



CITY OF DETROIT  
LAW DEPARTMENT

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**CONFIDENTIAL AND PRIVILEGED  
ATTORNEY-CLIENT COMMUNICATION**

April 1, 2012

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

Re: **Legal Analysis of the Proposed Financial Stability Agreement Dated March 29, 2012 and Submitted to City Council**

Honorable City Council:

On March 29, 2012, Your Honorable Body requested that the Law Department provide legal analysis of the proposed Financial Stability Agreement Dated March 29, 2012, which was submitted to the Body at the Committee of the Whole on that day. We are now responding to your request.

**BACKGROUND**

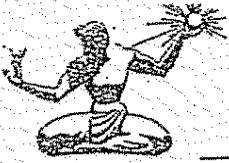
Over recent weeks, there have been proposed Agreements, which have been discussed at City Council, but were not referred to the Law Department for review. After Council's request concerning the proposed Agreement, dated March 29, 2012, the Law Department has researched Michigan law to determine the statutory authority which authorizes the acts contemplated by the proposed Agreement.

**LAW AND ANALYSIS**

**I. Michigan Law Requires That There Be an Enabling Statute for the State and the City to Enter Into the Proposed Agreement.**

Article 7, Section 28, of the 1963 Michigan Constitution, *Governmental Functions and Powers; Joint Administration, Costs and Credits, Transfers*, provides:

The legislature by general law shall authorize two or more counties, townships, cities, villages or districts, or any combination thereof among other things to: enter into contractual undertakings or agreements with one another or with the state or with any combination thereof for the joint administration of any of the



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functions or powers which each would have the power to perform separately; share the costs and responsibilities of functions and services with one another or with the state or with any combination thereof which each would have the power to perform separately; transfer functions or responsibilities to one another or any combination thereof upon the consent of each unit involved; cooperate with one another and with state government; lend their credit to one another or any combination thereof as provided by law in connection with any authorized publicly owned undertaking.

*Officers, eligibility.* Any other provision of this constitution notwithstanding, an officer or employee of the state or any such unit of government or subdivision or agency thereof, except members of the legislature, may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. (Emphasis added.)

As the plain language of the Michigan Constitution states, ~~there must be an underlying statute that serves as the basis for the State and the City to enter into a contract. Under this provision, an agreement between the State and the City is required to arise from enabling legislation.~~

~~A) There is No Authority Under the Michigan Home Rule City Act for the City to Enter Into Such an Agreement with the State.~~

The City of Detroit enjoys general police powers, as delegated by the Michigan Home Rule City Act, MCL 117.1 *et seq.* Section 1-102 of the 2012 Detroit City Charter, *General Powers*, provides:

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.

The enactment and enforcement of an ordinance related to municipal concerns is a valid exercise of municipal police powers as long as the ordinance does not conflict with the constitution or general laws of the state. *Rental Property v City of Grand Rapids*, 455 Mich 246; 566 NW 2d 514 (1997) (citing *Austin v Older*, 283 Mich 667, 674; 278 NW 727 (1938)); Mich Const 1963, art 7, § 22; MCL



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117.4(j)(3); Section 1-102 of the 2012 Detroit City Charter. In addition, the 1963 Michigan Constitution ensures that the provisions of the Constitution and laws concerning cities shall be liberally construed in their favor. Mich Const 1963, art 7, § 34. Pursuant to this authority, home rule cities enjoy not only the powers specifically granted, but they may also exercise all powers not expressly denied. *City of Detroit v Walker*, 445 Mich 682, 689-90, 520 N.W.2d 135 (1994).

Among other things, the Michigan Home Rule City Act gives the City authority to enter into contracts. In particular, Section 3(j) of the Home Rule City Act, MCL 117.3(j), provides that:

Each city charter shall provide for all of the following:

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(j) The public peace and health and for the safety of persons and property. In providing for the public peace, health, safety, a city may expend funds and enter into contracts with a private organization, the federal or state government, a county, village, or township, or another city for services considered necessary by the legislative body. Public peace, health, and safety services may include the operation of child guidance and community mental clinics; the prevention, counseling, and treatment of developmental disabilities, the prevention of drug abuse, and the counseling and treatment of drug abusers.

Section 4-122 of the 2012 Detroit City Charter, *Approval of Contracts and Disclosure*, provides in pertinent part, that:

The City may not purchase or in any way procure property or the services of independent contractors without approval by resolution of the City Council, except as provided for by ordinance

However, the proposed Agreement goes beyond any authority which flows through the City's police powers under the 2012 Detroit City Charter.

**B) The Proposed Agreement Is Not Based Upon Public Act 7 of 1967, the *Urban Cooperation Act of 1967*.**

Earlier drafts of Agreements between the City of Detroit and the State of Michigan specifically reference Public Act 7 of 1967 ("Public Act 7"), known as the *Urban Cooperation Act of 1967*, MCL 124.501 through MCL 124.512, as the enabling statute that authorizes the State and the City to enter into such an agreement. The draft agreement dated March 29, 2012 does not



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specifically refer to Public Act 7.

The Preamble of the *Urban Cooperation Act of 1967* provides for:

AN ACT to provide for interlocal public agency agreements to provide standards for those agreements and for the filing and status of those agreements; to permit the allocation of certain taxes or money received from tax increment financing plans as revenues; to permit tax sharing; to provide for the imposition of certain surcharges; to provide for additional approval for those agreements; and to prescribe penalties and provide remedies.

This Preamble delineates the reasons for which agreements under the Act can be negotiated and executed. A careful reading of the proposed Agreement indicates that its subject matter does not fall under the scope of the *Urban Cooperation Act of 1967*.

C) Authority for Taking Certain Actions Under the Proposed Agreement Is Based Upon Public Act 4 of 2011.

A review of the proposed Agreement indicates that the document contains the following references to Public Act 4 of 2011:

- 1) Section 3.6, Budget Reductions Ordinance, requires that the "City Council... adopt an amendment to the Finance and Taxation Ordinance or other appropriate provisions of the Detroit City Code providing that if the Chief Financial Officer reports to the Mayor, or if the Council Fiscal Analysis Director reports to the City Council and the Chief Financial Officer concurs, that expenditures during a fiscal year have exceeded or are likely to exceed appropriated levels, the Mayor shall submit a proposed appropriation amendment to the City Council decreasing budgeted appropriations in amounts sufficient to avoid the deficit; and the City Council promptly shall amend appropriations to avoid the deficit; and further if the City Council fails to so amend the appropriations ordinance as proposed by the Mayor within 45 days after the submittal of the proposed appropriation amendment, then the requested appropriation amendment submitted by the Mayor becomes effective."

The proposed Agreement provides that "The powers and actions authorized by this Section 3.6 shall be granted pursuant to MCL 141.1514a and MCL 141.1519(1)(b) to the extent necessary to implement this Section 3.6, but only to the limited extent and limited time necessary to implement Section 3.6."



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- 2) *Sec. 4.3 Collective Bargaining Agreements, Approval*, requires that "Upon the prior approval of the Financial Advisory Board, the head of the Labor Relations Division shall deliver to the Mayor any proposed collective bargaining agreement which satisfies the requirements of Section 4.2 of this Agreement for consideration and transmittal to the City Council in accordance with Sec. 6-408 of the Charter."

The proposed Agreement provides that "The powers and actions authorized by this Section 4.3 shall be granted pursuant to MCL 141.1514a, MCL 141.1519(f)(g), and MCL 141.1519(dd)(f) to the extent necessary to implement this Section 4.3, but only to the limited extent and limited time necessary to implement Section 4.3."

- 3) *Sec. 4.4 Duty to Bargain*, requires that "it is the State Treasurer's determination pursuant to MCL 141.1514a(10) that beginning 30 days after the effective dates of this Agreement, the City is not subject to Sec 15(1) of Act 336, Public Acts of Michigan, 1947, as amended, the Public Employment Relations Act, MCL 423.215, for the remaining term of the Agreement."

- 4) *Sec. 6.3 Default, Remedies*, requires that "a declaration of default on account of a material breach of the agreement as provided in Section 6.2 may result in (e) the placement of the City in receivership as provided in MCL 141.1515. . ."

- 5) *Sec. 6.4(e) Program Management Director, Board Reform Initiative Remedies*, provides that "the powers and actions of the Program Management Director and the Financial Advisory Board authorized by this Section 6.4(e) additionally shall be granted pursuant to MCL 141.1514a, MCL 141.1519(f)(g) and 141.1519(dd)(f) to the extent necessary to implement this Section 6.4(e); but only to the limited extent and limited time necessary to implement this Section 6.4(e); to

Other provisions of the proposed Agreement do not refer to Public Act 4 of 2011. However, because a review of Michigan law reveals that no other enabling legislation exists, which authorizes the acts that are contemplated in the proposed Agreement, a court is likely to find that the proposed Agreement has been written in its entirety to comport with the Act.

**III. Public Act 4 of 2011 Does Not Contain Any Explicit Grant of Authority to Create a Financial Advisory Board.**

A careful reading of Public Act 4 of 2011, the *Local Government and School District Fiscal Accountability Act*, MCL 141.1501 through MCL 141.1531, reveals that the Act does not contain any explicit language to create a Financial Advisory Board. Instead, Section 14a(11) of the Act,



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MCL 141.1514a(11), provides that "The consent agreement may provide for the required retention by the local government of a consultant for the purpose of assisting the local government to achieve the goals and objectives of the consent agreements."

**IV. Unless Based Upon Public Act 4 of 2011, the Proposed Agreement Contains a Number of Provisions Which, Without Legal Authority, Vitate Provisions in the 2012 Detroit City Charter.**

**(A) Unless the Agreement Is Based Upon Public Act 4, Certain Provisions in the Agreement, Which Vitate the 2012 Detroit City Charter, Are Not Authorized By State Law.**

A review of the proposed Agreement indicates that the document contains the following provisions, which vitate provisions in the 2012 Detroit City Charter:

- 1) Sec. 2.1 requires that the Mayor and City Council restrain their respective exercise of their powers, privileges and authorities in certain circumstances as provided in this Agreement.
- 2) Sec. 2.2 requires that the Mayor create the position of Chief Financial Officer as a group executive within the executive office of Mayor; that "the Budget and Finance Directors . . . report directly to the Chief Financial Officer," that the Chief Financial Officer . . . be treated as a "Director" for purposes of Sec. 5-103 of the Charter," and that the "Chief Financial Officer's compensation shall be agreed to between the Mayor and the State Treasurer, and the City Council shall approve such amendments to the City's 2011-2012 Official Compensation Schedule (the "White Book") as necessary to reflect the agreed to compensation."
- 3) Sec. 2.3 requires that "the Mayor create the Program Management Office within the executive office of Mayor, headed by the position of Program Management Director as a group executive," that the "Program Management Director shall directly assist the Chief Operating Officer, the Chief Financial Officer and other Directors and senior executive staff, and shall be treated as a "Director" for purposes of Sec. 5-103 of the Charter," and that the "Program Management Director's compensation shall be agreed to between the Mayor and the State Treasurer, and the City Council shall approve such amendments to the White Book as necessary to reflect the agreed to compensation."



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- 4) Sec. 3.1 requires that "consistent with Section 8-213 of the Charter, the Directors of the Finance Department, Budget Department, Auditor General and City Council's Fiscal Analysis Division shall hold a revenue estimating conference each January and July, or other such dates as shall be determined by the Financial Advisory Board or agreed to by the participants in the Revenue Conference," that the "Board Chair of the Financial Advisory Board or his or her designee and the Chief Financial Officer shall attend and participate in the revenue estimation conference," and that the "Board Chair of the Financial Advisory Board shall set the meeting dates of the Revenue Conference and shall preside over the Revenue Conference; or, in the absence of the Board Chair, the Chief Financial Officer shall preside."
- 5) Sec. 3.3, *Limitation on Mayor's Budget Proposal*, requires that "except for the Transitional Period as set forth in Section 6.7(b) of this Agreement, the Mayor shall not develop or propose a Budget, any amendment to a Budget, unless in compliance with criteria in the Agreement"
- 6) Sec. 3.4, *Limitation on City Council's Budget Approval*, requires that "except for the Transitional Period as set forth in Section 6.7(b) of this Agreement, the City Council shall not approve a Budget, any amendment to the budget, a general appropriations ordinance or any amendment to a general appropriations ordinance" unless in compliance with criteria in the Agreement"
- 7) Sec. 3.5, *Budget Proceedings and Adoption*, requires, under Subsection (f) that "During the term of this Agreement, no officer or employee of the City shall make or authorize any obligation or other liability (i) not authorized by the Budget or (ii) in excess of any amount authorized in the Budget unless approved by the Mayor and Financial Advisory Board" and, under Subsection (g), that "if during a fiscal year the Chief Financial Officer becomes aware of a proposed financial transaction or settlement of claim which, in the Chief Financial Officer's judgment, will have a material adverse impact on the Budget or on [the] City's long-term ability to achieve and maintain Financial Stability, the Chief Financial Officer shall report the Chief Financial Officer's concerns respecting the proposed transaction to the Mayor, the City Council, the Financial Advisory Board and the Treasury Department."
- 8) Sec. 3.6, *Budget Reductions; Ordinance*, requires that the City Council . . . adopt an amendment to the Finance and Taxation Ordinance or other appropriate provisions of the Detroit City Code providing that if the Chief Financial Officer reports to the Mayor; or if the Council Fiscal Analysis Director reports to the City Council and the Chief Financial Officer concurs, that expenditures during a fiscal year have exceeded



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...or are likely to exceed appropriated levels, the Mayor shall submit a proposed appropriation amendment to the City Council decreasing budgeted appropriations in amounts sufficient to avoid the deficit; and the City Council promptly shall amend appropriations to avoid the deficit; and further if the City Council fails to so amend the appropriations ordinance as proposed by the Mayor within 45 days after the submittal of the proposed appropriation amendment, then the requested appropriation amendment submitted by the Mayor becomes effective.”

- 9) **Sec. 3.7, *Triennial Budget***, requires that “beginning with fiscal year 2013 the City, in consultation with the Financial Advisory Board, shall develop and maintain a Triennial Budget for adoption by the City Council” and that the “Financial Advisory Board may approve modifications to the period within which the accumulated deficit will be eliminated.”
- 10) **Sec. 4.1, *Collective Bargaining Agreements; Approval***, requires that “Upon the prior approval of the Financial Advisory Board, the head of the Labor Relations Division shall deliver to the Mayor any proposed collective bargaining agreement which satisfies the requirements of Section 4.2 of this Agreement for consideration and transmittal to the City Council in accordance with Sec. 6-408 of the Charter.
- 11) **Sec. 6.7(b), *Transactional Provisions***, provides that the “City and the Treasury Department agree that during the Transactional Period, the City will make every effort to comply with the Budget process requirements set forth in this Agreement, and any failure to comply with any such Budget process requirements during the Transitional Period may be waived by the State Treasurer” and that “notwithstanding the provisions of this Section 6.7(b), the Mayor and the City Council shall perform their respective obligations under Act 2 and the Charter in respect of the fiscal year 2013 Budget preparation and shall cause the final year 2013 Budget and the 2013 general appropriations ordinance to be in affect July 1, 2012.

Unless the proposed Agreement is based upon Public Act 4, there is no legal authority to vitiate complementary provisions in the 2012 Detroit City Charter.

**(B) Unless the Agreement Is Based Upon Public Act 4, City Council Cannot Pass Ordinances Which Disregard the 2012 Detroit City Charter.**

Sec. 3.6, ***Budget Reduction; Ordinance***, of the proposed Agreement requires that City Council pass an ordinance, which would conflict with the 2012 Detroit City Charter, specifically Section 8-212, ***Report of Budget Deficit***. The 2012 Detroit City Charter was properly adopted by the





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People of the City of Detroit pursuant to the Michigan Home Rule City Act, MCL 117.1 *et seq.* Unless the proposed Agreement is based upon Public Act 4 of 2011, the provision requiring City Council to pass an ordinance which conflicts with the City Charter would be invalid.

~~As to Provisions of the Agreement which Rely Upon Public Act 4 of 2011, Would Be Enforceable Prior to Suspension or Repeal of the Act and Would Be Unenforceable Upon Suspension or Repeal of the Act.~~

Under Sec. 29.118 of McQuillin, *Municipal Corporations*, the treatise provides:

~~The validity of a municipal contract is to be determined by the laws in force at the time the agreement was made. (citations omitted.) The law as it exists when contracts are made, including charter and statutes as they exist at the time contracts are executed, or bonds are issued, and the judicial interpretation of the law and construction then placed on such statutes by the highest court of a state, become a part of such contracts, and they cannot be impaired by subsequent legislation or judicial decisions to the contrary. (citations omitted.) The obligation of a contract is measured by the standard of the laws in force at the time it was entered into, and its performance is to be regulated by the terms and rules which they prescribe. (citations omitted.)~~

Under these legal principles, any actions taken under the proposed Agreement, which do not arise under Public Act 4 would remain enforceable. In addition, under these legal principles, where Public Act 4 is suspended or repealed, any action executed and completed prior to suspension or repeal would be valid. However, under these legal principles, any actions, which were not executed or completed prior to the suspension or repeal of Public Act 4, cannot be executed or completed.

**CONCLUSION**

A close reading of the proposed Financial Stability Agreement reveals that the document is not based upon Public Act 7 of 1967, the *Urban Cooperation Act of 1967*, and, although not specifically cited, appears to be based upon Public Act 4 of 2011, the *Local Government and School District Fiscal Accountability Act*, MCL 141.1501 through MCL 141.1531. Because, as required by the Michigan Constitution, the proposed Agreement is not based, in its entirety, upon any state enabling statute, it is possible that a court may determine that the Agreement is not authorized under state law. However, given the most favorable reading of the Agreement, a court could construe the Agreement to be authorized, in whole or in part, under Public Act 4.



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In the event that the State Board of Canvassers certifies the petitions, which were filed to repeal Public Act 4 of 2011 and the Act is suspended under the 1963 Michigan Constitution until the People of the State of Michigan vote, the ability to act pursuant to the proposed Agreement, in accordance with those provisions deemed to be based on Public Act 4, would be suspended until the vote to retain the Act. In the event that the Act is repealed, the provisions in the proposed Agreement, which are based deemed to be based upon Public Act 4, would be terminated.

Unless it is assumed that the proposed Agreement is based upon Public Act 4, the proposed Agreement contains numerous provisions, which are in conflict with the 2012 Detroit City Charter. Without an enabling statute, the State and City are not authorized to vitiate provisions in a home rule charter, which have been adopted through a vote of the People. In the event that a court determines that the proposed Agreement is not based upon Public Act 4, it is likely that provisions, which vitiate the 2012 Detroit City Charter, would be held invalid.

Although the City may enter into the proposed Agreement, the City Council should be cognizant of the possibility that the Agreement may be invalid if the petitions to repeal Public Act 4 are certified or Public Act 4 is repealed. Further, although the City may enter into the proposed Agreement, the City Council should be cognizant of the potential legal challenges that may arise concerning the proposed Agreement.

If you have any further questions regarding this matter, please let us know.

Respectfully submitted,

  
Krystal A. Crittendon  
Corporation Counsel