



DISAPPROVED BY THE
COUNTY LEGISLATURE ON
JANUARY 3, 2018

FILED

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MARY JO SPINO
COUNTY CLERK

FRANK WHITE, JR.
Jackson County Executive

Corrected
January 3, 2018

EXECUTIVE ORDER NO. 17-26

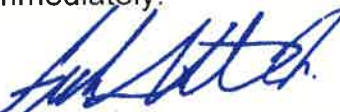
TO: MEMBERS OF THE LEGISLATURE
CLERK OF THE LEGISLATURE

FROM: FRANK WHITE, JR.
COUNTY EXECUTIVE

DATE: DECEMBER 28, 2017

RE: APPOINTMENT OF ACTING CHIEF ECONOMIC DEVELOPMENT
OFFICER

I hereby appoint Caleb Clifford as Acting Chief Economic Development Officer to serve until a permanent replacement is appointed. Mr. Clifford shall continue to serve as the Chief of Staff. This Executive Order shall be effective immediately.



Frank White, Jr., County Executive

Dated: 1/3/2018



handout 1/3/2018



OFFICE OF THE COUNTY COUNSELOR

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MEMORANDUM

TO: FRANK WHITE, JR.
COUNTY EXECUTIVE

FROM: W. STEPHEN NIXON
COUNTY COUNSELOR *WSN*
10/30/2017

DATE: OCTOBER 30, 2017

RE: EXISTENCE OF LEGISLATIVE POWER TO DISAPPROVE
APPOINTMENT OF ACTING OFFICER UNDER THE CONSTITUTIONAL
HOME RULE CHARTER OF JACKSON COUNTY

This memorandum is prepared in response to your recent request for guidance on the issue of whether, under the Constitutional Home Rule Charter of Jackson County ("the Charter"), the county legislature has the power to disapprove the appointment by you, as county executive, of an acting officer to perform the duties of a county officer whose position is temporarily vacant, pending the permanent appointment of an officer to fill the position. After research and analysis, it's our view that a strong argument can be made that the legislature does not have such a power. However, I must point out that Missouri law is not crystal clear on this issue. We could not find a Missouri Supreme Court precedent directly on point. Therefore, the most I can offer at this point is that the courts would likely hold that the power described above is lacking.

By way of factual background, this issue has arisen by virtue of the resignation of the county's chief financial officer (CFO) on October 16, 2017. You have indicated your intention to initiate a competitive search process to identify and hire a suitable replacement. However, you believe that such a process will take some significant period of time, and wish to appoint an acting officer to fill the position temporarily, until the permanent appointee can assume office, in order to ensure the orderly continuation of essential government functions. I would note that there was some confusion and turbulence within county government since the CFO's resignation, regarding who was responsible for performing these functions. This should be largely alleviated by your most recent formal appointment of an acting CFO. The issue is complicated by the actions taken with regard to the earlier appointment of an acting director of the county's anti-drug program (COMBAT) office. On September 27, 2017, you appointed the county's chief of health services, Jaime Masters, to serve as acting COMBAT director.

On October 9, 2017, the county legislature, upon oral motion and voice vote, disapproved this appointment. The issue of the legislature's authority to do so, or lack thereof, was not raised at that time, and this memorandum will not attempt to address the status of that appointment.

Two Charter provisions come into play in the present analysis. Article II, section 16.4 of the Charter grants to the legislature the power to:

Disapprove, within fifteen days after notice is filed with the clerk of the county legislature, the appointment of all directors of departments, officers and members of boards or commissions who are appointed by the county executive...

Article III, section 6.1 of the Charter grants the county executive the power to:

Appoint, subject to the county legislature's power of disapproval, directors of departments, officers not otherwise provided for, members of boards and commissions, and acting officers to fill any vacancy in any appointive or elective office, except that of county legislator...

I must emphasize here that, while the county executive is clearly granted power to appoint "acting officers" to temporarily fill vacancies, the legislature's grant of authority to disapprove executive appointments set out in Article II, Section 16.4, does not include the power to disapprove such temporary appointees. One could argue that the reference in article III, section 6.1 to all of its enumerated executive appointment powers being "subject to the County Legislature's power of disapproval" implies that the legislature has such power with regard to all of the executive's article III appointees. But I think the better view here is that the "subject to" language in article III, section 6.1 is not a grant of authority to the legislature, but rather a recognition of the limitation on executive authority contained in article II of the Charter. The legislature's disapproval authority, if it exists, must be found in article II. And such authority is not found in section 16.4, or anywhere else in that article.

The canon of statutory construction *expressio unius est exclusio alterius* is relevant here. Under this canon, when construing a list of enumerated items, "the expression of one is the exclusion of another." In the case of *Greenbrier Hills Country Club v. Director of Revenue*, 47 S.W.3d 346 (Mo. banc 2001), the court relied on this principle to find that the Missouri General Assembly's omission of a certain category of cases from a list of cases in which fees and expenses can be awarded, contained in section 536.085, RSMo, was intentional. After citing *County of Jefferson v. Quicktrip Corp.*, 912 SW.2d 487, 490 (Mo. banc 1995) for the proposition that the general assembly is presumed to know the existing law when enacting a new piece of legislation, the court in *Greenbrier* held "the legislature must have intentionally omitted tax cases from the excluded cases." *Id.* at 352. Likewise, in the case of the county legislature's enumerated disapproval powers listed in article II, section 16.4 of the Charter, the Charter's framers are presumed to have known that the power to

disapprove acting officers is omitted from that section, even though the power to appoint such officers is specifically included in the executive's article III powers. Such omission is presumed to be intentional.

Construction of provisions contained in the Charter is governed by the principles for construction of constitutional provisions. These principles are the same as are applied to construction of statutes, except that constitutional (Jackson County Charter) provisions are given broader construction due to their more permanent character. *State ex rel, Martin v Independence*, 518 S.W.2d 63, 65 (Mo 1974). Constitutional (Charter) provisions must be construed as a whole so as not to destroy the general intent and purpose of the framers. *Id.* at 66. Construction of the Charter provisions contained in Article II and Article III must be construed so as not to destroy the general intent and purpose of the framers.

Also relevant to this discussion is Missouri jurisprudence regarding the necessity of continuation of government operations in the event of a vacancy in office. The caselaw in this area mainly involves gubernatorial appointments of acting officers at the state level. In *Bank of Washington v. McAuliffe*, 676 S.W. 2d 67 (Mo. banc 1984), the court considered the issuance of a state banking charter at the direction of an acting director of finance, who was appointed by the governor without the advice and consent of the senate. The court, in resolving an apparent conflict between two provisions of the Missouri Constitution regarding the governor's power to appoint an acting officer, noted "the uninterrupted functioning of the government has been recognized as a vital end." *Id.* at 486-87. The court construed the constitutional provisions in such a way as to allow for the appointment of an acting director of finance who didn't require senate confirmation, recognizing "the importance of uninterrupted governmental operations." *Id.* at 487. In a concurring provision, Justice Blackmar observed "Constitutional provisions should not be construed in a way which will bring essential government operations to a standstill." *Id.* at 488. Justice Blackmar also remarked that any challenge to the actions of an acting officer appointed under these circumstances could only be brought by "public authorities, by a proceeding in the nature of *quo warranto*," and not be members of the general public. *Id.* at 489.

In light of Missouri's strong public policy in favor of ensuring the continuation of governmental operations in the event of a vacancy in public office and the Charter's lack of a clear grant of authority to the county legislature to disapprove an acting officer appointed to temporarily fill a vacancy, it's our view that Missouri courts would likely hold that the county legislature does not have the power to disapprove such an appointment. If you choose to make such an appointment, we recommend you make it clear that it's temporary only, and include in your appointment order the circumstances that, once they occur, will cause the appointment to end.