

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

ROBERT DASCOLA,

Plaintiff,

v

CITY OF ANN ARBOR and  
JACQUELINE BEAUDRY, ANN  
ARBOR CITY CLERK,

Defendants,

and

SECRETARY OF STATE RUTH  
JOHNSON,

Intervenor-Defendant.

**INTERVENOR-  
DEFENDANT'S RESPONSE  
TO COURT'S  
OPINION AND ORDER  
DATED JULY 22, 2014**

No. 2:14-cv-11296

HON. LAWRENCE P.  
ZATKOFF

MAG. R. STEVEN WHALEN

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**INTERVENOR-DEFENDANT'S RESPONSE TO COURT'S  
OPINION AND ORDER DATED JULY 22, 2014**

In response to the Court's Conclusion in its Opinion and Order dated July 22, 2014 (R. 42, Opinion and Order, Pg ID #15-17), Intervenor-Defendant Ruth Johnson responds as follows:

**a) What is the basic procedure for counting votes in the Third Ward primary election (i.e., Where will these votes be counted? Who will count the votes? If the votes will be certified, who will do so and what is the process for doing so? What process will the Ann Arbor Defendants and the Secretary of State use to guarantee only those absentee votes cast for Third Ward Council member on accurate ballots are counted?);**

Attached are detailed procedures which the Bureau of Elections has issued and has reviewed with the City of Ann Arbor, covering the tracking of all original and replacement ballots and the process for tabulating the appropriate ballots on Election Day, with strict controls to ensure that NO votes for the Ann Arbor City Council Ward 3 race from original (incorrect) ballots are counted. (Exhibit 1). The Bureau of Elections has further reviewed the detailed election inspector instructions that the Ann Arbor City Clerk has prepared for Absent Voter Counting Board (AVCB) inspectors for use on Election Day and has confirmed that those instructions fully follow and comply with the directions provided by the Bureau.

These procedures utilize numerous controls to ensure that: (1) all originally issued (incorrect) ballots have been and continue to be tracked; (2) that only replacement (correct) ballots are delivered to the AVCB for counting on Election Day; (3) the few remaining original (incorrect) ballots from voters that did not return a replacement ballot are kept segregated and are delivered to the AVCB after the close of polls on Election Day; and (4) valid votes from those remaining original ballots are duplicated at the AVCB onto a replacement ballot, **except for the Ward 3 City Council race (which will not be counted)**, before they are tabulated.

The Bureau of Elections has been advised that the City of Ann Arbor plans to tabulate the AVs in their usual location, the Justice Center in Ann Arbor, and is planning to utilize experienced election inspectors and an experienced AVCB Supervisor. The City Clerk has advised that she will be present for the duplication and tabulation of any remaining original (incorrect) Ward 3 AV ballots for which no replacement ballot was returned; a representative of the Bureau of Elections will also be present for this portion of the AVCB process on Election Night.

The City of Ann Arbor has advised that it will produce unofficial results on Election Night. Final canvass and certification of the Ann Arbor City races will be handled by the Washtenaw County Board of

Canvassers in accordance with election procedures. See Michigan Secretary of State, Bureau of Elections publication, “Manual for Boards of County Canvassers,”<sup>1</sup> published July 2014. Note that the standard canvass procedures do not provide for review of specific ballots unless the County Board of Canvassers finds that it is unable to determine an accurate result.

Please refer to the detailed procedures (Exhibit 1) for more information on the overall process and the controls and safeguards included which are designed to ensure that only those absentee votes cast for Third Ward City Council candidates on accurate ballots will be counted.

**b) What are the safeguards currently in place to guarantee that all votes are counted accurately?**

The City of Ann Arbor has advised that it will employ numerous safeguards to ensure that all votes are counted accurately and that no votes for the Ann Arbor Ward 3 City Council race form original (incorrect) ballots are counted, including:

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<sup>1</sup> Available at [http://www.michigan.gov/documents/sos/BCC\\_Manual\\_2011\\_342730\\_7.pdf](http://www.michigan.gov/documents/sos/BCC_Manual_2011_342730_7.pdf)

Use of a separate series of ballot serial numbers to clearly differentiate between the original (incorrect) and replacement ballots;

Tabulator program that will only accept and tabulate replacement ballots, and will reject any original (incorrect) ballots;

Thorough tracking of all returned ballots and segregation of all original ballots;

Separate tracking and segregation of ballots from voters that have only returned the original ballot; and

Ballot duplication process that will involve multiple election inspectors and multiple verification steps to ensure ballots from voters who returned only the original (incorrect) ballot are duplicated correctly, and that no votes cast in the original Ward 3 City Council race are duplicated or tabulated.

Please see the attached procedures (Exhibit 1) for more detailed information on the safeguards that are in place throughout the process.

**c) Do the parties' believe these are adequate safeguards in this situation to guarantee that all votes are counted accurately? If not, what other safeguards should be in place?**

Yes. The City of Ann Arbor has taken a comprehensive approach to outlining controls and safeguards into every step of the process, and considering every possible voter scenario. The Bureau of Elections has worked with the City to outline clear instructions that are to be used by clerk staff and election inspectors for every step and possible scenario.

**d) Other information the parties' believe the Court should have to ascertain the probability that all votes cast in the Third Ward primary election will be counted correctly.**

The City of Ann Arbor has advised that it will continue to contact affected voters to ensure that, to every extent possible, the number of affected ballots will be kept to a minimum. At this point, according to the City, only ten (10) original ballots remain for which a replacement ballot has not been returned.

City Clerk and Bureau of Elections staff will be available for consultation and verification that appropriate steps and controls are in place throughout Election Day until the completion of the tabulation process and generation of unofficial results on Election Night.

Respectfully submitted,

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Attorney General

s/Denise C. Barton  
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Dated: July 25, 2014

## CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2014, I electronically filed the above document(s) with the Clerk of the Court using the ECF System, which will provide electronic copies to counsel of record, as well as via US Mail to all non-ECF participants.

/s/Denise C. Barton

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**EXHIBIT LIST**

1. Procedures Associated with Replacement Absent Voter Ballots



# EXHIBIT 1

## **Procedures Associated with Replacement Absent Voter Ballots**

### **City of Ann Arbor, City Council Ward 3 Ballots – August 5, 2014 Primary**

July 25, 2014

BACKGROUND: Ballots for Ann Arbor City Council Ward 3 excluded one candidate in the Democratic Primary. Replacement ballots were issued to all 392 voters who were sent the incorrect Ward 3 Absent Voter (AV) ballot. NOTE: Electronic ballots that were sent to military/overseas voters were sent the correct version of the ballot.

The following steps are being taken to track, process and tabulate the affected ballots:

#### **Tracking of Original and Replacement Ballots as they are Issued and Returned**

- 1) A record of the ballot serial numbers for both the original (incorrect) and replacement ballots for each affected voter is included on each voter's AV Ballot Application form.
- 2) The first ballot issued is recorded as "Spoiled" in the Qualified Voter File (QVF) system. The new replacement ballot number is now recorded in QVF.
- 3) Replacement ballots contain a different numeric series (4000 and 5000 series) than the original ballots, and that serial number appears on a label on the replacement ballot return envelope as well as in the upper right corner of each ballot. The use of the different number series will help to easily differentiate and identify the replacement (correct) ballot envelope as it is returned and prepared for processing.
- 4) As replacement ballots are returned, each voter's signature is verified using the AV ballot application and/or the QVF under routine procedure; the date of the ballot's return is noted in the "Clerk Record" section of the AV ballot envelope; and the date of the ballot's return is recorded in the QVF.
- 5) Original (incorrect) ballots that are returned by voters are segregated and secured. When a voter who previously returned the first ballot returns the replacement ballot, the outside of the return envelope which contains the first ballot issued is marked 'SPOILED', the date of return is recorded and the voided ballot is retained (unopened) in a secure location.

### **Tabulator Program**

The memory card that is secured in the tabulator has been re-programmed to accept only the new replacement ballots and will reject any original (incorrect) ballots, as the original ballot program code is not readable in the new program. This functionality will be demonstrated at Ann Arbor's Public Accuracy test on July 25.

### **Ensuring the Appropriate Ballot is Counted on Election Day**

The deadline for the return of AV ballots is 8:00 pm on Election Day. If a voter who was issued a replacement ballot returned the first ballot issued – but did not return the second ballot issued – **the ballot must be duplicated, and any valid votes which appear on the first ballot issued must be counted – EXCEPT FOR VOTES IN THE CITY COUNCIL WARD 3 RACE, which shall not be counted.**

AV Ballots for voters that have returned only the original (incorrect) ballot will be held by the clerk's office until after the polls close on Election Day. If the **replacement ballot** issued to the voter is **received** by the clerk by the close of polls, the **first ballot issued** to the voter will be **voided** and the **replacement ballot** will be **counted**. The clerk will coordinate delivery of the remaining original (incorrect) ballots that must be duplicated and tabulated, as well as any new replacement ballots that arrive on Election Day, to the Absent Voter Counting Board (AVCB) after 8 pm on Election Day. (Note: an AVCB is a centralized precinct that processes and counts all absent voter ballots.)

If the **replacement ballot** issued to the voter is **not received** by the clerk by the close of polls, the election inspectors will proceed with the duplication, processing and counting of the first ballot issued to the voter - **EXCEPT FOR VOTES IN THE CITY COUNCIL WARD 3 RACE. All duplication of original "first" ballots will take place under the direction of the AVCB Supervisor. Duplication will be checked and verified prior to tabulation.**

In an instance where a **voter returns both ballots** and the AVCB inspectors find that the voter has enclosed the **first ballot in the envelope supplied for the return of the replacement ballot**, the Absent Voter Counting Board (AVCB) chairperson will contact the clerk's office to obtain the envelope containing the other ballot that was returned by that voter, so that the **replacement ballot** can be **counted**. Under such a scenario, the **first ballot** sent to the voter **will NOT be duplicated** and will be secured using the original ballot envelope and placed in an envelope specifically for Ward 3 voided ballots. These ballots will be held until AVCB processing is

complete; at which time they will be returned to the clerk's office to be held with the other voided first ballots.

All Election Day Ward 3 precinct inspectors have been instructed to notify the clerk's office if any AV voter that has returned only an original (incorrect) ballot arrives to vote in person on Election Day. Upon receipt of this information, the clerk will authorize the issuance of a ballot to the voter in the precinct and shall remove the original (incorrect) ballot from those to be delivered to the AVCB. This ballot will be voided and secured with other voided Ward 3 ballots. Note: This follows standard Election Day procedures. Precinct Inspectors are always instructed to call the City Clerk for assistance when an absent voter arrives in the polling place on Election Day wanting to vote in person, so that the status of the absentee ballot can be verified.

**Processing and Tabulating Procedures – Voter Returns ONLY the Original (Incorrect) Ballot**

- 1) Ballots for affected AV voters that returned only the original (incorrect) City Council Ward 3 ballot must be segregated and processed as a group after the close of the polls.
- 2) The AVCB notes the receipt of the return envelope next to the voter's name in the List of Voters section of the Poll Book. The AVCB verifies the ballot serial number entered for the voter.
- 3) The ballots **must be duplicated** using standard procedures (**see below**). Duplicate all valid votes from the first ballot to the duplicate ballot - **EXCEPT FOR VOTES IN THE CITY COUNCIL WARD 3 RACE.**
- 4) In preparation for the possibility that affected ballots may face additional legal challenge after Election Day, process the original (incorrect) ballots following the standard procedure used for processing challenged ballots:
  - a. the election inspector writes the number appearing on the voter's ballot in pencil on the **original (incorrect)** ballot;
  - b. the election inspector conceals the number with post it tape or a slip of paper as directed by the AVCB Supervisor; and
  - c. the election inspector proceeds with the routine processing and counting of the **duplicated** ballot.
- 5) **Tabulate the ballot under routine procedure.**

**DUPLICATING BALLOTS:** City Council Ward 3 ballots *must not* be duplicated until *after* the close of the polls.

The standard procedures for duplicating ballots are detailed below:

- After identifying the ballots which must be duplicated, count out an equal number of unused ballots. At the top of the first “original” ballot to be duplicated write “ORIG1”; at the top of the blank ballot that will be used to create the “duplicate” write “Dup 1.” Follow the same numbering system for the remaining ballots which must be duplicated, e.g.: “ORIG2” – “Dup 2”; “ORIG3” – “Dup 3”; etc.
- Because there may be additional ballots to be duplicated (for reasons other than the Ward 3 original ballot misprint), the Ward 3 ballots to be duplicated must be separated from the ballots being duplicated due to other reasons. Duplicate the Ward 3 City Council ballots in one group, using this designation: “Dup 1 – Ward 3”.
- Under the direction of the AVCB Supervisor, the ballots will be duplicated using a reader-checker process with two election workers who have expressed different political party preferences on their applications to work as an election inspector. One election worker calls the valid votes from the “original” ballot as the second election worker records the votes to the “duplicate” ballot. The AVCB Supervisor will act as an additional verification, and will ensure the ballot is properly marked.
- After completing the duplication process, the AVCB Supervisor and the election workers who handled the procedure must verify that:
  - 1) The “original” ballot is labeled at the top with a number “ORIG1” and the corresponding “duplicate” ballot is labeled at the top with corresponding duplicate notation (e.g., “Dup 1 – Ward 3”).
  - 2) All valid marks have been transferred from the “original” ballot to the corresponding “duplicate” ballot. Note: If the ballot is overvoted or has crossover votes, it must still be duplicated to include any mistakes made by the voter, except for any Third Ward City Council votes.
  - 3) A separate verification step must be taken to ensure that votes for the City Council Ward 3 race are not duplicated.

As explained above, this same numbering scheme is continued for all ballots requiring duplication. The second "original" ballot to be duplicated is numbered "ORIG2" and the "duplicate" ballot is labeled "Dup 2 – Ward 3," etc.

All duplicated ballots are then tabulated. All "original" ballots are placed into a special envelope labeled "Original ballots for which duplicates were made and tabulated." The special envelope is sealed into an approved ballot container along with all other used and unused ballots following the close of the polls.