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TO: Detroit City Council

FROM: David Whitaker, Director 
Legislative Policy Division Staff

DATE: May 11, 2021

RE: Opnion re Election Law and Primary Elections for City of Detroit

The Legislative Policy Division has been requested to provide a legal opinion on whether the City of Detroit can hold a general election to fill the vacant office on City Council without first having a primary election for the potential City Council office candidates.

The issue of filling a vacant City Council seat was brought about by Council Member Gabe Leland of the 7th District, submitting his written resignation to the City Clerk's Office on May 3, 2021, which expressed its immediate effect. The resignation created a vacancy for the remaining term of the former Councilman's office, which will end on December 31, 2021. The resignation also occurred after the deadline for the submission of nominating petitions for the August 2, 2021 primary election. The filing deadline for the August primary was on April 20, 2021.

The filling of a City Council vacancy is governed by the City Charter, Article III, *Elections*, Section 3-105 which provides in pertinent part:

If a vacancy occurs on City Council it shall be filled by appointment, based on a two-thirds ($\frac{2}{3}$) vote of members. The person appointed shall serve until an elected member takes office. The election to fill the vacant position shall occur

at the next general election to be held not sooner than one hundred eighty (180) days after occurrence of the vacancy.¹

The Charter language regarding the replacement of a City Council member requires the City Council to appoint a person to fill the vacancy until a person is elected to complete the unexpired term. The language in Section 3-105 that states “The person appointed shall serve until an elected member takes office” is designed to hold the interim person in place until the next general election, giving the voters the opportunity to select the City Council representative of their choice. LPD notes that a general election is not necessarily an election in which the City of Detroit government officials including the nine-member City Council, Mayor and Clerk are elected. Other general elections are scheduled for the election of President, Governor, U.S. Senate and U.S. Representatives.

By way of example, if Member Leland had resigned in May 2020, the next general election would have been the presidential election in November 2020 which was not an election for City of Detroit government officials. If City Council had appointed a person, they would have filled the vacancy until the general election. At that November 2020 general election, the person elected would complete the remainder of Member Leland’s term which would end December 2021. However, the general election in November 2021 is a City of Detroit government election and includes the nine-member City Council for the term beginning January 2022. To give full voice to Section 3-105 as applied to this vacancy, the November 2021 general election would also serve to elect the member to fulfill the 60 days remaining of Council Member Leland’s term until December 31, 2021.

In addressing the issue of whether a primary must occur before a general election, it is the Michigan Election Law, Public Act 116, of 1954 that governs. Under Chapter XV *City Offices*, MCL 168.321 provides in pertinent part:

Sec. 321.

- (1) Except as provided in subsection (3) and sections 322, 327, 641, 642, 644e, 644f, 644g, and 646a, the qualifications, nomination, election, appointment, term of office, and removal from office of a city officer must be in accordance with the charter provisions governing the city.

The language in MCL 168.321 indicates the election, appointment and term of office for a city officer must be in accordance with its charter provisions, subject to the provisions of law enumerated. While the Charter provides how elections in the City will take place, they must also comply with specific provision of State law. MCL 168.641 provides that dates in which regular elections must be held and states in pertinent part:

¹ LPD notes it was the intent of the 2009 Charter Commission to hold the elections to fill a vacancy at the same time as the regular general election in November to avoid having a separate special election costing the City millions of dollars to facilitate. This was to avoid a special election that was contemplated in the 1997 Charter at 3-101. Having the election to fill the vacancy at the regular general election would also coincide with the regular primary election in August.

- (1) Except as otherwise provided in this section, an election held under this act shall be held on 1 of the following regular election dates:
 - (a) The May regular election date, which is the first Tuesday after the first Monday in May.
 - (b) The August regular election date, which is the first Tuesday after the first Monday in August.
 - (c) The November regular election date, which is the first Tuesday after the first Monday in November.
 - (d) In each presidential election year when a statewide presidential primary election is held, the date of the statewide presidential primary election as provided in section 613a.
- (2) If an elective office is listed by name in section 643, requiring the election for that office to be held at the general election, and if candidates for the office are nominated at a primary election, the primary election shall be held on the August regular election date.
- (3) Except as otherwise provided in this subsection and subsection (4), a special election shall be held on a regular election date.

The language of Section 641 provides that the regular election dates shall be in May, August and November. In compliance with Section 641, the City Charter provides under Section 3-105 the following:

A regular City general election to fill the elective offices of the City shall be held on the Tuesday after the first Monday of November of 2013 and every fourth year thereafter.

A regular City primary election to nominate candidates for City offices shall be held on the Tuesday after the first Monday of August before the general election.

The City has selected as the general election date to fill elective offices of the City of Detroit, the Tuesday after the first Monday of November 2013 and every fourth year thereafter. The City has also selected as the primary election date to nominate candidates for City offices the Tuesday after the first Monday of August as the election date before the general election. These are the primary and general election dates for City offices as set forth by the Charter and in conformance with State election law. Additionally, Section 641(3) provides that in a special election, it shall be held on a regular election date.² The City Charter provides that an election for a City Council

² MCL 168.641(3) This provision would coincide with the Charter provision to have the special election to fill a vacancy occur on the same election as the regular general election.

vacancy shall “occur at the next general election”. In this instance, the next general election is November 2, 2021.

MCL 168.321 requires that a city comply with MCL 168.644f which details the date and time of filing of nominating petitions. Section 644f(1) provides in pertinent part:

(1) Except as provided in this section and section 644e, nominating petitions for offices to be filled at the odd year general election must be filed by 4 p.m. on the fifteenth Tuesday before the odd year primary election.

When Section 641 and 644f(1) are applied to the City’s election process, the upcoming general election is to be held the first Tuesday in November. The nominating petitions for persons seeking to be elected at the November general election must be filed by 4 p.m. on the fifteenth Tuesday before the primary election which is designated in August.³

The Charter language providing for the filling of a City Council vacancy at the “next general election” is actually a special election. According to the Michigan Election Law, an election to fill a vacant office or partial term is defined by statute as a special election and is governed by the Michigan Election Law, Chapter XXVII, *Special Primaries and elections*. MCL 168.4 *Definitions*, Subsection (f) provides:

"Special election" means an election to elect an individual to, or nominate an individual for, a partial term in office or to submit a ballot question to the electors.

MCL 168.631 provides:

If a special election is called to fill a vacancy in any office, the candidates for which are regularly nominated in accordance with the provisions of this act relating to primary nominations, **a special primary** for all political parties must be held in the county, district, or city in which the vacancy occurs on a day as may, subject to section 641(3), be fixed by the official or legislative body calling the special election, but not less than 45 days before the date of the special election. The official or legislative body calling a special primary shall, in the call for the special primary, fix the time within which candidates may file nominating petitions. (Emphasis added)

Under Section 631, if a special election is called to fill a vacancy in any office, the City is required to hold a special primary on a day fixed by the legislative body, that is not less than 45 days before the special election (pursuant to Section 641(3) is the day of the general election).⁴

³ MCL 168.644f(1) This provision would allow the Charter’s desire to fill a vacancy by holding the August election date as the special primary. The special election primary would use the date and time for filing that is set for the regular primary.

⁴ MCL 168.631, This provision would coincide with the Charter’s intent to hold the filling of the vacancy with the regular election date since the special election is the same date of the general election in November. The special

In this instance, the special primary must be held prior to September 18, 2021. In addition, the legislative body in calling for the special primary shall fix the time within which the candidates may file nominating petitions for the special primary election. The special election statutory provisions does not provide separate nominating petition deadlines for the special primary. The language set forth under Section 644f(1) provide the date and time for filing nominating petitions for the general election which must be filed by 4 p.m. on the fifteenth Tuesday before the primary election. The primary election is on August 3, 2021. The fifteenth Tuesday before the primary was April 20, 2021.

In answer to the general question of whether a primary is required before the November election to fill the vacant City Council seat, according the statutory law regarding special elections, is yes. While the language regarding the nominating peititions for special elections provides the authority to the legislative body to fix the time candidates may file, it gives no guidance as to how to determine that deadline. If the deadline to be fixed is in the normal manner under Section 644f(1), the time to file before the “primary election” has passed.

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

election primary would be in August with the regular primary. The special primary held in August would be in compliance because it would be more the 45 days prior to the special election in November.