Hagan's resignation as an elector following the tax payer's suit is distinguishable on at least three grounds. First, the lawsuit against Representative Hagan was filed prior to the date on which the Electoral College voted to elect Donald Trump as president. Based upon an article dated January 6, 2017, from the Columbus Dispatch, however, Representative Hagan stated "I did not step down due to the liberal left's lawsuit. I stepped down to ensure they did not slow the process of electing the president in any way." Accordingly, Representative Hagan's resignation as an elector was

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motivated by her desire to ensure that the legitimacy of Trump's election was not in any way tainted with her status as an elector despite her view that the case was frivolous.

Second, the Ohio constitution uses the words "public office" while the Charter uses "elected public office." Statutory construction requires giving effect to all the words used, including "elected." Since Mr. Scott was not elected to the position of elector, his situation is once again distinguishable from Representative Hagen's situation.

Third, when evaluating the tax payer's position, we note that statutes authorizing the removal of an incumbent from public office are quasi penal in nature and should be strictly construed. See *Ziegler v. Zumbar*, 129 Ohio St.3d 240, 2011-OHIO-2929, 951 N.E.2d 405. Ohio Law disfavors the removal of dually elected officials. *In re Removal of Sites* 170 Ohio App.3d 272, 2006-OHIO-6996, 8<sup>th</sup> 66 N.E.2d 1119. Thus, an elected public official should not be removed except for clearly substantial reasons and conclusions that his further presence in office would be harmful to the public welfare. See *ex rel. Corrigan v. Hensel* (1965) 2 Ohio St.2d 96, 100, 3 O.O.2d 144, 206N.E.2d 5063. The Supreme Court in *Ziegler* noted that the process set forth in Article II, Section 38 recognizes "Ohio's obligation to the cardinal doctrines included within the phrase, "due process of law." It must have been clearly intended that a complaint and hearing should be allowed to all officers. What the Constitution grants, no statute can take away. *State ex rel. Howel v. Brown*, 105 Ohio St. 479 at 487-, 138 N.E.-230 (1922) *Id.* at 33-39.

In *State ex rel. Steve Fullencamp v. Kenneth Kirp* case number 2016CV-04765, Judge Richard Skelton held that Sections 404 and 604 of the Riverside Charter are unconstitutional as they conflict with the parallel constitutional provision, Article III, Section 38 as interpreted by the Supreme Court in *Ziegler*. In that case, the court held that the constitutional requirement as set forth in Ohio Constitution pertaining to the removal of officers "upon complaint and hearing" is so important that it cannot be cured by the council actually providing notice of the hearing before the council. For this reason, Judge Skelton held that even the exercise of local self-government is limited by parallel constitutional provisions and implementing statutes. *Bazell v. Cincinnati*, 13 Ohio St.2d 63, 233, N.E.2d 864 (1968) and *Benjamin v. Columbus*, 167 Ohio St. 103, 106, 146 N.E.2d 854, 1957. Judge Skelton held that the Ohio Supreme Court has continued to follow this principal as set forth in *Buckeye Co. MM. Hope Foundation v. City of Cuyahoga Falls*, 82 Ohio St.3d 539, 697 N.E.2d 181 (1998).

More recently, the court noted that the Ohio Supreme Court reaffirmed that position in *State ex rel. Ebersole v. Del Cty. Bd. Of Elections*, 140 Ohio St.3d 487, 491, 2014-OHIO-4077, 20 N.E.3d 678 (2014). Accordingly, Judge Skelton held that the Court agreed that local self-government authority is limited. See *Blauvelt v. City of Hamilton*, 12<sup>th</sup> Dist. Butler No. CA 2008-07-174, 2009-OHIO-2801 (Butler County, June 15, 2009). (Grady, j., Brogan and Fain, concurring). The court held that even though *Ziegler* did not involve a charter city, the holding that such a provision for the removal of an officer on its' face, violates of Article II, Section 38. Even a charter adopted under home rule cannot adopt a process for removing an elected official if the charter conflicts with Article II, Section 38 of the Ohio Constitution.

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For all of these reasons, Judge Skelton held that as in *Ziegler*, the Riverside council was operating under a charter scheme wherein the charter city council could remove a council member when it found the council member violated a provision of the charter and did not require a finding of misfeasance or malfeasance. Accordingly, the court concluded that Sections 4.04 and 6.04 of the Riverside City Charter are unconstitutional as they conflict with the parallel constitutional provisions of the Ohio Constitution Article II, Section 38 as interpreted by the Supreme Court in *Ziegler*. The court held that the constitutional requirement of such a removal be "upon complaint and hearing" is so important that it cannot be cured, as applied by the council actually providing notice and a hearing before the council.

For all of these reasons we conclude, even if the City of Kettering council voted to remove council member Scott, such an action would be unconstitutional and violate the Ohio Constitutional safeguards requiring that such a process be conducted only "upon complaint and hearing." The well-reasoned decision in *Fullencamp*, containing an exhaustive analysis of a nearly identical city charter that has already been held to be unconstitutional, influences our opinion that the City of Kettering city council would lack the constitutional authority to remove council member Scott.

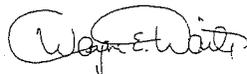
Similarly, any such removal would not be supported by the facts as Mr. Scott is appointed rather than an elected official. Additionally, as Judge Skelton has noted in the *Riverside* decision, any attempted removal of council member Scott would violate the Ohio Constitution. Even if Mr. Scott's role as a presidential elector was determined to violate the City of Kettering Charter, his removal or declaration of a vacancy as demanded by the tax payer would be an unconstitutional act by the Kettering City Council.

Accordingly, the tax payer's allegation that the City Council should remove Mr. Scott lacks merit. For these reasons, we recommend you consider the legal analysis set forth herein. We also recommend that the law director advise City Council that any action by the council to remove Mr. Scott would likely, in our opinion, not be supported by the facts or law as stated herein. Similarly, in our opinion, any such action would not only be contrary to law, but would also be violate the Ohio Constitution. For all of these reasons, in our opinion, the tax payer's allegation as set forth in the January 5, 2017, correspondence lacks merit.

In the event you have any questions with respect to our opinion, please let me know.

Very truly yours,

POLING LAW



Wayne E. Waite

WEW/clk