

EXHIBIT D-2

Your question involves section 5, which sets forth a number of restrictions on the powers of a city. In particular, subsection 5(f) provides that a city does not have the power to "make a contract with, or give an official position to, one who is *in default* to the city." MCL 117.5. (Emphasis added.)

Most city charters include a provision acknowledging this limitation on their powers that typically restates the requirements of section 5. Some city charters contain standards to guide the city in awarding contracts and granting official city positions, but such provisions may be no less stringent than those provided in state law. For example, a city charter may provide that a default does not occur until a specified period of time after an obligation, debt, or payment is due or that a default will not occur while the obligation, debt, or payment is being contested in an administrative tribunal or court of law.

The Legislature has not defined the term "in default" in the HRCA; therefore, it is subject to interpretation in accordance with well-established rules of statutory construction.¹ The foremost rule, and the primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). As summarized in *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002):

When interpreting statutory language, our obligation is to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). . . .

* * *

¹ In contrast, under the General Law Village Act, 1895 PA 3, MCL 62.1 *et seq*, the Legislature has provided that a person in default to the village is not eligible for any office in the village, defining "in default" to mean "delinquent in payment of property taxes or a debt owed to the village" under specified circumstances. MCL 62.7(2).

Courts must give effect to every word, phrase, and clause in a statute, and must avoid an interpretation that would render any part of the statute surplusage or nugatory. *Wickens, supra* at 60. Further, we give undefined statutory terms their plain and ordinary meanings. *Donajkowski [v Alpena Power Co., 460 Mich 243, 248-249; 596 NW2d 574 (1999)]*; *Oakland Co Road Comm'rs v Michigan Property & Cas Guaranty Ass'n, 456 Mich. 590, 604; 575 NW2d 751 (1998)*. In those situations, we may consult dictionary definitions. *Id.*

Moreover, statutory language must be read in context with the entire act, giving consideration to both the plain meaning of the critical phrase or word and its placement and purpose in the statutory scheme. *Sweatt v Dep't of Corrections, 468 Mich 172, 179; 661 NW2d 201 (2003)*. Because even the most common word can have a number of different meanings, context is helpful to determine which of the ordinary meanings found in a dictionary is the one intended in the statute under review. *Bio-Magnetic Resonance Inc v Dep't of Public Health, 234 Mich App 225, 229-231; 593 NW2d 641 (1999)*.

Legal encyclopedias have commented on the difficulty of defining the word "default" when used as a noun:

There is perhaps no larger or looser word. It is a purely relative term, like "negligence," and means nothing more, and nothing less, than not doing what is reasonable under the circumstances – not doing something which one ought to do, having regard to the relations which one occupies toward the other persons in the transaction. It has been said that the word obviously has two meanings, one relating to a failure to perform, the other to conversion or misappropriation of that which belongs to another. [26A CJS, Default, pp 126-127.]

Section 5(f) of the HRCA states in plain terms that a city lacks the power to *māķē ā* contract with, or *give* an official position to, one who is in default to the city. These words are forward-looking in nature, leading to the conclusion that the prohibition in section 5(f) applies

only to prospective contracts and office holders rather than to existing contracts and existing office holders.²

OAG, 1935-1936, No 120, p 316 (October 29, 1935), examined a charter provision that excluded from elective office a candidate who was in default to the city, concluding that an element over and above a mere failure to perform was necessary to establish a default: "The term 'in default to the city', as here used, implies more than a mere civil debt or liability. There must exist a willful omission to account or pay over funds belonging to the city with a corrupt intention." *Id.* p 316. OAG No 120 was followed in Letter Opinion of Attorney General Frank J. Kelley to acting City Attorney Don E. Hiltunen, dated September 26, 1974, which concluded that a provision of the Hancock City Charter prohibiting a person who was in default to the city from being elected to city office "cannot be construed to apply to one who merely has delinquent tax assessments owing the city."

In determining whether these opinions remain viable, it is necessary to reiterate that the overarching principle of statutory construction is to effectuate the intent of the Legislature based on the plain language of a statute, with due regard to the context in which the words are used. *The American Heritage Dictionary, Second College Edition* (1991), defines "default" in several ways:

1. To fail to do what is required.
2. To fail to pay money when it is due.
3. *Law*:
 - a. To fail to appear in court when summoned.
 - b. To lose a case by not appearing.

² It should be noted that many home rule city charters preclude elected office holders from continuing to hold elective city office if they are in default to the city. See, for example, section 15 of Chapter V of the Fourth Class City Act, MCL 85.15, which serves as the charter of former fourth class cities that became home rule cities on January 1, 1980, pursuant to MCL 81.1c, until those cities adopt their own charter. See also, OAG, 1979-1980, No 5721, p 826 (June 13, 1980), and OAG, 1979-1980, No 5525, p 248 (July 13, 1979).

The third of these definitions is easily dismissed as inapplicable in the context presented by section 5(f) of the HRCA because it applies to court procedures. The first and second definitions, however, both appear relevant because each could reasonably apply to disqualify a person from consideration to hold a position of public trust or perform a public contract.

The first of the above definitions ("[t]o fail to do what is required") clearly applies in the context of one charged with an existing duty, who is regarded as defaulting in the performance of that duty, or to a person who has failed to perform a contractual or other obligation. Such an application of the term "default" is found in the case of *Lansing School District v City of Lansing*, 260 Mich 405, 412; 245 NW 449 (1932), which involved a school district's attempt to recover losses resulting from a city treasurer's negligent conduct. The statute at issue made the city liable for any loss sustained by the "default" of the officer in the discharge of any duty imposed by the statute. The *Lansing* Court noted the following definitions of the word "default" in holding the city liable to the school district:

A default is defined as "The nonperformance of a duty, whether arising under a contract or otherwise" (1 Bouvier's Law Dictionary [Rawle's 1st Rev.], p. 527); as "The omission or failure to fulfil a duty, observe a promise, discharge an obligation, or perform an agreement" (Black's Law Dictionary [2d Ed.], p. 342); as "To fail in fulfilling a contract, agreement, or duty." "Neglect to do what duty or law requires" (Webster's International Dictionary). [*Id.* p 412.]

The second *American Heritage Dictionary* definition ("[t]o fail to pay money when it is due") represents a subcategory of the first definition – focusing on failures to do what is required in the context of meeting financial obligations. It offers a common sense meaning of "in default," which would render a person disqualified from participating in a city's government as an appointed official or realizing the benefits of a contract with the city where the person had

been determined to owe money to the city. Such financial obligations to a city that would reasonably be encompassed within the term include income taxes, property taxes,³ utility bills, and other liquidated sums.

Consistent with *Lansing School District v City of Lansing* and the plain and ordinary meaning of the word as used in MCL 117.5, "default" means the failure to fulfill a duty, whether arising from contract or otherwise, that the person owes to the city.

In addition, the statutory language selected by the Legislature – "in default" – makes plain that an "alleged" default or a "challenged" default would not qualify. This is consistent with the rule of statutory construction requiring that meaning be given to each word and prohibiting a court from reading anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks*, 460 Mich 305, 311; 596 NW2d 591 (1999). Thus, for a person to be "in" default within the meaning of MCL 117.5, the defaulted status must have been fairly determined; it must reflect an actual and uncontested failure to perform an obligation to the city at the point in time that the contract or appointment is to be made or given. Thus, construing the phrase "in default to the city," the defaulter must have been given adequate notice and a reasonable time to cure the default, and the obligation, debt, or payment must not be the subject of a pending court contest or administrative proceeding. See, for example, *Golliday v Benton*

³ See the General Property Tax Act, MCL 211.47, which was amended by 1988 PA 202 to allow for the seizure and sale of personal property to collect delinquent real property taxes; *Detroit v Walker*, 445 Mich 682; 520 NW2d 135 (1994), holding that the city was permitted to maintain a personal action against the debtor for collection of unpaid property taxes where such method was not expressly excluded by city charter; and *Corrigan v City of Newaygo*, 55 F3d 1211 (CA 6, 1995), which dismissed a constitutional challenge to a ballot access ordinance which prevented delinquent taxpayers access to the ballot as candidates.

Harbor, 216 BR 407, (Bankr WD Mich 1998) (holding that MCL 117.5(f) could not be enforced by the city council because the debtor's bankruptcy status overrode the city charter provision which would void the debtor's election to the city council).⁴

It is my opinion, therefore, that the phrase "in default to the city" as used in section 5(f) of the Home Rule City Act, 1909 PA 279, MCL 117.5(f), which disqualifies one from receiving a city contract or appointment, means that, at the point in time the contract or appointment is to be made or given, the person has failed to meet a financial, contractual, or other obligation to the city after adequate notice of the obligation and an opportunity to cure it were provided to the person and the obligation is not the subject of a pending judicial or administrative proceeding.

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⁴ While neither OAG No 120 nor Letter Opinion to Acting City Attorney Hiltunen address the definition of "in default" as that term is used in section 5(f) of the HRCA, to the extent those Opinions could be understood as permitting a person who is in default, as that term is defined in this Opinion, to be eligible for a city contract or office, they are superseded.



A major twist in a lot of Detroit wrong turns

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DETROIT -

Anyone who has spent time recently within earshot of Detroit City Council member JoAnn Watson knows what's coming.

Her constant, broken record style, high decibel verbal drumbeat has been to decry the state of Michigan at every turn. She can and does 20 emotional minutes as if in a revival meeting on how Michigan reneged on a deal cut in 1997 between then Gov. John Engler and Detroit Mayor Dennis Archer. It gave the city roughly \$270 million dollars a year in revenue sharing funds in exchange for reducing its city income tax rates. She points out that is roughly the

number that would keep Detroit out of financial trouble for this year and prevent the need for an emergency manager.

She says any discussion of Detroit's inability to pay its bills would disappear if the state would simply pay its bills, like a quarter of a billion dollars owed to the citizens of Detroit. She even persuaded Mayor Dave Bing to make the same loud argument in his memorable afternoon news conference inside City Hall last month.

Local 4 started following the trail of this story last spring.

At the time, the treasurer's office said vehemently it owes the city of Detroit nothing. Its reasoning was because the original deal only addressed the then current revenue sharing formula and it stated in writing if revenue sharing legislation changed [which it did] the state money would run dry.

Which it did!

So, fast forward to Tuesday morning; no one saw this coming!

On the Inside Detroit radio show on WCHB-AM, hosted by the ever vigilant Mildred Gaddis, Michigan Treasurer Andy Dillon dropped a sizable bombshell. For the first time since taking office he admitted the state in fact does owe Detroit the money.

He said:

The state failed to live up to that 10 year deal and if you add up the last revenue sharing it totals up to \$224 million. So, we don't deny that deal was not kept; although Detroit, like all other cities across the state that received revenue sharing, that's statutory revenue sharing, did receive deductions beginning in about 2004."

Dillon said a lot there, yet what he did NOT say was whether the state felt any obligation to now pay back the money, or whether the state even had the wherewithal to do so. It's a carefully timed political move considering the governor has a State of the State address later this month. The belief around the city is he is likely to announce a budget surplus. Detroiters would certainly claim the first quarter of a billion as theirs and have done so loudly for more than a year. So, Dillon goes on Gaddis' show, a decidedly Detroit-centric venue, and throws residents a bone. One gets the feeling some of that money may find its way back at some future date. Whether only a small amount will get paid has been the rumor around City Hall for a while now and no one knows for sure what's at play here.

Still, as quickly as the Treasurer gave credence to one of the most hotly contested points against the emergency manager legislation in the city, he threw cold water on those raised hopes. He said, "\$200 million, much of it would help the city get through this year, it won't solve the long term problems the city facing which is over \$12 billion in liabilities that they have on their balance sheet."

To be fair, the city can fund roughly \$10 billion of that debt, but it's the federally mandated pension funds going unfunded and that is Dillon's largest worry.

He told Gaddis, "So while that would be nice if would get us through this year and probably next year it won't solve the systemic structural problems the city has." Dillon made it clear he is deeply concerned about the pension problem, so much so he told Gaddis he believes the City will never be able to pay it off: "I think the review team will find it unsustainable and that to me is a big problem." What he is saying there is even an emergency manager can not solve that problem. No, it would take a Chapter 9 Municipal Bankruptcy filing. That, for a city blanching at an EM would amount to Armageddon. So here are huge problems still to be ironed out.

That takes us to what's happened over the holidays at Detroit City Hall. The mayor's office and the city's union leaders have been negotiating, meeting almost daily. There is a self imposed gag order in place so no one is doing interviews. But Local 4 has learned through sources the unions are willing to give back 10 percent in pay and are willing to live with much lesser health care. The sticking point is giving back anything in the area of pensions. This is preventing the mayor from coming up with a plan that, if the state treasurer's office thought would solve the problem, could avoid an emergency manager. This is also why the treasurer has his review team already in place doing its deep dive into the City of Detroit's books. He worries a deal is unlikely

So, in the end it's all about the pensions, a crushing unfunded debt, and the one place where unions aren't willing to bend and where the federal government requires payment. So what will it be, a courageous last minute agreement that can save the city of Detroit, or a federal judge carving up what's left of the city's assets in Chapter 9?

These are very tough questions with very few good options or answers. This will be the ultimate test of the city's and the state's leadership.

The clock ticks as the money continues to run out.



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