

**CITY OF CHARLEVOIX
SPECIAL CITY COUNCIL MEETING MINUTES
Thursday, January 2, 2014 — 5:00 p.m.**

210 State Street, City Hall, 2nd Floor Council Chambers, Charlevoix, MI

The meeting was called to order at 5:00 p.m. by Mayor Norman L. Carlson, Jr.

I. Pledge of Allegiance

II. Roll Call of Members Present

Mayor: Mayor Norman L. Carlson, Jr.
City Manager: Rob Straebel
City Clerk: Stephanie C. Brown, Deputy Clerk
Members Present: Council members Greg Stevens, Leon Perron, Jeff Porter, Shane Cole, Lyle Gennett, and Shirley Gibson
Absent: None

III. Inquiry Regarding Possible Conflicts of Interest

None.

IV. Requests, Petitions, and Communication and Actions Thereon

A. Consideration to Pass a Resolution Regarding the Qualification of Clerk-Elect Lawrence Sullivan

Assistant City Attorney Bryan Graham provided a brief overview of the item and answered questions from Council. Legal Counsel has done an interpretation of the City Charter and determined, for multiple reasons, that a County Commissioner cannot hold an elected office with the City, including City Clerk. Those reasons are summarized as:

1. Section 2.16(a) of the City Charter references "elected official". Since there is no limitation associated with "elected official," the plain language of the text must be construed to mean that the reference applies to all elected officials that are subject to the regulations of the City Charter.
2. The pertinent language of Section 2.16(a) is that "no elected official shall hold any other office" during his or her term of office. In examining the text of the provision, the language is clear and unambiguous; therefore, under the rules of statutory construction, no interpretation of this language is permitted.
3. If the language of Section 2.16(a) were considered ambiguous, an interpretation would require ascertaining the intent of the Charter. Section 2.16(a) does not expressly limit the "other office" to a City office. Therefore, the question that must be addressed is whether or not the failure to limit the "other office" to a city office was intentional. Under the rules of statutory construction, the charter must be read as a whole. Other provisions of the City Charter make reference to "official" in contexts that make clear that those references are to City officials. Unlike these other provisions, Section 2.16(a) does not limit the office to a city office. The Michigan Supreme Court has stated that the use of different terms within similar statutes generally implies that different meanings were intended. Therefore, it is reasonable to conclude that the failure to expressly limit "office" to a city office was intentional.
4. Because the objective of Section 2.16(a) of the City Charter is to eliminate the potential for conflicts associated with the City's elected officials, and because conflicts can arise between public offices of different municipalities, it is reasonable to conclude that the Charter Commission intended to eliminate this potential conflict by prohibiting an elected city official from holding any other office, and not just another city office.

In addition to this opinion, legal counsel advised City Council that per Section 3.1 of the City Charter, City Council has the authority to determine if a Clerk-elect is qualified to assume the office of clerk. Attorney Graham reiterated that Mr. Sullivan has the ability to eliminate any violation of Section 2.16(a), and thus qualify for the office of City Clerk, by resigning his office as a County Commissioner prior to taking office as the City Clerk.

Attorney Graham stated that he had spoken with the Attorney General's (AG) office that morning, and that he was advised that the AG's office is actively reviewing this matter and anticipates issuing a letter to the City within the next seven to ten days. Based on this information, Attorney Graham is suggesting a revision to the proposed resolution to require the City Council to reevaluate the situation if the AG's office renders an opinion that Mr. Sullivan may simultaneously hold both offices.

Councilmember Gibson asked why the AG's office had not offered an opinion months ago. Attorney Graham assured Council that an opinion had been requested, but that the AG's office had declined the request to offer an opinion at that time. Attorney Graham does not know why.

Mayor Carlson asked Council for input.

Councilmember Gibson addressed Council and the audience, noting that the original legal opinion dated August 20, 2013 stated that there was no incompatibility of office, and questioned additional legal opinions that differed. Assistant City Attorney Graham noted that 1) information received by his office after August 20 affected the legal opinion, and 2) the proposed resolution does not address incompatibility of offices, but rather the qualification of a County Commissioner to serve as City Clerk.

Councilmember Gibson asked if the City Attorney had received information from the County Clerk regarding election duties at the time the first legal opinion was rendered. Attorney Graham stated that they had received information, prior to the first opinion, that there were no contracts between the City and the County. Due to questioning by the AG's office, additional information came to light

about the relationship between the City and County Clerks in regards to elections and election equipment. This information was received after the first legal opinion was rendered, and affected legal counsel's opinion.

Councilmember Porter asked if there were any written contracts between the City and the County. Attorney Graham stated that there may be, but of concern is the oral contracts and bailment contracts between the City and the County.

Councilmember Porter believes that the City Charter is nebulous in regards to the City Clerk. On the other hand, the County operates under State law, which is very clear. It is Councilmember Porter's opinion that the City should swear in Mr. Sullivan as City Clerk, and then let the City's law firm and the County's law firm, which happen to be the same, figure out how State law impacts Mr. Sullivan's ability to hold both positions. Councilmember Porter is concerned that if the City does not allow Mr. Sullivan to swear in, it will disenfranchise the voters. Because the Charter is unclear, and State law is not, Councilmember Porter believes this issue should be addressed at the County level under State law.

Councilmember Gennett stated that the primary problem is that the Charter is unclear on this matter. He also stated that a Charter revision is necessary, but noted that is not a viable solution for the problem at hand. Additionally, the AG's office is going to provide an opinion, but Council needs to act tonight, without knowing the outcome of the AG's review.

Attorney Graham noted that Section 3.1 of the City Charter lists the City Clerk as one of the Administration Officials, and stated that "the qualifications, duties, and compensation of City officers shall be determined by the City Council." Therefore, it is legal counsel's opinion that the Charter does provide the guidance needed in this circumstance. City Council has the responsibility and the authority to determine if any of its members are, or would be, in violation of the City Charter.

Both Councilmembers Gibson and Porter stated that the August 20, 2013 opinion provided an opinion on the impact of the Charter regarding a City official holding a position as County official. Attorney Graham reiterated that the August 20, 2013 opinion did not address the Charter, only the Incompatibility of Offices Act. Councilmember Gibson asked, if the opinion was not about the Charter, why an opinion of the impact of the Charter was not provided at that time. Attorney Graham stated that his office had not been asked for an analysis of the Charter, only of the potential incompatibility of office. If an opinion regarding the Charter provision had been requested in August, it would have resulted in the opinion provided now.

Mayor Carlson asked Attorney Graham several questions, and received the following answers:

1. One of the options before Council is to pass a resolution stating that Mr. Sullivan is not qualified to hold the office of City Clerk because doing so would be a violation of the Charter. The only violation would be his holding two offices. The Charter does not state that the offices need to be incompatible, only that no official cannot hold two offices at once.
2. The resolution does not go into effect until January 6, 2013, giving Mr. Sullivan the opportunity to remove the violation by resigning his position as County Commissioner.
3. If the AG's opinion comes back stating that Mr. Sullivan can hold both positions, Council can reevaluate the matter and use the AG's analysis that Mr. Sullivan can hold both offices simultaneously. Under that presumption, Mr. Sullivan would be able to swear into office at that time.
4. The second option before Council is to not pass the resolution. If Council chooses this option, then they have lost the opportunity to determine that Mr. Sullivan is not qualified under the Charter, and Mr. Sullivan could take office. In the scenario where Mr. Sullivan takes office and the AG determines that Mr. Sullivan cannot hold both positions simultaneously, either the County Prosecutor or the State Attorney General's (AG's) office could issue an injunction requiring Mr. Sullivan to choose one of the positions. If the County Prosecutor determines that he cannot file an injunction against one of the people he reports to, then the County Prosecutor would be required to assign a Special Prosecutor. This legal action would not be on the behalf of the City or the County, it would be a legal enforcement of the Incompatibility of Offices Act.
5. Attorney Graham is anticipating that the AG's opinion will address the Charter, but he has no guarantee.

Councilmember Stevens noted that Mr. Sullivan had previously asked for an opinion from the AG's office, and that he has repeatedly stated that he will abide by that opinion. Councilmember Stevens feels that it is in the City's best interest and the simplest option to pass the resolution and wait for an AG opinion. The resolution allows the City and Mr. Sullivan to legally wait for an AG opinion, which is expected in under two weeks.

Mayor Carlson addressed Mr. Sullivan, asking several questions and receiving the following answers:

1. It is clear to Mr. Sullivan that this is not a personal matter; Council is concerned about an individual holding two elected positions, not who that individual is.
2. Mr. Sullivan finds it acceptable for Council to pass the resolution and readdress the situation when the Attorney General's opinion is rendered.
3. Mr. Sullivan is concerned that his "window" for legally being allowed to take the oath might close while Council is waiting for an AG opinion, and asked if Council could direct Staff to check into this matter. [Subsequent to the meeting, it was determined that Mr. Sullivan would need to take the oath prior to acting as City Clerk, but there is no other time stipulation on taking the oath.]
4. Mayor Carlson noted that the proposed actions are being considered to protect Council and the City, which is a primary function of the City Clerk. If the situation is resolved in a way that puts Mr. Sullivan in the position of City Clerk, then he

and City Council will need to be able to work together effectively for at least two years. Mayor Carlson reiterated that this is not a personal issue with Mr. Sullivan, and he does not want Council and Mr. Sullivan to start their working relationship in a stressful position.

5. Mr. Sullivan will abide by the AG's opinion. If the AG determines that Mr. Sullivan will hold both positions, that is his desire; however, if the AG determines that Mr. Sullivan must choose one position, then he will do so.
6. If an AG opinion is not received in a reasonable time, the City Council will re-address the issue before the position is officially considered "vacant" due to Mr. Sullivan's not taking the oath.
7. Mr. Sullivan's only concern at this point is that no effort has been made to resolve any incompatibility of office issues, in spite of his offering some solutions.
8. Mr. Sullivan disagrees with the City Attorney's opinion that the Charter is clear and unambiguous. The attorneys also stated that if the language was unclear, then the intent should be through a reasonable construction, considering the purpose of the Charter provision and the object sought to be accomplished. Mr. Sullivan argues that since Section 8.5 of the City Charter reads "any other political subdivision", and Section 2.16(a) does not, that it is not the intent of the Charter Commission to include "any other political subdivision" in its limitations.

Mayor Carlson thanked Council and Mr. Sullivan for being willing to work together. Councilmember Gennett offered his copy of the proposed resolution to Mr. Sullivan, and Mr. Sullivan took a few minutes to read it.

Upon questioning, Attorney Graham stated that if Council does not pass the resolution, Mr. Sullivan takes office, and the AG renders an opinion that he cannot hold both positions, legal action is only necessary if Mr. Sullivan does not voluntarily relinquish one of the positions.

Councilmember Porter noted that the August 20 legal opinion states that the language is unclear; however, the December 20 legal opinion states that the language of the Charter is clear and unambiguous. Attorney Graham reminded Council that the August 20 opinion addresses the Incompatibility of Offices Act, while the December 20 legal opinion addresses the Charter. Councilmember Porter disagrees with Attorney Graham's opinion that the Charter is clear.

Council generally agreed that the Charter needs to be reviewed and amended.

Council asked if they could choose to not pass the resolution and take Mr. Sullivan's word that he will not attempt to take office prior to receiving the opinion from the Attorney General's office. Attorney Graham advised Council that they need to take formal action. If they do not, and Mr. Sullivan changes his mind, there is nothing to prevent him from taking the oath. It is the attorney's responsibility to advise the Council how to protect itself: in this case, that means passing this resolution.

Mr. Sullivan, after reviewing the proposed resolution, asked about Item C in Recitals in the proposed resolution, which states that "the Charter prohibits an elected City official from holding any other elected office" and noted that this recital does state that it is a "formal, legal opinion". However, based on that recital, Mr. Sullivan takes issue with items 1 and 2 of the resolution, which states that he is not qualified. Attorney Graham stated that Item 6 requires City Council to reevaluate its determination in the event that the AG determines Mr. Sullivan may hold both positions, during which Council may reverse its earlier opinion.

Mayor Carlson stated that item 6 requires the Council to reevaluate if the AG opinion is favorable to Mr. Sullivan. While that item does not mean that Council would rescind the resolution, it does give Council the opportunity to reevaluate, which is what they are looking for at this time. The City Attorney has asked the AG for an opinion on the Charter, and if that is provided it would supersede the City Attorney's legal opinion.

Mr. Sullivan stated that he is agreeable to the plan to enact the resolution now, and reevaluate after the AG's opinion is received.

Council further discussed whether or not the resolution is necessary, given Mr. Sullivan's statement that he will abide by the AG opinion. Councilmember Stevens noted that the resolution not only protects the City, it also protects Mr. Sullivan, putting the decision on the AG's office.

Mayor Carlson opened the item to public comment at 5:46 p.m.

Michael Doherty addressed Council, suggesting that instead of passing this resolution, Council ask Mr. Sullivan to sign a sworn statement that he will abide by the decision of the AG office. Additionally, Mr. Doherty noted that the City Attorney has an obvious conflict of interest and has caused more problems by not thoroughly pursuing the matter. Mr. Doherty is upset that the City Attorney has not actively pursued a response from the AG, and believes that the City Attorney is "double billing" the City and County for services rendered. Mayor Carlson stated that the County and City are sharing costs for this item. Mr. Doherty restated that he believes the City Attorney is double billing, and that the attorney padded his billing by not giving a thorough opinion in August. Additionally, Mr. Doherty stated that the citizens who voted for Mr. Sullivan knew that he is County Commissioner and expected that he would have both positions.

Deputy Clerk Brown addressed Council, informing them that she was at fault for not providing complete information in August. She had been asked about any contracts between the City and County, but had not considered the potential impact of the City using

County services and equipment. Ms. Brown assured Council that this additional information was provided to the Attorney after he rendered his August opinion. Manager Straebel noted that there was not a City Clerk in place at that time.

Gabe Campbell suggested that Council create a subcommittee of one Councilmember from each ward to clarify some of the issues in the Charter. Council agreed.

Bob Bergmann noted that all of the Administration Officials listed in Section 3.1, except the City Clerk, are appointed officials. In his opinion, that is a conflict in itself. Additionally, Mr. Bergmann noted that Mr. Sullivan was willing to delay taking office until after the AG's opinion is received and that City Council has agreed to reevaluate the issue at that time. Mr. Bergmann stated that the AG's opinion will not address the Charter. Mayor Carlson stated that it may, or it may not, but Council can revisit the matter at that time. Mr. Bergmann asked Council to hold any action until the AG's opinion is received.

Jodi Laurent noted that the both Council's and Mr. Sullivan's intentions are on tape, creating an oral contract; therefore, she does not believe that the resolution is necessary. Additionally, Ms. Laurent asked if there is any stipulation on when Mr. Sullivan should receive his salary, since he is supposed to take office on the 6th but is not taking office until a later date. Mayor Carlson stated that the Compensation Commission handles the Clerk, and all elected officials, compensation.

Councilmember Stevens stated that he would not have a problem with paying Mr. Sullivan retroactively if the AG's office determines that he could have taken office on January 6 without resigning his other position.

Ms. Laurent reiterated that the resolution is unnecessary. Mayor Carlson agreed that, in a perfect world, the resolution would not be necessary; however, the City attorney has stated that not adopting the resolution would result in unnecessary risk to the City and Council. Additionally, adopting the resolution does not result in any adverse condition. Mr. Sullivan has stated he understands the need for the resolution; why are other citizens so opposed? Council is trying to do the right thing, which is not an easy decision in this case.

Mary Eveleigh noted that there are two issues: one regarding the Charter, and one regarding the Incompatibility of Office Act. Ms. Eveleigh suggested that the Council is considering amending the Charter through a resolution, which is illegal. Any change to the Charter would need to go to a vote of the people. Ms. Eveleigh also stated that Mr. Sullivan was elected by the people, and that choice should be respected by Council. Ms. Eveleigh noted that the August 20 legal opinion stated that an AG opinion had been requested, but Council is stating they haven't received one. Mayor Carlson noted that asking for and getting are two different things. Ms. Eveleigh asked how any opinion from the Attorney General could overwrite the City Charter. Mayor Carlson explained that the City Charter reads that a person cannot hold two offices; however, State law supersedes the City Charter. If the AG determines that Mr. Sullivan can hold both offices, that will supersede the City Attorney's opinion that an official cannot hold both offices.

Ms. Eveleigh reiterated that Mr. Sullivan was elected by a vote of the people, and that he should be sworn in. If the AG office returns an opinion that he cannot hold both offices, Mr. Sullivan could resign one of them at that time. However, Ms. Eveleigh believes that the proposed resolution is changing the Charter, and Council does not have that right.

Councilmember Porter suggested that Recitals C, G, and Resolution Items 1, 2, and 3, be stricken from the proposed resolution. Attorney Graham noted that, if these items were stricken from the resolution, the resolution would be meaningless.

Attorney Graham pointed out that elected officials frequently run for other office, and are required to relinquish their current position before taking the new one. For example, if a township board member holding a four year term were to run for and win a State Legislature seat, Attorney Graham stated that the public would expect the elected official to resign his board position before taking the oath for the State Legislature position; furthermore, if a District Court judge with a six year term should run for and win a Circuit Court judgeship, the public would expect the judge to resign the District Court judgeship before taking the Circuit Court judgeship. Therefore, the fact that Mr. Sullivan has won the position of City Clerk does not mean that the public was anticipating that he would hold both positions.

Councilmember Porter stated that, if the Attorney General's opinion is that Mr. Sullivan can hold both positions, the City Attorney's opinion is mute. Attorney Graham agreed.

Mr. Doherty restated that Council should ask Mr. Sullivan for a sworn statement to the effect that he would abide by the Attorney General's opinion. Mr. Doherty thanked Ms. Brown for her service, but noted that the City needs a City Clerk.

Mayor Carlson restated that, if the AG has not provided an opinion within 30 days, which is more than three times what is anticipated, City Council can revisit the issue without the AG's opinion; however, there is no reason why the AG's opinion should not be available in that time frame.

Mayor Carlson thanked Mr. Sullivan for working with the City on this matter, and suggested that if it is legal, Council seems agreeable to providing retroactive pay if the AG's office determines that he could have taken office on January 6 without resigning his other position.

Councilmember Gibson asked Mr. Sullivan why he couldn't choose one position. Mr. Sullivan stated that, if the AG says he can do both, then he will.

John Haggard objects to the idea that Council might pay Mr. Sullivan retroactively for work that he didn't perform. Mayor Carlson clarified that Council would consider the retroactive pay only if the AG's office determines that the City's decision was wrong. Mr. Haggard insists that it is not appropriate to pay someone not to work, regardless of a third party's opinion.

Motion by Councilmember Stevens, second by Councilmember Gibson, to adopt Resolution 2014-01-01, a Resolution to Determine the Qualification of Clerk-Elect, County Commissioner Sullivan.

RESOLUTION 2014-01-01
A RESOLUTION TO DETERMINE THE QUALIFICATION OF CLERK-ELECT, COUNTY COMMISSIONER SULLIVAN

Recitals

- A. WHEREAS, Larry Sullivan is a currently serving member of the Charlevoix County Board of Commissioner;
- B. WHEREAS, Mr. Sullivan received the most votes for the elected position of City Clerk in the last election and, pursuant to section 4.7 of the City Charter, is to assume office at the first City Council meeting in 2014, which will be on January 6, 2014;
- C. WHEREAS, the City Attorney has provided a formal legal opinion that section 2.16.a of the Charter prohibits an elected City official from holding any other elected office;
- D. WHEREAS, the Michigan Attorney General's Office is currently reviewing whether Mr. Sullivan can simultaneously hold both the office of County Commissioner and the office of City Clerk;
- E. WHEREAS, Mr. Sullivan's status as a currently serving County Commissioner and his stated position that he also intends to assume the office of City Clerk requires a determination regarding whether Mr. Sullivan is qualified to assume the office of City Clerk;
- F. WHEREAS, section 3.1 of the City Charter mandates that the City Council shall determine the qualifications of City Officers, which includes the City Clerk;
- G. WHEREAS, Mr. Sullivan has the right to either resign his position as a County Commissioner or elect not to assume the office of City Clerk and the Council desires to give Mr. Sullivan the opportunity to decide which elected office he wishes to hold; and
- H. WHEREAS, the Council has an obligation to uphold the intent of the City Charter and, thereby, promote public confidence in government and avoid even an appearance of impropriety.

Resolution

NOW, THEREFORE, BE IT RESOLVED by the City Council for the City of Charlevoix that:

1. The Council finds that section 2.16.a of the Charter prohibits a City official from holding another office during the term for which the City official is elected and that this prohibition includes the position of a County Commissioner.
2. The Council finds that Mr. Sullivan's serving as City Clerk, while simultaneously serving as a County Commissioner, would violate section 2.16.a the City Charter.
3. Based on the findings stated above and pursuant to section 3.1 of the Charter, the City Council determines that Mr. Sullivan is not currently qualified to assume or hold the office of City Clerk and shall neither be given the oath of office nor assume the office of City Clerk for the City of Charlevoix.
4. This resolution relates only to the obligation of the City Council to determine the qualifications of its City officers under the City Charter and this resolution does not pertain to whether there would be a violation of the Incompatibility of Public Offices Act (MCL 15.181 et seq.), if Mr. Sullivan simultaneously would hold the position of City Clerk and County Commissioner.
5. This resolution shall become effective on January 6, 2014 unless Mr. Sullivan resigns as a Charlevoix County Commissioner prior to that date.
6. The Council, however, shall reevaluate its determination in this Resolution in the event the Michigan Attorney General's Office renders an opinion that Mr. Sullivan may simultaneously hold both the office of County Commissioner and the office of City Clerk.

RESOLVED, this 2nd day of January, A.D. 2014.

Resolution was adopted by the following yea and nay vote:

Yeas: Stevens, Cole, Gennett
Nays: Perron, Porter, Gibson
Absent: None.
TIE VOTE
Mayor Carlson: Yea
RESOLUTION ADOPTED.

V. Audience Input (Non-agenda)

The Mayor called for non-agenda public comment. There were no comments.

VI. Adjourn

The Mayor stated if there were no objections, the meeting would adjourn.

There were no objections.

Meeting adjourned at 6:21 p.m.

Stephanie C. Brown

Deputy City Clerk

Norman L. Carlson, Jr.

Mayor