

STATE OF WISCONSIN

CIRCUIT COURT

BROWN COUNTY

JAMES SCHMITT  
509 Spring Street,  
Green Bay, WI 54301,

Petitioner,

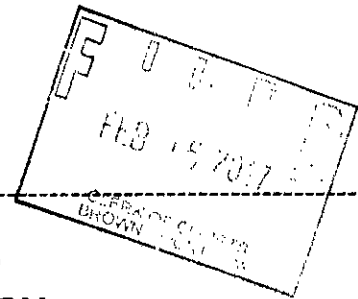
vs.

CITY OF GREEN BAY COMMON COUNCIL  
100 N. Jefferson Street  
Green Bay, WI 54301,

Respondent.

Case No.  
Case Code 30953

17CV193



**MEMORANDUM IN SUPPORT OF  
PETITION FOR WRIT OF PROHIBITION**

**INTRODUCTION**

James J. Schmitt, Mayor of Green Bay, Wisconsin, has petitioned the Court for the issuance of a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on a petition seeking Schmitt's removal from office, which is set to occur on **February 20, 2017 at 7 p.m.** Schmitt also seeks an order scheduling a hearing at which the Common Council shall show cause as to why it should not be absolutely restrained from any further proceedings related to conducting a hearing on the petition for removal. Finally, Schmitt seeks an order awarding him his costs and disbursements in this action pursuant to Wis. Stat. § 783.08, *et seq.*

The basis for Schmitt's petition is that the Common Council lacks jurisdiction and authority to proceed with a hearing on the petition for removal because the petition fails to allege any misconduct by Schmitt that meets the definition of "cause" for removal under Wis. Stat. §§17.001 and 17.16(2).

### FACTUAL BACKGROUND

Schmitt is the duly elected Mayor of Green Bay, Wisconsin, with a term set to expire in April 2019, and has been the Mayor since he was first elected to the office in April 2003. (Affidavit of Patrick J. Knight at ¶1). During his last campaign for office, Schmitt was charged with criminal misdemeanor campaign finance offenses related to the handling and reporting of campaign contributions. (Knight Affidavit at ¶2, Ex. A, p.2).

On December 5, 2016, Schmitt pled guilty to three misdemeanor charges, including one count of attempting to make false statements to an election official, contrary to Wis. Stat. §§12.13(1)(b), 12.60(1)(a) and 939.32, one count of attempting to accept campaign contribution funds not belonging to a reported contributor, contrary to Wis. Stat. §§11.24(1), 11.61(1)(a), and 939.32, and one count of attempting to accept campaign contributions in excess of limits, contrary to Wis. Stat. §§ 11.26, 11.61(1)(b), and 939.32. (*Id.* at p.9). At sentencing, the Court imposed 40 hours of community service and a total forfeiture of \$4,000 (Knight Affidavit at ¶2, Ex. A, p.34), which Schmitt completed and paid in full by February 3, 2017, within the sixty days ordered by the court.

In his sentencing argument, Special Prosecutor Bruce Landgraf confirmed that all of the charges against Schmitt related to his conduct as a candidate for office and were not related to his official duties as Mayor:

I hasten to add there was nothing that I came across in my investigation that suggested misconduct in public office. These were candidate transactions, they were not entered into as a public official. They are official in some sorts, but they're not any sort of misconduct in public office by Mr. Schmitt.

(Knight Affidavit at ¶2, Ex. A, p.20).

Despite this unequivocal statement, on or about December 8, 2016, within days after Schmitt's plea and sentence, a Green Bay citizen filed with the Common Council a petition for removal of Schmitt from the office of Mayor of Green Bay, pursuant to Wis. Stat. ch. 17 and Article XIII, Section 3(2) of the Wisconsin Constitution. (Knight Affidavit at ¶6; Ex. C). The petition realleges the charges against Schmitt and his conviction, and asserts that Schmitt's conduct violated the public trust; however, the petition does not allege or establish that Schmitt was convicted of a crime that constitutes cause for removal under Wis. Stat. §17.16(2), nor does it allege or establish any misconduct by Schmitt that meets the definition of "cause" for removal under Wis. Stat. §§17.001 and 17.16(2).

Schmitt's counsel advised the Common Council of the deficiency of the petition by letter on December 14, 2016. (Knight Affidavit at ¶8; Ex. E). The citizen petitioner responded by filing an amended petition. (Knight Affidavit at ¶9; Ex. F). Although containing more facts, the amended petition again failed to allege or establish "cause" for removal as required by Wisconsin law.

Despite this, and despite Schmitt's counsel's communications with both the Common Council and its outside counsel advising of the deficiency in the petition, the Common Council moved forward and issued a notice of hearing for February 20, 2017. (Knight Affidavit at ¶10; Ex. G). The notice states that the Common Council intends to function in a judicial or quasi-judicial capacity, and expects the parties to "submit evidence and legal authorities, question and cross-examine witnesses, and present argument as to whether cause exists for Mayor Schmitt to be removed from office." (*Id.*). The notice further states that the Common Council "shall deliberate (potentially in closed session according to Wis. Stat. §19.85(1) upon proper motions) and resolve the matter in the fashion required by the referenced statutes." (*Id.*).

#### ARGUMENT

Schmitt is entitled to a writ of prohibition under section 783.03 because the Common Council lacks jurisdiction and authority to proceed with a hearing on the petition for removal and because the petition fails to allege any misconduct by Schmitt that meets the definition of cause for removal under sections 17.001 and 17.16(2). Further, the Common Council lacks any authority to proceed with a hearing under Article XIII, Section 3(2) of the Wisconsin Constitution, which defines eligibility for public office in the State.

STATE OF WISCONSIN

CIRCUIT COURT

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BROWN COUNTY

JAMES SCHMITT  
509 Spring Street,  
Green Bay, WI 54301,

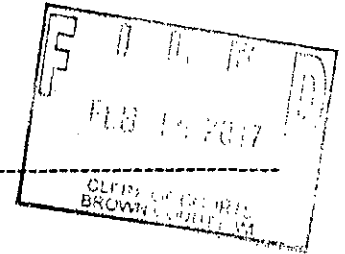
Petitioner,

vs.

CITY OF GREEN BAY COMMON COUNCIL  
100 N. Jefferson Street  
Green Bay, WI 54301,

Respondents.

Case No. 17CV193  
Case Code 30953



PETITION FOR WRIT OF PROHIBITION

TO: Marc Mamme BROWN COUNTY CIRCUIT JUDGE

Petitioner Mayor James Schmitt, by his attorneys Gimbel, Reilly, Guerin & Brown LLP, respectfully petitions this Court for a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on the petition seeking to remove him from office under Wis. Stat. §17.12, *et seq.*, which is set to be heard before the Common Council on February 20, 2017 at 7 p.m., until such a time when the Court can schedule and notice a hearing at which the City of Green Bay Common Council shall show cause as to why the Common Council should not be absolutely restrained from taking any action related to the petition for removal.

The petition shows:

1. Schmitt is an adult resident of the State of Wisconsin residing at 509 Spring Street, Green Bay, Wisconsin 54301.

2. Schmitt is the duly elected Mayor of Green Bay, Wisconsin, with a term set to expire in April 2019, and has been the Mayor at all times pertinent to this petition.

3. Respondent City of Green Bay Common Council is a municipal body organized and existing under the laws of the State of Wisconsin, with principal offices located at 100 North Jefferson Street, Green Bay, WI 54301.

4. On December 5, 2016, Schmitt pled guilty to three misdemeanor charges:

- a. one count of attempting to make false statements to an election official, contrary to Wis. Stat. §§12.13(1)(b), 12.60(1)(a) and 939.32;
- b. one count of attempting to accept campaign contribution funds not belonging to a reported contributor, contrary to Wis. Stat. §§11.24(1), 11.61(1)(a), and 939.32;
- c. one count of attempting to accept campaign contributions in excess of limits, contrary to Wis. Stat. §§ 11.26, 11.61(1)(b), and 939.32.

5. Additional charges were dismissed and read in. Upon Schmitt's accepting his plea, the Circuit Court, Judge Mitchell J. Metropulos sentenced Schmitt to 40 hours of community service and imposed a total forfeiture of \$4,000. A true and correct copy of an excerpt of the plea and sentencing transcript is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit A.

6. On February 3, 2017, Schmitt filed with the Judge Metropulos letters verifying his completion of community service and a copy of the receipt confirming full payment of the forfeiture.

7. On or about December 8, 2016, after Schmitt pled guilty to the three misdemeanors and was sentenced, a Green Bay citizen filed a petition for removal of

Schmitt from the office of Mayor of Green Bay under Wis. Stat. chapter 17 and Article XIII, Section 3(2) of the Wisconsin Constitution. A true and correct copy of the petition for removal is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit C. That petition later was amended and a true and correct copy of the amended petition for removal is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit D.

8. The citizen petition identifies the charges set forth above, Schmitt's plea to those charges and his conviction. In addition, the petition alleges that Schmitt violated the public trust by making misrepresentations related to the charges.

9. The common council of a city may remove an elected official for cause under Wis. Stat. §17.12(1)(c). "Cause" is defined as "inefficiency, neglect of duty, official misconduct, or malfeasance in office." Wis. Stat. §17.001.

10. The statutory definition limits the common council's power, authority and jurisdiction to remove an officer. Any attempt to remove an officer for some alleged cause not affecting the officer's competency or fitness to discharge the duties of the office, constitutes an excess of power and is not a removal within the statute.

11. The citizen petition fails to allege any facts establishing that Schmitt was inefficient, that he neglected his mayoral duties, that he engaged in any misconduct in his official mayoral duties or that he engaged in malfeasance in office.

12. All of the charges were brought against Schmitt related to his conduct as a candidate for office, not his conduct as mayor. Indeed, the prosecutor's sentencing argument affirmatively stated that he had uncovered no evidence of misconduct in

public office and that the charges were unrelated to anything that Schmitt did while acting in his capacity as Mayor. (Knight Affidavit at ¶2, Ex. A, p.20).

13. Schmitt has never been convicted or accused of any crimes other than those to which he pled guilty on December 5, 2016.

14. None of the crimes to which Schmitt pled guilty were felonies, nor have they been designated by the legislature as misdemeanors involving a violation of public trust pursuant to Article XIII, Section 3(2) of the Wisconsin Constitution.

15. None of the crimes to which Schmitt pled guilty were related to his official duties as mayor; Schmitt has never been accused or convicted of a crime that constitutes cause for removal under Wis. Stat. §17.16(2).

16. The City of Green Bay Common Council lacks jurisdiction and authority to proceed with a hearing on the petition for removal because the petition fails to allege any misconduct by Schmitt that meets the definition of cause for removal under Wis. Stat. §§17.001 and 17.16(2).

17. Counsel for Schmitt has notified the City of Green Bay Common Council and its legal counsel that the Common Council has no legal basis to proceed with a hearing on the petition for removal.

18. Nevertheless, the City of Green Bay Common Council has scheduled a public hearing regarding the petition for removal, which is set to occur on February 20, 2017 at 7 p.m. A true and correct copy of the notice of hearing is attached to the accompanying Affidavit of Patrick J. Knight as Exhibit I.



19. The notice of hearing states that the City of Green Bay Common Council intends to function in a judicial or quasi-judicial capacity, and expects the parties to “submit evidence and legal authorities, question and cross-examine witnesses, and present argument as to whether cause exists for Mayor Schmitt to be removed from office.” The notice further states that the Council “shall deliberate (potentially in closed session according to Wis. Stat. §19.85(1) upon proper motions) and resolve the matter in the fashion required by the referenced statutes.” (*Id.*).

20. Schmitt lacks any adequate remedy at law to prohibit the City of Green Bay Common Council from proceeding with the removal hearing.

21. If the Common Council is allowed to exceed its statutory authority and proceed with the hearing, Schmitt will be compelled to defend himself at a judicial or quasi-judicial proceeding, incurring substantial legal expense, great political harm and public embarrassment.

22. Schmitt’s only remedy at law is a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on the petition for removal, and for this Court to notice and schedule a hearing to show cause as to why the City of Green Bay Common Council should not be absolutely restrained from any further proceedings related to conducting a hearing on the petition for removal.

WHEREFORE, petitioner James Schmitt, requests the following relief:

- (a) issuance of a writ of prohibition commanding the City of Green Bay Common Council to immediately desist and refrain from conducting a hearing on the petition for removal;
- (b) an order scheduling a hearing at which the City of Green Bay Common Council shall show cause as to why it should not be absolutely restrained from any further proceedings related to conducting a hearing on the petition for removal;
- (c) an order awarding Schmitt his costs and disbursements in this action, and any further relief the court deems just and equitable.

Dated this 14 day of February, 2017.

GIMBEL, REILLY, GUERIN & BROWN LLP

By: 

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*r/cr/Schmitt/p/petition for writ of prohibition*

James Schmitt vs. City of Green Bay Common Council

**Application and Order  
for Specific  
Judicial Assignment**

Case No. 2017CV000193

**Case Information**

Current Court Official Marc A. Hammer	Code 2286	Branch No. 5	District No. 8
Date Case Filed 02-15-2017	Case Type Civil	Class Code and Description 30953 - Petition for Writ of Prohibition	

**Case Status Information**

Last Activity in Case	Date
Next Scheduled (or to be scheduled) Activity in Case No scheduled or proposed activity.	Date
<input type="checkbox"/> Jury Trial <input type="checkbox"/> Bench Trial <input type="checkbox"/> Post-Judgment Case <input type="checkbox"/> Other:	
Additional information that will be helpful to the Chief Judge and the Judge to be assigned (e.g., time limits waived or not waived, defendant in custody, speedy trial demand, prior judicial substitutions or disqualifications, other attorneys, etc.):	

**Attorney/Party Information**

Patrick J. Knight Attorney for Plaintiff Gimbel Reilly Guerin & Brown LLP Two Plaza East, Suite 1170 330 E. Kilbourn Street Milwaukee, WI 53202	City of Green Bay Common Council Defendant 100 N Jefferson St Green Bay, WI 54301
Other Attorney(s) (and role: e.g., GAL, Adversary Counsel, etc.):	

**Reason for Assignment Application**

Reason Disqualification per Statute §757.19: 757.19(2)(g)	Reason Presiding Judge has determined the case requires an out-of-county assignment.
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James Schmitt vs. City of Green Bay Common Council

**Application and Order  
for Specific  
Judicial Assignment**

Case No. 2017CV000193

**Current Court Official Approval**

**Application Order and Order of Assignment**

Application Prepared by:  
Nancy A. Briski, Judicial Asst. Br. V

It is **Ordered** the judge named below is assigned this case.  
 This assignment is denied.

Approved  
 Denied  
Explain:

By:

\_\_\_\_\_  
Chief Judge/Deputy Chief Judge/DCA/Director/Chief Justice

\_\_\_\_\_  
Date

By:

Electronically signed by Marc Hammer

\_\_\_\_\_  
Current Court Official

February 16, 2017

\_\_\_\_\_  
Date

Name of Judge Assigned: