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MEMORANDUM

TO: Mayor Michael Wilkinson
Deputy Mayor Tom Kurey
Commissioner Tom Shelly
Commissioner Coleen Chaney
Commissioner Thomas Nessler

FROM: Jay Daigneault, Esq.

CC: JP Murphy, Town Manager

DATE: November 11, 2021

RE: Proposed Charter amendment concerning Police Department

Dear Mayor, Deputy Mayor, and Commissioners:

At the Town Commission meeting on November 2, 2021, a consensus was reached to move toward protecting against the future elimination of the Town's Police Department. The proposed method of doing so was to amend the Charter to require a referendum vote obtaining sixty (60) percent approval of the Town's electors. Given the unique nature and timing of the project relative to the status of the Town's RFP for attorney services, this office was asked to and did provide legal advice to Town staff, including the research and drafting of the Ordinance before you on the November 16 agenda. This memo is intended to explain the reasoning for approaching the issue in the manner proposed.

Section 2.07 (f) of the Town Charter, entitled *Department abolishment*, provides that "[n]o department of the town shall be abolished except by the affirmative vote of at least four (4) of the commission members." But, section 166.031 (5), Fla. Stat., states in relevant part that a "municipality may, by unanimous vote of the governing body, abolish municipal departments provided for in the municipal charter . . ." ¹ Thus, the initial legal inquiry is whether the Town's Police Department is "provided for" in the municipal charter and therefore subject to § 166.031 (5), Fla. Stat. Because the establishment of municipal departments is an enumerated and exercised Charter power of the Town Commission (see § 2.06 (b)) and because the Police Department is captured by Charter § 2.07 (f)'s abolishment language, it is my opinion that the Police Department is "provided for" in the Charter. I note here that a contrary conclusion provides less protection against the Police Department's elimination because, were it considered a creation of ordinance or

¹ The Town Charter at present, then, conflicts with the statute and also provides less protection to the Town's departments than does the statute. The proposed amendment to § 2.07 (f) of the Charter remedies this issue.

administration, it could potentially be eliminated by a simple majority vote of the Town Commission, subject to § 8.01 (b) of the Charter if done by ordinance.

Because it is “provided for” in the Charter, the Police Department is subject to § 166.031 (5), Fla. Stat., and may be abolished only by a unanimous vote of the Town Commission. This is so because it is an old and fundamental principle of statutory construction that a legislative directive as to how a thing shall be done is, in effect, a prohibition against it being done in any other way. Alsop v. Pierce, 155 Fla. 185 (Fla. 1944) (en banc). While § 166.031 (5), Fla. Stat., uses the permissive word “may” regarding the abolishment of municipal departments, its context demonstrates that the unanimous vote requirement is a mandatory way of doing a discretionary thing. Comcoa, Inc. v. Coe, 587 So.2d 474, 477 (Fla. 3d DCA 1991) (“It is well settled that, according to the context and surrounding circumstances, a statutory ‘shall’ is to be read as ‘may’ and vice versa”) (internal citations omitted). In other words, there is no requirement that the Town eliminate its Police Department but, if it chooses to do so, then it must do so by a unanimous vote. Accordingly, a charter amendment which subjected the proposed elimination of the Police Department to a referendum requiring 60% approval would conflict directly with § 166.031 (5), Fla. Stat., and therefore be invalid. See e.g. Citizens For Responsible Growth v. City of St. Pete Beach, 940 So.2d 1144 (Fla. 2d DCA 2006); Fla. AGO 89-76; Fla. AGO 88-98.

Considering the foregoing and having eliminated the referendum vote requiring 60% approval as a legal means of accomplishing the desired result, Attorney Mora, Town Manager Murphy, and I discussed other ways to provide the greatest degree of legal protection to the Police Department. The most effective solution discussed, and therefore the one proposed to the Town Commission, centers upon not what is explicitly stated in § 166.031 (5), Fla. Stat. (the requirement for a unanimous vote), but what is not stated (the procedural mechanism for the unanimous vote). Section 166.031 (5), Fla. Stat., requires a unanimous vote to abolish a municipal department provided for by the charter, but it is silent on the procedural manner in which such a vote must arise. Further, municipal legislation can parallel or complement state statutes but not conflict with them. See e.g. Sarasota Alliance For Fair Elections, Inc. v. Browing, 28 So.3d 880 (Fla. 2010). This discussion about the procedural gap in the statute led to the proposed amendment submitted for your consideration.

The proposed amendment to § 2.07 (f) of the Charter does two things: first, it aligns the section with § 166.031 (5), Fla. Stat., and resolves the conflict identified above as to all Town departments; second, it requires that the Police Department may be abolished only by the unanimous adoption of an ordinance voted on by all five commission members.² Significantly, because the elimination of the police department will have been accomplished by ordinance, the ordinance will then be subject to § 8.01 (b) of the Town Charter, which vests the Town’s electors with the power to require reconsideration by the commission of any adopted ordinance. If the commission fails to repeal an ordinance so reconsidered, the ordinance must be presented to the electors for approval or rejection. So, while this amendment does not and cannot accomplish the previously stated goal of compelling a referendum question obtaining 60% approval, it does provide the greatest degree of legally permissible protection against the elimination of the Town’s Police Department by requiring a unanimous vote on an ordinance which may then itself be subject to reconsideration and referendum.

² The statute is also silent on whether the unanimous vote must be that of the full governing body or only of the members present for the vote. The amendment as proposed also supplements the statute in this regard by requiring that all five members vote.

Finally, I note that the proposed amendment originated, at least in part, from citizen concern that the Police Department may be abolished or have its operating budget substantially reduced. While the Town Council is principally tasked with the annual allocation of the Town's resources through the budgeting process, recent amendments to Florida Statutes provide a mechanism to challenge funding reductions for police departments. The Legislature during the 2021 session adopted HB 1, which amended § 166.241, Fla. Stat., to add a new section whereby the state attorney for the judicial circuit in which the municipality is located, or a member of the Town Commission, can object to a funding reduction in the tentative budget relating to the Police Department. That challenge would be filed with the Executive Office of the Governor, who would hold a budget hearing where the arguments in the petition and the Town's reply thereto would be considered. Within thirty (30) days of the hearing, the Administration Commission would either approve the action of the Town Commission or modify the budget as to each separate item within the operating budget of the Police Department. The Administration Commission's version of the budget would then be deemed final. In its current form, then, § 166.241, Fla. Stat., provides a remedy for any attempt by a majority of the commission to reduce the funded operations of the Police Department. Given the specificity of this process, it is likely that local attempts to buttress it will be found to be preempted, and therefore it is not addressed in the proposed amendment.

Please do not hesitate to contact me directly about this issue or any other. I can be reached in the office at (727) 733-0494 or on my cell phone at (727) 735-4496.

Respectfully,

TRASK DAIGNEAULT, LLP.

A handwritten signature in blue ink, appearing to be "JD" or "Jay Daigneault", written in a cursive style.

/s/ Jay Daigneault, Esq.