



September 6, 2022

Durham City Council
101 City Hall Plaza
Durham, North Carolina 27701

RE: Darryl Howard civil verdict

Dear Durham City Council,

As a civil rights organization that litigates police misconduct and that has called Durham our home for nearly 50 years,¹ we have watched the recent developments between the Durham City Council and Darryl Howard with a growing sense of alarm. Over the course of this summer, our employees have fielded calls from confused community members and fellow attorneys, seeking to reconcile the Council’s decision to refuse payment to Mr. Howard with its professed commitment to police accountability. Many people are currently struggling with this decision. The national media has taken note, with *The Washington Post* publishing a particularly harsh critique, stating that “only a desire for justice and a sense of shame” could fix the situation, and lamenting that “Durham officials appear in short supply of both.”²

These criticisms do real damage to the work that many in this city, including those on this Council, have done to establish Durham as a community committed to protecting the civil rights of the people who live and visit here. While we were not privy to the conversations that led to your decision, declining payment of a judgment for a wrongful conviction strikes our organization as morally wrong and very bad public policy. Refusing to indemnify an officer that the City of Durham employed and entrusted with public duty does not punish “bad” police officers. Rather, it re-punishes the victims of police misconduct. It undermines public trust in the city’s willingness to take responsibility for harms that its residents suffer as a result of the acts and omissions of city actors. It is the type of legalistic defense that we associate with jurisdictions that are overtly hostile to substantive protections for civil rights.

Indeed, the city’s position sets a bad example for other North Carolina municipalities. These councils and commissions may be tempted to follow Durham’s example to side-step their financial liabilities for official misconduct. It will make it even harder than it already is for victims of misconduct to find civil rights attorneys to bring meritorious accountability litigation. Litigants will be forced to contend with the risk that going to trial – and winning – will result in a lesser

¹ Founded and based in Durham, Emancipate NC was known from 1975 to 1992 as The Prison & Jail Project of North Carolina and from 1992 to 2019 as the Carolina Justice Policy Center.

² Radley Balko, *Durham, N.C. Refuses to Compensate Innocent Man After 24 Years in Prison*, WASHINGTON POST, April 26, 2022; see also Nicole Duncan-Smith, *‘It is Offensive’: Durham City Council Rejects Federal Jury’s Recommendation to Pay Wrongfully Convicted Man \$6M After He Spent Two Decades in Prison for Crime He Didn’t Commit*, YAHOO! NEWS, April 18, 2022.

recovery than settling for a smaller sum than a jury would be willing to award. Finally, and most distressingly, the city's position appears to rest on a false legal premise. We write today to correct the public record about the choice that was and is actually before the Council, and to urge the Council to revisit its decision.

City Attorney Kimberly Rehberg, who is the only person thus far to publicly speak about this matter on the city's behalf, has repeatedly asserted that "the city's hands [are] tied"³ and that Council lacks legal authority to make payment in light of the jury's finding that former Detective Dowdy acted in bad faith. In emails to reporters, Ms. Rehberg has said that state law "prohibits the city from paying judgments for employees who 'acted or failed to act because of actual fraud, corruption or actual malice on his part.'"⁴ According to Ms. Rehberg, "[o]nce the jury made those factual findings" of bad faith, making payment to Howard became "prohibited by state law."⁵

This is not accurate. The general statute that Ms. Rehberg contends bars payment to Mr. Howard says nothing about juries.⁶ Rather, it makes clear the law prohibits payment only "if the city council . . . finds that such . . . former [employee] . . . acted . . . because of . . . actual malice."⁷ Thus, it was not up to the jury to determine whether this statute should function to deprive Mr. Howard of his compensation. It is up to you. Unless a vote is or was called on the question of whether Mr. Dowdy acted because of "actual malice," and the majority of the council votes or voted *yes*, then the general statutes present no obstacle to paying Mr. Howard.⁸

Council might be reluctant to pay the judgment because relieving Mr. Dowdy of the responsibility to pay could be construed as signaling some diminished responsibility on his part. But Council evidently takes this position constructively, in any case, as it continues to contest the jury verdict on appeal. Moreover, the general public is not concerned with the technicalities of why Durham is not paying this man; they're concerned that *he hasn't been paid*. According to *The News & Observer*, the city allocated "millions of dollars" to a defense strategy aimed at attacking the character of Mr. Howard, who has received a pardon of innocence.⁹ Concluding Dowdy acted without actual malice would be consistent with Durham's long-term defense strategy in this case,¹⁰ and paying Mr. Howard the compensation he is due would signal to the public that the city is

³ Virginia Bridges, *Durham Explains, Defends Decision Not to Pay Darryl Howard After Wrongful Conviction*, NEWS & OBSERVER, April 25, 2022; Thomasi McDonald, *How Durham Council is Skirting \$6 Million Payment to Wrongfully Convicted Man*, INDY WEEK, June 1, 2022.

⁴ Bridges, *Durham Explains, Defends Decision*, *supra* note 3.

⁵ McDonald, *Durham Council Skirting \$6 Million Payment*, *supra* note 3.

⁶ There is no case law to support the proposition that jury verdicts dictate this outcome. North Carolina's appellate courts have cited G.S. 160A-167(b) only once, in a footnote to a 2017 opinion. The entirety of the sentence involving the statute reads as follows: "The payment of any judgments entered against such municipal employees or officers, which is a subject beyond the scope of the present action given that plaintiff was not held to be liable in the *Alexander, Fulmore*, or *Hinson* suits, is governed by the provisions of N.C.G.S. § 160A-167(b) and (c)." *Wray v. City of Greensboro*, 370 N.C. 41, 57 n.2, 802 S.E.2d 894, 904 n.2 (2017).

⁷ G.S. 160A-167(b) (emphasis added).

⁸ In the event such a vote was taken in closed session, it could be revisited and reversed for reasons discussed *infra* page 3 & n.12.

⁹ Virginia Bridges, *A Federal Jury Awarded Darryl Howard \$6 Million. The City of Durham Will Not Pay Him*, NEWS & OBSERVER, April 24, 2022.

¹⁰ *See id.* ("The city has known all along what Captain Dowdy did and decided to defend him on that basis," [attorney Patricia Shields] said.).

committed to paying victims of police misconduct, as opposed to maneuvering to evade accountability.

Ms. Rehberg has also said that a resolution adopted in 1981 binds the Council from paying Mr. Howard's verdict. Even if it were true that the resolution precludes payment in this circumstance—which it is not¹¹—the Council is not bound by the decisions of its predecessors. The present Council has every authority to revise earlier-adopted resolutions.¹² In other words, the city's hands are not "tied,"¹³ and the Council has the authority it needs to pay Darryl Howard. If the city did take action to pay him, no one would appeal or assert otherwise.

All of this is to say that if Darryl Howard does not ultimately receive the money that the jury awarded him, it will be because of a deliberate policy choice made by this Council, not the operation of law. The explanations offered by the City Attorney as to why the city cannot pay do not hold up to scrutiny. We strongly urge the Council to revisit its decision in this case, to satisfy this judgment, and to send a message to the Durham community and beyond that the city's elected leadership believes in police accountability and will not default on civil rights verdicts.

Respectfully,

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¹¹ We agree with Mr. Dowdy's attorney, who has noted that the "specific things that are set out as exceptions in those resolutions were not the issues decided by the jury." See Bridges, *Durham Explains, Defends Decision*, *supra* note 3.

¹² See, e.g., *Bd. of Adjustment of Town of Swansboro v. Town of Swansboro*, 108 N.C. App. 198, 423 S.E.2d 498 (1992) (affirming authority of a city council to revise ordinance, even though it functioned to reduce the length of the terms of the members of an existing board of adjustment, and holding that courts may not inquire into the motives of a city council in enacting an ordinance which is valid on its face), *aff'd*, 334 N.C. 421, 432 S.E.2d 310 (1993).

¹³ Bridges & McDonald, *supra* note 3.