

Dear Clarkston City Council Members:

The council will consider at its April 8, 2024, meeting a blanket Depot Park user fee waiver for specifically named, privileged groups while keeping the user fee intact for the people who actually pay the taxes to provide for the park's upkeep and maintenance. The resolution includes a provision allowing the city manager the unsupervised ability to waive fees for charitable organizations in the future, presumably because the city council doesn't want to be bothered dealing with the requests and/or doesn't want the public to be aware of how often this giveaway of public resources occurs.

I realize this is a long communication, but you should take the time to read what I have to say. It's always better to resolve things without going to court.

I have three objections to this resolution. The first is that the city has no authority under Michigan law or the city charter to make charitable contributions of this nature to anyone. This type of taxpayer giveaway is a problem the city attorney should have addressed for you already, since he's been present on numerous occasions when the city council waived Depot Park user fees. But since this has continued for quite some time, he's either properly advised you and you've ignored his advice, or he hasn't advised you that what you are doing is improper.

My second objection is that it's become obvious from looking at the city's practices and the face of the resolution that the city can no longer justify charging Depot Park user fees to anyone. Since the city charges \$200 for a resident's two-hour wedding, but also waives a \$200 fee to the Clarkston Community Historical Society (CCHS) for its 72-hour long massive fundraiser considering set up and tear down time (even though the CCHS is not a resident of Clarkston), there is no relationship between the amount of the fee and the benefit received, which fails the test established by the Michigan Supreme Court in *Bolt v City of Lansing*.

My third objection is that the city manager has an unwaivable conflict of interest that no one on the council has addressed. He has exceeded his authority in the past with no consequences or condemnation from the council. He has established an unauthorized policy that allows these privileged organizations to make what he refers to as a "donation" toward DPW employee wages for these events, rather than paying the full cost, something that the city council has never authorized. This has been especially problematic as applied to his own organization, the CCHS. I hope the council will consider addressing this conduct during the city manager's upcoming performance review.

I'll take the objections in order.

**THERE IS NO AUTHORITY UNDER MICHIGAN LAW OR THE CLARKSTON CHARTER FOR THE CITY COUNCIL OR THE CITY MANAGER TO GIVE AWAY TAXPAYER ASSETS TO PRIVATE ORGANIZATIONS SIMPLY BECAUSE THE CITY COUNCIL HAS DEEMED THEM TO BE "GOOD" ORGANIZATIONS.**

Article IX, Section 18, of the Michigan Constitution prohibits the State of Michigan from giving away public property, stating, in part: "The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution." Article VII, Section 26, of the Michigan Constitution similarly prohibits the city from "loan[ing] its credit for any private purpose or, except as provided by law, for any public purpose." To "lend credit" is understood in Michigan law as giving away public property without receiving value in return – as would occur with a blanket giveaway of the right to collect Depot Park user fees from a select few named (and yet-to-be-named) privileged groups who have obtained a 501(c)(3) IRS designation that excuses them from paying the taxes that everyone else has to pay, regardless of how much donor money they rake in, something that is a significant gift in itself. Perhaps the council is unaware that possessing a 501(c)(3) status simply means the organization has met an IRS test but says nothing about the goodness of the organization. After all, if being good was a requirement, then the IRS would not have awarded the Satanic Temple 501(c)(3) status on February 6, 2019.

The Michigan Home Rule City Act (MHRCA) is the enabling state law that allows the City of the Village of Clarkston to exist and provides the requirements for that existence. Among other things, the MHRCA lists mandatory and permissive charter sections. The section that applies to this discussion is MCL 117.4k, which states:

*Each city in its charter may provide for the appropriation and allocation of public funds to a public or private nonprofit institution engaged within the city in the provision of civic, artistic, and cultural activities, including but not limited to music, theater, dance, visual arts, literature and letters, architecture, architectural landscaping, and allied arts and crafts, to the general public.*

If such a provision were in the city's charter – something Clarkston voters would have had to explicitly authorize – it would probably provide the authority to waive Depot Park user fees if the city went through an individual analysis for each request.

Our city charter contains no such provision. If these user fee giveaways are important to the city council, then the council should put a charter revision on the ballot, defend these giveaways to the public, and then see if the public supports this activity by voting to modify the charter to allow it. Otherwise,

the city council and city manager are not authorized to proceed with this resolution.

Since city officials seem to place great stock in things provided by the Michigan Municipal League (MML), I include the following additional information from the MML website for your review, providing salient quotes from the material below the citations as well as a weblink so you can read the references for yourselves in their entirety.

**Fact Sheet, Municipal Expenditures, October 2016, which includes information from the Michigan Department of Treasury**  
([https://mml.org/resources/publications/one\\_pagers/x%20FS%20Muni%20Expenditures.pdf](https://mml.org/resources/publications/one_pagers/x%20FS%20Muni%20Expenditures.pdf))

“Municipalities are frequently requested to make donations to various worthy private organizations. Such organizations include chambers of commerce . . . community funds . . . and other educational, promotional, or benevolent associations. . . . [I]t appears clear from Michigan law that such donations are questionable expenditures of public funds.”

“May a Michigan city/village make a charitable donation, gift or contribution to service clubs, charities or public or private social service agencies? Generally, no. Such expenditures have been held not to be used for a public purpose. . . .”

“Local units of government in Michigan are only allowed to incur expenditures for a valid public purpose. The local unit is the steward of public resources, and they may not be used for a private purpose.”

“Charitable Donations to Non-Profit Organizations: Unless the payment is in exchange for the provision of a governmental service that the local unit could have provided itself, this is not a valid public purpose. . . . This prohibition includes churches, veterans’ organizations, community organizations, Little League, Boy Scouts, Big brothers/Big Sisters, etc.”

**Determining Lawful Expenditures, January 7, 2002**  
([https://mml.org/resources/publications/one\\_pagers/lawful\\_expenditures.pdf](https://mml.org/resources/publications/one_pagers/lawful_expenditures.pdf))

“UNLAWFUL EXPENDITURES BY A GOVERNMENTAL UNIT: Contributions or appropriations which are not specifically authorized by the Constitution or State Statute cannot be authorized regardless of the worthiness of the cause. Examples [include] [c]ontributions to churches, veterans, non-profit organizations. . . . Donations, including use of property or equipment to Little League, Scouts, Big Brothers/Sisters. Donations to community organizations.

. . . [This is] not intended to be an exhaustive list of legal or illegal expenditures . . . ”

**Municipal Expenditures, undated (last visited April 5, 2024)**  
([https://mml.org/resources/publications/one\\_pagers/municipal\\_expenditures.pdf](https://mml.org/resources/publications/one_pagers/municipal_expenditures.pdf))

“On many occasions municipalities are requested to make contributions or donations to various worthy private organizations. Such organizations include chambers of commerce . . . community funds . . . and other educational, promotional or benevolent associations . . . it appears clear from various court decisions and legal opinions that such donations are illegal expenditures of public funds.”

“[I]t is generally agreed that municipalities have the power to expend funds only for a ‘public purpose.’”

Factors to consider when deciding whether something is a public purpose: “Whether the benefit is available on **equal terms to the entire public** in the locality affected; whether the service or commodity supplied is **one needed by all or by a large number of the public**; whether the enterprise **bears directly and immediately**, or only remotely and circumstantially, **upon the public welfare**; whether the need to be met in its nature **requires united effort** under unified control, or can be served as well by separate individual competition; whether **private enterprise has in the past failed** or succeeded in supplying the want or in eradicating the evil; whether, insofar as benefits accrue to individuals, the **whole of society has an interest in having those individuals benefited**; whether a proposed extension of governmental activity is in line with the historical development of the Commonwealth and with the general purpose of its founders; whether it will be **necessary to use public ways** or to invoke the power **of eminent domain**; whether a **special emergency** exists, such as may be brought about by war or public calamity.” (This language comes from a Massachusetts case and was quoted by the Michigan Supreme Court; citation omitted; bolding in original.)

“Generally a public purpose has for its objective the promotion of the public health, safety, morals, general welfare, security, prosperity, and contentment of all the inhabitants or residents within the municipal corporation, the sovereign powers of which are used to promote such public purpose. . . The right of the public to receive and enjoy the benefit of the use determines whether the use is public or private. (Court citation omitted; ellipses in original.)

Questions to ask when determining a public purpose:

- “Is the purpose specifically granted by the Constitution, by statute or by court decision? Absent a specific grant of authority by law, the expenditure should be analyzed under the remaining questions.
- Is the expenditure for a public purpose? When analyzing this question try and identify who will be the primary beneficiary. Is the benefactor a private organization or a public organization? Is the expenditure for the public's benefit and welfare? If the primary benefit is to the public, then the courts have generally held that the expenditure is legal.
- Is the city or village contracting for services for which the city is legally authorized to provide? [If the answer is yes, then is] the operation or service under the direct control of the city? If the city does not directly control, or have an oversight provision governing the expenditure, it will likely be deemed illegal.”

“The Michigan Supreme Court has ruled that a city cannot give away funds or other property even for a public purpose, without express statutory authority.”  
(Court citation omitted.)

“If the purpose for which the funds are expended is public in nature, but the operation is not under the control of the city or village which is making the contribution, it may nonetheless still be an illegal expenditure.”

“There has been no relaxation in the rule that municipalities are forbidden to expend funds for the purpose of making a donation to any private purpose. This remains true regardless of whether that purpose will incidentally benefit some or all of its citizens. All charitable donations, gifts and contributions to service clubs and agencies . . . are specifically forbidden.”

I submit that even if there were a charter provision authorizing giveaways of Depot Park user fees, and there is not, it would be beyond the authority of the city council to give a blanket authorization to named and yet-to-be-named privileged entities without going through a public purpose analysis for each individual beneficiary as has been proposed by the pending resolution. And, before the city council entertains the drastic measure proposed by the resolution, I suggest someone from the city council contact Lake Orion about its limited fee waiver policy expressly stating that waiving, reducing, or forgiving fees and charges for private, nonprofit, charitable, civic or other organizations, or individuals, is a conversion of public resources to a private benefit when the consideration isn't given to the public generally.

I think that's a well-stated summary of the existing law. You can read more about the Lake Orion policy in a June 21, 2023, article in The Lake Orion Review by going to this web address: <https://lakeorionreview.com/village-council-adopts-policy-on-waiving-fees-and-charges-for-groups-businesses-holding-events-within-the-village/>

**THE DEPOT PARK USER FEES WOULD LIKELY BE HELD INVALID UNDER PREVAILING MICHIGAN LAW.**

While residents and nonresidents are charged \$200 and \$250 respectively to use the park for only a two-hour increment (with an extra fee tacked on if they want the bathroom key), the non-resident CCHS has asked for a \$200 fee waiver for an entire weekend of use, which represents multiple two-hour increments that should be charged at the \$250 per two-hour increment nonresident rate. This abuse is not unique to the CCHS; other privileged organizations have also inequitably received fee waivers for more than a two-hour period.

The CCHS is unique in the fact that the primary purpose of Art in the Village is to raise funds for the CCHS and its vendors and not to benefit the public. Even though the resolution lists certain events as "day events" of an uncertain duration, I suspect this resolution was likely crafted by the city manager to obscure the fact each day of the CCHS's event is a 24-hour period (and doesn't acknowledge set up and tear down time before and after the event), while the other events will not occupy the park for entire days.

Given the fact that the city council treats a two-hour event the same as a 72-hour event, I question whether the Depot Park user fees are valid at all. *Bolt v City of Lansing*, a seminal Michigan Supreme Court case, requires that user fees must: serve a regulatory purpose rather than a revenue-raising purpose; be proportionate to the necessary cost of the service and correspond to any benefit provided by the service; and reflect the actual cost of the service provided.

If I made a FOIA request for the user fee study justifying each of the city's user fees, including the Depot Park user fee, would you be able to produce one? Somehow, I doubt it, though you would be required to justify your user fee if there were a lawsuit over it.

**THE CITY MANAGER HAS AN UNWAIVABLE CONFLICT OF INTEREST IN THE DEPOT PARK USER FEE ISSUE, HE'S EXCEEDED HIS AUTHORITY IN THE PAST AND GRANTED USER FEE WAIVERS TO PRIVATE ENTITIES, AND HE WAIVES DPW EMPLOYEE WAGES FOR WORK AT THESE PRIVATE EVENTS UNDER AN UNAUTHORIZED POLICY.**

As you are or should be aware, the city manager is also the president and treasurer of the CCHS. The city manager's wife is CCHS's director and its only paid employee. Both the city manager and his wife have come before the city council to ask for a Depot Park user fee waiver for the last two years.

I presume it's not an accident that the CCHS is one of the blanket proposed beneficiaries of the Depot Park user fee waivers in the pending resolution. The city manager has casually suggested that he should be given this authority in the past, and the CCHS has received some pushback during past council meetings for having the chutzpah to ask taxpayers to provide a Depot Park user fee waiver for a massive annual fundraiser in the taxpayer-owned Depot Park. Even the CCHS seemed to appreciate the outrageousness of such a request, since it wisely didn't ask for a fee waiver before the 2022 Art in the Park event.

Please note I will be referencing records I obtained through FOIA requests in this section. If you'd like to see the records, I can provide them on request. Alternatively, you can ask the city manager for a copy of the records, since I assure you, he's fully aware I have them. And, if the city manager thinks I've misstated anything, I'd be glad to make the correction.

**The fact that the city manager has made unauthorized Depot Park user fee waivers in the past counsels against providing him with any unsupervised user fee authorizations.**

At the April 24, 2023, city council meeting, the city manager alleged he had a "pattern or agreement" with previous councils that provided him with some sort of \$500 magic wand to give Depot Park user fee waivers on request. However, the only \$500 authorization he has comes from the procurement ordinance, and that ordinance does not allow the city manager to waive user fees.

I was curious about the city manager's declaration, so I sent a FOIA request to find out how many times the city manager had waived Depot Park user fees without city council authorization during the previous two years from the date of the request. I learned he'd done so for a couple of Kindermusik events, as well as a few reading program events put on by the Clarkston Independence District Library. But most concerning was the city manager's blanket Depot Park user fee waivers to Mueva Fitness, a small private business, every Saturday from May through September 2021 and again on July 30, 2022. The city manager unilaterally granted all these Depot Park user fee waivers even

though he was fully aware the city council needed to review and approve any individual fee waiver, a requirement he acknowledged on every other occasion when he'd brought fee waivers to the city council seeking approval.

Even if the city council can waive fees for favored organizations, and even if the fees waived are valid under the legal test outlined in *Bolt v City of Lansing* - and I don't believe either are true for the reasons stated above - it's unwise to give city manager blanket authority to authorize user fee waivers with no city council oversight given his past conduct.

**The city manager asks the council for budget money to pay DPS employees for his CCHS event and regularly waives part of the cost of DPW labor required to work the event.**

While it appears the city manager has been giving unauthorized taxpayer-funded gifts in the form of DPW wages to other organizations, which is also an entirely improper use of public funds for private purposes, my focus here is on the conduct of the city manager in connection with his own private organization because I believe what's been happening is a clear conflict of interest.

I sent FOIA requests for information from 2017 forward seeking to learn how much of the cost for the private CCHS fundraising event the taxpayers improperly paid. (The city manager was appointed to his job in January 2017). I learned that, except for one year, and even during the years when the CCHS didn't ask for a Depot Park user fee waiver, the CCHS still wasn't fully reimbursing taxpayers for all DPW wages plus a \$250 user fee. This occurred despite the fact that the CCHS makes tens of thousands of dollars in gross profits from its Art in the Village Event, and even though it possessed significant net assets (as reported on its public tax returns) and could easily afford to reimburse the taxpayers for our grace in allowing the CCHS to use our park for its event. Unfortunately, the amount of the deficiency has been escalating over the years.

In 2022, the first year the city council waived the Depot Park user fee at the city manager's personal request (made while sitting in his city manager's seat rather than at the lectern as an outsider), the CCHS paid nothing at all to the city for its September 2022 Art in the Village event. That is, it paid nothing until after I sent a July 6, 2023, FOIA request for the information ten months after the 2022 Art in the Village event and despite the fact the 2022 fee waiver resolution stated, "as in year's [sic] past, the Society will pay the DPW wages for their time worked during Art in the Village weekend."

The cost to the taxpayers for the 2022 event was \$1,499.88, the city council excused \$200 of that amount for Depot Park user fees (even though that's the nonresident rate for two hours of use), and the CCHS "donated" only \$550 on July 10, 2023. This left taxpayers on the hook for a forced contribution to the



CCHS in the amount of \$749.88. The city manager's notes on my FOIA response asserted "the Historical Society's donation for the 2022 event was just received this week after the completion of the detailed analysis of the DPW wages to explain a significant year-over-year increase." I'm sure it was merely a coincidence that the "detailed analysis" wasn't prepared, nor payment sent, until shortly after I sent the FOIA request and just before the city sent its response to me. I can't help but wonder if the city would have ever received any reimbursement if I hadn't sent the FOIA request and drew attention to the omission.

Please note the city manager's use of the word "donation" to explain the fact he doesn't believe his organization is required to fully reimburse the taxpayers for all the DPW wages associated with his personal organization's massive fundraising event. He apparently perceives this exchange as the CCHS making a voluntary donation to the city, as opposed to what actually happens, which is that the taxpayers are forced to "donate" the unreimbursed balance of the DPW wages paid for his private organization's event.

I sent a FOIA request for information about the 2023 Art in the Village event, the second year the city council waived the Depot Park User fee. I learned the taxpayers paid \$796.50 in DPW wages for the event, but the CCHS paid only \$465.50, which the city manager explained was the difference between the actual taxpayer costs and the budgeted amount of \$331.00. The city manager explained that "[t]he Society strives, to the best of its ability, to make a donation to the City every year to make the City 'whole', [sic] but it has never been communicated to the Society - or any other community organization holding events in the city - that this is a requirement." He also stated that "[i]t is not always financially possible to cover all of the labor costs incurred." The city attached a copy of a check from the CCHS, signed by the city manager in his CCHS role, and a copy of a receipt, signed by the city's administrative assistant. This response, along with the city manager's comments, was also copied to the city attorney, which means he's been made aware of the issue but apparently did nothing about it (except perhaps bill for reading the response).

It simply beggars belief that any public official would think it's OK to use taxpayer money to pay for his organization's private event because no one told him it was improper. It's also incredible to suggest that I and every other taxpayer in the city should be forced pay for any part of the CCHS's annual fundraiser because the city manager/CCHS president and treasurer alleges, "it's not always financially possible [for the CCHS] to cover all of the labor costs incurred." I question this assertion because the CCHS's 2022 tax return (the last one they posted on their website) shows a net fund balance of \$131,111. Even if that were not the case, if the CCHS can't afford to pay the full cost of Art in the Park through its fundraising activity or by using volunteer

labor, then they should move the event elsewhere. The answer should never be that taxpayers must be required to fund any shortfall.

The city manager's most recent response to me clearly sets out the unwaivable conflict of interest. To recap:

1. The city manager requests the budget dollars for DPW wages for his organization's private event, and the city council always rubber stamps the request.
2. At the time the city manager makes the budget request, he knows he plans to force taxpayers to pay the budgeted amount of DPW wages and only "donate" the actual wages over the budgeted amount.
3. Since the DPW reports to the city manager, this means he supervises the DPW employees' labor before, during, and after the Art in the Village event and has a hand in how much DPW labor is used. This has a direct effect on the amount of the CCHS's eventual "donation," that is, if he remembers to write a check from the CCHS's treasury without worrying about a FOIA request.
4. In his role as treasurer for the CCHS, the city manager signs a check made payable to the city for only the amount that exceeds his original budget request to the city.
5. On the other side of the transaction, the city manager's direct report accepts the check, and another direct report logs the payment in.

Does the council see something wrong with this picture? Not only is it improper to be on both sides of a financial transaction with the city, but it's also using public funds for a private purpose. And, based on the city manager's response to my last FOIA, he's apparently been accepting "donations" from other private organizations toward DPW wages in lieu of full reimbursement without any council authorization to do so and without apparently understanding that this is improper. It's also unclear how long this has been happening, further emphasizing that the city manager should not be allowed to make unsupervised fee waiver determinations in any amount.

Regardless of what you might believe, my preference is always to avoid litigation. Were it otherwise, I would just go to court whenever I perceived that a cause of action exists and let the chips fall where they may. Instead, I always do what I'm doing now – making you aware that this is a problem that I am ready to go to court over. I think the user fee and DPW wages giveaway issue, and the city manager's unchecked conflict of interest, have gone on long enough. Monday's proposed Depot Park fee waiver resolution demonstrates the council is willing to hand off its responsibilities to a city manager who needs more, not less, supervision.

If the information I've provided isn't enough to persuade the city council members the Depot Park user fee waiver resolution scheduled for consideration on Monday is a bad idea, then I would suggest the council get an opinion from a competent municipal attorney (or at least get an opinion from an attorney who will advise you how to comply with the law when threatened with litigation rather than advising you to "play chicken" and wait and see if a lawsuit will be filed, as the city attorney advised you to do in connection with last year's FOIA lawsuit).

Frankly, if the city would prefer not to entangle itself in litigation, I think the best solution would be to either stop charging Depot Park user fees to anyone or charge user fees to everyone based on actual use. Should the city decide to continue to charge Depot Park user fees, then it needs to conduct a fee study to determine whether the user fees being charged are proper under the *Bolt* requirements. If the council thinks it's a good idea to go ahead with this resolution, even after reviewing the information I've provided and after having the opportunity to seek legal counsel, I suggest that someone at least contact your insurance carrier and ask whether your legal fees will be covered by insurance should we end up in court over this matter. Please be sure to let your insurer know that I will be asking for injunctive relief, not damages, since injunctive relief will be sufficient to stop you from continuing these questionable practices. I suspect you'll find your insurance won't cover the lawsuit, and then you'll need to decide if providing privileges only to a favored few organizations is worth the legal expense to the city.

Best regards,

Susan Bisio