Municipal pre-1973 charter, amendment

Number: INFORMAL

Date: December 11, 2008

Ms. Toni L. Craig
Fort Walton Beach City Attorney
908 Pineview Boulevard
Fort Walton Beach, Florida 32547

Dear Ms. Craig:

On behalf of the Fort Walton Beach City Council, you ask whether the city may amend the city charter by ordinance to abolish the offices of Recorder and Finance Director without approval by referendum. You also ask whether the charter may be amended to remove certain financial procedures without a referendum.

You indicate that a response to your inquiry is needed prior to December 23, 2008. Moreover, you have not advised this office as to how the charter will specifically be amended. Accordingly, the following informal comments are offered in an effort to be of some assistance.

In securing the broad home rules powers granted by Article VIII, section 2 of the Florida Constitution, section 166.021(4), Florida Statutes, provides:

"It is the further intent of the Legislature to extend to municipalities the exercise of powers for municipal governmental, corporate, or proprietary purposes not expressly prohibited by the constitution, general or special law, or county charter and to remove any limitations, judicially imposed or otherwise, on the exercise of home rule powers other than those so expressly prohibited. However, nothing in this act shall be construed to permit any changes *in a special law or municipal charter* which affect the exercise of extraterritorial powers or which affect an area which includes lands within and without a municipality or 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 their election except for the selection of election dates and qualifying periods for candidates and for changes in terms of office necessitated by such changes in election dates, the distribution of powers among elected officers, matters prescribed by the charter relating to appointive boards, *any change in the form of government*, or any rights of municipal employees, without approval by referendum of the electors as provided in s. 166.031. Any other limitation of power upon any municipality contained in any municipal charter enacted or adopted prior to July 1, 1973, is hereby nullified and repealed.

(5) All existing special acts pertaining exclusively to the power or jurisdiction of a particular municipality *except as otherwise provided in subsection (4)* shall become an ordinance of that municipality on the effective date of this act, subject to modification or repeal as other ordinances." (e.s.)

Thus, municipal charter provisions adopted prior to 1973 which do not affect the above

enumerated areas were either repealed or were converted into ordinances and are subject to modification or repeal as are other ordinances. Charters adopted or readopted subsequent to the adoption of the Municipal Home Rule Powers Act in 1973, however, may only be amended as provided in section 166.031, Florida Statutes.

You state that the current city charter was created by special act in 1953.[1] You further state that the charter which was adopted prior to July 1, 1973, the effective date of the Municipal Home Rule Powers Act, has not been readopted.[2]

It appears from a review of the charter provisions that the charter officers involved or reflected in question, the city manager, the finance director, and the recorder are all appointive offices. Thus, the provision in section 166.021(4), Florida Statutes, relating to the distribution of powers among elected officers would not be applicable. It is also assumed for purposes of this inquiry that the finance director and the recorder are not members of any appointive boards prescribed by the charter such that the limitation in section 166.021(4) relating to matters prescribed by the charter relating to appointive boards is not implicated.

In Attorney General Opinion 80-97, this office stated that section 166.021(4), Florida Statutes, contains no limitations (except as related to matters prescribed by ante 1973 charters relating to appointive boards), in connection with appointive municipal officers or the duties and powers of such officers.[3] Thus, this office concluded that the city's governing or legislative body, pursuant to section 166.021(1) and (4), Florida Statutes, and Article VIII, section 2(b), Florida Constitution, has the power to create and abolish municipal offices and to prescribe the duties, powers, and responsibilities of such offices. However, to the extent that such actions may affect the form of government of the city or the distribution of powers among the elected officers, they may not be changed by ordinance without approval by referendum of the electors.

In Attorney General Opinion 77-135, this office stated that the phrase "any change in the form of government" as used in section 166.021(4), Florida Statutes, contemplates a change in the allocation of the basic policymaking and administrative functions of municipal government (as from a strong mayor form to a city manager form). Thus, this office concluded that amendments to municipal charter provisions adopted prior to July 1, 1973, the effective date of the Municipal Home Rule Powers Act, may be made by ordinance if such changes do not affect the basic organizational and administrative structure of the municipality's government and if such changes do not fall within any of the other excluded areas set forth in section 166.021(4).[4] In reaching such a conclusion, this office relied on McQuillen, The Law of Municipal Corporations, which provided under the heading "Forms of municipal government":

"A rough classification of form of organization (each class presenting characteristic features) would include (1) the mayor-and-council, or what is commonly called the aldermanic or councilmanic; (2) the autocratic mayor as the chief power in city government with the council having little real authority; (3) the commission plan; (4) (a slight modification of the last) the city or commission-manager plan; (5) division of powers into executive, legislative and judicial, incorporating the system of so-called checks and balances in like manner as the national and state governments and creating independent departments, often mentioned as the 'federal plan;' and (6) when executive or administrative powers are exercised by various departments or boards it is sometimes called 'the board system.'"[5]

The opinion, therefore, states that the term "form of government," as used in section 166.021(4), Florida Statutes,

"was intended to refer to one of the basic organizational forms as exemplified in the above quotation and that the referendum requirement regarding changes in the form of government is not invoked unless there is a change from one basic form to another (*e.g.*, from strong mayor form to city manager form). Thus, any contemplated change in a charter provision which was in existence on July 1, 1973, should be examined in the context of its effect on the basic form of government under which the municipality operates and should be considered in light of other changes which might be made at the same time. (Even though none of a number of changes--when considered alone--would constitute an actual change in the basic form of organization and overall distribution of powers, a number of such changes, when made at the same time and considered together, could effect a transfer of powers so substantial as to have the effect of changing the municipality's 'form of government,' thereby requiring a referendum.)"

Thus, while the abolishment of an appointive municipal office or department under a pre-1973 charter by ordinance would not on its face appear to require approval by the electorate, as noted above, any contemplated change in a charter provision which was in existence on July 1, 1973, should be examined in the context of its effect on the basic form of government under which the municipality operates and should be considered in light of other changes which might be made at the same time.

This office has not been apprised of the language of the proposed changes or whether other changes are also contemplated. I hope, however, that the above informal comments may be of assistance to the city in resolving this matter.

Sincerely,

Joslyn Wilson
Assistant Attorney General

JW/t

---

[1] *See* Special Act 29092 (1953).

[2] You refer to Attorney General Opinion 2008-38 in which this office stated that the city charter could not be amended to abolish the charter offices of city clerk and city treasurer without an approving referendum. The charter under consideration in that case, however, was adopted after 1973 and therefore subject to the amendment procedures set forth in section 166.031, Florida Statutes. The opinion addressed the abolishment of charter officers in a post-1973 charter and thus did not consider the provisions of section 166.021(4), Florida Statutes, or the authority under that statute to abolish appointive charter officers under a pre-1973 charter. Section 166.031(5), Florida Statutes, authorizes municipalities, by unanimous vote of the governing body, to abolish municipal departments provided for in the municipal charter. In construing this provision, this office concluded that the language of section 166.031(5) did not permit the

abolishment of charter officers, only municipal departments provided for in the charter.

[3] *Cf.* s. 166.031(5), Fla. Stat., which empowers municipalities to abolish municipal departments provided for in the municipal charter.

[4] *And see* Op. Att'y Gen. Fla. 81-74 (1981), recognizing that if a municipality contemplates a change only in its "internal, administrative operations" and there is no alteration of the basic distribution of policymaking and administrative functions, there would be no change in the form of government, and such a change could be made by ordinance alone. In the 1981 opinion, however, the mayor, an elected official, had general supervision of the police and fire departments and the proposed ordinance would remove supervision of these two departments from the mayor and place them under the council. This office concluded that such action would affect the distribution of powers among elected officials and thus concluded that a referendum was required to make such an amendment to the charter.

[5] Op. Att'y Gen. Fla. 77-135 (1977) cited to 2 McQuillen *The Law of Municipal Corporations* s. 9.12, p. 643 [*see now* 2A McQuillin *The Law of Municipal Corporations* s. 9.12, p. 198 (3rd rev. ed.)].