

January 5, 2017

Via facsimile to 937.296.3216, email to Theodore.Hamer@ketteringoh.org, and U.S. mail

Theodore Hamer
Director of Law
City of Kettering
3600 Shroyer Rd.
Kettering, OH 45429

Re: Taxpayer demand under R.C. 733.59 and Kettering Charter § 10–13 that (1) the City Council declare the District 1 (Robert L. Scott) seat vacant under Charter § 3–4 and (2) recover any compensation paid to Scott from December 19, 2016 to the present, because he vacated his Council seat by serving as an Electoral College member

Dear Director Hamer:

Best wishes for the New Year.

I write on behalf of City of Kettering taxpayer John J. Murphy under R.C. 733.59 and Kettering Charter § 10–13 to demand that the Kettering City Council do the following:

- (1) declare vacant the District 1 Council seat most recently held by Robert L. Scott, as mandated by the Kettering Charter § 3–4, and
 - (2) take action to recover any salary and benefits paid to Mr. Scott ostensibly for being a Council member from December 19, 2016—the date Scott served as a presidential Electoral College member representing Ohio—forward.
- 1. The Kettering Charter mandates that Council declare Rob Scott’s seat vacant because he vacated the office by serving as an Electoral College member.**

Kettering’s Charter § 3–4 mandates that the Council “declare vacant the seat of any of its members who shall cease to be qualified as a member of Council,” and that Council members are barred from holding “any other elected public office”:

SECTION 3–4. REMOVAL AND VACANCIES. The Council shall be the judge of the election and qualifications of its own members. In case of persistent failure to abide by the rules of council or absence without justifiable excuse for three (3) consecutive meetings, the seat of such member

may be declared vacant by resolution of Council, five members concurring. **Council shall declare vacant the seat of any of its members who shall cease to be qualified as a member of Council.** Council members shall at all times be qualified electors of the City. **No member of Council shall hold any other elected public office,** hold any other City office or City employment. The following shall not be considered holding another City office or holding City employment: membership of a board, commission, committee or similar group by appointment of City Council; holding the office of Mayor or Vice-Mayor of the City. Holding the office of notary public, being a member of the Armed Forces of Ohio or the United States, or having the status of trustee or director without pay of a public institution shall not disqualify a member of Council. No member of Council shall hold the position of chief or lead executive officer of any political subdivision of Ohio, or be employed by another State of Ohio political subdivision in a position that is mandated by the State, appointed by the governing body of that other political subdivision and requires performing duties prescribed by State law.

The office of presidential elector is an elected public office; presidential electors are “nominated as candidates for election.” R.C. 3513.11. According to the Ohio Supreme Court, moreover, “the office of presidential elector is a state office.” *State ex rel. Beck v. Hummel*, 150 Ohio St. 127, 147, 80 N.E.2d 899, 909 (1948).

On December 19, 2017, Mr. Scott assumed the position of presidential elector, appointed to substitute for Ohio Rep. Christina Hagan. As was widely reported, Hagan herself resigned as she faced a lawsuit for removal as an elector because she was violating Ohio Constitution, Article II, Section 4’s similar prohibition against General Assembly members holding dual public offices.

By serving as an elector, Mr. Scott has held dual offices and thus vacated his Council seat (the very reality Rep. Hagan resigned to avoid). And the Charter requires Council to declare Mr. Scott’s former seat vacant.

2. Taxpayer request that the Council declare the seat vacant and recover misapplied funds.

Please arrange for us to receive by **January 17, 2017** written assurance from appropriate Kettering officers that a process for declaring Scott’s seat vacant has been scheduled to do so, *and* that the City will seek to recover any salary and benefits paid to Scott for supposed Council service from December 19, 2016 forward.

If the Council fails to declare the District 1 Council seat vacant as the Charter expressly requires, or to seek recompense for misapplication of funds for Scott’s compensation, then R.C. 733.58 requires you as law director to seek a writ of mandamus forcing “an officer or board of a municipal corporation” to perform the duty and to seek recovery of misapplied funds. *See also* R.C. 733.56 (Application for Injunction) (“The... city director of law shall apply, in the name of the municipal corporation, to a court of competent jurisdiction for an order of injunction to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of any contract made in behalf of the municipal corporation in contravention of the laws or ordinance[s] governing

it, or which was procured by fraud or corruption.”); R.C. 733.57 (Specific Performance) (“When an obligation or contract made on behalf of a municipal corporation,...creating a public duty, is being evaded or violated, the ... city director of law shall apply for the forfeiture or the specific performance thereof as the nature of the case requires.”).

Swift action is required. Not only is the City improperly expending money on Mr. Scott’s salary and benefits, but his continuing participation in Council business, including motions, resolutions, ordinances, or even deliberations, is illegal. His continued participation as a non-councilmember likely makes the work product of Council void *ab initio*.

If you file litigation against the Council or Mr. Scott under your R.C. 733.56–733.58 duties, then please name our client as a party defendant under R.C. 733.581 so that we may assist in presenting all issues of law and fact in the matter as that statute authorizes.

If we do not receive timely reassurance that the requested actions will occur promptly, then we will file taxpayer litigation on our client’s behalf under R.C. 733.59 and Kettering Charter § 10–13 against Mr. Scott, the Council members, you, and Mr. Scott.

R.C. 733.59 provides as follows:

733.59 Taxpayer’s suit.

If the village solicitor or city director of law fails, upon the written request of any taxpayer of the municipal corporation, to make any application provided for in sections 733.56 to 733.58 of the Revised Code, the taxpayer may institute suit in his own name, on behalf of the municipal corporation. Any taxpayer of any municipal corporation in which there is no village solicitor or city director of law may bring such suit on behalf of the municipal corporation. No such suit or proceeding shall be entertained by any court until the taxpayer gives security for the cost of the proceeding.

Charter § 10–13 provides as follows:

SECTION 10–13. ENFORCEMENT OF CHARTER PROVISIONS. Any resident or taxpayer of the City shall have standing to seek the enforcement of any provision of this Charter or to restrain any action contrary to or in violation of this Charter through the filing of any legal action in an appropriate court. If said resident or taxpayer is successful, either through the entry of judgment, prompting a modification of the action or omission prior to the entry of judgment, or otherwise, then said resident or taxpayer shall be entitled to an award of costs and litigation expenses, and the attorney prosecuting said action shall receive a reasonable compensation for such services. (Ord. 4273-16; passed 7/26/16.)

Our client will be entitled to his attorneys' fees and costs if he is successful. Charter § 10–13. *See also* R.C. 733.61 (attorneys' fees and costs for successful taxpayer lawsuits); *State ex rel. Fisher v. City of Cleveland*, 109 Ohio St.3d 33, 2006-Ohio-1827, at ¶ 45. It is difficult to see how Mr. Murphy would *not* be successful given the Charter's clear and unambiguous mandate. Robert L. Scott is no longer a Kettering Councilman. The Council must declare so—and recover any misapplied Kettering funds. Our firm lawyers' current respective hourly rates range between \$240 and \$475. If the Council fails to act swiftly, it will be subjecting Kettering's taxpayers to needless cost of litigation, when the duty under the Charter could not be more plain.

I will follow up with a call to you tomorrow to discuss the matter further. If you need more time, we are open to discussing it, but as explained, time is of the essence before Mr. Scott's continued participation in government business further harms the public.

Sincerely,



Subodh Chandra

Cc: Robert L. Scott via Rob@OldhamDeitering.com, rob.scott@ketteringoh.org
Councilman Joe Wanamaker, Ward 2, via joe.wanamaker@ketteringoh.org
Councilman Walter A. (Tony) Klepacz, Ward 3, via Tony.Klepacz@ketteringoh.org
Councilman Bruce Duke, District 4, via Bruce.Duke@ketteringoh.org
Councilwoman Amy Schrimpf, At-Large, via @Amy.Schrimpf@ketteringoh.org
Councilman William J. (Bill) Lauter, At-Large, via Bill.Lauter@ketteringoh.org
Mayor Don Patterson, via Don.Patterson@ketteringoh.org
Mark W. Schwieterman, City Manager, via Mark.Schwieterman@ketteringoh.org