

**Official Proceedings  
Pontiac City Council  
220<sup>th</sup> Session of the Tenth Council**

**Call to order**

A Study Session of the City Council of Pontiac, Michigan was called to order electronically, on Tuesday, March 23, 2021 at 6:03 p.m. by Council President Kermit Williams.

**Roll Call**

<b>Members Present</b>	<b>Attendance</b>	<b>Location</b>
Carter	Remotely	Ingham County, MI
Miller	Remotely	Pontiac, Oakland County, MI
Pietila	Remotely	Pontiac, Oakland County, MI
Shramski	Remotely	Pontiac, Oakland County, MI
Taylor-Burks	Remotely	Pontiac, Oakland County, MI
Waterman	Remotely	Pontiac, Oakland County, MI
Williams	Remotely	Pontiac, Oakland County, MI

Mayor Waterman was present.  
Clerk announced a quorum.

**Approval of the Agenda**

21-76 **Motion to approve the Agenda.** Moved by Councilperson Carter and second by Councilperson Taylor-Burks.

Ayes: Miller, Pietila, Shramski, Taylor-Burks, Waterman, Williams and Carter

No: None

**Motion Carried**

**Approval of Minutes**

21-77 **Approve meeting minutes for March 16, 2021.** Moved by Councilperson Taylor-Burks and second by Councilperson Carter.

Ayes: Pietila, Shramski, Taylor-Burks, Waterman, Williams, Carter and Miller

No: None

**Motion Carried**

**Public Comments**

Five (5) individuals submitted public comments read by the City Clerk

**Councilwoman Pietila made a motion to suspend the rules and then withdrew her motion**

**Suspend the Rules**

21-78 **Motion to suspend the rules to vote.** Moved by Councilperson Waterman and second by Councilperson Shramski.

Ayes: Taylor-Burks, Waterman, Williams, Carter, Miller, Pietila and Shramski

No: None

**Motion Carried**

**Resolution**

**Department of Public Works (DPW)**

21-79            **Resolution for Martin Luther King Jr Blvd Preventive Maintenance through the Local Bridge Program.** Moved by Councilperson Waterman and second by Councilperson Taylor-Burks.

WHEREAS, the condition of the bridge listed below has deteriorated to such an extent that preventive maintenance is necessary and

WHEREAS, the budget of the City of Pontiac will not allow preventive maintenance of this bridge without additional funds from other sources.

THEREFORE BE IT NOW RESOLVED that the City of Pontiac request local bridge program funds for preventive maintenance of the MLK Jr Blvd over the Grand Trunk Western Railroad Bridge for the year 2024.

Ayes: Waterman, Williams, Carter, Miller, Pietila Shramski and Taylor-Burks

No: None

**Resolution Passed**

**Suspend the Rules**

21-80            **Motion to suspend the rules to vote.** Moved by Councilperson Taylor-Burks and second by Councilperson Waterman.

Ayes: Williams, Carter, Miller, Pietila, Shramski, Taylor-Burks and Waterman

No: None

**Motion Carried**

**Resolution**

**Department of Public Works (DPW)**

21-81            **Resolution for Orchard Lake Road Bridge Preventive Maintenance through the Local Bridge Program.** Moved by Councilperson Taylor-Burks and second by Councilperson Shramski.

WHEREAS, the condition of the bridge listed below has deteriorated to such an extent that rehabilitation is necessary and

WHEREAS, the budget of the City of Pontiac will not allow rehabilitation of this bridge without additional funds from other sources.

THEREFORE BE IT NOW RESOLVED that the City of Pontiac request local bridge program funds for rehabilitation of the Orchard Lake Road over the Clinton River Bridge for the year 2024.

Ayes: Carter, Miller, Pietila, Shramski, Taylor-Burks, Waterman and Williams

No: None

**Resolution Passed**

**Suspend the Rules**

21-82            **Motion to suspend the rules to vote.** Moved by Councilperson Waterman and second by Councilperson Shramski.

Ayes: Miller, Pietila, Shramski, Taylor-Burks and Waterman

No: Williams and Carter

**Motion Carried**

**Resolution**

**Finance**

21-83            **Resolution to approve AT&T as the telecommunications and internet provider of the City for April 1, 2021 – April 1, 2024.** Moved by Councilperson Pietila and second by Councilperson Shramski.

Whereas, AT&T, the City's current telecommunications and internet provider has presented the City with proposals for these services for a period of three years; and,  
Whereas, the Mayor and Finance Director have reviewed the proposals, have recommended that proposals are accepted, and have certified available funding.  
Now Therefore, Be It Resolved, that the City Council approves the proposal from the AT&T to provide telecommunication and internet services as outlined in the summary sheet and the separate agreements attached in this resolution.

Ayes: Pietila, Shramski, Taylor-Burks and Waterman

No: Williams, Carter and Miller

**Resolution Passed**

**Received Communication from the City Clerk**

Memorandums from Nick Curcio, Esq., The Curcio Law Firm regarding Medical Marihuana and the Planning Commission.

- a. Attorney Memorandum regarding Locational Requirements for Marijuana Growers and Processors
- b. Attorney Memorandum regarding Planning Commission's Failure to Act on City Council Referral
- c. Attorney Memorandum regarding Planning Commission Holdovers

Memorandums are attached as Exhibit A

**Adjournment**

President Kermit Williams adjourned the meeting at 6:50 p.m.

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GARLAND S DOYLE  
INTERIM CITY CLERK

GARLAND S. DOYLE, M.P.A.  
*Interim City Clerk*  
*FOIA Coordinator*

SHEILA GRANDISON  
*Deputy City Clerk*



OFFICE OF THE CITY CLERK  
47450 Woodward Avenue  
Pontiac, Michigan 48342  
Phone: (248) 758-3200  
Fax: (248) 758-3160

MEMORANDUM

TO: Honorable City Council

FR: Garland S. Doyle, Interim City Clerk

A handwritten signature in black ink, appearing to be "G. Doyle", is written over the "FR:" line. The signature is enclosed in a hand-drawn oval.

DA: March 18, 2021

RE: Memorandums from Nick Curcio, Esq., The Curcio Law Firm regarding Medical Marihuana and the Planning Commission

As you are aware, City Attorney Anthony Chubb, Giarmarco, Mullins & Horton, P.C. issued a legal opinion on April 29, 2020 regarding conditional rezoning obligations/Glenwood Plaza. In the opinion, it states that the conditional rezoning agreement approved by the City Council on January 21, 2020 "allows zoning and uses nonconforming with the relevant provisions of Pontiac Zoning Ordinance Amendment No. 2363 to the extent its requirements are inconsistent. Therefore, pending applications submitted by Pharmaco must be timely reviewed. Further, upon determination that they are in compliance with all requirements of Ordinance 2357 (B) applicable to growing operations, such licenses shall be issued by the City Clerk's Office." I have informed your honorable body, Mayor Waterman and City Attorney Chubb on several occasions that his opinion is asking me to issue a license when it is not permitted by Ordinance 2363.

Despite my concern, Mayor Waterman and City Attorney Chubb along with the developer Rubicon Capital LLC continue to apply pressure to myself as the City Clerk and has asked this Council to force me to issue licenses (permits) to their prospective tenants (Pharmaco Inc and Family Rootz).

On February 16, 2021 during the Clerk's Response to Glenwood Plaza Medical Marihuana Project, I informed the City Council that it would be illegal for me to issue a license to any medical marihuana grower or processor applicant at the Glenwood site. Ordinance 2363 does not permit growers or processors to be licensed outside of the Cesar Chavez or Walton Blvd Overlay Districts. My statement is recorded in the February 16, 2021 approved minutes.

As a result of my concern that the City Administration (Mayor and City Attorney) are asking me to perform what I believe is an illegal act, I felt that this was necessary for me to seek my own independent legal counsel to protect myself from any civil or criminal liability. I retained Nick Curcio, Esq. Attorney Curcio practice primarily focuses on municipal and zoning law.

I asked Attorney Curcio the following questions:

1. Whether, and in what circumstances, the zoning ordinance allows parcels outside the Medical Marijuana Overlay District (MMODs) to be approved for marijuana-related uses. To help clarify the issue, I asked for an opinion as to whether the Planning Commission is authorized to grant a special exemption permit for a marijuana grower or processor at a location outside of the MMODs. Also I asked if a conditional rezoning agreement could authorize the Planning Commission to do so, without rezoning the property in question to be part of an MMOD.

Attorney Curcio's memo regarding locational requirements for marijuana growers and processors dated March 9, 2021 is on the agenda as item 10a. Attorney Curcio's opinion validates my position that Ordinance 2363 does not currently permit growers or processors to be licensed outside of the Cesar Chavez or Walton Blvd Overlay Districts. It would be a violation of Ordinance 2363 and illegal for me as the City Clerk to issue any grower or processor a license (permit) if they are located outside of the Cesar Chavez or Walton Blvd Overlay Districts. If the City wants to permit growing and processing at the Glenwood site, then the City Council would have to amend Ordinance 2363.

2. In addition, I asked for an opinion as to whether the Planning Commission has a duty to review the proposed ordinance and make an up-or-down recommendation to the City Council.

Attorney Curcio's memo regarding Planning Commission's failure to act on City Council referral dated March 9, 2021 is on the agenda as item 10b.

3. Finally, I asked for an opinion as to whether planning commissioners are legally permitted to continue serving after their reappointments were rejected by City Council. If so, whether there is any limitation on their ability to do so.

Attorney Curcio's memo regarding Planning Commission holdovers dated March 9, 2021 is on the agenda as item 10c.

cc: Mayor Waterman  
City Attorney Anthony Chubb

## Attorney Memorandum<sup>1</sup>

**To:** Garland Doyle, Pontiac City Clerk  
**From:** Nick Curcio, Attorney  
**Re:** Locational Requirements for Marijuana Growers and Processors  
**Date:** March 9, 2021

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In 2019, the City of Pontiac adopted Ordinance Number 2363 to establish zoning requirements for medical marijuana facilities.<sup>2</sup> Among other things, the ordinance establishes three medical marijuana overlay districts (MMODs), known as the Walton Boulevard MMOD, the Cesar Chavez MMOD, and the C-2 downtown MMOD. The stated purpose of MMODs is to “provide for the placement of Medical Marijuana<sup>3</sup> related uses . . . with a goal of minimizing potential adverse impacts on adjacent property owners, neighbors, and the City.”<sup>4</sup> Over the last year, questions have arisen as to whether, and in what circumstances, the zoning ordinance allows parcels outside the MMODs to be approved for marijuana-related uses. To help clarify this issue, you asked for my opinion as to whether the Planning Commission is authorized to grant a special exception permit for a marijuana grower or processor at a location outside of the MMODs. You also asked if a conditional rezoning agreement could authorize the Planning Commission to do so, without rezoning the property in question to be part of an MMOD.

For the reasons described below, I believe the answer to both of those questions is “no.” If called upon to interpret the City’s zoning ordinances, a reviewing court would likely conclude that the MMODs are the exclusive locations in the City where growers and processors can legally operate. While the zoning ordinance expressly allows other

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<sup>1</sup> This memo is one of several that you asked me to prepare as your privately retained legal counsel. During our initial consultation, you explained to me that you felt pressured to take actions in your role as City Clerk that you believed to be contrary to applicable law. Accordingly, you asked for my opinion on various legal issues to help you decide how to respond to those pressures. Please note that I do not represent or have any relationship with the City of Pontiac. Pursuant to Section 4.202(a) of the Pontiac City Charter, the City Attorney is responsible for “supervising the conduct of all the legal business of the City and its departments.”

<sup>2</sup> The statements of fact in this opinion are based primarily on your representations to me during our initial consultation. For the most part, I have not independently verified those representations.

<sup>3</sup> Notably, both the City’s zoning ordinance and various state statutes use an antiquated spelling of “marijuana” that includes an “h” instead of a “j.” This memo uses the more modern spelling except where quoting directly from ordinance or statutory text.

<sup>4</sup> Pontiac Zoning Ordinance § 3.1101.

types of medical marijuana facilities to be located outside of the MMODs subject to a special exception permit, it makes no such allowance for grower and processor uses. Accordingly, the City cannot reasonably interpret the zoning ordinance to provide such an allowance, nor can it create such an allowance through a contract with a private party. Rather, the only scenarios in which a parcel that is currently outside of an MMOD could be lawfully approved for grower or processor uses would be if: (1) the parcel is rezoned to be within an MMOD; or (2) the City amends the zoning ordinance to allow medical marijuana growers and processors in other locations, either as permitted uses or special exception uses.

By way of further explanation, there are several sections of the zoning ordinance that are relevant to answering the question posed above. First, section 2.201 explains the distinction between the different designations for zoning uses in the City of Pontiac. A “permitted use” is one that is clearly compatible with a given zoning district and therefore “require[s] a minimum of limitations.” Permitted uses are allowed “by right,” subject only to site plan review to the extent required by section 6.202. A “special exception use,” by contrast, is a use “presenting potential injurious effect upon residential and other property, unless authorized under specific imposed conditions.” In particular, special exception uses require a special exception permit issued by the Planning Commission pursuant to a more rigorous review process provided in article 6, chapter 3 of the zoning ordinance. If the zoning ordinance does not authorize a defined use as either a permitted use or a special exception use in a particular zoning district, section 2.202 provides that the use is prohibited in that district.

Pursuant to section 2.204 of the zoning ordinance, a table labeled “Table 2” lists “the uses that may be permitted in each zoning district.” In doing so, it uses different symbols to distinguish uses that are permitted by right from those that require a special exception permit. Among other things, Ordinance Number 2363 amends Table 2 to include five different types of medical marijuana facilities, each of which is defined and

authorized by the Michigan Medical Marihuana Facilities Licensing Act. The new sections of Table 2 appear as follows:

Commercial, Office, and Service Uses												
Residential Districts			Commercial Districts				Industrial Districts					
R-1	R-2	R-3	C-0	C-1	C-2	C-3	C-4	M-1	M-2	IP-1		
									o	o	o	Section 2,544
									o	o	o	Section 2,545
			*		o	o	*	*	o	o		Section 2,546
			*		o	o	*	*	o	o		Section 2,547
			*		o	o	*	*	o	o		Section 2,548

\* Special Exception Permit Uses outside the Medical Marihuana Overlay Districts

o Principal Permitted Uses in the Medical Marihuana Overlay Districts

As shown above, the rows in the table for grower and processor uses are identical, with both having a circle symbol (o) in the M-1, M-2, and IP-1 columns. According to the key below the table, that symbol indicates that a use is a principal permitted use in the MMODs. In other words, when a parcel is zoned M-1, M-2, or IP-1 with an MMOD overlay designation, grower and processor uses are permitted by right. Notably, the rows in the table for grower and processor uses do not include any asterix symbols (\*), which indicate that a use can be authorized via special exception permit for parcels outside the MMODs. By contrast, the rows for the other three types of medical marijuana uses contain asterix symbols in various columns.

In addition to Table 2, there are several other sections in the zoning ordinance that are potentially relevant to the question posed. For each use type, Ordinance Number 2363 creates a new zoning section that provides locational and other regulatory requirements. For example, section 2.544 pertains to grower facilities, and states in a subsection entitled "Licensing" that "Medical Marihuana Grower uses are not permitted



outside the Cesar Chavez and Walton Blvd Medical Marihuana Overlay Districts.” Section 2.545 pertains to processors and has a nearly identical provision. By contrast, sections 2.546, 2.547, and 2.548, which pertain to provisioning centers, safety compliance facilities, and secure transporters, respectively, state that each of those uses may be located outside of the MMODs. For example, section 2.546 states: “No More than five (5) Provisioning Centers shall be established in the C-1, C-3, and C-4 zoned properties combined outside the Medical Marihuana Overlay Districts.” Sections 2.547 and 2.548 include similar language.

The final relevant section of Ordinance Number 2363 is section 3.1106, which provides: “Medical Marihuana uses outside the Medical Marihuana Overlay Districts are subject to Planning Commission approval following the Standards for Approval of Section 6.303 for Special Exception Permits, and Article 2, Chapter S, Development Standards for Specific Uses.”

In my opinion, these sections collectively indicate that growers and processors can only be located in the MMODs, where they are permitted by right. I understand that some have suggested otherwise, asserting that section 3.1106 allows all five types of medical marijuana uses to locate outside of the MMODs if the Planning Commission approves a given location by issuing a special exception permit. This reading of the ordinance is contrary to two principal rules of legal interpretation, and therefore is not legally viable. First, when possible, courts must “give every word meaning, and should seek to avoid any construction that renders any part of a statute surplus or ineffectual.”<sup>5</sup> As the Supreme Court has explained, “when there is tension, or even conflict, between sections of a statute, this Court has a duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.”<sup>6</sup> Here, if section 3.1106 is read to allow all five types of medical marijuana uses to locate outside of the MMODs, the sections of the ordinance that expressly prohibit growers and processors from locating outside of the MMODs (*i.e.*, Table 2 and sections 2.544 and 2.545) would be superfluous and ineffectual. On the other hand, all of the relevant sections can be easily harmonized by reading section 3.1106 more narrowly, so that its reference to “Medical Marihuana uses outside the Medical Marihuana Overlay Districts” refers only to the

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<sup>5</sup> *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 (2003).

<sup>6</sup> *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002).

three specific types of uses that are expressly allowed to locate outside of the MMODs pursuant to other sections (i.e., provisioning centers, safety compliance facilities, and secure transporters). This reading is perfectly consistent with the text of the ordinance, in that it does not require giving any words or phrases irregular meanings.

A second relevant principal of interpretation is that when two sections of a statute or ordinance are in conflict with each other, the more specific provision takes precedence over the more general one.<sup>7</sup> This rule is thought to help courts give effect to the legislature's intent, on the theory that "the specific provision comes closer to addressing the very problem posed by the case at hand and is thus more deserving of credence."<sup>8</sup> Here, to the extent that the various provisions of the zoning ordinance are in conflict with each other, the provisions that directly address the locational requirements for growers and processors are more specific than section 3.1106, which refers to medical marijuana uses more generally. Accordingly, a court would likely find that the more specific provisions that prohibit growers and processors from locating outside of the MMODs take precedence over any language in section 3.1106 that might suggest otherwise.

Aside from the interpretive issue involving section 3.1106, some have suggested that the Court of Appeals's decision in *Reilly v Marion Township*<sup>9</sup> empowers the Planning Commission to grant special exception permits for growers and processors outside of the MMODs, even if the text of the ordinance does not do so. This suggestion is based on a fundamental misunderstanding of the holding in *Reilly*. In that case, the Court considered a narrow issue of interpretation involving the Marion Township zoning ordinance: whether the zoning board was authorized to grant a special exception permit for a commercial trucking operation even though commercial trucking was not specifically listed in the zoning ordinance as a special exception use permitted in any zoning district.<sup>10</sup> The court concluded that the zoning board had the power to do so, because language in the ordinance specifically "empowered [the board] to add to the list

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<sup>7</sup> See, e.g., *Bruwer v Oaks* (On Remand), 218 Mich App 392, 396; 554 NW2d 345 (1996).

<sup>8</sup> Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 183.

<sup>9</sup> 113 Mich App 584, 317 NW2d 693 (1982).

<sup>10</sup> *Id.* at 588-589.

of special use exceptions those exceptions deemed necessary to protect adjacent properties, the general neighborhood, and its residents and workers.”<sup>11</sup>

There are at least three reasons why the decision in *Reilly* has no bearing on the question you posed above. First, unlike the ordinance in *Reilly*, the Pontiac Zoning Ordinance is not silent as to whether the various medical marijuana facilities are allowed as special exception uses. Rather, Table 2 and other sections of the ordinance specifically indicates that some are and some are not. This fact alone distinguishes the present circumstance from *Reilly*. Second, also unlike the ordinance in *Reilly*, the Pontiac Zoning Ordinance does not include any language indicating that the Planning Commission can add to the list of uses that are permitted by special exception permit. Third, it is questionable whether *Reilly* remains good law after the passage of the Michigan Zoning Enabling Act (MZEA). In *Whitman v Gallien Township*,<sup>12</sup> the Court of Appeals held that the MZEA, which was enacted in 2006, “require[s] that a zoning ordinance specifically enumerate the land uses and activities that are eligible for special-use status.”<sup>13</sup> In doing so, the court seemed to indicate that the open-ended list of special exception uses at issue in the *Reilly* may not comply with the new requirements in the MZEA.<sup>14</sup>

Finally, some have suggested that the City can allow growers and processors to locate outside of the MMODs by entering into conditional rezoning agreements wherein the City agrees to rezone a parcel to a zoning designation that does not ordinarily allow growers or processors (*i.e.*, a zoning designation outside of the MMODs), but then provides in the agreement that the parcel can be used as a grower or processor via a special exception permit. In my opinion, the MZEA does not allow this type of arrangement. The relevant provision of the MZEA authorizes conditional rezoning agreements by providing that “[a]n owner of land may voluntarily offer in writing, and the local unit of government may approve, certain use and development of the land as a condition to a rezoning of the land or an amendment to a zoning map.”<sup>15</sup> When used in the zoning context, the word “condition” refers to a “limitation[] on the use of the land and to protect nearby owners.”<sup>16</sup> Accordingly, the purpose of a conditional rezoning

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<sup>11</sup> *Id.* at 588.

<sup>12</sup> 288 Mich App 672; 808 NW2d 9 (2010).

<sup>13</sup> *Id.* at 17.

<sup>14</sup> *Id.*

<sup>15</sup> MCL 125.3405.

<sup>16</sup> *City of Troy v Aslanian*, 170 Mich App 523, 528; 428 NW2d 703 (1988).

agreement is to place *additional limitations* on a specific parcel that would not otherwise exist under the zoning designation to which the property is being rezoned. For example, a community might choose to rezone a residential parcel to a commercial designation, but then provide by agreement that the parcel can only be used for a lower-intensity commercial use, like an ice cream store, rather than for any of the commercial uses ordinarily permitted in the district.<sup>17</sup> Importantly, nothing in the text of the statute indicates that a rezoning agreement can authorize a property owner to engage in uses that are not allowed in the zoning district to which the parcel is being rezoned. Such an arrangement is inconsistent with the common understanding of the word “condition,” which refers to imposition of additional limitations rather than granting of additional rights. Therefore, if the City wishes to use conditional rezoning to allow growers or processors in new locations, the only permissible way to do so would be to rezone the parcel in question to an MMOD zoning designation. A reviewing court would likely determine that a rezoning agreement that rezones a parcel to a different zoning designation, outside of an MMOD, cannot authorize grower or processor uses to operate via special exception permit.

I hope this memo sufficiently answers your question. Please let me know if there is anything further I can do to assist with this issue.

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<sup>17</sup> As one prominent commentator has explained, “To reduce controversy or concerns the applicant might volunteer to condition the zoning amendment to restrict the use of the parcel(s) to only a specific certain land use. For example an ice cream store rather than all the possible land uses in a commercial district. If the zoning amendment is approved something like a deed restriction is placed on the parcel so that only the restricted uses of the parcel are possible.” Kurt H. Schindler, Michigan State University Extension, “All zoning does not have to include everything in the Michigan Zoning Enabling Act,” August 19, 2015

## Attorney Memorandum<sup>1</sup>

**To:** Garland Doyle, Pontiac City Clerk  
**From:** Nick Curcio, Attorney  
**Re:** Planning Commission's Failure to Act on City Council Referral  
**Date:** March 9, 2021

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In January 2020, the Pontiac City Council voted to refer a proposed zoning ordinance amendment regarding medical marijuana regulations to the Planning Commission.<sup>2</sup> To date, the Planning Commission has not given a recommendation on the referred ordinance, and some have suggested that it is unnecessary for it to do so. You asked for my opinion as to whether the Planning Commission has a duty to review the proposed ordinance and make an up-or-down recommendation to the City Council. For the reasons described below, I believe that it does.

Pursuant to the Michigan Zoning Enabling Act, the legislative body (here, the City Council) "may refer any proposed amendments to the [planning] commission for consideration and comment within a time specified by the legislative body."<sup>3</sup> Although the statute does not expressly state that a legislative body's referral obligates the planning commission to make a recommendation on the proposal, that obligation is necessarily implied from the text and structure of the statute. For one, if a planning commission could simply ignore referrals, the language in the statute that authorizes the legislative body to make referrals and set deadlines for the planning commission's consideration would be effectively meaningless. That would be contrary to a principal rule of statutory interpretation that requires all words in a statute to be given operative meaning to the

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<sup>1</sup> This memo is one of several that you asked me to prepare as your privately retained legal counsel. During our initial consultation, you explained to me that you felt pressured to take actions in your role as City Clerk that you believed to be contrary to applicable law. Accordingly, you asked for my opinion on various legal issues to help you decide how to respond to those pressures. Please note that I do not represent or have any relationship with the City of Pontiac. Pursuant to Section 4.202(a) of the Pontiac City Charter, the City Attorney is responsible for "supervising the conduct of all the legal business of the City and its departments."

<sup>2</sup> The statements of fact in this opinion are based primarily on your representations to me during our initial consultation. For the most part, I have not independently verified those representations. I did verify, however, that on January 21, 2020, the City Council approved a motion "to refer item #18 (emergency ordinance to amend Ordinance 2363) to the Planning Commission." Corrected Minutes of the Pontiac City Council, January 21, 2020.

<sup>3</sup> MCL 125.3401(3).

extent possible.<sup>4</sup> Further, other provisions in the statute require that a planning commission hold at least one public hearing on a proposed zoning ordinance and make a recommendation to the legislative body before the legislative body can consider its adoption.<sup>5</sup> In light of these requirements, if a planning commission could simply refuse to take action on a referral, it would effectively have the power to veto proposals put forward by the municipality's elected officials. Given that planning commissions are appointed advisory bodies rather than elected lawmaking bodies, the statute could not possibly contemplate such extraordinary power.

One notable aspect of the scenario that you described is that the City Council's referral did not state a deadline by which the Planning Commission must act on the proposed amendment. The general rule is that when no express deadline is provided, a public official or public body must act within a "reasonable period of time."<sup>6</sup> While there is no precise formula for determining what amount of delay is reasonable, it would seem that a delay of over a year would likely be deemed unreasonable. Nevertheless, if the City Council wishes to prompt the Planning Commission to make a recommendation on the proposal, it could consider making a new motion directing the Planning Commission to act within a specified deadline, as authorized by the Zoning Enabling Act. If the Planning Commission then refuses or fails to comply with that deadline, the City Council or other interested parties could likely bring a mandamus lawsuit seeking to compel it to do so.<sup>7</sup> Further, individual Planning Commissioners who refuse to comply with the deadline would potentially be subject to removal from the Planning Commission based on "nonfeasance" in office.<sup>8</sup>

I hope this memo sufficiently answers your question. Please let me know if there is anything further I can do to assist with this issue.

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<sup>4</sup> *In re Turpening Estate*, 258 Mich App 464, 465; 671 NW2d 567 (2003) ("In construing a statute, this Court should give every word meaning, and should seek to avoid any construction that renders any part of a statute surplus or ineffectual.").

<sup>5</sup> See MCL 125.3202(1), MCL 125.3306(1), MCL 125.3401(1).

<sup>6</sup> 1970 OAG 5613 (1979).

<sup>7</sup> See, e.g., *Citizens Protecting Michigan's Constitution v Sec'y of State*, 280 Mich App 273, 283; 761 NW2d 210 (2008) ("Mandamus is the appropriate remedy for a party seeking to compel action by [public] officials.").

<sup>8</sup> MCL 125.3815(9) ("The legislative body may remove a member of the planning commission for misfeasance, malfeasance, or nonfeasance in office . . ."). "Nonfeasance" is generally defined as "failing to perform any act that the duties of the office require of the officer." *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003).

# Attorney Memorandum<sup>1</sup>

**To:** Garland Doyle, Pontiac City Clerk  
**From:** Nick Curcio, Attorney  
**Re:** Planning Commission Holdovers  
**Date:** March 9, 2021

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Approximately two and a half years ago, the Mayor of Pontiac nominated four incumbent Planning Commissioners to be reappointed for additional terms after their terms expired.<sup>2</sup> The City Council voted in September 2018 to reject all four reappointments. The Mayor has not nominated any additional candidates to replace the incumbent Planning Commissioners,<sup>3</sup> and all four have continued to serve on the Planning Commission. You asked for my opinion as to whether they are legally permitted to continue serving and, if so, whether there is any limitation on their ability to do so.

With respect to your first question, the Michigan Planning Enabling Act states that a Planning Commissioner “shall hold office until his or her successor is appointed.”<sup>4</sup> In light of this provision, the Planning Commissioner’s seat is not automatically vacated at the expiration of the appointed term. Rather, the incumbent Planning Commissioner becomes a “holdover” or “de facto” officer until a successor is appointed, and any actions that he or she takes during the holdover term have the same force and effect as the actions of other Planning Commissioners.<sup>5</sup> In other words, the decision of a Planning Commission cannot be challenged on the grounds that a member of the Planning Commission was holding over in office after the expiration of his or her appointed term.

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<sup>1</sup> This memo is one of several that you asked me to prepare as your privately retained legal counsel. During our initial consultation, you explained to me that you felt pressured to take actions in your role as City Clerk that you believed to be contrary to applicable law. Accordingly, you asked for my opinion on various legal issues to help you decide how to respond to those pressures. Please note that I do not represent or have any relationship with the City of Pontiac. Pursuant to Section 4.202(a) of the Pontiac City Charter, the City Attorney is responsible for “supervising the conduct of all the legal business of the City and its departments.”

<sup>2</sup> The statements of fact in this opinion are based primarily on your representations to me during our initial consultation. For the most part, I have not independently verified those representations.

<sup>3</sup> It appears that the Mayor made an additional attempt to nominate two of the four incumbent Planning Commissioners for reappointment in late 2019, and the City Council again rejected their reappointment in January 2020.

<sup>4</sup> MCL 125.3815(3).

<sup>5</sup> See, e.g., 1979 Mich OAG 5606; 3 McQuillin, Municipal Corporations § 12.160 (3rd ed.).

One notable aspect of the scenario that you described is that the Mayor nominated the four incumbent Planning Commissioners for reappointment approximately two and a half years ago, and the City Council rejected their reappointment. In my opinion, the City Council's rejection does not preclude the incumbent Planning Commissioners from continuing to serve as holdover officers. Based on the plain language of the statute, it appears that the term "appointment" is best understood as a two-step process in which the chief elected official (the Mayor) first nominates a candidate, and the legislative body (the City Council) then confirms or rejects the nominee.<sup>6</sup> Under this understanding of the term, the time at which a Planning Commissioner's "successor is appointed" occurs once the City Council confirms a successor, not when the Mayor unsuccessfully nominates a candidate for appointment or reappointment. This construction follows not only from the common understanding of the appointment power,<sup>7</sup> but also from the underlying rationale of the common-law holdover rule, which was that "the public interest requires that public offices should be filled at all times without interruption."<sup>8</sup>

With respect to your second question, the incumbent Planning Commissioner's ability to holdover in office is subject to a practical limitation: the Mayor's duty to nominate new candidates for the position. As noted above, the Planning Enabling Act provides for the appointment of Planning Commissioners by the Mayor with the consent of the City Council.<sup>9</sup> The Michigan Attorney General has opined that when a statute vests the power of appointment in a particular officer, "the duty to provide for an election or to make an appointment within a reasonable amount of time is necessarily implied."<sup>10</sup> While there is no precise formula for determining what amount of delay is "reasonable," a delay of seven months in making an appointment has previously been deemed "unreasonable."<sup>11</sup> Accordingly, it appears that the Mayor is likely in breach of her duty to nominate new candidates for the Planning Commission within a reasonable time. A party harmed by that breach of duty — such as the City Council or an applicant

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<sup>6</sup> See MCL 125.3815(1) ("In a municipality, the chief elected official shall appoint members of the planning commission, subject to approval by a majority vote of the members of the legislative body elected and serving.").

<sup>7</sup> See *In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) (explaining that when an appointment requires the consent of the legislative body, the legislative body shares the appointing power.").

<sup>8</sup> 3 McQuillin, *Municipal Corporations* § 12.160 (3rd ed.).

<sup>9</sup> MCL 125.3815(1).

<sup>10</sup> 1970 OAG 5613 (1979).

<sup>11</sup> *Id.*



for a seat on the Planning Commission – could potentially bring a lawsuit for mandamus seeking to compel the Mayor to nominate new candidates.<sup>12</sup> The Mayor may also be subject to censure or other sanctions, particularly if there is evidence to suggest that she is refusing to nominate new candidates as an end-run around the City Council’s advice-and-consent power.

I hope this memo sufficiently answers your question. Please let me know if there is anything further I can do to assist with this issue.

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<sup>12</sup> *Id.* (“In the event that a county board of commissioners neglects to make the appointments to fill vacancies on the county road commission after expiration of a reasonable period of time, an action of mandamus may be instituted to compel the board to make the appointments.”); see also *State ex Rel. Hartman v Thompson*, 627 So 2d 966 (Ala Civ App 1993) (addressing a mandamus petition to compel the Governor of Alabama to make appointments within a reasonable time).