

**MEMORANDUM
NO. 2015-002**

TO: BOB MARGOLIS, MAYOR
JOHN GREENE, VICE MAYOR
MATT WILLHITE, COUNCILMAN
HOWARD K. COATES, JR., COUNCILMAN
ANNE GERWIG, COUNCILWOMAN

CC: Paul Schofield
Senior Staff
Awilda Rodriguez

FROM: Laurie S. Cohen *L.S.C.*

DATE: January 6, 2015

RE: Filling of Vacancy of Councilmember

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Councilwoman Gerwig has asked whether the vacancy caused by the appointment of Councilman Coates to the Circuit Court of Palm Beach County can be filled by election rather than by appointment. As set forth below, filling the seat by election would constitute an impermissible amendment to the Village's Charter.

The Florida Municipal Home Rules Powers Act (F.S. 166.021), adopted in 1973, recognizes the home rule powers granted to municipalities by Art. VIII, section 2(b) of the Florida Constitution. Pursuant to the statute and the Florida Constitution, municipalities may exercise any power for municipal purposes except where expressly prohibited by law. To implement these broad powers, the Legislature modified, repealed, or converted into ordinances many of the provisions contained in then-existing municipal charters. However, section 166.021(4) expressly states that "nothing in the act shall be construed to permit *any changes* in a special law or *municipal charter* which affect the creation or existence of a municipality, the terms of elected officers and the *manner of election*... without approval by referendum of the electors as provided in Section 166.031" (emphasis added). The Florida Supreme Court has interpreted the term "method of election" as meaning the manner in which a person is chosen to fill an office and has advised that whenever the selection of an officer is referred to the people or an organized body it is called an "election." Florida AGO 75-158.

The Village Charter, drafted and adopted more than 10 years after the municipal home rule legislation, specifically provides as follows:

If any vacancy occurs in the office of any councilmember and the remainder of the unexpired term is less than 2 years and 81 days, the remaining councilmembers shall, within 30 days following the occurrence

of such vacancy, by majority vote, appoint a person to fill the vacancy for the remainder of the unexpired term. *If however, the remainder of the unexpired term exceeds 2 years and 81 days, the remaining councilmembers shall, within 30 days following the occurrence of such vacancy, by majority vote, appoint a person to fill the vacancy until the next regularly scheduled village election.*

Village Charter Section 5(G)4b (emphasis added).

No part of the Charter contemplates delegating the duty of appointment to anyone other than the Village Council, including the electors. *Alsop v. Pierce*, 19 So. 2d 799, 805-806 (Fla.1944); *Thayer v. State*, 335 So. 2d 815, 817 (Fla. 1976) (legislative directive as to how a thing shall be done is, in effect, a prohibition against its being done in any other way). Therefore, because more than two years and 81 days will remain on Councilman Coates' term of office, the portion of Section 5(G)4b italicized above controls.

Based upon the above, as well as the Attorney General Opinions addressing substantially similar questions, it is my opinion that the Village is prohibited by Section 166.021(4) from modifying or varying the method established by its Charter for filling a vacancy in office and the vacancy created by Councilmember Coates' resignation must be filled by appointment of a candidate selected by the Council. See Florida AGO 75-158 (Town may not amend a provision of the charter establishing the method by which vacancies in the officers of mayor and town councilman are to be filled without referendum approval as provided in 166.031, F.S.); AGO 94-31 (City commission may not adopt ordinance amending the city charter to provide for a change in the date on which municipal elections will occur; a charter referendum is required); AGO 83-39 (appointment of alternate members with voting power to an appointive municipal board created by special law may only be accomplished by a charter amendment with approval by referendum); AGO 97-53 (City may not delegate its canvassing board duties to a secondary board absent a charter provision authorizing such a transfer).

Aside from the legal bar to filling the seat by special election, there is no practical way to fill the vacancy by election within the timeframe contemplated by the Charter. The Village Clerk's office estimates that it takes a minimum of 90 days to review all aspects of the municipal election process, prepare polling place agreements, and staff an election. Moreover, based upon past fee agreements with the Palm Beach County Supervisor of Elections, a special election would cost in excess of \$35,000.

As always, please do not hesitate to contact me if you have any questions concerning this matter.