

**TOWN OF DAVIE**  
**TOWN COUNCIL AGENDA REPORT**

**AGENDA DATE:** March 5, 2003

**TO:** Mayor and Councilmembers

**FROM/PHONE:** Mark Alan, Director, Human Resources Management/954-797-1169

**PREPARED BY:** El pagnier K. Hudson, Assistant Director, Human Resources Management

**SUBJECT:** Ordinance 2nd Reading/ Approval of revision to Town Administrator's Contract to require an affirmative vote of four members of Town Council in the event of dismissal without cause

**AFFECTED DISTRICT:** Townwide

**TITLE OF AGENDA ITEM:** AN ORDINANCE OF THE TOWN OF DAVIE, FLORIDA, APPROVING THE REVISION TO TOWN ADMINISTRATOR'S CONTRACT IN COMPLIANCE WITH FS 166.041(6) TO REQUIRE AN AFFIRMATIVE VOTE OF FOUR MEMBERS OF TOWN COUNCIL IN THE EVENT OF DISMISSAL WITHOUT CAUSE; AMENDING THE EXISTING CONTRACT; PROVIDING FOR SEVERABILITY AND PROVIDING FOR AN EFFECTIVE DATE.

**Report in Brief:** Upon request of Town Council, the inquiry was made regarding the validity of a proposed resolution amending the Town Administrator's contract terms to require an affirmative vote of four members of Town Council in the event of dismissal without cause. Per the opinion of Town Attorney, Monroe Kiar, an ordinance is required to effect this change in the Town Administrator's contract. The ordinance contains a revision to the Administrator's contract which includes a liquidated damages provision for breach of contract as indicated in the attached Town Attorney's, February 18th, 2003, Memorandum.

**PREVIOUS ACTIONS:** None

**FISCAL IMPACT:** None

**RECOMMENDATIONS:** Human Resources Management recommends that the ordinance be submitted to Town Council for favorable consideration.

**ATTACHMENTS:** Ordinance  
Town Attorney's, February 11th, 2003, Memorandum  
Town Attorney's, February 18th, 200, Memorandum

ORDINANCE \_\_\_\_\_

AN ORDINANCE OF THE TOWN OF DAVIE, FLORIDA, APPROVING THE REVISION TO TOWN ADMINISTRATOR'S CONTRACT IN COMPLIANCE WITH FS 166.041(6) TO REQUIRE AN AFFIRMATIVE VOTE OF FOUR MEMBERS OF TOWN COUNCIL IN THE EVENT OF DISMISSAL WITHOUT CAUSE; AMENDING THE EXISTING CONTRACT; PROVIDING FOR SEVERABILITY AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town Council of the Town of Davie desires to bring more stability to the Favorable operations of the Town; and

WHEREAS, the Town Attorney conducted extensive research on the impact of altering the Town Administrator's contract by resolution and found that FSS166.041 makes clear, a municipality may adopt additional, more stringent requirements to this section by ordinance or charter amendment; and

WHEREAS, the Town wishes to retain Thomas J. Willi as Town Administrator with a revision in the contract to require an affirmative vote of four members of Town Council in the event of dismissal without cause:

NOW THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA

Section 1. That the Town Administrator's Contract be revised to require an affirmative vote of four members of Town Council in the event of dismissal without cause.

Section 2. That the Town Administrator's Contract be revised to include a liquidated damages provision for breach of contract per attached Addendum to Employment Agreement, "Section 3. Termination and Severance Pay," subsection (4), hereto attached as Exhibit A.

Section 3. This Ordinance shall take effect immediately upon its passage and adoption.

PASSED ON FIRST READING THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2003.

PASSED ON SECOND READING THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2003.

ATTEST:

\_\_\_\_\_  
MAYOR/COUNCIL MEMBER

\_\_\_\_\_  
TOWN CLERK

APPROVED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2003

Addendum to employment agreement between Administrator and Town of Davie

Section 3 Termination and Severance

(3) Termination of the Administrator without cause shall require a super-majority vote of the Town Council.

(4) Notwithstanding an amendment to Section 3 of the Town Administrator's Contract establishing that an affirmative vote of four (4) Councilmembers is required to terminate the Town Administrator; in any suit brought by the Town Administrator for a breach of contract related to the Town Administrator's termination by a majority of the Town Council, the extent of the Town Administrator's redress is subject to the maximum liquidated damages equal to a sum equal to not more than nine (9) month's aggregate salary, benefits and deferred compensation as enumerated more specifically within Section 3 of the Town Administrator's contract.

Approved

By \_\_\_\_\_

Harry Venis, Mayor

\_\_\_\_\_

Thomas J. Willi

Attest \_\_\_\_\_

Russell Muniz, Town Clerk

**EXHIBIT A**

MONROE D. KIAR  
TOWN ATTORNEY  
TOWN OF DAVIE  
6191 SW 45<sup>th</sup> Street, Suite 6151A  
Davie, Florida 33314  
(954) 584-9770

MEMORANDUM

DATE: February 11, 2003  
TO: Mayor and Councilmembers  
FROM: Monroe D. Kiar   
RE: Proposed amendment to Town Administrator's contract

You asked this office to provide a legal determination regarding the validity of a proposed resolution which would amend the Town Administrator's contract to require an affirmative vote of four members of the Town Council in order to terminate the Town Administrator without cause as described within the provisions of the contract.

STATEMENT OF FACT

An evaluation of the Town Administrator's performance was set forth for the Council's review on the February 5, 2003 Town Council Agenda under Item 8.1. Within the provisions of that item, it was proposed that by resolution, the Town Council was vested with the authority to amend the Town Administrator's contract to establish that the Town Administrator could not be terminated without cause unless by an affirmative vote of four councilmembers.

The Town Council reviewed the item and entered into substantial debate regarding the matter. During this debate, the Town Attorney was asked to present his legal opinion as to whether the proposed resolution was valid. The Town Attorney indicated that the current charter of the Town of Davie did not address the question of whether a supermajority can be required in order to dismiss the Town Administrator. The Town Attorney also stated that it was his belief, without the benefit of thorough research, that due to a provision of the charter that allows the Council to forgo Robert's Rules of Order in certain situations, the resolution may be permissible.

It was the decision of the Town Council, however, to table this matter to the February 19, 2003 Town Council Meeting. The Town Council additionally requested the Town Attorney's office to conduct extensive legal research regarding the validity of the proposed resolution and to prepare an opinion concerning the present matter.

#### DISCUSSION

The current Town of Davie Charter is silent with respect to the manner in which the Town Administrator may be hired or dismissed. Section 6 of the Town Charter establishes that a Town Administrator shall be the Town's "administrative head" and shall conduct the administrative duties of the Town. This section further enumerates the powers and duties granted to the Town Administrator. However, the provisions of the current Town Charter do not explicitly or implicitly indicate the manner in which the Town Administrator may be dismissed.

Although the Charter does not prescribe a method by which the Town Council may dismiss the Town Administrator, prior Town Administrators have been dismissed by affirmative votes of three Councilmembers through resolutions. Because the proposed resolution would amend the Town Administrator's contract to expressly require that (4) Councilmembers affirmatively vote to dismiss the Administrator, in order to terminate the Administrator's contract, the proposed resolution would in this circumstance heighten the standards established within the Charter for the enactment of a resolution.

A review of the Charter indicates that the manner in which resolutions are enacted is addressed in Section 7(J)(9). That section of the Charter expressly states that "Resolutions may be introduced and passed by three (3) affirmative votes at any regular or special meeting of the Town Council". As this office has previously indicated, in the event that the Council wishes to dismiss a Town Administrator, the provisions of the proposed resolution would undoubtedly heighten the standard for enacting a resolution established by the Charter.

Pursuant to the Home Rule Act, passed by the Legislature in 1973, the Town of Davie possesses broad home rule powers and may exercise any power for municipal purposes except when expressly prohibited by law. In accordance with the Home Rule Act, the Town may, by charter, exercise its powers to enter into any contract with the Town Administrator that is not inconsistent with established law. Sect. 166.021(1) Fla. Statutes. Conversely, the Town is prohibited by law from entering into contracts which will abridge applicable provisions of the Florida Statutes.

The Florida Statutes expressly established in Section 166.041 (4), the standard by which a municipality "may" enact ordinances and resolutions. The statute indicates that an affirmative vote of a majority of a quorum present is necessary to enact any ordinance or adopt any resolution. It is established law that a municipality may not enact an ordinance or resolution with less exacting standards than the standard established by the Legislature. However, it has also been firmly established that a municipality may require additional, more stringent requirements than those established by Section 166.041. This principle was expounded upon by the Attorney General in an opinion of the Attorney General, AGO 74-371.

In AGO 74-371, the Attorney General opined that the City of Miramar was authorized to adopt by "ordinance or charter amendment" additional, more stringent requirements than those established by Section 166.041. The Attorney General's Office further reiterated their opinion in AGO 74-371 that a municipality may adopt additional requirements to Section 166.041 by "ordinance or charter amendment" in three subsequent opinions, AGO 76-197, AGO 84-63, and AGO 86-15.

It is the clear opinion of the Attorney General that the only manner in which a municipality may enact additional and more stringent requirements than that of Section 166.041 is by ordinance or through a charter amendment.

As such, it is the opinion of this office that the proposed resolution which would amend the Town Administrator's contract to require an affirmative vote of four members of the Town Council in order to terminate the Town Administrator is invalid. While the Town Council may vote to require a supermajority to dismiss the Town Administrator through an ordinance or amend the Town charter, it may not do so through a mere resolution.

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Davie, Florida 33314  
(954) 584-9770

MEMORANDUM

DATE: February 18, 2003  
TO: Mayor and Councilmembers  
FROM: For Monroe D. Kiar *MP*  
RE: Town Administrator Contract  
Control Number: 030201

This memorandum is pursuant to the Town Council's request for this office to prepare specific language limiting the amount of damages that the Town Administrator may seek in the event that the Council grants the Town Administrator's proposed "supermajority" amendment to his existing contract and subsequently resolves to terminate his contract through a majority vote. Upon careful review of the Town Administrator's contract and applicable law, it is the determination of this office that the Town may not, subsequent to the enactment of the contract, unilaterally insert provisions into the Town Administrator's contract that would limit the amount of damages that the Town Administrator may seek as damages for breach of contract. Instead, the only method that the Town may utilize to restrict the amount of damages that the Town Administrator may seek is through the insertion of a liquidated damages provision within the text of the contract.

It is established law that liquidated damages provisions must be agreed upon by both parties as those provisions restrict the amount of compensation that the injured party may seek to redress his or her injuries. It was further established at common law that liquidated damages must encompass the total amount of damages that may be incurred as a result of a breach, as foreseen by the parties at the time of contract. Design Time, Inc. v. Monco of Orlando, Inc 518 So.2d 454 (Fla. 5<sup>th</sup> DCA 1988). As such, both parties must come to an agreement through negotiations with respect to the amount of liquidated damages that the Town Administrator may receive in the event that the Town grants the proposed "supermajority" amendment.

Aside from the legal requirements, it is also imperative to the interests of the Town that the proposed liquidated damages provisions accurately reflect the amount of damages that the Town Administrator may incur as a result of a breach of contract by the Town. In cases where the court has concluded that the liquidated damages provisions were too

small, the court has exercised its discretion to set aside the subject contract's liquidated damages provisions and determine that the amount of damages incurred by the damaged party should be ascertained at law. Varner v. B.L. Lanier Fruit Co., 370 So.2d 61 (Fla. 2<sup>nd</sup> DCA 1979). In this case, the damaged party to the contract appealed a judgment that limited his recovery to liquidated damages as specified within the contract. The District Court of Appeals reversed the trial court's judgment on the basis that the liquidated damages were too small and also provided the appellant with the opportunity to show that the liquidated damages did not accurately reflect the amount of damages that the appellant incurred. *Id.* at 63. The Court came to this decision irrespective of the fact that the Appellant agreed to the inclusion of the liquidated damages provision in the contract. Thus, if the Town and the Town Administrator agree to insert liquidated damages provisions to limit the measure of damages that the Town Administrator may seek for a breach of contract, the court may set aside the liquidated damages provisions as inadequate to compensate the Town Administrator.

In compliance with the Council's request, this office has prepared an example of a liquidated damages provision that may be inserted into the Town Administrator's contract, upon an agreement between the Council and the Town Administrator. This provision must be acceptable to both parties in order for the liquidated damages provision to gain effect.

Attached, please find the pertinent language limiting amount of damages that the Town Administrator may seek in the event that the Council agrees to grant the proposed "supermajority" amendment and subsequently dismiss the Town Administrator by a majority vote.

**LIQUIDATED DAMAGES PROVISION**

Notwithstanding an amendment to Section 3 of the Town Administrator's Contract establishing that an affirmative vote of four (4) Councilmembers is required to terminate the Town Administrator; in any suit brought by the Town Administrator for a breach of contract related to the Town Administrator's termination by a majority of the Town Council, the extent of the Town Administrator's redress is subject to the maximum liquidated damages equal to a sum equal to not more than nine (9) month's aggregate salary, benefits and deferred compensation as enumerated more specifically within Section 3 of the Town Administrator's contract.