

City Council Chamber  
735 Eighth Street South  
Naples, Florida 34102

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**City Council Workshop Meeting – May 2, 2005 – 8:30 a.m.**

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Mayor Barnett called the meeting to order and presided.

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**ROLL CALL .....ITEM 1**

**Present:**

Bill Barnett, Mayor  
Tamela Wiseman, Vice Mayor (arrived 8:34 a.m.)

**Council Members:**

William MacIlvaine  
Johnny Nocera  
Clark Russell  
John Sorey, III  
Penny Taylor

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**Also Present:**

Robert Lee, City Manager  
Ron Wallace, Construction Management Director  
Brenda Blair, Recording Specialist  
Karen Kateley, Administrative Specialist  
Cheryl Boutot, Network Specialist  
Jessica Rosenberg, Deputy City Clerk  
Tara Norman, City Clerk  
Mike Klein, Dockmaster  
David Lykins, Community Services Director  
Victor Morales, Asst. to the City Manager  
Robert Pritt, City Attorney  
Bill Kennedy  
Nancy Oppenheim  
Douglas Finlay  
James Siedel

Jim Boula  
Martha Dykman  
Alan Ryker  
Richard Housh  
Craig Holland  
Lois Selfon  
Terry Brennen  
Ron Jamro  
Jon Iglehart  
Forrest Nichols  
Henry Kennedy  
Sue Smith  
Debra Newman  
Arlene Guckenberger  
Other interested citizens and visitors.

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**SET AGENDA.....ITEM 2**

***MOTION by Nocera to SET THE AGENDA; seconded by Russell and carried 6-0 (MacIlvaine-yes, Nocera-yes, Russell-yes, Sorey-yes, Taylor-yes, Wiseman-absent, Barnett-yes).***

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**PUBLIC COMMENT.....ITEM 3**

None.

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**It was noted for the record that Vice Mayor Wiseman arrived at 8:34 a.m.**

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.....**ITEM 4**

**INTERVIEWS WITH APPLICANTS FOR VARIOUS BOARDS AND COMMITTEES**

- 8:30 a.m. Nancy Oppenheim – Police Pension Board  
8:36 a.m. Doug Finlay – Community Services Advisory Board  
8:43 a.m. Bill Kennedy – Community Services Advisory Board

**SIDEWALK MASTER PLAN .....ITEM 6**

City Manager Robert Lee reported that both the Comprehensive Plan and Code of Ordinances support such a plan which also defines roadway classifications, and lists specific collector roadways. It also summarizes criteria used to develop a sidewalk program, along with specific sidewalk improvements needed along with collector roadways. The plan also includes a recommendation from the Planning Advisory Board (PAB) and Community Services Advisory Board (CSAB) to engage a consultant to assist in developing a citywide pathway plan.

Construction Management Director Ron Wallace noted that much of the information provided had already been discussed. He then delivered the following presentation:

**Sidewalk Master Plan**

**Approvals**

- On February 2, 2005, City Council adopted a policy to establish criteria for development of a Sidewalk Master Plan.
- A joint workshop with the CSAB and PAB was held on March 9, 2005, for input and endorsement of the proposed plan for implementation.

**Proposed Plan**

- Maintain/repair existing walkways.
- Complete links and obvious gaps in highly traveled areas.
- Construct new walkways to complete the “Collector System”.
- Pursue development of a Comprehensive Pathway Plan.

**Five-Year Program**

Neapolitan Way	FY '06	\$ 80,000
Ninth Street Gaps		\$ 20,000
Gulf Shore Boulevard	FY '07	\$120,000
Second Street	FY '08	\$100,000
Third Street	FY '09	\$175,000
Collectors with bike paths only	FY '10	Varies

**Comprehensive Pathway Plan**

- As recommended by the PAB and CSAB, engage a consultant to prepare a comprehensive inventory as well as an origin and destination study for development of a citywide pathway plan.
- Recommendations for implementation and funding are to be incorporated into the results of the study.

### **Funding**

- Budget request of \$100,000 has been submitted for fiscal year 2006 for the improvements as noted.
- An additional \$100,000 has also been submitted for fiscal year 2006 to fund the proposed Pathway Study.

### **Justification:**

#### **Neapolitan Way**

Petition submitted from residents to proceed with installation; this is the only collector road in the northern end of the City which is void of sidewalks. Completion will connect US 41 to Crayton Road.

#### **Ninth Street**

Small gaps exist in an isolated area which will complete the system extending from US 41.

#### **Gulf Shore Boulevard**

High volume of pedestrians and bicyclists coupled with an existing narrow roadway justifies the need. Completion will connect Fifth Avenue South to the Fishing Pier.

#### **Second Street**

This will complete a network that has numerous gaps due to redevelopment.

#### **Third Street**

Extension of Collector Roadway System in Old Naples.

Director Wallace explained that a determination of whether Gordon Drive will continue to be identified as a collector roadway will be made during the Evaluation and Appraisal Report (EAR) process. It is not listed in the five-year plan due to a priority on completing the connecting network.

**Public Input:** (9:03 a.m.) **Richard Housh, 160 Seventh Avenue South**, characterized the funds being proposed as insufficient to make the community more accommodating to pedestrians and cyclists, citing a lack of both facilities and signage. He urged that City Council move forward immediately with a comprehensive pathway program. In response to Council Member Sorey, Mr. Housh recalled his experience on the Metropolitan Planning Organization's (MPO) Pathways Advisory Committee, noting numerous grant opportunities in this regard and pointing out that both Marco Island and Everglades City had been recipients of these types of funds. (During his comments, Mr. Housh also confirmed that he is interested in being reappointed to the Community Services Advisory Board.) **Debra Newman, 649 Fifth Avenue South**, executive director of the Fifth Avenue South Association, advised that a common feature in the new urbanism is pedestrian connectivity among community services, particularly in light of redevelopment in both the 41-10 area and Grand Central Station. **Craig Holland, 378 Fourth Avenue South**, executive director of the Naples Pathway Coalition, noted the presence of several members of his group. He also stated that, as a lifelong resident, he is puzzled by the absence of sidewalks and bike paths, pointing out that adults often select a community based on connectivity in this regard. **Lois Selfon, 71 12th Avenue South**, said that it is a myth that installation of sidewalks on Gulf Shore Boulevard would depreciate the charm of the neighborhood since most of the older residences have already been replaced. She also expressed

concern with safety, noting that her son had previously fallen and broken his leg on Gulf Shore, and expressed concern with possible accidents in the future. **Douglas Finlay, 3430 Gulf Shore Boulevard South**, said his primary concern is safety, noting that in March during the peak tourist season, Gulf Shore Boulevard south of Fifth Avenue South experienced just under 1,000 vehicles per hour. Since this is a collector street with only an eight-foot travel lane and no legal bike lane or sidewalk, there is concern for the extensive use by cyclists, trucks, and wide-frame grounds maintenance trailers. He also noted danger for pedestrians and cyclists at dusk from the individuals leaving the Fishing Pier after having viewed the sunset. In conclusion, Mr. Finlay urged that Council address community safety as a whole and to pursue grant funding for sidewalks and bike paths.

Council Member Sorey then characterized the aforementioned plan as minimal and sought consensus from Council for the following activities:

- Perform a comprehensive pathway study.
- Project the amount of grant funding required to complete a collector sidewalk system in five years. Although there is an issue of whether Gulf Shore Boulevard should be converted to one-way traffic, he said that he would support an origin and destination study to determine whether this change is appropriate as far as Gordon Drive. He also requested that funds be in fiscal year 2006 rather than 2007.
- During the Certificate of Occupancy (CO) review/approval process, consider some type of framework to prevent substantial landscaping installation within the right-of-way. (Mr. Sorey cited the following construction locations of concern: construction at 95 Tenth Avenue South, 670 Gulf Shore Boulevard South, and at the southwest corner of Fifth Avenue South and Gulf Shore Boulevard South.)

Council Member Russell took the position that the plan should be fully developed prior to seeking grant funds to accelerate the process. Director Wallace also pointed out that until the past two months the City had no sidewalk policy. Obvious constraints, he said, also include City funding, noting that the street overlays had to be delayed in recent years due to insufficient funding. He then identified the following areas of progress: recent receipt of a \$500,000 sidewalk grant; bidding of the Fleischmann Park improvements which includes a Goodlette-Frank Road pathway program; recent completion of Third Avenue South; and receipt of a grant for bike lanes on Harbour Drive. Council Member Russell also noted that, as a member of the Metropolitan Planning Organization (MPO), he stressed the difficulty of seeking funding from sources such as this if programs are not clearly articulated.

Council Member Russell recommended moving forward with the proposed plan. Council Member Nocera recommended aggressively pursuing grant funding as well as accelerating the proposed plan; he also suggested budgeting funds from elsewhere into the sidewalk fund. Council Member MacIlvaine agreed with expediting the plan and increasing the funding; he also recommended moving forward with hiring a consultant before fiscal year 2006 in order to produce a long-range plan and more efficiently pursue grant funding. Vice Mayor Wiseman concurred with moving forward with the proposed plan and proceeding with the study for additional funding.

Council Member Taylor urged that possible conversion of Gulf Shore Boulevard to one-way traffic be considered concurrently in order to dispense with the issue. City Manager Lee, however, characterized it as a separate study and suggested determining whether any of the work

could be done in-house, although it could be added to the scope of the master plan. Council Member Taylor agreed with initiating the plan, urging coordination with Collier County personnel, and concurred with moving it into the sidewalk account.

After discussion of time frames for implementing a sidewalk program, the Council arrived at the consensus below.

***Consensus of Council to move forward with a study to determine whether to one-way Gulf Shore Boulevard (Nocera dissenting).***

In further discussion, Construction Management Director Wallace pointed out that study of the Gulf Shore Boulevard matter would not only entail considerable work, but addressing concerns regarding sidewalks from property owners and expected impact on surrounding streets from increased activity on Gulf Shore. This study will be detailed and must include outgoing routes, he said, and it may in fact be determined that sidewalks are less of an intrusion than converting the street to one-way.

Council then discussed additional timing and priority issues, specifically with regard to sidewalks, as well as the advisability of keeping the President's Council informed through the City Manager's monthly meeting with the group.

City Manager Lee suggested providing the Council with a timeline the first meeting in June in order to summarize that day's discussion. He then related Council's direction as being to move forward with a study to determine whether Gulf Shore Boulevard should be converted to one-way traffic; securing a consultant and determining a timeline for the purposes of performing a citywide sidewalk master plan; and maintaining contact with the Presidents' Council regarding sidewalks. He however sought clarification concerning the sidewalk plan submitted by staff, noting that Council had suggested moving forward with the items listed in fiscal year 2006, and pointing out that the plan submitted by staff could be modified as a result of changes to a master plan.

After receiving further comment from various Council Members, City Manager Lee confirmed that a timeline for the following items would be presented at the first meeting in June: fill Neapolitan Way and Ninth Street gaps in fiscal year 2006; include the Gulf Shore Boulevard study in 2006; budget additional funds to maintain/repair existing walkways in 2006; and include a master pathways plan in 2006.

Council Member Taylor also asked whether staff is recommending changing the designation of the lower (southern) segment of Gordon Drive from a collector to a local street. Mr. Wallace explained that staff must first review the information, and City Manager Lee noted that this would be included in the Evaluation and Appraisal Report (EAR) which the PAB is expected to review prior to the Council's summer recess; he further noted that this item would be included in the timeline presented to Council the first meeting in June.

In response to Council Member Nocera, Director Wallace also explained that the items suggested by Council for fiscal year 2006 (including the Gulf Shore Boulevard study) would cost approximately \$450,000; although funding is typically derived from gas tax revenue, other sources must be identified if the work is to be performed in the near future. Vice Mayor Wiseman ascertained from City Manager Lee that while the City does not employ a designated

grant writer, various employees work with grants as part of their responsibilities. Mrs. Wiseman suggested exploring grant funding for the sidewalk master plan and encouraged anyone with information to provide it to the City Manager.

**Public Input: (9:58 a.m.) James Siedel, 514 Neapolitan Lane**, speaking on behalf of the Park Shore Homeowner's Association, said he was encouraged by Council's inclination to move forward and asked whether the Neapolitan Way sidewalk project could be first on the construction list. Mayor Barnett confirmed that this had occurred, and City Manager Lee explained that the project is budgeted for fiscal year 2006 and actual construction could commence after October 1; he also agreed to add this to the timeline to be presented to Council in June. Mr. Siedel requested specifics concerning this project in order to include it in the Association's newsletter.

*Staff to provide timeline in June.*

.....**ITEM 5**  
**PRESENTATION OF "UNTOLD STORIES" HISTORY DOCUMENTARY PROJECT BY WGCU**

(It is noted for the record that a copy of materials provided in conjunction with this item is contained in the file for this meeting in the City Clerk's Office.)

Terry Brennan of WGCU Public Media reported that WGCU-TV had begun focusing programming on the Southwest Florida community including local history. Some 15 archival history documentaries will include interviews with historians and with families directly linked to the beginnings of communities, nine of which will be produced over the next three years. To this end, Mr. Brennan said, WGCU has formed partnerships with local governments and school systems within a six-county area, Collier County government and the Collier County School System having already committed funds for the stories to be told about Collier County.

Collier County Museum Director Ron Jamro urged City Council to support the Untold Stories program. To acknowledge the City Council for its recent support of the Naples Depot project, Mr. Jamro presented a framed period photograph of the Depot. He also reported that renovations at the Depot had already begun, with long-term restoration to follow.

Mr. Brennan requested that the City Council contribute \$4,000 each for three programs, two of which would specifically deal with the City of Naples, the third program being an overview and the first to air in August. The \$12,000 was being requested in the following increments: \$8,000 in calendar year 2005 and \$4,000 in calendar year 2006, Mr. Brannan said.

After ascertaining that aviation history would be a topic, Council Member MacIlvaine recommended that Mr. Brennan contact the Naples Airport Authority due to its importance in local history. Council Member Taylor encouraged inclusion of City residents since taxpayer revenue would contribute to program funding. Mr. Brennan concurred.

In further discussion, Mr. Brennan also reported that this would be part of the core history curriculum for all six Southwest Florida public school systems as well as available on the Internet, as will the interviews themselves. In conclusion, Mr. Brennan explained that WGCU is also offering the City of Naples and all other entities that have community television channels the opportunity to air the entire series of programs.

*Staff directed to place this item on a future agenda in order to take action.*

.....**ITEM 8**  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION UPDATE ON THE MOORING**  
**FIELD NEXT TO CITY DOCK**

Jon Iglehart, representing the Florida Department of Environmental Protection (DEP), South District headquartered in Ft. Myers, confirmed that the City's Crayton Cove mooring field had been installed without State authorization. However, when this was discovered the previous year, the City had immediately notified the DEP and vessels were immediately removed. After it had been ascertained that the City in fact is interested in maintaining a mooring field in that location, the DEP began drafting a temporary use agreement to allow the anchorage chains to remain in place, although authorization to use the field could take up to one year. Mr. Iglehart also said that the DEP is working with city staff to obtain the information necessary to the process.

In response to Mayor Barnett, Mr. Iglehart explained that authorization could not be issued through his office in Ft. Myers; there is a possibility that the Governor's office would authorize emergency use of the mooring field during the hurricane season. In further response to Council Members, Mr. Iglehart explained that anchorage during hurricane emergencies would be considered as storage and not habitation; it is the management of the field that requires authorization, he added.

Council Member Taylor then asked about applicability of the Butler Act in this instance. Mr. Iglehart explained that the Butler Act involves historic usage of submerged lands that would eliminate the need for a State lease; this would be more associated with the City Dock, he said, the portions of which appear to qualify. Facilities such as bathrooms however may not occupy the docks, although the DEP is examining whether the number of facilities at the City Dock could be increased.

Council Member Russell said that he was only interested in the mooring field being available for specific storm events and asked whether this must be approved at the Cabinet level. Because the DEP has been instructed by the Cabinet to refer all projects with a heightened public interest, the City Dock application will be reviewed having been the subject of numerous letters and phone calls received by the DEP. The matter could be considered within the regular Tallahassee schedule of the Cabinet or during the "capital for a day" program which is scheduled in Ft. Myers in June on a date to be announced.

Expressing appreciation to Mr. Iglehart for his responsiveness, Council Member Sorey received clarification that even allowing the mooring field to be used on a first-come basis could nevertheless expose the City to liability. Council Member Sorey then asked how the field had existed over time without being detected, and about the fines associated with unauthorized installation. Mr. Iglehart explained that since his office had not received responses to questions regarding a 1998 City application, the request was denied without prejudice. The same result had occurred with a second application received that same year; sometime afterward, the mooring field was installed, he said, and DEP did not discover the installation until 2004 when issues arose concerning the City Dock.

Stressing the advantages of a mooring field, particularly in light of the fact that bottom conditions make traditional anchoring difficult, Mr. Iglehart said approval is an onerous process which includes written notification to interests within 500 feet and the requirement for a formal lease based on the square footage used, with multipliers based on whether it is open to the public.

If the expenses associated with the mooring field equal the revenue, no fee is assessed against the municipality. It would be necessary to match mooring field expenses with income reports in order to determine whether any additional penalties are due, although Mr. Iglehart confirmed that this had not been requested pending receipt of the City's mooring field. Mr. Iglehart then clarified for Council Member Sorey that Naples is the first municipality to have installed a mooring field without State permission. In response to Council Member Taylor, Mr. Iglehart noted that the application had not yet been received, and that he did not have the information concerning how the DEP discovered the presence of the mooring field.

**Public Input:** (10:29 a.m.) **Forrest Nichols, 1301 Seventh Street South**, indicated that everyone in his condominium association favors the mooring field and enjoys the view of the vessels traversing the Bay.

City Manager Lee confirmed for Vice Mayor Wiseman that he had spoken with Mr. Iglehart the previous Friday regarding a resident's questions she had forwarded.

In response to Council Member Taylor, Mr. Iglehart concurred that any City-conducted survey of residents within 500 feet of the mooring field could be combined with DEP's documentation and would further the process. He also clarified for Council Member Nocera that, following consultation with the State land staff in Tallahassee, it had been determined that the City should go through the permitting process which would facilitate bringing all interested parties together, as opposed to a more protracted enforcement process.

In further discussion, Mr. Iglehart indicated that the DEP would concur with the City seeking a directive from the Governor to issue an emergency order to accommodate the 2005 hurricane season.

**Jim Boula, 702 Broad Avenue South**, urged that City Council both approach the Cabinet and direct City staff to immediately submit a mooring field application, even for a portion of the anchorage. He then related how a vessel had recently dragged its anchor from Crayton Cove to the area off the yacht club.

City Manager Lee assured Council of cooperation between City staff and the DEP and confirmed that the application process had begun, but that staff is awaiting survey information. Mr. Iglehart said the relationship with City Staff has been very positive.

While acknowledging that a City survey of residents within 500 feet of the mooring field on behalf of the DEP would facilitate the process, Mr. Iglehart said that the issue of past financial records must be resolved in order to demonstrate to the Governor and Cabinet that past issues had been resolved; he urged that this issue be resolved if the intent is to speak to the Governor and Cabinet in June. Mayor Barnett thanked Mr. Iglehart for working with the City, and assured him that the City staff would continue to work with the DEP to resolve these issues. Mr. Iglehart thanked City Council, noting that Council Members could contact him at any time.

*Staff to continue to work with Department of Environmental Protection  
representative Jon Iglehart.*

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**Recess: 10:41 a.m. – 10:50 a.m. It is noted for the record that the same members were present when the meeting reconvened.**

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Additional discussion then occurred regarding the issue of legal representation in the matter of obtaining DEP permissions noted under the prior agenda item. City Attorney Pritt noted that a partner in the Roetzel & Andress Tallahassee office had served as general counsel for the DEP and is therefore conversant with the application process and had already provided information to the City staff, which he said, is capable of completing the application without assistance.

In response to various Council Members, City Manager Lee indicated that he had discussed with the DEP whether there are alternatives to paying fines and that he had been working closely with the City Attorney's Office and that the mooring field accounting matter must be resolved prior to meeting with the Governor and Cabinet in June. He agreed to update Council at the May 4 Regular Meeting. Council Member Russell said he had confidence in staff and the City Attorney and that additional resources would be employed if necessary.

City Attorney Pritt indicated that while the mooring field application must be completed and pending by June, the City may also inquire of the Governor whether there is a resolution to the problem. Council concurred with the Mayor drafting a letter to the Governor to make the aforementioned inquiry.

**DISCUSSION OF ELECTION ISSUES** *(continued from 4/20/05)* ..... **ITEM 7**

City Attorney Robert Pritt reported that he had met with Jennifer Edwards, Supervisor of Elections, and Tara Norman, City Clerk, to discuss various issues subsequently summarized and discussed in Supervisor Edwards' correspondence dated March 22, 2005 (Attachment 1). He also noted a legal opinion he had issued to reveal the thought process of the analysis for each of the issues raised (Attachment 2). Issues to be addressed are to amend the City's candidate qualifying period; whether to change the date when Mayors and Council Members take office after the election, and whether Council wishes to amend early voting requirements in the City, including opting out of the process.

He further explained that due to current tabulation equipment requirements the Supervisor of Elections cannot guarantee that results will be final by noon the following day when successful candidates are to be sworn in. Mr. Pritt also noted that the current qualifying period is insufficient to accommodate an additional qualifying period should a special election be needed (as was the case in 2004). The qualifying period and election date can in fact be amended, notwithstanding that, a different qualifying period resides in the Charter since this is specifically allowed by State Statute, he said. The question is however whether the Council has the authority to change the swearing-in requirement without undertaking a Charter amendment by referendum.

Mayor Barnett asked whether, instead of amending the Charter, the post-election Council meeting day could be moved to the Friday following the election. City Clerk Tara Norman however noted that the issue becomes whether terms expire and whether this would therefore extend terms. She also noted that new software is being implemented to better provide for recounts on seats that are determined on a vote-for-three basis; however, this would not solve the problem of the current swearing-in requirement.

Mr. Pritt recommended requesting an Attorney General opinion, in part, because the Attorney General has already opined that a Council cannot use the statutory provision giving Council the authority over qualifying periods and election dates to enlarge terms even though this change could be implemented by ordinance.

Mr. Pritt further recommended seeking an Attorney General's opinion on any of the various other issues pertaining to the election in order to ensure compliance. He further recommended against seeking an amendment to the Charter unless absolutely necessary.

Vice Mayor Wiseman concurred, with the exception of filling vacancies during terms of office. She said she felt that Council should not conduct special elections unless absolutely necessary, and that she favored amending the Charter to the process utilized by Collier County, which allows the Governor to make an appointment, particularly since voters will consider changing the mayoral term on the upcoming ballot. Mr. Pritt said while he felt that the Governor could in fact appoint a City Council Member, this is the requirement relative to counties and for other types of officers because they do not have the benefit of the same home rule provision afforded to cities, which allows them to conduct elections at different times and in a different manner.

In response to Council Member Russell concerning the possibility of a 120-day candidate-qualifying period, City Clerk Norman noted that this would be desirable since the current end of qualifying occurs within days of Christmas making it difficult to accomplish the steps necessary for the Supervisor of Elections to prepare voting equipment. She said she had also heard from various groups over the years that the campaign period then does not allow sufficient time for them to invite candidates to be heard prior to the election.

Mr. Pritt said that it would most likely be possible to open qualifying for all potential openings, including one created by resignation, and as long as the qualifying period is extended, someone who has already qualified for the regular election could opt to qualify for a special election instead, and a special election could be conducted at the same time as the regular. Mrs. Norman noted that candidates changing from one office to another are covered under state law.

City Clerk Norman then explained that if the City does not opt out of early voting, the state will require a 15-day schedule, which she said she believed was excessive in this case. Some cities, she noted, have opted out and have set their own early voting periods by resolution annually, although it is advisable to regularize the process for the benefit of the public. Mrs. Norman recommended this course of action, noting that other issues concerning the election are also required to be addressed by resolution prior to each election. Council recommended that Mrs. Norman provide Council with an appropriate timeframe for early voting.

***Consensus of Council to opt out of the state's early voting process and Council to determine what is feasible.***

**Public Input:** (11:24 a.m.) **Henry Kennedy, Tarpon Road**, expressed opposition to early voting, saying that he had been told he could not cast another vote if a candidate for whom he had voted was no longer in the race. He also expressed concern with having the Governor appoint a Council Member, instead recommending that the candidate receiving the next highest number of votes be considered.

Mr. Pritt reiterated items to be considered: language to change the Charter concerning the vacancy in office provision, and by ordinance any other changes desired, including the opt out of early voting provision. In response to Council Member Taylor, Mr. Pritt confirmed that the Code of Ordinances is currently undergoing review, which will be provided to Council following the summer recess. He explained that the vacancy in office section of the Code is separate from the

canvassing section, and that he would be willing to draft an ordinance dealing with the areas that can be addressed by City Council.

Council Member MacIlvaine concurred with Mr. Kennedy's suggestion to consider the candidate receiving the next highest number of votes to fill a vacancy; however, Vice Mayor Wiseman cautioned that it would be unknown whether that individual would be available or even willing to serve, especially if that candidate had received a very low number of votes. Council Member Taylor said she would not support automatic selection of an individual receiving the next highest number of votes; she also noted that Council must determine whether it wished state-level politics to influence local offices if the Governor were to fill a Council vacancy. Council Member Sorey concurred.

City Clerk Norman confirmed for Mayor Barnett that Council had in fact previously appointed a member to fill a council seat as well as a Mayor. Vice Mayor Wiseman suggested that if a vacancy is within one year of an election it was acceptable for Council to fill it, however, if it was for a full two years, then Council should retain the special election provision. City Attorney Pritt however pointed out that maintaining local control over filling a vacancy could result in a three-to-three deadlock, noting that the Town of Ft. Myers had been deadlocked for several months on such an issue.

***Consensus of Council to appoint someone to fill a vacancy on Council if it is for less than one year.***

In further discussion of induction into office, Mrs. Norman noted that should results of an election not be final, there would most likely still be sufficient Council Members to affect a quorum. Miss Taylor also noted that the Supervisor of Elections has stated that software is being developed and recommended placing the onus on that process.

City Attorney Pritt said he would draft language for ordinances if necessary and obtain an opinion from the Attorney General, particularly since it relates to the Charter and since on two separate cases within the area the position taken by the local government had turned out to be inconsistent with the position taken by the courts. Anything that can be solidified before the election season would be prudent, he added.

***Consensus of Council for the City Attorney to pursue an Attorney General's Opinion and/or provide draft ordinances to City Council on election issues.***

.....**ITEM 9**  
**REQUEST TO HOLD ATTORNEY/CLIENT SESSION RE: ALLEN WALBURN V. CITY OF NAPLES, U.S. DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, CASE NO. 2:04-CV-00194-VMC-DNF**

City Attorney Robert Pritt requested that, pursuant to Section 286.011(8)(a), Florida Statutes, the City Council conduct an executive or closed (attorney/client) session at 10:15 a.m. during the Regular Meeting of May 4, 2005, to discuss settlement negotiations and strategy related to litigation expenditures in reference to Allen Walburn v. City of Naples, U.S. District Court, Middle District of Florida, Case No. 2:04-CV-00194-VMC-DNF. The following persons will be present for the executive session: Mayor Bill Barnett; Vice Mayor Tamela Wiseman; Council Members Clark Russell, Penny Taylor, John Nocera, John Sorey, and William MacIlvaine; City Manager Robert Lee; City Attorney Robert Pritt; Attorney Clay Crevasse of Roetzel & Andress; and Pam Arsenault of AAF Reporting or other certified court reporter. The estimated duration for the attorney/client session is 15 minutes.

***Consensus to conduct at 10:15 a.m. during 5/4/05 Regular Meeting.***

**BRIEFING BY CITY MANAGER.....ITEM 10**

City Manager Robert Lee submitted his written report (A copy of this and related material is contained in the file for this meeting in the City Clerk's Office.) He stated City staff had been working with Collier County and traffic consultants Kimley-Horn on the traffic calming study concerning the Waterside Shops expansion. City homeowner associations had also been meeting with staff, and staff would make a presentation at a future Council workshop, noting that Council had expressed concern regarding this expansion; he also pointed out that Vice Mayor Wiseman had assisted in securing funds from the contractor relative to this effort. Council Member MacIlvaine pointed out that in the tables included in the meeting materials relative to that portion of the road from Seagate Drive south to Neapolitan Way, there appears to be a major increase between 2005 and 2010, and not the 2% shown.

**REVIEW OF ITEMS ON THE 5/4/05 REGULAR MEETING AGENDA .....ITEM 11**

Item 8-g (six-laning Goodlette-Frank Road) It was noted that the cost will be reduced and a new resolution submitted. Item 11 (George Washington Carver Apartments leases) The petitioner requested a continuance to the 5/18/05 Regular Meeting. Item 8-f (live entertainment permit renewal for Comfort Inn & Marina) Council Member Taylor requested that it be removed for separate discussion. Item 9 (live entertainment permit renewal for Café Orleans) Council Member Russell requested submission of the noise impact study stipulated during a previous hearing in order to consider additional hours, and Council Member Taylor requested clarification from the petitioner concerning name changes.

**CORRESPONDENCE/COMMUNICATION .....ITEM 12**

Mayor Barnett noted a memo from Deputy City Clerk Jessica Rosenberg to the effect that Richard Housh had been absent from the Community Services Advisory Board in February, August, October, and December, 2004, and March 2005, and that he had not responded to the Clerk's Office correspondence and telephone messages to determine his interest in reappointment. (Mr. Housh had indicated earlier in this meeting that he however wished to be considered.)

Mayor Barnett then noted several letters to the Naples Daily News concerning vehicles parked in a lot behind Bistro 821 on Fifth Avenue South being towed, and that on Saturday evening he had observed vehicles parked in a teller lane where the ATM machine is located. While that lot is open to the public at 3:00 p.m. daily, the ATM lane must remain open. He indicated that the towing charge is \$301 payable in cash only, and individuals seeking a response had been treated rudely. It was also noted vehicles are being towed from the Bank of America lot located at Eighth Street South/Fifth Avenue South, and suggested that the City Manager or Community Redevelopment Agency Manager address the associated issues of rudeness to individuals that had their vehicles towed and fines. Mayor Barnett then noted that there had also been comments concerning a Lowdermilk Park concession stand employee. City Manager Lee explained that he received notification from the stand operator that the concession employee in question is no longer working at Lowdermilk, noting that staff could monitor the situation.

Council Member Taylor asked whether the City Manager had obtained any information concerning intensification of activity on the Florida Power & Light (FPL) substation site between Tenth Street and Goodlette-Frank Road. City Manager Lee explained that he had not yet received the information sought. Miss Taylor then explained that FPL Regional Manager Grover Whidden indicated that FPL intended to relocate its equipment from the north end of the City to the aforementioned site, and that the City Manager had already been contacted to determine if the City is willing to purchase the property. However, she noted, the zoning has changed from

**City Council Workshop Meeting – May 2, 2005 – 8:30 a.m.**

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"I" Industrial to "D" Downtown and the City Clerk had been unable to locate a Planned Development (PD) for the property, pending further research by the Planning Department. City Manager Lee stated that he had cautioned Mr. Whidden to ascertain zoning requirements before FPL makes any commitments, noting that it was his understanding that the closing on a property transaction is sometime in May. Miss Taylor noted that the issue is one of appropriateness and that FPL is moving forward without coming before City Council. Mayor Barnett noted that they must follow City Code.

In response to Council Member Sorey, City Manager Lee explained that the most recent information he received concerning the stop work order at Lido Bay Marina is that the contractor had been receptive and is in the process of drafting a plan to mitigate the situation concerning the mangroves. Staff is working with the project in order to obtain an acceptable resolution although it is yet unknown what DEP's (Department of Environmental Protection) response has been. Mr. Sorey requested an update at that week's regular meeting concerning the stop-work order.

**ADJOURN** .....  
11:53 a.m.

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Bill Barnett, Mayor

---

Tara A. Norman, City Clerk

Minutes prepared by:

---

Brenda A. Blair, Recording Specialist

Minutes Approved: 6/1/05



**JENNIFER J. EDWARDS**  
**SUPERVISOR OF ELECTIONS**

Attachment 1  
City Council Workshop  
5-2-05 / Page 1 of 3

REC'D. CAO'S APR 4

March 22, 2005

Mr. Robert Pritt  
Attorney for the City of Naples  
735 8<sup>th</sup> St. South  
Naples, FL 34102

Dear Mr. Pritt,

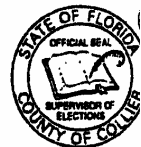
Thank you for attending the meeting with us on March 21<sup>st</sup> to discuss issues relating to the City of Naples Elections. The discussion brought clarity to some of the issues facing our office and the City and it is our goal to resolve these issues well in advance of the February 2006 City Election.

Machine Recounts

Since the City Charter defers to Florida Election Law in a recount situation, the recount of the 2004 City of Naples Election posed challenges to our office as well as the City's Canvassing Board. As we discussed, the recount law is written for a "vote for one" race and the City races are "vote for more than one" races. The voting systems are designed and certified according to the "vote for one" law. The challenge has been that in a recount situation the law requires us to tabulate the votes in the races being recounted by running the absentee ballots through the scanner and out-stacking the over and under votes for the race being recounted. Since the system is designed for "vote for one" races, in 2004 the races with "vote for more than one" races could not be out-stacked.

As we all are now aware, our voting system vendor, Election Systems & Software, with the upcoming certification of their newest software, will solve this problem. This change will allow our optical scanners to out-stack the under votes during a recount so that these votes may be examined by counting teams in the case of a manual recount. This will allow us to correctly follow the recount procedures established by the Florida Division of Elections when dealing with the City of Naples Election.

Collier Government Complex • Martin Luther King, Jr. Bldg. • 3301 Tamiami Trail East  
Naples, Florida 34112-4902  
Telephone: 239/774-8450 • Fax: 239/774-9468



#### Manual Recounts and Induction of Newly-Elected Councilman

Since the 2004 City of Naples Election, the Division of Elections has adopted a new rule for manual recounts conducted in counties with touch screen voting systems. This new rule (ISERO4-1) requires us to print the ballot images of those ballots containing under votes and to manually examine and tally them for the races being recounted. In order to comply with the rule, we will be required to return all of the voting units from the polling sites to our warehouse where a copy of the electronic audit can be downloaded into the Unity Tabulation System, the under votes sorted and the ballot images printed. The next steps will include the manual examination of the downloaded audits and tallying by the counting teams.

All of these steps will take time and will prohibit the Elections Office from providing the necessary data the City's Canvassing Board needs to certify the City's Election in time for the newly elected councilmen to be inducted into office by noon on the day following the election pursuant to the City Charter. It is the recommendation of the Elections Office that the induction of the newly elected councilmen be performed following certification of the election. In order to provide adequate time, a minimum of one week is recommended. Florida Election Law requires certification of a Primary Election seven days following the election and eleven days following a General Election.

#### Candidate Qualifying Period

Our discussion regarding the qualifying date for candidacy seemed to lead to a general agreement among all parties that this date needs to be moved forward for a variety of reasons: ballot preparation and procurement, ability to have a financial reporting schedule consistent with state law, and the ability to have a supplementary qualifying period in case the events of 2004 repeat themselves; i.e., resign to run situations.

#### Early Voting

Early voting is entirely at the discretion of the City. We have provided you with information that demonstrates what other municipalities have done, but the decision regarding early voting for City Elections must be made by the City Council. In your deliberations, we recommend that you consider the time frame available between the end of qualifying and election day. A reasonable timeframe is required for election preparation such as ballot printing, absentee mailing/returning and, if provided, early voting.

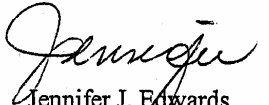
To aid you in your decision-making, the following early voting history for the City of Naples is provided: In 2004 City of Naples Election, 516 voters voted early. Early voting was provided for three days at two sites. If an ordinance is not created, the City will be mandated by Florida Election Law to provide early voting for 15 days, eight hours a day including eight hours on weekends.

Possible Special Election

Our office has previously agreed to stage a mail ballot election for the City of Naples this fall if you desire to make charter changes. There is the possibility that the Legislature will pass a bill that will mandate a Special Statewide Election this fall. If, indeed, this Special Election comes to fruition, we offer you the opportunity to place your items on the ballot at that time. Of course, we will not know for sure about this Special Election until after the end of the Legislative session.

Again, thank you for taking the time to discuss these issues with us. While our office will do its best to assist you, it is ultimately the duty of the City of Naples and its Canvassing Board to make any necessary adjustments to resolve conflicting areas before the next City Election. Resolving areas of concern well in advance of your next election will serve to promote a successful Election Day for the City.

Sincerely,

  
Jennifer J. Edwards  
Supervisor of Elections

Cc: Naples Mayor, Bill Barnett  
Naples City Clerk, Tara Norman



# Memorandum

*from the office of the City Attorney*

NAPLES CITY COUNCIL - WORKSHOP  
Agenda Item 22 7  
For the Meeting of 4/22/05

05/02/05



Agenda Item 7

**TO: BILL BARNETT, MAYOR, AND MEMBERS OF COUNCIL**  
**FROM: ROBERT D. PRITT, CITY ATTORNEY**  
**DATE: April 13, 2005**  
**RE: Election and Charter Issues**

Council directed this office to review the Naples City Charter (Charter) and related provisions of the Code of Ordinances, City of Naples (Code) in conjunction with the upcoming elections and to address concerns and issues raised by the Collier County Supervisor of Elections in her March 22, 2005 letter, to determine the necessity and advisability of proposing changes to the Charter and/or to determine the necessity or advisability of adopting ordinances amending the Code.

Any opinion at this stage must be considered preliminary, since the Legislature is now in session and changes to the election laws seem to be perennial. Also, the Collier County Supervisor of Elections is obtaining upgrades of the machine tabulation equipment that will better accommodate the City's open elections (top 3 vote-getters win). (See Supervisor of Elections letter, March 22, 2005, p.1)

## Legal Background-

The method of election of the governing body is up to the people of the City as an essential element of the home rule authority granted municipalities under the Florida Constitution (S. 2(b), Article VIII. The municipalities "may exercise any power for municipal purposes, except when expressly prohibited by law".

The Charter has the same status as a Legislative enactment, except that the Legislature may enact statutes that limit the provisions of a charter. The legislature has adopted Section 166.021 Fla. Stats. that recognizes the municipal home rule power, but provides that municipal powers do not extend to matters that are preempted to the state or counties (Sec.166.021 (3)(c)).

It has also adopted the Florida Election Code, Chapters 97-106, Fla. Stats., that preempts (overrides) in part inconsistent provisions of municipal charters. Normally, in order to preempt, the statute must be clear that it is intended to override the municipal charter provision and the municipal charter provision must be in conflict (inconsistent) with the statutory scheme.

Therefore, in any analysis of the interplay between the City's Charter and the Florida Election Code, it is necessary to review the particular Charter provisions and the Election Code for inconsistencies. The same goes for any ordinance provisions.

Section 100.3605. Fla. Stats. Conduct of municipal elections.-- provides:

*Ethics above all else.... . Service to others before self.... . Quality in all that we do*

April 13, 2005

- (a) The Florida Election Code, chapters 97-106, shall govern the conduct of a municipality's election in the absence of an applicable special act, charter, or ordinance provision. No charter or ordinance provision shall be adopted which conflicts with or exempts a municipality from any provision in the Florida Election Code that expressly applies to municipalities.
- (b) The governing body of a municipality may, by ordinance, change the dates for qualifying and for the election of members of the governing body of the municipality and provide for the orderly transition of office resulting from such date changes.

There are other state laws that impact on the determination. The first is Sec. 166.021 (4) Fla. Stats. , which provides in relevant part:

...However, nothing in this act shall be construed to permit...any changes in a...municipal charter which affect...the terms of elected 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...without approval by referendum of the electors...

...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.

These provisions have been interpreted to allow the Council to treat such covered matters as nullified or as ordinances. As ordinances, Council is free to amend or repeal by another ordinance without taking the matter to voter referendum.

In addition, the Florida Election Code provides a method for qualifying candidates and electors (voters) and for the conduct of elections. Chapter 102, Fla. Stats. provides an elaborate procedure for conducting elections and ascertaining results. This includes such matters as tabulation of votes, canvassing results, certifying election, recounts and contesting elections.

An element of home rule is that municipalities may conduct their own elections, using their own elections personnel, their own voting places and their own voting methods. County supervisors of elections do not have to conduct elections. Conducting elections independently was more common when voting and tabulation was uncomplicated, when Florida communities were smaller and when much of the Naples City Charter was adopted (1959 and before).

Now, especially after the 2000 national election experience, new and more strict voting methodology and required equipment make it infeasible for all but the largest cities to conduct their own elections with their own equipment. Even before 2000, the City contracted with the Collier County Supervisor of Elections for election services. This has served the City well.

The Charter provides in pertinent part:

April 13, 2005

13.1 Regular election dates: election officers.

(a) Unless provided by this Charter or by ordinance to the contrary, all elections hereunder shall be conducted substantially pursuant to F.S. chs. 97-106 as applicable and insofar as such elections are not in conflict with this Charter.

(b) That the "Florida Election Code" (F.S. chs. 97-106, as amended from time to time) is hereby incorporated and specifically adopted as controlling law regarding election procedures in the City of Naples, such laws as relate to the conduct of elections in the City of Naples; specifically excluding any portions of said statutes which conflict with this section and sections 2.1[Council-number, selection; term], 2.2 [Induction into office; meetings of Council—editorially transferred to Code Sections 2-26, 2-27 and 2-45—2-27], 2.3 [Vacancies in office of mayor or Council members] and 2.4 [Presiding officer; mayor; vice-mayor] of the City Charter, and excluding any portions of said statutes which conflict with this section and sections 13.2 [Qualifications of electors], 13.3 [Elections; canvass of returns], 13.4 [Filing of candidates for election; disqualification] and 13.5 [Voting Machines]. (Brackets added for clarification)

13.3 (4) Elections; canvass of returns.

The Canvassing Board shall, prior to 12:00 noon of the day following the election, canvass the returns of the election, including the absentee electors' ballots, and shall deliver to the City Council at the meeting aforesaid, a certificate containing the total number of votes cast for each candidate.

In addition, there is a lengthy and precise method for canvassing returns, examining counters on voting machines, tabulating ballots and absentee ballots, and challenging election returns.

Most of these procedures are covered precisely and minutely, in the state Election Code.

13.4 Filing of candidates for election; disqualification.

All candidates for mayor or City Council shall...file with the City Clerk not more than sixty (60) days, not later than 5:00 P.m. on the sixth Tuesday preceding the general municipal election...Any candidate may withdraw his name at any time before the forms for the election ballots are delivered to the printer...

Code section 2-27. Induction into office; oath.

The newly elected mayor and City Councilmembers shall be inducted into office at a meeting to be held on the day following their election, at which time the City Clerk or any judicial officer shall administer an oath of office to the newly elected mayor and City Councilmembers.

April 13, 2005

In general, the charter language can be construed consistently with state law. However, there are some “glitches” between the Charter and the normal procedures for conduct of elections as well as some practical problems caused by the more sophisticated machinery needed for the election process.

**Issue 1.**

**Candidate Qualifying Periods.** (See Supervisor of Elections letter March 22, 2005, p. 2 and Council discussions). **How can the City avoid having a special election that is with a short period of the general election, such as occurred in the 2004 election?**

**Facts.**

A sitting Council member resigned to run for mayor on December 22, 2003, the day before the end of the qualifying period for the February 1, 2004, general election. Other candidates filed for his “seat” at the last minute. This office issued a guidance memo dated December 23, 2003, that interpreted Charter Sec. 2.3 as requiring a special election within 60 days and requiring a special qualifying period for the newly vacated seat. (See attached memo). This experience disclosed several flaws:

1. 60 days is no longer enough time to call and conduct an election. With early voting, absentee balloting, overseas voting, machine requirements, etc., 90 days is an absolute minimum and 120 days is more in line.
2. Neither state law nor City Charter covered the qualifying period for filling a vacancy.

**Solution:**

**Alternative 1.** Change Charter section 2.3. to read as follows:

- a. Vacancies in office of mayor or Councilmembers.

Vacancies in the office of the mayor or Councilmember shall be filled by a ~~special~~ an election for the unexpired term to be called by the City Clerk upon a resolution adopted by the Council and held within ~~sixty (60)~~ 120 days of such vacancy, unless such vacancy occurs within ~~one (1) year of preceding~~ a general election for the election of City officers, in which event such vacancy may be filled by the Council until the next general election. Whenever any incumbent office holder ceases to possess the qualifications prescribed by this ~~act~~ Charter or by law, the Council, by a majority vote of its members, ~~may~~ shall declare such office vacant and proceed to fill such vacancy by the holding of a ~~general~~ an election or appointment as herein provided. If a vacancy occurs during the qualifying period for election of mayor or any Councilmembers, such qualifying periods will be extended for a period of 21 days.

**Problem with solution.** This would entail a referendum. What happens if voters reject? This recently occurred in the City of Bonita Springs, where a provision concerning residency that was in contravention of established precedent was proposed for amendment by the Council and placed upon the ballot for referendum. The voters rejected the corrective amendment. The provision was successfully challenged. (*Feeley v. City of Bonita Springs*, Case No. \_\_\_\_\_, 20<sup>th</sup> Cir. 2004).

April 13, 2005

**Alternative 2.** Change qualifying period by ordinance as permitted by Sec. 100.3605 and 166.021 (4) Fla.Stats. (see discussion below).

**Issue 2. Manual Recounts & Induction of Newly-Elected Council members.** (See Edwards letter, p.2)

The Recount procedure for elections, especially manual recounts, does not guarantee that the election can be certified by noon on the day after the election. The challenge periods for elections generally end on 11<sup>th</sup> day after the election. The Charter (13.3 (4) requires delivery before noon of the day following. Code Section 2-27 requires induction into office at a meeting at noon the following day.

**Facts:**

In the last election, the need to do manual recounts made it very difficult for the Canvassing Board to accomplish the recount and certify the election by noon the next day. The former Mayor, who was on the Canvassing Board, was also presiding at the regular Council meeting where the transition of power was to take place, and so could not attend the Canvassing Board meeting in person. Likewise, the City Attorney, who is, by Charter, the Canvassing Board attorney, could not attend due to the City Council duties.

**Solutions:**

**Alternative 1.** Amend charter sections 13.1 and 13.3 to provide for a date of assumption of office similar to that for constitutional officers (11<sup>th</sup> day) or since election day in Naples is on the first Tuesday in February, make it on the 15<sup>th</sup> day after the election, which coincides with the regular Council meeting. If this change were made by charter amendment, it would be a good idea to rework the whole section on elections procedures. Council can change the ordinance without a referendum. If this were adopted by the voters, Code Section 2-27 may not be needed, or in the alternative, could be amended as provided above.

Problem with Solution: Same as above. Also, for reasons set forth below, it may be unnecessary.

**Alternative 2.** Without amending the Charter, amend Code Sec. 2-27 to read as follows:

2-27. Induction into office; oath.

The newly elected mayor and City Councilmembers shall be inducted into office at 9:00 A.M. at a meeting to be held on the 15<sup>th</sup> day following their election, at which time the City Clerk or any judicial officer shall administer an oath of office to the newly elected mayor and City Councilmembers.

(Note also: While it is a longstanding custom, there is no state law requirement for taking an oath at this time. The official oath is taken at qualifying time.)

**Problem with Solution:** The legal question remains open as to whether the charter requirement in 13.3. (4) (See above) for delivering the canvassed returns by noon the next day can be met. However, from a legal standpoint, if the Supervisor of Elections cannot do

April 13, 2005

it by then, due to Florida Election Code requirements, there is nothing the City can do about it. In this sense, the Florida Election Code overrides the City Charter.

There is also an open issue whether the Council can extend the date for induction into office. As a general rule (see above) any increase in a term of office would have to be approved by referendum. Section 100.3605 (b) Fla. Stats. does allow Council by ordinance to change the dates for **“qualifying and election and provide for the orderly transition of office resulting from such date changes.”** (emphasis added).

Likewise, Sec. 166.021 (4) Fla Stats. provides:

...However, nothing in this act shall be construed to permit...any changes in a...municipal charter which affect...the terms of elected 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...**without approval by referendum of the electors... (emphasis added).

Council would be changing the date for qualifying (see discussion above), but would not be changing the actual election date. Nor would it be changing the term, except to provide for the orderly transition resulting from changes in state law that make it extremely difficult to implement by noon the next day. (Cf. AGO 2001-81 in which the City of Punta Gorda considered increasing the terms from two to four years by ordinance, which the attorney opined negatively and *Meador v. Town of Ft. Myers Beach, Case No. \_\_\_\_\_*, (20<sup>th</sup> Circuit (2005)) in which the court ruled that the attempt to increase the term was invalid (case still pending on implementation of election date).

There is a significant difference here in that the change would not be used as a means of delaying an election but rather as a means to provide orderly transition. If the Supervisor of Elections cannot complete the recount in time for the Canvassing Board to Certify at noon, the City is technically without a full Council. Due to the City's open election procedures (top 3 vote-getters win), the likelihood of recounts is great. Since the induction date is implemented by ordinance, it should be able to be amended by ordinance.

On the other hand, the Naples Charter does provide for terms of 4 years for Mayor, “or until his successor is duly elected” (Charter Sec. 2.1 (a)). Curiously, the same “until successor elected” language is not in the Councilmembers’ provision (b).

**Recommendation:**

- a. **Consider adoption of Alternative 2. Seek Attorney General's Opinion** as to whether Council can change the induction date to accommodate the requirements of the Florida Election Code.
- b. If not lawful, **Adopt Alternative 1.** Propose changes to Charter that would accommodate the needs of the Florida Election Code.

April 13, 2005

**Issue 3. Early Voting** See Supervisor of Elections letter of March 22, 2005 page 2.  
Should the City, by ordinance, opt out of some or all of the early voting provisions of Sec. 101.657, Fla. Stats.?

**Facts:**

Section 101.657, Fla. Stats. (attached) allows the Supervisor of Elections to provide for early voting. The requirements are somewhat stringent. The State Division of Elections, November 24, 2004 has determined that municipalities may opt out entirely or partially from the early voting requirements. This would be done by ordinance.

**Recommendation:** From a legal standpoint there is no major issue. I would defer to the City Clerk and the County Supervisor of Elections. Enclosed are sample ordinances showing opt-out provisions.

Respectfully submitted,



Robert D. Pritt  
City Attorney  
Attachments

1. Supervisor of Elections Letter of March 22, 2005
2. City Attorney Guidance memo of December 23, 2003
3. Canvassing Board Attorney memo of January 28, 2002
4. Charter Sections 2.1, 2.3, 13.1, 13.3, 13.4
5. Attachments (to Original Only)
  - a. AGO 2003-38
  - b. AGO 2003-52
  - c. AGO 2001-81
  - d. AGO 2000-61
  - e. Sec. 101.657 Fla. Stats.
  - f. 10. Division of elections Opinion November 24, 2004
  - g. Sample Opt-Out ordinance-Holmes Beach
  - h. Sample Ordinance-Boca Raton
  - i. Sample Ordinance-Miami Springs
  - j. Sample Ordinance-Sanibel



MEMORANDUM

850 PARK SHORE DRIVE  
TRIANON CENTRE - THIRD FLOOR  
NAPLES, FL 34103  
239.649.2814 DIRECT  
239.649.6200 MAIN  
239.261.3659 FAX  
rpritt@ralaw.com

**TO:** Mayor Bonnie R. MacKenzie and Naples City Council  
Dr. Robert E. Lee, City Manager  
Tara Norman, City Clerk

**FROM:** Robert D. Pritt, City Attorney

**DATE:** December 23, 2003

**Re:** Elections--Filling of Vacancy on Council

The purpose of this memo is to give guidance concerning the procedures for filling a vacancy on Council caused by the resignation of a council member (Joseph Herms) on December 22, 2003, who filed to run for mayor at the next regular city election on February 3, 2004. Due to time constraints, this memo will be in summary format only and may not have all relevant citations.

1. The council member's resignation from office is required by the Florida Constitution and state law.
2. The resignation opens up the council member's seat, which has 2 years, 1 month and a little over a week remaining.
3. The resignation took place the day before the deadline for qualification for the regular city election.
4. The regular city election will fill the office of mayor and 3 council seats.
5. The city elects the mayor separately from the other council members.
6. The council members are not elected by seat; instead the highest vote-getters (top 3) are elected.
7. The City Charter, Section 2.3 provides:

Vacancies in the office of mayor or council member shall be filled by a special election for the unexpired term to be called by the city clerk upon a resolution adopted by the council, and held within 60 days of such

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MEMORANDUM

( PAGE 2 OF 3 )

vacancy, unless such vacancy occurs within 1 year of a general election for the election of city officers, in which event such vacancy may be filled by the council until the next election...

While this section is ambiguous, it is my opinion that it means:

- a. This vacancy must be filled by a special election for the unexpired term of the council member.
  - b. The council must authorize the clerk to call the special election after adoption of a resolution at a regular or special meeting.
  - c. The special election must be held within 60 days of the vacancy (i.e., by February 20, 2004 (but see below)).
  - d. The special election can be held on the date of the general election (February 3, 2004) if called in time for:
    - (1) The Collier County Supervisor of Elections to be able to conduct the election, send out absentee ballots, print ballots, etc. (Note: The Supervisor of Elections has preliminarily indicated that this is infeasible).
    - (2) The U.S. Department of Justice to pre-clear the special election.
8. The timing of the resignation on the day before the end of the qualifying period (City Charter 13.4) does not provide sufficient notice or time for qualifying for persons interested in running for the unexpired term.
9. There is no provision in the charter or ordinances covering the qualifying period for a special election. (Charter 13.4 does not cover this situation. Sec. 30-2, Code of Ordinances does not cover it either.)
10. State law, Sec. 99.012 (3) (f) 2. Fla. Stats. provides:
- With regard to an...elective municipal office, the vacancy created by the officer's resignation may be filled for that portion of the officer's unexpired term in a manner provided by the respective charter...
11. The state law does not set out any regulations for qualifying in such circumstances.

## MEMORANDUM

( PAGE 3 OF 3 )

12. State law does not allow qualifying for more than one office at a time. (See Sec. 99.012 (2), Fla. Stats.

13. State law does provide that:

The governing body of a municipality may by ordinance, change the dates for qualifying and for the election of the members of the governing body of the municipality and provide for the orderly transition of office resulting from such date changes. (100.3605 (2), Florida Statutes).

14. Section 166.041 (3)(b), Fla. Stats. provides:

The governing body of a municipality may, by a two-thirds vote, enact an emergency ordinance without complying with the requirements of Paragraph (a) [notice and 2 reading requirement] of this subsection.

### Conclusions:

The qualifying period ending December 23, 2003 is for the regular election offices only (Mayor and 3 new 4-year terms)

The council must meet at a later date to establish dates for qualifying and for the special election of the unexpired council term of council member Herms. Qualifying dates will be announced in advance. It is not necessary to file qualifying papers for this unexpired term by December 23, 2003. Council will determine later whether to accept as qualified persons who may have filed for this office already.

CAUTION: PERSONS MAY ONLY QUALIFY FOR ONE OFFICE. IF ANYBODY HAS FILED QUALIFYING PAPERS FOR THE UNEXPIRED TERM AND WISHES TO FILE FOR MAYOR OR THE REGULAR TERM OF COUNCIL, THE PERSON MUST WITHDRAW THE PAPERS FOR THE UNEXPIRED TERM.

Note: Candidates should seek their own legal advice.

Opinion/pritt/Filling of vacancy on Council 122303



2320 FIRST STREET  
SUITE 1000  
FORT MYERS, FL 33901-2904  
941.337.3850 MAIN  
941.337.0970 FAX  
rpritt@ralaw.com

**TO:** City of Naples Canvassing Board

**FROM:** Robert D. Pritt, Attorney

**DATE:** January 28, 2002

**RE:** Canvassing Board Guidelines - Election - February 5, 2002-Recounts

At the Canvassing Board meeting on January 15, 2002, under Policies - H), I had indicated that I would provide further legal review and advice concerning the handling of one or more recounts, should that be necessary. (See page 5 of January 15th agenda).

There are three potential laws governing recounts. The first is Article 13 of the Naples City Charter (Exhibit "A" attached). Subsection (9) and specifically paragraphs (f) and (g) provide that the Canvassing Board may authorize a recount of the ballots cast and in the event of a recount, shall use reasonable effort to notify the candidate of the time and place of the recount.

Subsection (i) provides that the Charter section does not abrogate existing remedies in law or equity and that the proceeding is an alternate or cumulative remedy.

In addition, Section 13.1 (a) provides that unless provided by the Charter or by Ordinance to the contrary, all elections shall be conducted substantially pursuant to Florida statutes Ch.97--106 as applicable and insofar as such elections are not in conflict with the Charter. Paragraph (b) provides that the Florida Election Code (FS. Chs.91--106 as amended from time to time) is incorporated and adopted as controlling law [with certain exceptions].

The State Elections Code, Section 102.141, (attached as Exhibit "B") is entitled County Canvassing Board; Duties.

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## MEMORANDUM

( PAGE 2 OF 4 )

Subsections (1-5) and subsections (7) and (8) clearly apply to a County Canvassing Board and do not apply to a Municipal Canvassing Board. Therefore, a reasonable conclusion is that those Sections do not apply to this Board.

However, subsection (6) begins by stating as follows:

"(6) if the unofficial returns reflect that a **candidate for any office** was defeated or eliminated by one-half of a percent or less of the votes cast for such office. . . or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, **the Board responsible for certifying the results** of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure [unless waived by a candidate]..." (emphasis added)

The use of language "candidate for any office" and the language "the Board responsible for certifying the results" can be interpreted to go beyond application to just a County Canvassing Board. Read in conjunction with Article 13 of the Naples City Charter (incorporating most of the Florida Election Code) this statute would indicate an intention on the part of the legislature and the people of the City of Naples that a recount should occur if the conditions contained in subsection (6) occur. Therefore, it is recommended that a recount occur if the conditions of subsection (6) are met.

Having concluded that Sec. 102.141 (6), F.S. should be followed, the question arises as to when a candidate is defeated or eliminated by one-half of a percent or less of the votes cast for such office. In the case of the City of Naples, there are three council seats open and, in the current election, six candidates. The candidates with the three highest vote totals are deemed to be elected to the office. Thus, the ballots carry an instruction to vote for three candidates and votes are tallied for each ballot that indicates the votes cast for one, two or three candidates.

This raises the question as to the meaning of the term "votes cast for such office". Is the "office" one office or three offices?

## MEMORANDUM

( PAGE 3 OF 4 )

If there are three offices, subsection (6) has no meaning because it only refers to "such office". However, if the aggregate is deemed to be "such office" subsection (6) has meaning and the number of votes cast can easily be determined.

The methodology would be as follows:

1. Tally the number of votes cast (not ballots cast) for all candidates.
2. Multiply by one-half of one percent (.005).
3. Tally the votes for the third highest vote-getting candidate.
4. Tally the votes for the fourth highest vote-getting candidate.
5. Subtract 4. from 3.
6. Determine whether the result is equal to the amount set forth in 2. If so, recount unless requested otherwise by the candidate.

### Hypothetical Situation

Candidate #	Votes Cast
1	1000
2	900
3	800
4	700
5	600
6	500
Total Votes Cast	4500

$\times .005$   
= 22.5 votes (round upward=23 votes)

Candidate 3      800 votes  
Candidate 4    -700 votes  
                    100 number of votes by which Candidate 4 lost

Compare 100 to 23  
Since Candidate 4 lost by more than 23 votes, no recount.

## MEMORANDUM

( PAGE 4 OF 4 )

It may also be necessary to do the above math if the fifth or sixth candidate's tally is within the one-half percent or less category (compared to candidate #3).

Section 102.166, Florida Statutes (Exhibit "C") governs manual recounts. This would go into effect if the second set of unofficial returns pursuant to Section 102.141 F.S. indicates that a candidate was defeated by one-quarter of a percent or less of the votes cast for such office. Subsection (1) provides for a mandatory recount in elimination by one-quarter of a percent or less and Subsection (2) provides for a manual recount provided request is made by 5:00 p.m. on the second day after election for elimination by between one-quarter and one-half of a percent of the votes cast.

It is recommended that in the event that these conditions occur, the procedures of Section 102.166 be employed.

The City Clerk and I have also consulted with the legal staff of the State of Florida, Division of Elections, who have orally confirmed that the above methodology appears to be correct. They do not give official opinions for local elections. A copy of this memo is being sent to that office.

Please let me know if there are any further questions or comments.

Respectfully submitted,

Robert D. Pritt  
Attorney for  
City of Naples Canvassing Board

101292v3 01-28-02

**Sec. 2.1. Number; selection; term.**

- (1) The council shall consist of a mayor and six (6) councilmembers.
- (2) The mayor and councilmembers in office when this Charter becomes effective shall continue in office until the expiration of their respective terms.
- (3) Beginning with the general municipal election to be held in 1986, a mayor shall be elected from the qualified electors of the city for a period of four (4) years, or until his successor is duly elected at a general municipal election as provided herein. No person elected as mayor shall be eligible for reelection as mayor for the term immediately succeeding the term to which he was elected.
- (4) At each election to be held under this Charter, three (3) councilmembers shall be chosen. The three (3) candidates receiving the highest number of votes shall hold office for four (4) years. Thereafter, councilmembers shall be elected at each general municipal election, as provided herein, to fill the seats of the councilmembers whose terms then expire. No person elected as a councilmember shall be eligible for reelection as councilmember for the term immediately succeeding his second full consecutive term as councilmember.  
(Ord. No. 84-4518, § 1, 8-1-84; Ord. No. 86-5021, § 1, 6-18-86/11-4-86; Ord. No. 91-6407, § 2, 6-19-91)

**Sec. 2.3. Vacancies in office of mayor or councilmembers.**

Vacancies in the office of the mayor or councilmember shall be filled by a special election for the unexpired term to be called by the city clerk upon a resolution adopted by the council, and held within sixty (60) days of such vacancy, unless such vacancy occurs within one (1) year of a general election for the election of city officers, in which event such vacancy may be filled by the council until the next election. Whenever any incumbent office holder ceases to possess the qualifications prescribed by this act, the council, by a majority vote of its members, may declare such office vacant and proceed to fill such vacancy by the holding of a general election or by appointment as herein provided.  
(Ord. No. 91-6407, § 4, 6-19-91)

**Sec. 13.1. Regular election dates; election officers.**

- (a) Regular municipal elections, nonpartisan in nature, shall be on the first Tuesday in February of each even-numbered year. Unless provided by this Charter or by ordinance to the contrary, all elections hereunder shall be conducted substantially pursuant to F.S. chs. 97--106 as applicable and insofar as such sections are not in conflict with this Charter.
- (b) That the "Florida Election Code" (F.S. chs. 97--106, as amended from

time to time) is hereby incorporated and specifically adopted as controlling law regarding election procedures in the City of Naples, such laws as relate to the conduct of elections in the City of Naples; specifically excluding any portions of said statutes which conflict with sections 2.1, 2.2, 2.3 and 2.4 of the City Charter, and excluding any portions of said statutes which conflict with this section and sections 13.2, 13.3, 13.4 and 13.5.

(c) For each election, the council shall appoint the necessary election officials to insure that the same is conducted fairly and pursuant to law. The candidate receiving the highest number of votes for the office of mayor at said election, shall be considered elected mayor. The three (3) candidates for council receiving the highest number of votes at said election, shall be considered elected as members of council.  
(Ord. No. 2854, § 1, 1-4-78; Ord. No. 93-6877, § 1, 3-17-93)

**Sec. 13.3. Elections; canvass of returns.**

(1) The polls shall open at 7:00 a.m. and close at 7:00 p.m. the same date. When the results of voting have been ascertained, they shall be certified by the election officials in duplicate, one copy being delivered to the city manager and one copy to the city clerk, both of whom shall transmit such copies to the city council at a meeting to be held at 12:00 noon of the day following the election.

(2) The City of Naples Canvassing Board shall consist of the following three (3) persons:

- (a) The city clerk;
- (b) A person designated by city council to serve as the chief election official for the city; and
- (c) The mayor, unless the mayor is a candidate for election to a council seat or otherwise unable to serve.

However, if the city clerk conducts any particular election in the City of Naples and is hence designated the chief election official, the city council may appoint a person who is not a candidate in that election as a member of the canvassing board.

(3) In the event that any member of the canvassing board is unable to serve on the canvassing board, the city council shall name a replacement for that member of the canvassing board. The replacement shall be an elector of the City of Naples and not an incumbent member of city council eligible for reelection within the current year.

(4) The canvassing board shall, prior to 12:00 noon of the day following the election, canvass the returns of the election, including the absentee electors' ballots, and shall deliver to the city council at the meeting aforesaid, a certificate containing the total number of votes cast for each candidate.



(5) The city attorney shall act as legal counsel for the canvassing board.

(6) The responsibilities of the canvassing board shall include the canvassing of the returns of the election, general supervision of election procedures, investigation and determination of an administrative challenge of the election and any other procedural responsibilities related to the election appropriate under applicable law. In the event that the canvassing board of the City of Naples serves concurrently with the canvassing board of Collier County, duly constituted under law, the decision of the canvassing board of Collier County shall control.

(7) Before canvassing the returns of the election, the canvassing board shall:

- (a) When paper ballots are used, examine the tabulation of the paper ballots cast.
- (b) When voting machines are used, examine the counters on the non-printer machines or the print-pac on printer machines. If there is a discrepancy between the returns and the counters on the machine or the print-pacs, the counters of such machines or the print-pacs shall be presumed correct.
- (c) When electronic equipment is used, examine precinct records and election returns for any discrepancy which could affect the outcome of an election. The canvassing board may recount the ballots of the automatic tabulating equipment.
- (d) When absentee ballots are used, examine the tabulation of the absentee ballots received.

(8) Any registered voter of the City of Naples shall have the right to challenge the returns of a municipal election as being erroneous and affecting the outcome of the election by filing a written, sworn challenge to the canvassing board.

(9) (a) The form of the "Challenge of Election Returns to the Canvassing Board" shall be as follows:

CHALLENGE OF ELECTION  
RETURNS TO THE

Canvassing Board

Naples, Florida

\_\_\_\_\_, 19\_\_\_\_

As provided in the Naples City Charter, Section \_\_\_\_\_,  
I, (name), a registered voter of the City of Naples, Florida,

believe the election returns from Precinct Nos. \_\_\_\_\_, in the  
(date of) election, are erroneous and affect the outcome of the  
election.

I hereby protest the canvass of such returns by the City of  
Naples Canvassing Board, and request that said returns be  
investigated, examined, checked; and corrected by said Canvassing  
Board. The basis for this protest is \_\_\_\_\_.

Under penalties of perjury, I swear that the factual basis of  
the foregoing, to the best of my knowledge and belief, are true  
based upon \_\_\_\_\_.

/s/ \_\_\_\_\_

STATE OF FLORIDA

COUNTY OF COLLIER

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_  
by \_\_\_\_\_, who is personally known to me or who has produced (\_\_\_\_\_) as  
identification and who did (did not) take an oath.

_____	NOTARY PUBLIC
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(SEAL)

- (b) Such challenge shall be received by the city clerk no later than 5:00 p.m.  
on the day following the election. The city clerk shall acknowledge receipt  
immediately. If challenge is received, the city clerk shall certify receipt of  
such challenge to the canvassing board. If no challenge is received, the  
city clerk shall certify same to the canvassing board.
- (c) Upon receipt of such challenge, the City of Naples Canvassing Board shall  
have the power to take any appropriate actions necessary to respond to the  
challenge of the election. These actions shall include:
  - (i) Meeting with complainant;
  - (ii) Collection of evidence, if time permits, directly from the polling  
precinct in question;
  - (iii) Collection of all other relevant evidence.
- (d) The canvassing board shall use reasonable effort to collect such evidence

in a sworn, written format.

- (e) The canvassing board shall issue a written determination of the challenge within forty-eight (48) hours after an election challenge is received by the city clerk.
  - (f) The canvassing board may authorize a manual recount of the ballots cast.
  - (g) In the event of a recount, the canvassing board shall use reasonable effort to notify every candidate whose race is being recounted of the time and place of such recount.
  - (h) The canvassing board shall have the authority to request judicial determination to declare a municipal election or a portion thereof void and to request that a new election be held.
  - (i) Nothing in this section shall be construed to abrogate or abridge any remedy that may now exist, in law or in equity, and the proceeding prescribed herein shall be an alternative or cumulative remedy.
- (Ord. No. 2854, § 1, 1-4-78; Ord. No. 93-6878, § 1, 3-17-93; Ord. No. 93-7056, §§ 1, 2, 11-17-93)

State Law References: The hours polls are open is superseded by state law, F.S. § 100.011.

#### **Sec. 13.4. Filing of candidates for election; disqualification.**

All candidates for mayor or city council shall have the qualifications of an elector provided for in this Charter, shall have been a resident of the City of Naples for a period of six (6) months prior to filing, and shall file with the city clerk not more than sixty (60) days, not later than 5:00 p.m. on the sixth Tuesday preceding the general municipal election, a written request that his name be placed upon the ballot for election and a statement that he is a bona fide candidate for such office. Such request shall be accompanied by a registration or filing fee of twenty-five dollars (\$25.00). Any candidate may withdraw his name at any time in writing before the forms for the election ballots are delivered to the printer for printing, but in no event shall the registration or filing fee be returned or refunded. No candidate for any office shall promise any money, office, employment or other thing of value to induce or secure votes. Conviction of a violation of this provision by action of the council shall disqualify the person found guilty of violating the same from holding office, and the person receiving the next highest number of votes shall be deemed elected to the office.

(Ord. No. 2854, § 1, 1-4-78; Ord. No. 84-4518, § 1, 8-1-84; Ord. No. 86-5020, § 1, 6-18-86)

State Law References: Assessment on municipal candidates, F.S. § 99.093.