



## CITY COUNCIL ACTION REPORT

Date November 5, 2007  
TO: Phillip L. Nelson, City Manager  
  
FROM: Tonni L. Bartholomew, City Clerk  
  
SUBJECT: Continued Automatic Mailing of *Absentee Voter Ballot Applications* to Troy Voters on the Permanent Absentee List and Voters 60-Years of Age and Older

### **Background:**

In order to continue the practice of mailing unsolicited *Absentee Voter Ballot Applications* to qualified Troy registered voters, Council can pass a resolution affirming the practice as authorized under the Home Rule Cities Act, (MCL 117.1 et seq.). This affirmative resolution would clarify the authority that the City of Troy relies upon in providing this service to our residents, and distinguish Troy from the City of Detroit, who has been enjoined from mailing these applications by a 2/1 decision at the Michigan Court of Appeals (October 25, 2007). Time is of the essence, since the applications for the January 15, 2008 election are slated to be mailed on November 20, 2007.

Troy joins the majority of other Oakland County communities in engaging in this practice. As part of Oakland County Clerk Ruth Johnson's January 2005 implementation of the Election Consolidation Laws, each community agreed to automatically mail *Absentee Voter Ballot Applications* to the registered voters on the *Permanent Absentee Voter Request List*, as well as those Registered Voters who are 60 years of age or older. Around this same time, there were two challenges to this practice that were registered against the City of Detroit, as well as Macomb County. In order to avert any additional challenges, there were unsuccessful efforts to explicitly authorize the practice in legislation. The current version of the law is silent on the issue, and there is no express authorization or prohibition of the practice.

The City of Troy has automatically mailed *Absentee Voter Ballot Applications* to Troy voters who are on the *Permanent Absent Voter List* for over ten years. In 2005, these *Absentee Voter Ballot Applications* were also mailed to all registered voters that were 60 years old or older, and this practice has continued for at least seven elections. Through our contacts with these registered voters, we know that there is a great reliance on the *Absentee Voter Ballot Application* mailing. In those cases where an *Application* is delayed by the mail service, the registered voter will call us to make sure that the *Absentee Voter Ballot Application* was mailed.

Macomb County prevailed in their similar Circuit Court lawsuit, which was dismissed in August of this year. The City of Detroit case, which was a little more complicated, was decided by the Michigan Court of Appeals on October 25, 2007. The Court of Appeals, in a 2-1 decision, determined that the Detroit City Clerk was appropriately enjoined from mailing unsolicited absentee ballot applications to Detroit voters. In that case, the absentee voter applications were mailed with a cover letter that was signed by the Detroit City Clerk, which is an elected position. The ballot included the contested City Clerk position. In addition, there were other factors that exacerbated the potential for undue influence in the Detroit case.

Based on the facts in the Detroit case, the Michigan Court of Appeals opinion contains some language that notes that there is no express authority for election officials to mail unsolicited absentee ballot applications under the Michigan Election Law. Unless and until this 2-1 decision is challenged, each Michigan community that provides *Absentee Voter Ballot Applications* to their residents should take affirmative action to allow for the practice to continue. It should be noted that dissenting Judge Smolenski found that there was no prohibition to the automatic mailing of *Absentee Voter Ballot Applications*;

There are several reasons for the City of Troy to continue its practice of mailing the *Absentee Ballot Applications* to qualified Troy voters. First, the practice is condoned by the Michigan Secretary of State, and is expressly allowed on the Information for Election Administrators, Michigan Qualified Voter File News You Can Use (NYCU) Election News Archive, on the Secretary of State web site. According to this web site, "A city or township clerk may mass mail blank absentee voter ballot applications to eligible absentee voter in advance of elections at his or her discretion; such mailings are not required by law. Mail lists used clerks to distribute blank absentee voter ballots applications forms must be equitably compiled." Second, the Troy voters have come to expect this service, which is a convenience to them. By automatically mailing out the *Absentee Ballot Applications*, voters are notified of upcoming elections, and are encouraged to vote. Third, although the *Absentee Voter Ballot Application* is available on the City of Troy web site, many of the persons who qualify for an absentee ballot will not download the Application from the web site or don't have alternative access to the application. Fourth, it is our belief that there will be a large number of voters that will be routinely expecting an application prior to the election and will not make contact to the Clerk's office to request an application in a time frame that will provide for adequate mailing time to an out-of-state destination. These voters will lose their voting right at no fault of their own. Fifth, in many other communities (including the City of Detroit), non-city groups or organizations have stepped in and have assumed the responsibility of mailing the city's *Absentee Voter Ballot Applications* to their registered voters. This mailing in some jurisdictions, but not others, may result in disproportionate voter participation on significant ballot questions which cross jurisdictional boundaries.

### **Financial Considerations:**

The current practice of mailing *Absentee Voter Ballot Applications* has saved the City money. By sending out the approximately 13,500 *Absentee Voter Ballot Applications* prior to every election, we are able to use bulk mailing for both the Applications for Absentee Voter Ballots as well as the Absentee Ballots themselves. This is possible since we are able to mail our *Absentee Ballot Applications* at prior to the first day a voter may submit an application for a ballot (75-days prior to an election). This generally leads to an early return of the majority of the *Applications*, which is generally

well before the ballots are available. This allows us to process the *Absentee Voter Ballot Applications*, and prepare for the mailing of the absentee ballots, which are processed at our earliest convenience. Generally, there are thousands of absentee ballots waiting to be mailed at one time, and therefore the city saves significant dollars on postage fees through the Election Logo Bulk Mail Permit. The cost savings realized by utilizing our Election Logo Bulk Mail Permit is estimated to be around \$17,000 for a November Presidential Election, based on past records.

If Troy is required to discontinue its current practice, then each request would be generated by individual pieces of mail and thus the elimination of the bulk mail savings. In addition to these direct mailing costs, there would also be a significant impact to the City Clerk staff, since a change would likely result in a dramatic increase in phone calls and personal contacts with voters requesting individual *Absentee Voter Ballot Applications*. The impact of the additional contact would most likely require significant part-time staffing to process the anticipated 13,500 individual contacts.

**Legal Considerations:**

The City Attorney's Opinion is attached to this City Council Action Report

**Policy Considerations:**

Due to time constraints, it is requested that a Council Resolution be adopted to continue the automatic mailing of *Absentee Voter Ballot Applications* with consideration to the adoption of an ordinance to provide for similar relief to be reviewed and offered as reinforcement to the resolution. There are no current policies or ordinances that govern the mailing of automatic AV Ballot Applications

**Options:**

To continue the practice and precedent of mailing *Absentee Voter Ballot Applications* to Registered Voters on the *Permanent Absentee Voter Ballot* list as well as Registered Voters 60-years and older under the provisions granted to Home Rule Cities, MCL 117.1 et seq. or discontinue the mailing of all automatic *Absentee Voter Ballot Applications*.

Approved for Submittal:

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Phillip L. Nelson, City Manager

Approved as to Form:

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Lori Grigg Bluhm, City Attorney

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## F- Automatic Distribution of Absentee Voter Ballot Applications

Resolution #2007-11-

Moved by

Seconded by

WHEREAS, The City of Troy has maintained a Permanent Absentee Voters List in excess of ten-years and has mailed *Absentee Voter Ballot Applications* prior to every election to the voters on the list as well as mailed applications to voters age 60 and over, one of the statutory reasons to be eligible to receive an Absentee Ballot, for the past 7 elections;

WHEREAS, The City of Troy believes that this is a service provided to its residents and eliminating the mailings would be a disservice to voters accustomed to receiving *Absentee Voter Ballot Applications*;

WHEREAS, The Michigan Court of Appeals issued a decision on October 25, 2007, as result of an appeal by the City of Detroit to the Wayne County Circuit Court's ruling in 2005 that then Detroit City Clerk Jackie Currie had exceeded her authority to mail *Absentee Voter Ballot Applications* to Detroit voters on her Permanent Absentee Ballot Voter List, which were generally voters 60-years or older;

WHEREAS, Detroit City Clerk Jackie Currie was an elected City Clerk and was a candidate for re-election listed on the ballot when the case was filed against her;

WHEREAS, The Troy City Clerk is an appointed official and has no personal gain in the distribution of unsolicited *Absentee Voter Ballot Applications* to Troy Registered Voters;

WHEREAS, The Michigan Court decision contains language that municipal clerks are not authorized by Michigan Election Law to mail unsolicited *Absentee Voter Ballot Applications* to voters, based on the Election Law provision cited in Section 168.759(5) which states that "The clerk of the city, township, or village shall have *Absentee Voter Ballot Applications* forms available in the office of the clerk at all times and shall furnish an *Absentee Voter Ballot Application* form to anyone upon a verbal or written request";

WHEREAS, Under Michigan Election Law, there are 478 times that the Legislature has used the words "shall not", but no similar limitation of unsolicited mailing of *Absentee Voter Ballot Applications* is expressed in Section 168.759(5);

WHEREAS, The Home Rule City Act, MCL 117.1 et seq., gives a broad range of authority to Home Rule Cities;

WHEREAS, The Troy City Charter, Section 2.1, General Powers, states, in part, "City and its officers shall have and be vested with any and all powers which Home Rule Cities";

WHEREAS, The Troy City Council believes that providing services to the residents of the City of Troy is a right and responsibility of local government;

WHEREAS, The City of Troy will be penalized financially by a per piece distribution of applications and ballots at the verbal or written request by qualified voters as the City will not be eligible to utilize their special Election Logo Bulk Mailing rate;

WHEREAS, The current City of Troy staffing levels will not be sufficient to handle the anticipated dramatic increase of in-person contacts for Absentee Voter Ballots;

WHEREAS, Every election administered by the City of Troy will have a dramatic increase in staffing and postage expenses;

WHEREAS, The November 2008 General Election will have an added expenditure for postage in an estimated amount of \$17,000.00 and an undetermined expenditure for an increase in part-time staffing needs;

WHEREAS, It is in the best interest for the City of Troy to encourage its voters to participate in the Election process;

WHEREAS, Troy voters are accustomed to receiving automatic mailings of *Absentee Voter Ballot Applications*, and the elimination of this practice may lead to disenfranchising voters who have previously relied upon the automatic mailing to exercise their right to vote;

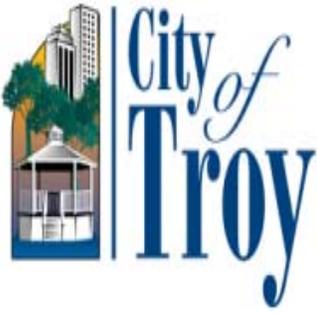
WHEREAS, Discontinuing the automatic mailing of *Absentee Voter Ballot Applications* to Troy voters, who have received applications for several elections and in excess of ten-years, is a disservice to those voters; and

WHEREAS, The right to vote is one of the very fundamental provisions of the United States Constitution and it is the belief of the Troy City Council that every effort should be made to assure that right is not disturbed;

NOW, THEREFORE, BE IT RESOLVED, That Troy City Council, under the Authority given to Home Rule Cities through MCL 117.1 et seq., hereby **DIRECTS** the Troy City Clerk to continue to automatically mail *Absentee Voter Ballot Applications* to voters of the City of Troy in the manner that has been established as a practice and precedent of the Troy City Clerk's Office.

Yes:

No:



**TO:** Members of the Troy City Council  
**FROM:** Lori Grigg Bluhm, City Attorney  
**DATE:** November 5, 2007  
**SUBJECT:** Absentee Voter Ballot Applications

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As a service to the residents of the City, the Troy City Clerk has been sending Absentee Voter Ballot Applications (AV Apps) to voters in the City. AV Apps are available on the City's web page, as well as the Michigan Secretary of State web page, or in person or by request through the City Clerk's office. AV Apps can also be mailed out by independent organizations, including but not limited to the political parties or groups with a focused message. As a convenience to the Troy voter, the City Clerk mails these applications at the earliest opportunity. The mailing of these AV Apps from a Permanent Absentee Ballot List (which includes but is not limited to those persons 60 years of age and older, precinct workers, and disabled persons), provides some economy of scale, since the mass mailing can be sent via the Election Bulk Mail rate. This would not necessarily be true if each request for an AV ballot were processed individually. However, there is a recently released Court of Appeals decision that might require the City Clerk to do a case by case processing, absent contrary action by City Council.

In *Taylor v. Currie and Detroit Election Commission*, released on October 25, 2007, elected City of Detroit Clerk Jackie Currie mailed AV Apps to voters in the City in 2005. At that time, the City of Detroit's Absentee Voter File was fairly large, since it had not been regularly purged by the Clerk, even when previous mailings were returned to the Clerk as undeliverable. Instead of just sending the Absentee Voter Application, the Detroit City Clerk, who was a candidate on the ballot, also sent a cover letter with each mailing. This practice was challenged by Ms. Taylor, who was an unsuccessful candidate in the election. According to the majority opinion of the Michigan Court of Appeals, Ms. Currie was distributing propaganda at the City's expense. However, instead of focusing on Campaign Finance laws, which prohibit the use of a municipality's funds to further an individual campaign, the Court relied upon the Michigan Election law in issuing an injunction, prohibiting Ms. Currie from further distribution of the AV App and her cover letter. In upholding the injunction against Ms. Currie, the Court of Appeals relied on MCL 168.759 (5), which states (in part) "(t)he clerk of the city, township, or village shall have absent voter ballot application forms available in the office of the clerk at all times and shall furnish an absent voter application form to anyone upon a verbal or written request." The Court noted that this provision does not expressly provide municipal clerks with the authority to bulk mail AV Apps. According to the Court, "municipal officers... have only such powers as are expressly granted by statute or by sovereign authority or those which are necessary to be implied from those granted." (*Presnell v. Wayne County Board of Road Commissioners*, 105 Mich. App. 362, 368 (1981)). Since Jackie Currie was the elected City Clerk, she was a municipal officer, whose authority was limited to only the expressly identified powers. This holding was challenged by dissenting Judge Smolenski, who said "I do not agree that MCL 168.759 implicitly prohibits clerks from mailing unsolicited applications for absent voter ballots..." Judge Smolenski cautioned that silence in a statutory provision doesn't necessarily mean that there was legislative intent to prohibit the activity. The context of a statutory provision should be examined. If the statute is written so that prohibited conduct is clearly identified, then all prohibited

conduct should be spelled out in the legislation. Mass mailing of AV Apps is not covered by Michigan Election law at this time, although there have been some unsuccessful efforts to amend the laws to expressly address this. However, in the interim, mass mailing of AV Apps is neither expressly prohibited or expressly permitted under Michigan law. Since the remainder of Michigan election law clearly identifies all prohibited actions, as well as all required actions that are necessary to preserve the integrity of the election process, the failure to address the mailing of AV Apps should not necessarily be construed as a prohibition, according to Judge Smolenski. Although he did not receive support from the two other panelists, it is possible that his logic would be adopted by the Michigan Supreme Court if the case is appealed. In August of this year, the Macomb County Circuit Court dismissed a similar challenge against the Macomb County Clerk, who did a mass mailing of AV apps. This case, although not precedential, does show support for Judge Smolenski's rationale.

In the meantime, the Detroit case does have some language that infers that there is no authority under the Michigan Election Law for an election official (ie, City Clerk) to do a mass mailing of the AV Apps. The *Taylor* case was limited to Michigan Election Law, and the appropriateness of an injunctive order against elected Detroit Clerk Jackie Currie. The *Taylor* case focused on an alleged abuse of power by a municipal official. It did not discuss the broad grant of power given to a municipality to govern its own affairs in the Michigan Home Rule Cities Act. Section 4 j of the Home Rule Cities Act (MCL 117.4j) authorizes the exercise of all municipal powers in the administration of government, whether enumerated or not. Troy's Charter also recognizes the broad grant of power provided under the Home Rule Cities, and provides that "Unless otherwise provided in this Chapter, the City and its officers shall have and be vested with any and all powers which Home Rule Cities and their officers are now or hereafter may be permitted to exercise under the Constitution and Statutes of the State of Michigan... In no case shall any enumeration of particular powers in this Charter be held to be exclusive." (Section 2.1) Following this, Troy City Council is vested with the authority to govern the City, as long as there is no direct conflict with state or federal statutory or constitutional provisions.

In her memorandum, the Troy City Clerk has identified several reasons why AV Apps are sent to the Troy voters. These reasons include the prevention of voter disenfranchisement, as well as cost savings which are realized through the use of bulk mail. The Troy City Clerk has sent out the AV Apps for several years, and is in a good position to analyze the benefits of doing the bulk mailing of the AV Apps. Since Troy's Clerk is not elected, the potential risk of using the AV Apps as election propaganda is eliminated, unlike in some of the other Michigan municipalities where the City Clerk is an elected position.

If the Troy City Council wants to continue the practice of having AV Apps mailed to the voters, then Council should make clear that it is a legislative mandate, which is permitted under the Home Rule Cities Act. A proposed resolution has been prepared for your consideration.

If you have any questions concerning the above, please let me know.