



## Administration Committee Memorandum

**MEETING DATE:** September 3, 2020

**TO:** Village Board Administration Committee

**SUBJECTS:** Appointment Powers

**FROM:** [Jeffrey M. Stein](#), Corporation Counsel

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### **Background and Executive Summary**

At the July 6, 2020 Administration Committee (“Committee”) meeting, the Committee requested a memorandum from the Corporation Counsel as to the law in regard to the appointments of individuals to the Village’s various Boards and Commissions (“Appointed Officials”).

In the Managerial Form of Municipal Government, the form of government that Wilmette has elected via referendum, the Village President has the power to submit the individual for an appointment to Boards and Commissions and the Board of Trustees has the power to approve or deny that appointment. As with all laws, there are some exceptions to this general rule, which are discussed more thoroughly below.

The general rule that the Village President submits to the Board of Trustees the individual for appointment, and the Board of Trustees either affirm or deny such an appointment is derived from state statute and has been affirmed as the rule by the Illinois Supreme Court as well as the Illinois Attorney General (“AG”). Based upon the foregoing, the Village President has clear and direct appointment power over those Boards and Commissions that are expressly provided for in state statutes (listed below). It is equally as clear that where state statutes provide for some other appointment process (also listed below), the Village President may have no such authority to make that appointment. Finally, where the state statutes are silent as to such appointment authority, the language of the statutes defining the roles of the executive and legislative branches of the government as well as the reasoning provided in the citations below, makes it probable such authority must rest with the Village President to submit the individual for appointment and the Board of Trustees to affirm or deny such an appointment.

#### *Appointment Procedures of each of the Specific Boards and Commissions.*

Appointment procedures for many of the Village’s Boards and Commissions are specifically provided throughout the various Illinois statutory provisions. Specifically, various sections of the Illinois Municipal Code provide that the Village President makes such appointments of

the membership of the following Boards and Commissions (collectively referred to as “Statutorily Created Boards and Commissions”):

- Zoning Board of Appeals
- Plan Commission
- Fire Pension Board (two of the five members)
- Police Pension Board (two of the five members)
- Board of Fire and Police Commissioners
- Electrical Commission

There are several boards and commissions for which state statute explicitly identifies what Village official makes such an appointment or rather that a specific individual is automatically appointed per state statute giving no discretion to the Village President or the Board of Trustees to make such an appoint. Per state statute these Boards and Commissions are appointed as follows:

- Emergency Telephone System Board (“ETSB”) – Appointments are made in the manner determined by the Board of Trustees (as opposed to the Village President), which has then been codified through the Village Code provision for this board. The qualifications for such appointments to the ETSB are specifically provided in the statute.
- Foreign Fire Insurance Board – Statutorily mandated to be comprised of the Chief of the Fire Department and 6 members of the department that are elected by the membership of the Fire Department.
- Local Electoral Board – The statutes automatically appoint specific elected Village Officials to the Local Electoral Board.

The state statutes do not address the creation and/or the appointment procedures to the following Boards and Commissions. However, pursuant to the roles of the executive and the legislature provided for in the Managerial Form of Municipal Government, the general rule is that the appointment power rests with the Village President and the Board of Trustees shall advise and consent on such an appointment:

- Housing Commission
- Human Relations Commission
- Transportation Commission
- Environmental and Energy Commission
- Building Code Board of Appeals

- Historic Preservation Commission

Below is the review and analysis of the relevant state statutes and the caselaw and AG Opinion on the subject.

*Form of Government Statutes Relevant to Appointment Process.*

The Village of Wilmette operates under the Managerial Form of Municipal Government pursuant to Article 5 of the Illinois Municipal Code (65 ILCS 5/5-1-1 *et. seq.*). While this memorandum is not intended to provide a detailed description of the Managerial Form of Municipal Government, the roles of the Village President and the Board of Trustees is briefly discussed in the context of appointment powers.

Specific to appointment powers of the Village President, Section 5-3-1 of the Illinois Municipal Code (65 ILCS 5/5-3-1) in relevant part states:

If any other Acts or any Article of this Code, other than Article 3 or Article 4, provides for the appointment of a board, commission, or other agency by the mayor or president, such appointments shall be made in manner so provided.

This provision applies to those statutorily created boards and commissions that already provide for the specific appointment powers vesting in a municipal official. For example, Section 5/ 11-12-4 of the Illinois Municipal Code is the statute that is not part of Article 3 or Article 4 and specifically provides that the appointment power for the Plan Commission rests with the Village President. That specific language is “[a] plan commission shall be appointed by a mayor of a city or president of a village board subject to confirmation by the corporate authorities.” 65 ILCS 5/11-12-4. Similar language is found in the statutes creating the other Statutorily Created Boards and Commissions.

The two provisions below (Section 5-3-6 and Section 5-3-1) are relevant because they describe the functions of the different branches of municipal government. This is directly relevant to the situations where the statutes are silent as to a board and commission itself or the appointment powers for such a board and commission.

Pursuant to Section 5-3-6 of the Illinois Municipal Code (65 ILCS 5/5-3-6):

The powers of the council or board shall be purely legislative except as may be otherwise provided by any other act or by any article of this Code other than Articles 3 or 4 [65 ILCS 5/3-1-1 *et seq.* or 65 ILCS 5/4-1-1 *et seq.*]. The executive and administrative powers conferred on the commissioners by Article 4 shall only be exercised when delegated to the appointive officers provided in this Article 5.

Section 5-3-1, in relevant part, states that “the mayor and president shall be recognized as the official head of the city or village by the courts for the purpose of serving civil process and by the Governor for all legal purposes.” 65 ILCS 5/5-3-1.

These statutory provisions provide the guidance that the appointment power for the board and commissions not otherwise specifically provided for in another statute, rests with the Village President. These provisions and other constitutional provisions were analyzed by

the courts and the AG in the cases and opinion below in regard to a home rule unit of government providing contradictory provisions for appointment powers.

*The Village cannot use its Home Rule Powers to Change the Appointment Process for its Boards and Commissions.*

There is guidance, in the form of caselaw from the Illinois Supreme Court as well as an opinion from the AG that clearly determined that a Village, even a home rule unit of government, does not have the authority to change the appointment powers of the otherwise responsible Village official or officials to make such an appointment.

It is important to note that the limitation to the home rule powers expressed in those opinions comes from the Illinois Constitution itself. Specifically, Article VII, Section 6(f) of the 1970 Illinois Constitution provides in part:

(f) A home rule unit shall have the power subject to approval by referendum to adopt, alter or repeal a form of government provided by law, except that the form of government of Cook County shall be subject to the provisions of Section 3 of this Article. A home rule municipality shall have the power to provide for its officers, their manner of selection and terms of office only as approved by referendum or as otherwise authorized by law.

Illinois Courts have ruled that when the Constitution states that a change to the "form of government" is allowed, it is only through the use of a referendum. When "form of government" is used, the Constitution is referring to the election of municipal governing bodies and the relationship between the legislative and executive branches of government. Peters v. City of Springfield, 57 Ill. 2d 142, 149. (1974); Kotte v. Normal Bd. of Fire & Police Comm'rs, 269 Ill. App. 3d 517, 521, (1995); Jaros v. Vill. of Downers Grove, 2017 IL App (2d) 170758, ¶ 25 (2017).

#### Pechous v. Slawko

When reviewing the relationship between the legislative and executive branches, the Illinois Supreme Court provided guidance in the case of Pechous v. Slawko. Pechous v. Slawko, 64 Ill. 2d 576, 583 (1976). This case was a consolidated case involving similar sets of facts for actions taken by two separate municipalities. The legal questions to be answered related to the scope of the power of legislative bodies in home rule municipalities, including the removal of the appointment powers from the municipal officer statutorily designated to make such an appointment. In each circumstance, the legislative body of the municipality enacted ordinances designed to transfer to itself the power to appoint certain municipal officials. Pechous, 64 Ill. 2d at 579. This case primarily used two sets of facts in determining its ruling.

The first set of facts involved the City of Berwyn. In addition to its elected mayor, city clerk, city treasurer, and eight aldermen, the applicable statutes provide for the appointment by the mayor, with the approval of the council, of certain other officers, including the city collector, superintendent of streets and commissioner of public works. Pechous, 64 Ill. 2d at 580. The aldermen of the City of Berwyn, under the theory of using home rule powers, enacted ordinances removing from office the incumbent superintendent of streets,

commissioner of public works, and city collector, and appointing replacements for them. Pechous, 64 Ill. 2d at 580 - 581.

The second set of facts involved the Village of Oak Lawn, a Managerial Form of Municipal Government (like Wilmette). The Oak Lawn Board of Trustees passed an ordinance, over the Village President's veto, that the president and board of trustees, "voting jointly, may employ an attorney or attorneys as an independent contractor or as independent contractors." Pechous, 64 Ill. 2d at 586.

In reviewing both sets of facts, the Court reviewed the differing forms of government a municipality may ultimately decide to undertake. A municipality may be organized as a city or as a village having the form of government provided in Article 3<sup>1</sup>, and it may by referendum change its form of government to either the Commission Form of Municipal Government provided in Article 4 or the Managerial Form of Municipal Government provided in Article 5. Different relationships between the legislative and executive branches of municipal government are provided in these different forms of government. Under the Commission Form of Municipal Government, for example, the statute provides that "[t]he council and its members shall possess and exercise all executive, administrative, and legislative powers and duties now possessed and exercised by the executive, legislative, and administrative officers" in other municipalities. Pechous, 64 Ill. 2d at 584. The most significant characteristic of the Managerial Form of Municipal Government is that the municipal manager (Village Manager) shall be the administrative head of the municipal government. The Board of Trustees have no powers with respect to administration. The statute for the Managerial Form of Municipal Government provides that powers of the council or board shall be purely legislative except as may be otherwise provided by any other act or by any article of this Code other than Articles 3 or 4. Pechous, 64 Ill. 2d at 586-587.

The Court examined what a transfer of appointment power to the legislative branch would entail. The Court stated that regardless of home rule powers, no municipality can change its form of government without a referendum. The Court continued that the only form of municipal government provided by law which authorizes a city council or the board of trustees of a village to exercise powers of appointment and removal is the Commission Form of Municipal Government provided for in Article 4 of the Municipal Code. Pechous, 64 Ill. 2d at 584-585.

Therefore, the Court concluded that the City of Berwyn and the Village of Oak Lawn could not transfer the appointment powers from the Mayor and Village President/Village Manager to their respective legislative bodies without first changing or altering the form of government via referendum as neither municipality was a Commission Form of Government.

#### Illinois Attorney General Opinion 97-028

While the above case dealt solely with the appointment of employees and officers, Illinois Attorney General Opinion 97-028 expanded the prohibitions provided for by the Pechous

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<sup>1</sup> Since the time of this opinion, Article 3 has been repealed and replaced with Article 3.1 which is the Aldermanic – Mayor; Trustee – President form of government. Article 3.1 form of government is the default form of government and can be changed through the referendum process.

Court to appointed members of boards and commissions (some of which are considered "officers" of the Village). The AG was asked to weigh in on a home rule city, operating under the managerial form of government, being lawfully empowered to abolish various boards and commissions established pursuant to statutes which prescribed mayoral appointment of their members and to recreate similar bodies by ordinances providing for the appointment of their membership by that city council. Attorney General Opinion 97-028 pg.1-2. Citing to the various constitutional provisions and statutory sections (all of which are referenced above), the AG opined that "under these provisions, it is clear that in the managerial form of government, the executive appointment authority reposes in the manager, with respect to most officers and employees, and in the mayor, with respect to boards and commissions designated as being so appointed." Attorney General Opinion 97-028 pg.3.

*Board of Trustees "Purely Legislative" Except Otherwise Provided.*

The above cited statutes, cases, and AG opinion clearly provide the guidance that the Village President or another Village official must make the appointment when that office is given the power to do so in the state statutes. The Village may not remove or alter such power, because doing so would be a change in government that is impermissible without first bringing a binding referendum to the electorate and having that referendum receive a favorable vote.

However, there remains the issue of when the appointment power to a Board or Commission is not addressed in a specific statute. While there is no direct caselaw or opinion on such a specific set of facts, taking into account the reasoning from the cases and opinion cited above, along with the statutory language that limits the Board of Trustees' role as "purely legislative" except when a non-legislative function is conferred upon the Village Board by statute, the appointment power must still rest with the executive or administrative head (depending upon the office being appointed) of the government.

To remove the power from either the Village President or the Village Manager as the case may be, would alter the Village's form of government from a Managerial Form of Municipal Government and make it more akin to a Commission Form of Government established under Article 4 of the Illinois Municipal Code. Specifically, a provision found in Article 4, the Commission Form of Government, states that "[t]he council and its members shall possess and exercise all executive, administrative, and legislative powers and duties now possessed and exercised by the executive, legislative, and administrative officers in other municipalities." 65 ILCS 5/4-5-2. For the Board of Trustees to obtain the executive (or administrative) power would be the type of authority granted by the statute above that is only applicable to a Commission Form of Government and would be clearly contrary to the Managerial Form of Municipal Government.

Therefore, as the Village President is the executive head of the Village, the executive power of appointment must rest with that office (unless specified in the state statutes as being with someone other Village official or officials). Furthermore, since the Board of Trustees' specific role in a Managerial Form of Municipal Government is "purely legislative," the Board of Trustees cannot possess the appointment power, only the power to advise and consent, unless specifically given such power by state statute or approved through a binding referendum.

*The Board of Trustees Powers regarding Boards and Commissions.*

The Board of Trustees does have a role when it comes to Boards and Commissions. Most appointments by the Village President are not absolute and are done with the “advice and consent” of the Board of Trustees. As such, while the Village President, in most cases, is the only office that can submit a name for appointment, the Board of Trustees may either approve or deny such appointments.

Furthermore, as the legislative body of the Village, the Board of Trustees can potentially shape Boards and Commissions. A few powers that the Board of Trustees have when regulating the Village’s Boards and Commissions (when not contrary to state statute) are as follows:

1. Create or abolish a Board or Commission
2. Increase or decrease the number of appointed members to a Board or Commission
3. Set forth qualifications for members of a Board or Commission
4. Assign the duties and/or purview of a Board or Commission
5. Create an appointment process or procedure to assist the appointing power in making the ultimate decision of appointing or submitting the individual for confirmation
6. Provide for a budget for a Board or Commission
7. Require meeting schedules or minimum number of meetings for a Board or Commission
  - a. Plan Commission is currently scheduled to meet the first Tuesday of the month
  - b. Zoning Board is currently scheduled to meet the first and third Wednesday of the month
  - c. Appearance Review Commission is currently scheduled to meet the first Monday of the month
  - d. Other Boards and Commissions are currently scheduled to meet as needed or as state statute requires<sup>2</sup>.

*Conclusion*

Based upon the above reasoning, the appointment powers, when conferred upon by state statute to a specific Village official, must be retained by that official. In addition, it is likely that a court would conclude, that unless expressly stated otherwise in a state statute, the appointment powers to a board or commission are an executive function and ultimately the

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<sup>2</sup> The Police Pension Fund Board must meet quarterly per state statute.

responsibility of the Village President with the legislative power to advise and consent resting with the Board of Trustees.