

Ladies and gentlemen: as I indicated in my email of July 24, 2022, this correspondence will address several issues regarding the Grand Haven City Council (“Council”) and the Grand Haven Board of Light and Power Board (“Board”). I appreciate this opportunity to address these issues with you.

1. Intragovernmental Agreement

As you know, the BLP has proposed that it and the City enter into an intragovernmental agreement. There are various Michigan laws that allow governmental units to enter into intergovernmental agreements (i.e. agreements between two or more governmental units) – such as Michigan Act 425 of 1984, Michigan Act 35 of 1951, Michigan Act 258 of 2003, Act 7 of 1967, Act 8 of 1967, etc. However, the BLP has proposed an intragovernmental agreement, an agreement between divisions of the same governmental agency (in this case, the Council representing the entire City and the Board representing the BLP which is a department in the City).

Based on my review of the City Charter, I believe that the Council and the Board may indeed enter into an intragovernmental agreement.

Section 12.1 of the Charter provides that the power to authorize contracts for the City is vested in the Council. However, Section 14.3(a) provides that the Board may make contracts concerning the City’s electrical facilities, but subject to the overall control of the Council. More definitively, Section 3.1(b)(7) says the powers of the City include joining with “. . . any other municipal corporation OR WITH ANY OTHER UNIT OR AGENCY OF GOVERNMENT . . . by contract . . . [emphasis added].”

Per the above, in my opinion, the Council and the Board may enter into an intragovernmental agreement.

2. Alleged Conflict of Interest for the City Attorney

I was not at the last Board meeting. In fact, I haven’t attended a Board meeting for over a year. Earlier this year, I was asked to plan on attending all regular Board meetings for the balance of the year, but I was thereafter advised that I would not be needed at the Board meetings; I was further advised that the Board was going to discontinue its long-standing practice of using its labor attorney to negotiate its collective bargaining agreement with the Utility Workers of America, AFL-CIO, and would instead negotiate that agreement on its own. However, I have what appears to be reliable evidence that during the last Board meeting, the BLP General Manager made the following statements:

- a. There is way too much conflict of interest to have one attorney represent both side in this discussion [of the intragovernmental agreement].
- b. If [others] can’t see the conflict in this situation, then [they] are walking around with blinders on.
- c. If the City Attorney doesn’t pull himself out of this and suggest there is a conflict of interest representing both side of the [intragovernmental agreement] negotiations there is something wrong.
- d. There should be one attorney representing the BLP and one representing the City negotiating this [intragovernmental] agreement.

Based on these above comments/allegations by the General Manager, I have been asked if I have a conflict of interest in representing the City and the BLP. My answer to that question is that I do not

have such a conflict of interest. I have given this same answer to the General Manager, several months ago, as well as my rationale, which I will give to you below. Nonetheless, the General Manager has continued to allege that I have a conflict of interest which would constitute a breach of my ethical obligations as a member of the Michigan Bar Association and the American Bar Association.

The Council has paid me the compliment of appointing me as the City Attorney. According to Section 7.6(e), the City Attorney is the attorney for the several boards and commissions of the City; this would include the BLP, which according to Section 14.1 is a department of the City government, just like the Department of Public Works, the Department of Public Safety, and all other City departments. No one would seriously argue that those other departments are entitled to their own independent attorneys. The only difference is that the BLP has its own elected Board. However, the existence of the Board does not make the BLP a separate legal entity entitled to separate legal representation. The same Charter created both the Council and the Board. How can the Council and the Board be separate legal entities if they are created by the same Charter, with that Charter being the Charter for the City of Grand Haven?

In fact, if the BLP truly believes it is a separate legal entity, entitled to separate legal representation, why is the BLP proposing that it enter into an intragovernmental agreement with the City, rather than an intergovernmental agreement?

The fact is that the same City Attorney has also represented the BLP for as long as I can remember, and I have represented the City off and on since I became a licensed attorney in 1979. If the City Attorney had a conflict representing the BLP as well as the City, that conflict would prevent the City Attorney from doing any work for the BLP, not just certain work for which the General Manager wishes to have separate legal counsel.

The above is not to say that there will not be conflicts at times if the same attorney is both the City Attorney and the attorney for the BLP. You have seen some of those conflicts play out on your computers. But those conflicts are not be LEGAL conflicts that are outlawed by the Code of Professional Responsibility as adopted by the American Bar Association. Besides, such non-legal conflicts have historically developed even when the BLP had access to both the City Attorney and special counsel. For example, the BLP previously used Varum for negotiating certain electrical contracts, while using the City Attorney for municipals matters. However, Varum has directly advised me that during that time, the General Manager would lean on Varum to perform municipal work for the BLP, so that the BLP could avoid contacting the City Attorney. In the recent past, that practice of the BLP resulted in the City Attorney being bypassed and the Board conducting a meeting that violated the Open Meetings Act, to the embarrassment of all involved.

Based on all of the above, I can categorically state that the City Attorney does not have a legal conflict of interest in representing the BLP in addition to or actually as part of representing the City.

3. Various Provisions of the Proposed Intragovernmental Agreement

Given my two above opinions, I'll now proceed to comment on at least some of the various provisions proposed by the General Manager to be included in the proposed intragovernmental agreement. The number assigned to each of my comments will correspond to the numbers of the provisions in the July 6, 2022 written communication from the General Manager. These comments are illustrative only and are not meant to be exhaustive.

(5) If the BLP intends to use bond proceeds to transfer funds to the City for remediation of the Sims site, the BLP should have the express approval from bond counsel for such use of bond proceeds.

(6) I fail to see why the Council should commit to the BLP how the Council will use general fund proceeds.

(7) Why should the City guarantee the BLP that the amount contributed by the BLP to remediate the Sims site will be all that the BLP will pay for that purpose, unless the BLP agrees to pay more? The BLP is liable to pay for ALL of the remediation of the Sims site resulting from the BLP's historical use of the property. If the cost of the clean-up turns out to be more than what the BLP has estimated, why should the City pay for the excess, unless the BLP agrees to pay more? It seems the BLP is saying it will pay now to the City what it estimates the clean-up costs will be if the City will guarantee that the BLP won't have to pay more.

(8) The BLP is asking the City to accept less than five percent of the gross electrical retail sales, if part of the sales are necessitated by a surcharge to pay additional environmental liability assigned to the BLP. This provision would not save the BLP ratepayers any money. It would only allow the BLP to pay less to the City.

(10) The BLP wants to be fully reimbursed for its snow melt expenses, but it doesn't want that reimbursement to detract from what the BLP is considered to have contributed to remediate the contamination of the Sims site. Basically, the BLP wants its contribution to the snow melt system to be double counted by the City.

(11) As noted above, this General Manager has an apparent objection to using the City Attorney even for municipal matters, according to Varnum.

Further, the General Manager refused to commit, in answer to a direct question, that he would not use an assistant City attorney assigned to the BLP to sue the City if he felt that was necessary.

The General Manager is on record as stating that he wants the attorney assigned to the BLP to be independent of any review or control by the City Attorney. On March 11, 2022, he wrote the following:

Quite frankly, I see no reason whatsoever to have special counsel to serve in this role, if their authority to act and advise, is continually questioned going forward, and the City Attorney is additionally reviewing such matters

To determine Varnum's appropriate roles and actions.

The Board and I desire legal counsel, independent from the legal counsel of those making such accusations [against the BLP]. This is a "utility matter" if there ever was one. And we now have no special "utility counsel."

City Council has now acted, to deny access to any independent legal counsel to represent our interests specifically in such matters AS THE BOARD DEFINES THEM.

It would seem [B]oard members and myself acting in the course of our utility business . . . should be afforded some form of indemnification by the Board [sic] to include legal representation
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(12) The BLP is demanding that the City provide substation property to the BLP free of charge, in return for the BLP paying what it is already legally obligated to pay for the environmental remediation of the Sims site.

(14) The BLP wants to be indemnified from any further liability for the Sims site – in return for the BLP simply paying what it is legally required to pay.

(15) The BLP wants the Council to no longer criticize the BLP, period. The BLP in turn will agree to not criticize the Council, but only if the Council complies with the proposed agreement.

Finally, there are things that are not addressed by the proposed provisions. Very notably, the provisions don't indicate how disputes would be handled. My suspicion is this is deliberate, because if the agreement is made and the BLP has separate counsel, any dispute would likely be handled in the courts. In my opinion, IF the Council and the BLP enter into an intragovernmental agreement, and based upon the fact that the Board's ability to enter into a contract is subject to the overall control of the Council, the agreement should include a provision that any dispute regarding the agreement will be determined by the Council, not by resort to any court.

4. Distribution of this Correspondence

As you know, the General Manager refused to ask me to prepare this correspondence, and refused to commit the BLP to splitting its cost with the City. Therefore, I am only sending this to the Council and its officials. However, there is no reason why any of you cannot provide this to the Board if you are so inclined and if you believe this correspondence would be valuable for Board members to review. Obviously, I am sure the General Manager will not be happy with my thoughts and conclusions; on the other hand, it seems that the General Manager's list of provisions for an intragovernmental agreement, whereby the BLP will pay only what it is legally required to pay anyway, is quite one sided in favor of the BLP.

If you have questions or comments regarding the above, please advise.