

MEMORANDUM

Memorandum to: Mayor and Board of Aldermen

From: Mike Brough

Subject: Charter amendment on filling vacancies

Date: March 7, 2006

At the retreat, the Board asked me to investigate whether other municipalities had adopted charter amendments requiring that vacancies on governing bodies be filled by appointing the person who had received the highest number of votes among the unsuccessful candidates at the last election. We have checked with both the School of Government and the League of Municipalities. The attorneys we spoke with at both places said that they were unaware of any charter provisions mandating such an approach, but they believed some municipalities have on occasion followed this method of filling vacancies. We also sent out an inquiry on the municipal attorneys listserv. We only received two responses. One attorney stated that it was his impression that various locally elected boards sometimes filled vacancies this way, but none had formalized this into a requirement. The High Point City Attorney stated that his city once had a charter amendment that required that the highest vote getter among the at large council candidates be appointed mayor pro tem, but that they have repealed this provision because it was too inflexible. He advised against the adoption of such a charter amendment.

As a result of the recent appointment process, the Board is well aware of the arguments for and against appointing the fourth highest vote getter to fill a vacancy. However, the question of whether to amend the charter to *require* this presents a different issue. That issue is not whether the fourth highest vote getter should be appointed in a particular case, but whether such person must *always* be appointed. The advantage of such a requirement is that it makes the selection automatic (assuming there were at least four candidates in the last election), thus avoiding the possibility of a Board deadlock. The disadvantage is that it removes the Board's flexibility to choose the person that in the judgment of the Board is the most qualified person.

The Board inquired about unintended or unexpected consequences of such a charter amendment. The only one I can think of is the possibility that the fourth highest vote getter could conceivably be someone that is demonstrably not qualified. Carrboro has been fortunate in recent years to have had many highly qualified and competent individuals willing to run for open seats on the Board. But it is not impossible to imagine a situation where all three incumbents are seeking reelection, other serious candidates are unwilling to oppose them, and a marginally qualified candidate files at the last minute on a lark. The marginal candidate does not campaign and receives only a handful of votes, but following the election, a vacancy occurs. Under the charter amendment that has been proposed, the Board would have no choice but to appoint the marginally qualified

candidate. An argument can be made that this would still be appropriate since such person did in fact receive more votes than any other person who might be considered to fill the vacancy. However, I point out this scenario to suggest that the context in which the issue arises might not be the same in the future.

MEMORANDUM

Memorandum to: Carrboro Mayor and Board of Aldermen
From: Mike Brough
Subject: Filling Vacancy
Date: November 4, 2005

At its meeting on November 1, 2005, the Board requested that I prepare this memorandum dealing with the procedures to be followed in filling the vacancy on the Board that will occur following the election on November 8th.

As a preliminary matter, it should be noted that Subsection 2-2(d) of the Town Charter is *not* relevant to this issue. That subsection states:

In the general municipal election the candidate receiving the highest number of votes for mayor shall be elected. The three candidates in such election receiving the highest number of votes for the office of alderman shall be elected for full four-year terms. If it is also necessary to elect one or more aldermen to fill the unexpired terms of one or more aldermen whose offices were vacated, the person receiving the fourth highest number of votes for aldermen (and, if necessary, the fifth and the sixth highest number of votes) shall be elected for the unexpired term or terms.

As the text plainly indicates, this subsection applies only to filling seats on the board at general municipal elections. It has nothing to do with filling vacancies by appointment of the Board.

The statute that covers filling vacancies is G.S. 160A-63. It states simply that “[a] vacancy that occurs in an elective office of a city shall be filled by appointment of the city council.” It then goes on to provide, in essence, that if a vacancy occurs during the first two years of a Board member’s four year term (and at least 90 days prior to the municipal election that occurs during the mid-point of that four year term), then the person appointed by the Board to fill that vacant seat “shall serve only until the elected successor takes office.” In other words, under those circumstances, at the municipal election that occurs after a vacancy that occurs in the first two years of a term, the electorate chooses a person to serve for the remaining two years of that term. On the other hand, if the vacancy occurs during the second half of a four year term (or less than 90 days before the municipal election that occurs during the middle of that term), then the person appointed by the Board to fill that vacant seat serves for the remainder of the term of that seat. The above cited charter provision fills in a gap in state law by clarifying that, if four seats are up for elections under the circumstances described above (i.e. three 4-year terms and one 2-year term), the candidate receiving the fourth highest number of votes is elected to the 2-year term.

Neither the General Statutes nor the Town Charter establishes any procedure for the Board to follow in filling a vacancy. And the Board's recent history in filling vacancies is mixed in terms of the procedures followed. In 1998, the Board established a formal process whereby the vacancy was published, written applications were accepted, and the Board interviewed the candidates before making an appointment. In 1997, the Board simply voted to appoint a former member of the Board to fill the vacancy. And in 1995, the Board appointed the person who had received the fourth highest number of votes for aldermen in the preceding municipal election. In short, the Board has broad discretion in deciding how to fill any vacancy that occurs.

However, the Board has no authority to call a special election to fill a vacancy. G.S. 163-287 provides the procedure for calling a special election, but this statute authorizes the Board to call such elections only "as permitted by law." Thus, other authority to hold such an election must be found, such as the authority to hold an election on a proposed bond issue. But there is no such authority to call a special election, advisory or otherwise, for the purpose of selecting a person to fill a vacancy.

A RESOLUTION RECEIVING THE REPORT ON
POSSIBLE REVISIONS TO THE TOWN CHARTER
Resolution No. 108/2006-07

WHEREAS, the Town Attorney has presented a report to the Mayor and Board of Aldermen regarding filling vacancies on the Board of Aldermen; and

NOW, THEREFORE, THE BOARD OF ALDERMEN OF THE TOWN OF CARRBORO HEREBY RESOLVE:

Section 1. The Board hereby receives the report from the Town Attorney and provides the following direction:

Section 2. This resolution shall become effective upon adoption.