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CC: Casey Joe Carl
City Clerk

FROM: Susan Segal
Susan Trammell
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City Attorney's Office

DATE: July 28, 2016

RE: Charter Amendment Petition Regarding Police Liability Insurance Requirement

MEMORANDUM

A citizen petition for a proposed charter amendment relating to police liability insurance has been transmitted to the City Council and verified by the City Clerk. The citizen petition proposes to add the following amendment (underlined, italicized text below) to the Minneapolis City Charter § 7.3(a)(2):

> Each peace officer appointed in the police department must be licensed as required by law. Each such licensed officer may exercise any lawful power that a peace officer enjoys at common law or by general or special law, and may execute a warrant anywhere in the county. *Each appointed police officer must provide proof of professional liability insurance coverage in the amount consistent with current limits under the statutory immunity provision of state law and must maintain continuous coverage throughout the course of employment as a police officer with the city. Such insurance must be the primary insurance for the officer and must include coverage for willful or malicious acts and acts outside the scope of the officer's employment by the city. If the City Council desires, the city may reimburse officers for the base rate of this coverage but officers must be responsible for any additional costs due to personal or claims history. The city may not indemnify police officers against liability in any amount greater than required by State Statute unless the officer's insurance is exhausted. This amendment shall take effect one year after passage.*

QUESTION PRESENTED

Chapter 410 of the Minnesota Statutes governs the charter process for home rule charter cities such as Minneapolis. When a citizen petition has been presented with the requisite number of signatures of registered voters, the City Council has a ministerial duty to place the measure on the ballot unless the proposed amendment contravenes the public policy of the state, is preempted by state or federal law, is in conflict with any statutory or constitutional provision, or contains subjects that are not proper subjects for a charter under Chapter 410. The question of whether the Council favors the proposed amendment is not relevant.

The sole question before the Council is whether the proposal satisfies this legal standard. If the Council determines that it does, the Council must craft a ballot question and transmit the proposal to the County Auditor prior to the August 26, 2016, deadline for this year's general election ballot. If the Council determines that it does not meet the legal test, then the Council should vote to withhold the proposed amendment from the ballot.

SUMMARY CONCLUSION

Based upon our review of the law as discussed below, it is our opinion that the proposed charter amendment is preempted by and conflicts with state law. As such, it is not a legally appropriate charter amendment and the City Council should decline to place the proposed amendment on the ballot.

ANALYSIS

I. STANDARD FOR PLACING A PROPOSED CHARTER AMENDMENT BY PETITION ON THE BALLOT.

Minnesota Statutes Chapter 410 governs home rule charter cities and Section 410.12 prescribes the steps that must be followed to place a voter-driven petition for a charter amendment on the ballot. Minnesota courts have made clear, however, that if the proposed amendment contravenes the public policy of the state or any statutory or constitutional requirement, the council may decline to place such a proposal on the ballot. *State ex rel. Andrews v. Beach*, 191 N.W. 1012, 1013 (Minn. 1923). The courts have reasoned that placing an unconstitutional or unlawful amendment on the ballot is a futile gesture not required by Chapter 410. *Hous. & Redevelopment Auth. of Minneapolis v. City of Minneapolis*, 198 N.W.2d 531, 536 (Minn. 1972). Similarly, a city council need not place a proposed amendment on the ballot where the amendment would be preempted by state law or in conflict with the public policy of the state. *Columbia Heights Police Relief Ass'n v. City of Columbia Heights*, 233 N.W.2d 760, 761-62 (Minn. 1975).

Many of the appellate precedents involve cases where the courts have affirmed the Minneapolis City Council's refusal to place certain citizen petition charter amendment proposals on the ballot. For example, in 2005, the Minnesota Court of Appeals affirmed the Council's refusal to place on the ballot a citizen petition charter proposal to authorize medical marijuana distribution centers "to the extent permitted by State and Federal law." *Haumant v. Griffin*, 699 N.W.2d 774, 780-81 (Minn. Ct. App. 2005). The court held that the proposed amendment conflicted with both state and federal law and also constituted an improper subject for a charter amendment. *Id.* The court reached this conclusion despite the qualifier in the text of the

amendment that it would only apply "to the extent permitted by State and Federal law." The Court of Appeals rejected this argument. The court reasoned as follows:

> If appellant's [the citizen petitioners] argument were accepted, it would allow *any* group or person with sufficient resources to comply with the technical requirements of proposing a charter amendment, to force a referendum on *any* issue by appending the phrase "to the extent permitted by State and Federal law" onto their amendment. That result would be absurd, and would gut the statutes and caselaw surrounding this issue. A parade of personal or "vanity" amendments would overtake the voting process if one "magic bullet" phrase trumped all concern for preemption, constitutionality, public policy, and common sense.

Id. at 781; *see also Minneapolis Term Limits Coal. v. Keefe*, 535 N.W.2d 306, 308 (Minn. 1995) (holding that proposed amendment limiting the terms of local elected officials violated Article VII, Section 6 of the Minnesota Constitution); *Davies v. City of Minneapolis*, 316 N.W.2d 498, 502 (Minn. 1982) (proposed amendment prohibiting levy of sales tax for domed stadium violated prohibition against impairment of contracts found in the United States Constitution); *Hous.& Redevelopment Auth.*, 198 N.W.2d at 536-37 (rejecting proposed amendment that would permit referendum on "any action" of the city council). "[D]espite the broad governance authority conferred through a home rule charter, any charter provision that conflicts with state public policy is invalid." *Haumant*, 699 N.W.2d at 779, (quoting *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn.Ct. App. 2002)).

In *Housing and Redevelopment Authority v. City of Minneapolis, supra*, the Minnesota Supreme Court found that because the proposed amendment was unconstitutional, it was "proper for the trial court to enjoin the election rather than permit the administration and the voters of the city of Minneapolis to experience the frustration and expense of setting up election machinery and going to the polls in a process which was ultimately destined to be futile." 198 N.W.2d at 536. The *Davies* court echoed this sentiment, stating that "[w]hen a proposed charter amendment

appears to be manifestly unconstitutional, the City Council must have the authority to avoid what would amount to a futile election and a total waste of taxpayers' money." 316 N.W.2d at 504.

The most recent charter petition involving the City of Minneapolis was *Fraser v. City of Minneapolis*, No. 27-CV-09-21704 (Henn. Co. Dist. Ct. Sept. 10, 2009). In *Fraser*, petitioners sought to amend the Minneapolis City Charter "to create the Park Board as 'a separate and independent governmental unit of the State of Minnesota . . . .'" *Id*. at 18. The *Fraser* court upheld the City Council's refusal to place the citizen petition charter amendment proposal on the ballot, ruling in favor of the City on all three grounds that formed the basis for the Council's action: that the proposed amendment was (1) manifestly unconstitutional; (2) expressly preempted by state law; and (3) contrary to public policy. *Id.*

These previously litigated proposed charter amendments make clear that it is appropriate for the City Council to refuse to place a proposed charter amendment on the ballot where the amendment would be futile because of preemption or conflict with the law or public policy of the state. *Haumant*, 699 N.W.2d at 779-80.

II. THE PROPOSED CHARTER AMENDMENT IS INVALID BECAUSE IT IS PREEMPTED BY AND IN CONFLICT WITH STATE STATUTES ON DEFENSE AND INDEMNIFICATION AND THE PUBLIC EMPLOYMENT LABOR RELATIONS ACT.

The proposed charter amendment seeks to require Minneapolis police officers to purchase their own professional liability insurance. It specifies that the required insurance must include coverage for "willful or malicious acts" and "acts outside the scope of the officer's employment" by the City. The proposal allows the City the option of reimbursing officers for the base rate cost of the coverage, but requires that officers must be personally responsible for "any additional costs due to personal or claims history." The proposal further states that the City "may

not indemnify police officers against liability in any amount greater than required by [s]tate [s]tatute unless the officer's insurance is exhausted."

This proposal is expressly preempted by and in conflict with the City's statutory obligations to provide defense and indemnity to its employees, including police officers, and with the Minnesota Public Employment Labor Relations Act. As such, the proposal is not lawful and the Council should decline to place the provision on the ballot.

A. The Charter Proposal Is Invalid Because it Is Expressly Preempted By and in Conflict with State Statutes Governing the Defense and Indemnity of Public Employees.

There are two different Minnesota statutes relating to the City's obligations to defend and indemnify employees that are relevant to this analysis. The first is contained in Chapter 466 and the second is set out in Minnesota Statutes Section 471.44. Both laws contain provisions that expressly supersede any contrary municipal charter provision or ordinance. *See, e.g.*, *Haumant*, 699 N.W.2d at 778 (quoting *Nordmarken*, 641 N.W.2d at 348) (home rule charter status "does not preclude the legislature from preempting charter authority").

Chapter 466 of the Minnesota Statutes sets out a comprehensive scheme addressing the subject of tort liability for political subdivisions, such as the City of Minneapolis, and the scope of the obligation of political subdivisions to provide a defense and indemnification for their employees. Section 466.07 of that law requires municipalities to defend and indemnify their employees for damages, including punitive damages, so long as the employee was acting within the scope of his or her job duties and was not guilty of malfeasance, willful neglect of duty or bad faith. The applicable portion of that section provides as follows:

> **Indemnification required.** Subject to the limitations in section 466.04[1], a municipality or an instrumentality of a municipality shall defend and indemnify

[1] Section 466.04 sets out the maximum tort liability for municipalities under Chapter 466. For example, it provides a current cap on liability of $1.5 million for claims arising out of a single occurrence. Minn. Stat. § 466.04, subd. 1(9).

> any of its officers and employees, whether elective or appointive, for damages, including punitive damages, claimed or levied against the officer or employee, provided that the officer or employee:
>
> (1) was acting in the performance of the duties of the position; and
>
> (2) was not guilty of malfeasance in office, willful neglect of duty, or bad faith.

Minn. Stat. § 466.07, subd. 1.

Section 466.11 of the chapter contains an express provision declaring Chapter 466 to be "exclusive of and supersede" all home rule charter provisions. The section states:

> Sections 466.01 to 466.15 are *exclusive of and supersede all home rule charter provisions* and special laws on the same subject heretofore and hereafter adopted.

Minn. Stat. § 466.11 (emphasis added).

Section 471.44 of the Minnesota Statutes contains a defense requirement that is specific to police officers. This section requires municipalities to furnish legal counsel to defend a peace officer in actions brought against such officer for damages for alleged false arrest or injury to person, property or character resulting from an arrest made in the good faith performance of official duties:

> [E]very city, town, or county of this state employing sheriffs, police officers, or peace officers shall be required to furnish legal counsel to defend any sheriff, deputy sheriff, police officer, or peace officer employed by any such governmental subdivision in all actions brought against such officer to recover damages for alleged false arrest or alleged injury to person, property or character, when such alleged false arrest or alleged injury to person, property or character was the result of an arrest made by such officer in good faith and in the performance of official duties and pay the reasonable costs and expenses of defending such suit, including witness fees and reasonable counsel fees, *notwithstanding any contrary provisions in the laws of this state or in the charter of any such governmental subdivision.*

Minn. Stat. § 471.44, subd. 1 (emphasis added). Like Section 466.11, this section provides that the statutory language supersedes any contrary provision in a city charter.

These statutory provisions, by their terms, supersede any local charter provision, including the police liability insurance charter amendment proposal. The phrase used in Section 466.11, that the Chapter 466 provisions are "exclusive of and supersede all home rule charter provisions," and the phrase contained in Section 471.44, that cities are required to provide a defense to police officers "notwithstanding any contrary provisions" in a city charter, are clear and unambiguous.

The question then is whether these statutory provisions are in conflict with the proposed police liability insurance charter amendment. If so, the charter proposal is preempted by the state laws and the proposal is invalid and unenforceable. Since state statutes take precedence over local law, any conflict between a state law provision and a city charter provision renders the local provision invalid and unenforceable. *State ex rel. Town of Lowell v. City of Crookston*, 91 N.W.2d 81, 84 (Minn. 1958).

In *Mangold Midwest Co. v. Village of Richfield*, the Minnesota Supreme Court set out the following principles to define the type of conflict that would make an ordinance or, in this case, a city charter amendment invalid:

> (a) when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other . . . (b) where the ordinance permits what the statute forbids . . . (c) where the ordinance forbids what the statute expressly permits . . . .

143 N.W.2d 813, 816-17 (Minn. 1966).

Applying the *Mangold* conflict principles here, the proposed police insurance charter amendment is contrary to Minnesota's statutory scheme because the proposed amendment forbids what the statutes require – providing a defense and indemnity for employees and, in Section 471.44, specifically providing a defense for police officers sued for actions arising out of an arrest. The proposed charter amendment requires the officers to obtain their own insurance

and requires that this insurance be their primary insurance. While the proposed amendment allows the city to pay for the base premium (but does not require this), it specifies that officers are personally responsible for any additional premium costs based on "personal or claims history." These requirements, similar to the medical marijuana dispensary proposal in the *Haumant* case, are in direct conflict with state statutory requirements imposed on the City. Under Sections 466.07 and 471.44, the City is obligated to provide insurance coverage, including a defense, for its employees, whether by procuring outside insurance or through self-insurance. The City could choose to buy individual policies for its police officers, but it would contradict state law to require the officers to do so. The requirement in the amendment for officers to be personally responsible "for any additional costs due to personal or claims history," flies directly in the face of the two state law requirements. The proposal is not only in direct conflict with state law, but it is in conflict with laws that, by their express provisions, are "exclusive" and "notwithstanding any contrary provisions" in a city charter. As such, the proposed charter amendment would be struck down by the courts as contradictory to governing state law and it is futile for the Council to place it on the ballot.

In a letter dated June 17, 2016, the Committee for Professional Policing (CFPP), the sponsor of the proposed charter amendment, puts forward the position that the proposal is not in conflict because it only holds officers responsible for conduct that constitutes "misconduct" and, thereby, only covers conduct outside the City's duty to provide a defense and indemnity under Minn. Stat. § 466.07 or § 471.44. This argument, however, fails for several reasons.

First, there are a number of situations where officers are sued when they have engaged in no misconduct at all. Of the cases handled by the City Attorney's Office over the last ten years involving allegations of police misconduct, we have obtained judgments in favor of the officers

and City, dismissing the lawsuits, in over half of all lawsuits filed and 95% of all lawsuits that we resolve in court. Typically, these cases are dismissed after all discovery in the case has been completed, a summary judgment motion has been prepared and argued before the court and/or a trial has been held. The cases are usually in federal court and require many hundreds of hours of attorney and paralegal time in defending the lawsuit. Thus, there are many cases where officers are sued when they have not comitted any unlawful acts.

Other situations include cases where liability may be imposed, such as in traffic accident cases, where there might be negligence but the officer would still have been acting in the course of their employment and without "malfeasance," "willful neglect" or "bad faith" within the meaning of Minnesota Statutes Section 466.07. This is another situation where the officer would be entitled to a defense and indemnity under state law. Similarly, there are a number of cases that are settled where, again, the officer may have been acting in the performance of his or her duties without "malfeasance," "willful neglect" or "bad faith," but where the case is settled because the plaintiff's settlement demand is in a monetary range that makes it reasonable to avoid the costs of defense and the risk of unpredictability of litigation. Again, the officer would be entitled to a defense and indemnity from the City in this situation as well. Other examples exist, but in the interests of brevity not all will be listed here.

The other problem with the petitioner's argument is that the proposed charter amendment requires officers to be personally responsible to pay "for any additional costs due to personal or claims history." As noted above, an officer can have a lawsuit brought against him or her even though the officer was performing within the scope of his or her duties and has engaged in no misconduct. Thus, officers could have a "claims history" and increased premiums through no fault of their own. This also directly conflicts with the City's statutory obligation to provide a

defense and indemnity. These would all be cases where the officers are acting in the performance of their duties and are entitled to defense and indemnity by the City under state law. Thus, the argument set out in petitioner's letter does not render the proposal a proper one to be placed on the ballot.

A second letter was submitted from attorney Tim Phillips, dated July 25, 2016, on behalf of the CFPP. In this letter, Mr. Phillips argues that the proposed charter amendment is not in conflict with Section 466.07 because the charter amendment only requires officers to purchase insurance to cover circumstances outside of the scope of defense and indemnity required by that section – i.e., the coverage is limited to only those circumstances where an officer has engaged in "malfeasance," "willful neglect of duty" or "bad faith." This simply is not accurate. The proposed amendment requires officers to obtain "insurance coverage in the amount *consistent with current limits* under the statutory immunity provision of state law" and that such insurance "must be the *primary insurance* and must *include* coverage for willful or malicious acts . . . ." The amendment clearly requires insurance to cover the limits of liability under Chapter 466 and thus is in direct conflict with Section 466.07. This is further underscored by the requirement that the individual policies must be the *primary* insurance. The amendment goes on to read that the insurance must *include* coverage for liability excluded under 466.07. It does *not* state that the insurance is *limited* to the types of liability that are not covered under 466.07. Thus, the argument set out in the Phillips letter is simply erroneous.

The proposed charter amendment is in clear conflict with the statutory obligations of defense and indemnity and therefore is not a lawful charter amendment proposal.

B. The Proposed Charter Amendment Is Also Invalid Because it is in Conflict with the Minnesota Public Employment Labor Relations Act.

Minneapolis police officers are represented by the Police Officers Federation of Minneapolis. The duties and responsibilities of the City with respect to labor matters is governed by the Minnesota Public Employment Labor Relations Act ("PELRA") set out in Chapter 179A of the Minnesota Statutes.[2]

PELRA contains a section setting out the rights and obligations of employers, which provides as follows:

> A public employer has an obligation to meet and negotiate in good faith with the exclusive representative of public employees…regarding grievance procedures and the terms and conditions of employment . . . .
>
> The public employer's duty under this subdivision [to meet and negotiate terms and conditions of employment] exists notwithstanding contrary provisions in a municipal charter, ordinance, or resolution. A provision of a municipal charter, ordinance, or resolution which limits or restricts a public employer from negotiating or from entering into binding contracts with exclusive representatives is superseded by this subdivision.

Minn. Stat. § 179A.07, subd. 2 (a).

The subject of defense and indemnity against liability claims is covered in the labor agreement between the City and the Federation. The labor agreement specifically provides:

> **Section 26.3 - Liability Insurance**. The City may, at its option, maintain a standard policy of liability insurance covering employees against the actions and claims referenced in Section 25.1 [sic] above.[3] The City shall pay all premiums for such coverage.

This provision has been part of the police union contract in various iterations for over thirty years. This section embeds in the labor agreement the City's duties and obligations under state law to provide employees with a defense and indemnity. The first sentence of this section merely

[2] PELRA covers "public employers," a term defined in the Act as including "notwithstanding any other law to the contrary, the governing body of a political subdivision..." Minn. Stat. §179A.03, subd. 15(a)(6).

[3] Section 26.1 references Minn. Stat. § 466.07, summarized earlier in this memorandum. The reference to Section 25.1 instead of 26.1 is a typographical error. The correct section number was contained in earlier contracts. When all of the articles and sections in contract were renumbered several contracts ago, there were some typographical errors in this process. This is one of those typographical errors.

reinforces that it is the City's right to choose whether to purchase outside insurance or, as is currently the case, to self-insure. This section of the union contract merely makes clear that if outside insurance is purchased, that the City "shall pay all premiums for such coverage." The proposed charter amendment, which provides that the officers have to acquire their own policies for which the City "may" pay the base rate, but not any additional premiums due to personal or claims history, conflicts with Section 26.3 of the union contract.

In the July 25, 2016, letter from attorney Tim Phillips written on behalf of the CFPP, Phillips argues that the proposed amendment does not require officers to obtain insurance for acts within the course of their employment and only requires coverage for acts '*outside the scope of the officer's employment.*' He posits that, as such, there is no conflict with the collective bargaining agreement. As explained above, this is simply not true. The charter amendment requires coverage for *both* acts within and outside of the course of an officer's employment and conflicts with the union contract.

The City may not adopt an ordinance or a charter provision that unilaterally changes an existing provision in a labor agreement nor can it unilaterally restrict what has become a term and condition of employment and, as such, a mandatory subject of collective bargaining. An employer that unilaterally changes a labor agreement provision violates the labor agreement and its obligations under PELRA to negotiate in good faith. *W. St. Paul Fed'n of Teachers v. Indep. Sch. Dist. No. 197*, 713 N.W.2d 366, 374 (Minn. Ct. App. 2006). In addition, a charter provision that conflicts with the labor agreement is superseded by the labor agreement and is thereby unenforceable.[4] Minn. Stat. § 179A.07 subd. 2; *Gallagher v. City of Minneapolis*, 364 N.W.2d

[4] Phillips argues in his July 25 letter that since the union contract takes precedence over a conflicting charter provision that the proposed charter amendment is harmless and can proceed. As discussed in the *Haumant* case, quoted on page 4 above, such reasoning has been frowned on by the courts as bad policy, confusing to voters and a futile effort that is a waste of public resources. 699 N.W.2d at 780-81.

467, 470 (Minn. Ct. App. 1985) (court rejected a suit by the Minneapolis Civil Service Commission to declare a collective bargaining agreement void as in conflict with the City Charter); *Somers v. City of Minneapolis*, 245 F.3d 782, 785-87 (8th Cir. 2001) (twelve-month probationary period established by the parties' labor agreement prevailed over conflicting six-month period established by City Charter).

The proposed charter amendment is directly contrary to a longstanding provision of the collective bargaining agreement between the City and the Federation. The proposal conflicts with PELRA's prohibition on unilateral changes by management to a collective bargaining agreement. This provides an additional, independent basis for finding the charter amendment proposal invalid and for withholding the measure from the ballot.

CONCLUSION

The proposed police insurance charter amendment is preempted by and in conflict with Minnesota Statutes addressing the subjects of municipal employee defense and indemnification as well as the "terms and conditions" of employment requiring good-faith negotiations under PELRA. Accordingly, the City Council should decline to place the proposed charter amendment relating to police liability insurance on the November 2016 municipal ballot.