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TO: Detroit City Council

FROM: David Whitaker, Director 
Legislative Policy Division Staff

DATE: May 26, 2021

RE: **Opinion on City Council's Purview to Extend Meetings through Electronic Means under the Michigan Open Meetings Act**

The Legislative Policy Division (LPD) has been requested to provide an opinion regarding whether the Detroit City Council has within its purview the power to extend public meetings through electronic means under the Michigan Open Meetings Act.

The manner in which the City Council must hold their meetings are generally governed by the City Charter, Article 4, Chapter 1, Section 4-102 *Meetings*, which provides in pertinent part:

The City Council shall hold its first (1st) meeting in the first (1st) week of January after the regular City general election and, during ten (10) months of the year, shall meet every business day unless otherwise provided by resolution at such times and places as it may provide...All business which the City Council may perform shall be conducted at a public meeting held in compliance with the Michigan Open Meetings Act, MCL 15.261 et seq.

The Charter provides that the City Council shall meet every business day unless otherwise provided by resolution at such times and places as it may provide. This Charter language gives the City Council the authority by resolution to set the times and places of its meetings. However, any meeting established by City Council must be conducted at a public meeting held in compliance with the Michigan Open Meetings Act. It is the Act which dictates how City Council conducts its meetings in public.

In conducting those meetings in compliance with the Open Meetings Act, MCL 15.263(1) provides in pertinent:

All meetings of a public body must be open to the public and must be held in a place available to the general public. All persons must be permitted to attend any meeting except as otherwise provided in this act.

MCL 15.263(2) provides:

(2) All decisions of a public body must be made at a meeting open to the public. For purposes of any meeting subject to this section, except a meeting of any state legislative body at which a formal vote is taken, the public body shall, subject to section 3a, establish the following procedures to accommodate the absence of any member of the public body due to military duty, a medical condition, or a statewide or local state of emergency or state of disaster declared pursuant to law or charter or local ordinance by the governor or a local official, governing body, or chief administrative officer that would risk the personal health or safety of members of the public or the public body if the meeting were held in person:

Pursuant to MCL 15.263(2), the decisions of City Council as a public body must be made at a public meeting in person, unless a statewide or local state of emergency or state of disaster is declared pursuant to law, charter or local ordinance. The state of emergency or disaster can be declared as set forth by the law, charter or local ordinance by the governor, local official, governing body or chief administrative officer. In reference to a local state of emergency or state of disaster, the Detroit City Code (Code), Chapter 14, Emergency Management, Section 14-101 provides definitions:

Local state of emergency means an executive order or proclamation by the Mayor that activates the response and recovery aspects of the City's emergency management operational plans, including the mobilization of the City's emergency management forces.

Emergency means any disaster, or threat of disaster, where the Mayor determines that the exercise or discharge of emergency powers is necessary to save lives, to protect the public health, safety and property, or to lessen or to avert the threat of a catastrophe within the City.

Disaster means an occurrence or threat of widespread or severe damage, injury, or loss of life or property resulting from a natural or human made cause including, but not limited to, air contamination; blight; drought; epidemic; explosion; fire; flood; hazardous materials incident; hazardous peacetime radiological incident; hostile military action, or paramilitary action or similar occurrences resulting from terrorist activities; riots or civil disorders; ice storm; infestation; major transportation accident; oil spill; snowstorm; tornado; utility failure; water contamination; wave action; or windstorm.

The Code provides that a local state of emergency is declared by an executive order or proclamation by the Mayor. An emergency is defined as a disaster or threat of disaster, where the Mayor exercises emergency powers to avert the threat. A disaster includes the threat of a

widespread epidemic. The Code provides no purview for the City Council to make any determination regarding the local state of emergency or state of disaster. In addition to the Mayor's authority, the Public Health Director is granted authority under Section 19-1-3. *Enforcement of chapter*, to take necessary steps to enforce this Chapter. Section 20-1-4. *Enforcement authority* provides:

The Health Department, as an authorized agent of the City and as an authorized local public health department under the Michigan Public Health Code, being MCL 333.1101 et seq., is empowered to enforce this chapter and this Code, state statutes and regulations pertaining to public health and safety, and to establish rules and policies necessary for enforcement.

The Public Health Director is also granted authority to act under state law, MCL 333.2451, providing:

(1) Upon a determination that an imminent danger to the health or lives of individuals exists in the area served by the local health department, the local health officer immediately shall inform the individuals affected by the imminent danger and issue an order which shall be delivered to a person authorized to avoid, correct, or remove the imminent danger or be posted at or near the imminent danger. The order shall incorporate the findings of the local health department and require immediate action necessary to avoid, correct, or remove the imminent danger. The order may specify action to be taken or prohibit the presence of individuals in locations or under conditions where the imminent danger exists, except individuals whose presence is necessary to avoid, correct, or remove the imminent danger.

In light of this authority, the Public Health Director has recently found that,

“[a] number of public bodies in Detroit, subject to the OMA, MCL 15.261 *et seq.*, will find it difficult, if not impossible, to conduct their business in live meetings that are open to the public, without violating safety guidelines issues by the CDC, the Michigan Department of Health and Human Services and the Detroit Health Department. For example, several public bodies do not have facilities that will allow for adequate physical distancing or open attendance in an in-person setting. In those instances, requiring public bodies to make their decisions in a meeting open to the public and in person (without the option of telephonic and video conferencing) would risk the personal health and safety of the member of the public or members of the public body.”

On May 20, 2021, the Public Health Director made the following findings in a newly issued *Emergency Order for Control of Epidemic*: “COVID-19 remains an imminent threat to the public of the City of Detroit; [p]er the Centers for Disease Control and Prevention (CDC), Michigan remains second in the nation in the number of SARS=C-V-2 B.1.1.7 variant cases at this time; [t]he emergence and spread of the SARS-CoV-2 variants in Detroit and surrounding communities, and current vaccination rates; certain in-person meetings pose a substantial risk to members of the public and governmental bodies in the City of Detroit.”

While the City Council has no authority to determine whether a state of emergency or state of disaster exist. Should the Mayor or the Public Health Director declare a state of emergency, the City Council and other local public bodies would be able to avail themselves of MCL 15.263a(1)(a) *Electronic public meetings*; which provides in pertinent part:

- (1) A meeting of a public body held, in whole or in part, electronically by telephonic or video conferencing in compliance with this section and, except as otherwise required in this section, all of the provisions of this act applicable to a nonelectronic meeting, is permitted by this act in the following circumstances:

For the purpose of permitting an electronic meeting due to a local state of emergency or state of disaster, this subdivision applies only as follows:

- (i) To permit the electronic attendance of a member of the public body who resides in the affected area.
- (ii) To permit the electronic meeting of a public body that usually holds its meetings in the affected area.

If a state of emergency or state of disaster is declared for the City of Detroit, public bodies may hold electronic meetings as set forth in the Open Meetings Act.

If we can be of further assistance, please feel free to call upon us.