



CITY of NOVI CITY COUNCIL

Agenda Item E
November 26, 2007

SUBJECT Approval of Resolution to request and authorize the City Clerk to automatically distribute Absentee Voter Ballot Applications in a manner consistent with prior practice.

SUBMITTING DEPARTMENT: City Clerk *m.c.*

CITY MANAGER APPROVAL: *Ch*

BACKGROUND INFORMATION:

In order to continue our practice of mailing unsolicited *Absentee Voter Ballot Applications* to qualified Novi registered voters, Council could adopt a resolution affirming the practice as authorized under the Home Rule cities Act, (MCL117/1 et seq). This resolution would clarify the authority that the City of Novi relies upon providing this service to our residents and distinguish Novi from the City of Detroit who has been enjoined from mailing these applications by a recent Michigan Court of Appeals 2/1 decision on October 25, 2007. However, in 2006, the Detroit City Clerk was appropriately enjoined from mailing unsolicited absentee ballot applications to Detroit voters because the applications were mailed with a cover letter that was signed by the elected City Clerk. Also there were other factors that exacerbated the potential for undue influence in the Detroit case.

The City of Novi has automatically mailed *Absentee Voter Ballot Applications* for more than 10 years to Novi voters who are on the Permanent Absent Voter List. With the implementation of Election Consolidation laws In 2005, these Absentee Voter Ballot Applications were also mailed to all registered voters that were 60 years of age or older and this practice has continued for at least eight elections. We are aware that Novi voters have come to rely on this service as they will often contact us if an application has been delayed by the mail service.

The current practice of mailing the *Absentee Voter Ballot Applications* and Ballots has saved the City money by use of the Official Election Logo that allows for Bulk Mail rates with First class mail service. If the City of Novi discontinues our current practice, then each request would generate individual pieces of mail that would eliminate the bulk mail savings which could amount to nearly \$10,000 in postage for November 2008 Presidential election. The Secretary of State web site for Election Administrators specifically condones the practice by stating: "A city or township clerk may mass mail blank absentee voter ballot applications to eligible absentee voters in advance of elections at his or her discretion; such mailings are not required by law. Mail lists used by clerks to distribute blank absentee voter applications must be equitably compiled."

A great number of applications are returned early allowing us to process the applications and prepare to mail the absentee ballots, also using bulk mail rates. The financial benefit would be severely reduced. The City Clerk staff would experience a dramatic increase in phone calls and personal contacts with voters requesting individual Absentee voter Ballot applications requiring significant overtime and/or additional part-time staffing to process the anticipated 5,000-7,000 individual contacts.

The City Attorney's Opinion is attached to this report concurring with the request for Council consideration to continue this practice.

Due to time constraints, the Council is requested to adopt the attached resolution for the January Presidential Primary. It is anticipated that this matter will be clarified by the Legislature prior to the August Primary.

RECOMMENDED ACTION: Approval of Resolution to request and authorize the City Clerk to automatically distribute Absentee Voter Ballot Applications in a manner consistent with prior practice.

	1	2	Y	N
Mayor Landry				
Mayor Pro Tem Capello				
Council Member Crawford				
Council Member Gatt				

	1	2	Y	N
Council Member Margolis				
Council Member Mutch				
Council Member Staudt				

CITY OF NOVI

COUNTY OF OAKLAND, MICHIGAN

**RESOLUTION TO REQUEST AND AUTHORIZE CITY CLERK TO
AUTOMATICALLY DISTRIBUTE ABSENT
VOTER BALLOT APPLICATIONS IN A MANNER CONSISTENT
WITH PRIOR PRACTICE**

Minutes of a regular meeting of the City Council of the City of Novi, County of Oakland,
State of Michigan, held in the City Hall in said City on the ____ day of _____, 2007,
at 7:00 o'clock p.m., prevailing Eastern Time.

PRESENT: Councilmembers _____

ABSENT: Councilmembers _____

The following preamble and Resolution were offered by Councilmember _____
and supported by Councilmember _____.

WHEREAS, the Michigan Court of Appeals recently issued an opinion (October 25,
2007) in a case involving an injunction issued by the Wayne County Circuit Court stating that
the then Detroit City Clerk, Jackie Currie—an elected official and a candidate for re-election—
had improperly mass-mailed absentee voter ballot applications to voters on the so-called
“permanent absentee ballot voter list,” made up generally of voters 60 years and older; and

WHEREAS, the Court of Appeals decision purports to state that municipal clerks are not
authorized to mail “unsolicited” absentee voter ballot applications based upon the language of
MCL 168.759(5), which states that “the 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 ballot application form to anyone upon verbal or written request”; and

WHEREAS, the dissenting judge in the Currie case noted reasonably that the requirement that the clerk shall furnish forms upon verbal or written request was not the same thing as a prohibition on furnishing such applications without request; and

WHEREAS, the City of Novi City Council has wide-ranging authority under the Home Rule Cities Act, MCL 117.4, *et seq*, that is to be liberally construed in its favor; and

WHEREAS, the Novi City Council recognizes that the City Clerk’s office has maintained a permanent absentee voter list (voters 60 years of age and older) for many, many years and has—consistent with the idea of encouraging broad public participation in elections and enhanced voter access—sent absent voter ballot application forms to individuals on that list as well as to others (e.g., those who had previously requested applications); and

WHEREAS, under the same election law cited in the Court of Appeals’ opinion any individual can send unsolicited absent voter ballot applications to voters within the City of Novi; and

WHEREAS, Novi voters have become accustomed to receiving ballot application forms from the City Clerk’s office; and

WHEREAS, the same concerns set forth in the Court of Appeals’ opinion regarding the Clerk’s office as an *elected office* is not present in this case; and

WHEREAS, the failure of the Clerk to send absent voter applications to those voters who traditionally receive them may have an impact on the operation of the City Clerk’s office with regard to increased staff time to address requests made during the work day and increased costs for individual mailings, that were not contemplated within the Court of Appeals decision.

NOW, THEREFORE, BE IT RESOLVED THAT the Novi City Council pursuant to statutory and charter authority hereby requests and authorizes the appointed Novi City Clerk to continue to mail absent voter ballot applications to voters on the City's permanent absentee voter list and others to whom the City Clerk would have mailed such applications before the issuance of the above-referenced Court of Appeals' opinion.

AYES:

NAYS:

RESOLUTION DECLARED ADOPTED.

MARYANNE CORNELIUS, CITY CLERK

CERTIFICATION

I hereby certify that the foregoing is a true and complete copy of a resolution adopted by the City Council of the City of Novi, County of Oakland, and State of Michigan, at a regular meeting held this ____ day of _____, 2007, and that public notice of said meeting was given pursuant to and in full compliance with Act No. 267, Public Acts of Michigan, 1976, and that the minutes of said meeting have been kept and made available to the public as required by said Act.

MARYANNE CORNELIUS, CITY CLERK



November 13, 2007

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Maryanne Cornelius
City of Novi
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Novi, MI 48375

**Re: Distribution of Absent Voter Ballot Application Forms
Our File No. 55142 NOV**

Dear Ms. Cornelius:

You have asked for our guidance on whether the City should discontinue or suspend its practice of mailing absent voter ballot application forms to eligible voters without a specific, current request for an upcoming election in light of the Michigan Court of Appeals' October 25, 2007 published opinion in the case of *Taylor v Currie and Detroit Election Commission* (Court of Appeals Docket Nos. 269684 & 271559). In that case, two of the three Court of Appeals judges construed the requirement in MCL 168.759(5) that clerks shall furnish an absent voter application form to anyone "upon a verbal or written request" as actually a limitation or prohibition on mailing an application without having specifically received such a request. The dissenting judge characterized the Court's decision as being based on a misapprehension of law.

General Discussion of Currie Case and the Election Statute

The *Currie* case was before the Court of Appeals for review of the propriety of a Wayne County Circuit Court injunction against the mass mailing of unsolicited applications by Detroit's Clerk. The Court of Appeals described the Clerk as having distributed what amounted to propaganda at the City's expense (referencing her cover letter on the 150,000 applications mailed out for an election for which she was running for office). In order to reverse that injunction, the appellate court needed to find an "abuse of discretion" by the circuit court—meaning a decision not within the range of reasonable and principled outcomes. That high standard might explain why the Court of Appeals affirmed the circuit court's interpretation of the statute. But while the injunction is not binding on persons who were not parties to the litigation, as a published opinion it still establishes precedent that all courts in Michigan would be required to honor in

any case brought before them involving the same issue. (The phrase “bad facts make bad law” would seem to apply here.)

We are informed that the practice of mass mailing absent voter ballot application forms to eligible voters is longstanding and widespread among clerks in Oakland County and throughout the state. In fact, it appears to be specifically authorized in the April 2002 “Election Officials’ Accreditation Study Guide” prepared by the Michigan Department of State Bureau of Elections:

“An election official may mass mail blank absent voter ballot applications to eligible absentee voters in advance of elections *at his or her discretion*; such mailings are not required by law. Mail lists used by election officials to distribute blank absent voter ballot application forms must be equitably compiled.” (Page 46, emphasis added).

To our knowledge, and notwithstanding the Secretary of State’s awareness of the *Currie* decision, neither the Secretary of State or Director of Elections has provided you or any other of our municipal client clerks with notice that the mass mailing authorization referenced above has been revoked, or otherwise provided any instruction or direction in response to the *Currier* decision.

We point this out in the context of Section 931 of the Michigan Election Law, MCL 168.931(1), which sets forth a laundry list of prohibited conduct in subsections (a) - (n). The only subsection we identified that might conceivably apply here is subsection (h) which reads:

“A person shall not willfully fail to perform a duty imposed upon that person by this act, or disobey a lawful instruction or order of the secretary of state as chief state election officer or of a Council of county election commissioners, Council of city election commissioners, or Council of inspectors of election.”

Given the prior authorization by the Secretary of State for mass mailings, and absent an instruction or order under the quoted statute, it is our opinion that notwithstanding the *Taylor v Currie* decision a mass mailing of the application forms—that is, a mailing in the normal course, without a specific request for an upcoming election—would not be prohibited conduct under MCL 168.931. That would include, in our opinion, mailing to a list of voters who have requested absent voter ballots in the past. Of course, there is no assurance that someone would not file a court complaint challenging such a mailing based on the *Currie* decision. As noted above, in that scenario, any court facing this issue would be bound to follow the decision unless and until it is changed by future orders of the

Court of Appeals or Michigan Supreme Court, or, the statute is amended to clear up the confusion.

In that regard, we have been informed of possible legislation that would expressly authorize the mass mailing practice and that the Secretary of State has specifically requested legislation on the topic. Given the level of interest and legitimate concern among municipal clerks (and presumably the state) regarding the *Currie* ruling, some sort of legislative action on the issue in the near future might be likely.

Options for Ensuring "Compliance"

Regardless of whether the legislature will address this situation, the immediate need is to determine whether the applications for the January 15, 2008 presidential primary should still be mailed to a list of voters who have not specifically requested them for that election—as would have normally occurred before the *Currie* decision. Without minimizing the importance of that election, to our knowledge the results of that primary would seem to have little *legal* significance. The plaintiff in *Currie* was a candidate that did not make it past the primary, apparently claiming that the Detroit Clerk's unsolicited mailing of the absent voter ballot applications was a cause. By contrast, a presidential candidate on the January 15 ballot seems unlikely to challenge the mass mailing of applications, even if every municipal clerk in the state did so.¹

From our discussions, it is my understanding that funding for the preparation and mailing of the presidential primary absent voter ballot applications is provided for in the approved budget for the Clerk's office for 2007. That approval would have been based on the premise that there was no question regarding the City's authority to do the mass mailing. With that authority now in question, we recommend that this situation be presented to the City Council at the first available meeting to provide direction on whether the Clerk's office should or should not proceed with the preparation and mailing of the applications as planned.

For purposes of a full and thorough consideration by the City Council, it would be appropriate to provide information on the cost of the planned preparation and mailing of the application versus the anticipated cost and staff time involved in mailing applications in response to individual complaints and fielding the

¹ Of course, any person can file a complaint in court, challenging actions taken by the City or its officials. In the context presented, we would see the most likely challenge to a mass mailing of the applications for the presidential primary coming from someone complaining about the unauthorized expenditure of public funds.

complaints and inquiries from voters that have come to expect and rely on the regular mailing of the applications over the years.

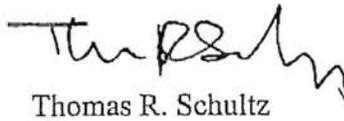
For purposes of the upcoming presidential primary, we view the decision on whether to mass mail the absent voter ballot applications as a policy matter for the City Council. As for any other elections next year, we hope by then the legislature will have clarified the confusion stemming from the *Currie* decision in one way or another.

To summarize:

1. Unless the Secretary of State or Director of Elections provide instructions stating that mass mailing of the absent voter ballot applications is no longer allowed, doing so would not seem to be prohibited conduct under Section 931 of the Michigan Election Law.
2. If a mass mailing is done, it should just be the application. Because you are not an elected official, any letter or other communication that goes with the application is less problematic than in *Currie*, but should be carefully worded in any event.
3. The City Council should decide in some form or another whether the planned mailing should be done for the presidential primary. An appropriate format would be a short resolution recognizing and continuing your office's existing practice.
4. These recommendations are limited to the presidential primary election absent voter ballot applications.

It is our intention to monitor the status of any state legislation on this subject and in the absence of same, to provide you and the City Council with a supplemental opinion for purposes of the other elections in 2008 at which candidates will actually be elected and any ballot proposals will actually be decided.

Sincerely,



Thomas R. Schultz

TRS/js

cc: Clay J. Pearson, City Manager

Maryanne Cornelius, City Clerk
November 13, 2007
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Pamela W. Antil, Assistant City Manager
Gary L. Dovre, Esq.

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