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From: Judson P. Garrett, Jr., *JPG*  
Chief, Opinions & Advice

Re: Filling an Interim Council Vacancy by a Temporary Appointment Pending a  
Special Election

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We are responding to your request for advice on the question of whether the County Council, if it enacts a law providing for a special election to fill an interim vacancy on the Council, may make (or enact a law authorizing it to make) a temporary appointment pending a special election. We have considered also whether the Council may enact a special-election law limited to vacancies in which at least a minimum specified time remains to be served, and fill by appointment vacancies in which the remainder of the term is less than that minimum.

Although these are questions of first impression, we advise:

(1) the Council lacks the authority to provide for temporary appointments pending a special election because neither the language nor the legislative history of the county-council-interim-vacancy provisions of the Constitution, the Express Powers Act, or the Charter reflect an intention to authorize such appointments;<sup>1</sup> and

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<sup>1</sup> Indeed, the enactment of a local law providing for the filling of interim Council vacancies by special election would suspend the Council's current charter authority to fill interim-council vacancies by appointment. Furthermore, should such a special-election law subsequently be repealed, the Council's charter authority to fill interim-council vacancies by appointment would be revived automatically, by operation of law.

(2) if, however, the Council enacts a special-election law that is limited to vacancies in which at least a minimum-specified time remains to be served, the Council's Charter authority to fill interim-council vacancies by appointment will continue to be available with regard to vacancies in which the remainder of the term is less than the special-election-law minimum.<sup>2</sup>

Our advice is founded on the following analysis of applicable law.

### **APPLICABLE LAW**

The authority to fill an interim vacancy on the Council derives from the interaction of the State Constitution, the Express Powers Act of the General Assembly, and the County Charter.

#### ***A. The Maryland Constitution.***

The Charter Home Rule Article of the Maryland Constitution gives charter counties the authority to provide for filling county-council vacancies by special election, if expressly authorized by a state statute:

From and after the adoption of a charter by . . . any County of this State, . . . the County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws of said City or County . . . upon all matters covered by the express powers granted as above provided, and, *as expressly authorized by statute, to provide for the filling of a vacancy in the County Council by special election . . .*<sup>3</sup>

(Emphasis supplied.)

#### ***B. The Express Powers Act.***

The constitutional requirement for an "express statutory authorization" has been satisfied by an amendment to the Express Powers Act that specifically permits charter counties to enact laws:

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<sup>2</sup> Such a law might provide, for example, for a special election to fill an interim council vacancy only if at least eighteen months remained in the vacant term following the special election.

<sup>3</sup> Md. Const. art. XI-A, § 3. *See also* Md. Const. art. XVII § 2, the Quadrennial Elections Article, which accommodates Article XI-A by exempting these special elections from the general requirement that elections for state and county officials be held every four years. Both of these special-election provisions were passed and ratified in 1996, in direct response to the decision of the Court of Appeals in *Prince George's County v. Bd. of Elections*, 337 Md. 496, 507 (1994), holding that the only authorized method of filling interim a county council vacancy was by appointment. *See Laws of Maryland* (1996) chs. 81 (S.B. 524) and 674 (S.B. 666).

[t]o provide for the conduct of a special election to fill a vacancy in the county council that occurs upon the death or resignation of a member of the county council or on forfeiture of office by a member of the county council.<sup>4</sup>

This relatively new special-election authority is, however, discretionary. A county is not required to fill interim county council vacancies by special election. A Council vacancy may be filled by appointment.<sup>5</sup> Indeed, the County Council of Montgomery County has long had the power, under both the Express Powers Act and the County Charter, to fill interim council vacancies by appointment.<sup>6</sup>

### *C. The Charter of Montgomery County.*

Exercising the authority vested in the County by the Constitution and the Express Powers Act, the Charter of Montgomery County, which has long authorized the filling of an interim Council vacancy by County Council appointment, now qualifies that appointment authority. The Council may fill an interim Council vacancy by appointment only if the Council has not enacted a law requiring a special election:

*Unless the Council has provided by law for filling a vacancy by special election, the following process for filling a vacancy [on the County Council] shall apply. When a vacancy has occurred, a majority of the remaining members of the council shall appoint a person to fill the vacancy within thirty days. An appointee to fill a vacancy, when succeeding a party member, shall be a member of the same political party as the person elected to such office at the time of election. If the council has not acted within thirty days, the county executive shall appoint a person to fill the vacancy within ten days thereafter. If a person having held the vacant position was a member of a political party at the time of election, the person appointed by the county executive shall be the nominee of the county central committee of that party. An appointee shall serve for the unexpired term of the previous member. Any member appointed to fill a vacancy shall meet the same qualifications and residence requirements as the previous member.<sup>7</sup>*

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<sup>4</sup> Md. Ann. Code art. 25A, § 5 (q) (2). The State Election Code, in addition, reflects this express power by requiring that local elections boards conduct the special election, and adopt regulations as necessary. Md. Ann. Code art. 33, § 2-9. Both of these special-elections provisions were enacted in 1996. *Laws of Maryland* (1996), ch. 674 (S.B. 666).

<sup>5</sup> Md. Ann. Code art. 25A § 5(q) (1) (The County may “provide for the appointment . . . of all county officers except those whose appointment or election is provided for by the Constitution or public general law . . .”).

<sup>6</sup> Md. Ann. Code art. 25A, § 5 (q), and Montgomery County Charter § 106.

<sup>7</sup> Montgomery County Charter § 106.

(Emphasis supplied.) This special-election qualification was approved by the voters of Montgomery County at the 1998 general election, following the 1996 amendments to the Constitution and the State Express Powers Act.

## ANALYSIS

Unlike the General Assembly, which inherently possesses all legislative power, except as restrained by the state or federal constitution,<sup>8</sup> the County Council has only such authority as the State has delegated through the Constitution and laws of the State.<sup>9</sup> Indeed, although the Charter Home Rule Article of the Maryland Constitution and the Express Powers Act it mandates afford “chartered counties a certain measure of independence from the State Legislature,”<sup>10</sup> nevertheless, “[t]he exercise of local legislative powers [by charter county councils] is subject at all times to provisions of the Constitution and general law, and is limited to those matters allocated by the express powers which the Legislature has delegated under Article 25A of the Annotated Code.”<sup>11</sup> And the authority to fill a vacancy must be either specifically granted or necessarily or fairly implied or incidental to the enjoyment and exercise of a power expressly granted,<sup>12</sup> such as a general appointment power:

“[B]y statute or charter, it is often prescribed that the council or other local governing body shall have power to appoint or select certain municipal officers and employees. This frequently includes power to fill vacancies occurring in certain offices, whether such offices are elective or appointive. But the appointment of a particular officer or employee, in the absence of specific authorization, is invalid, unless, of course, a general power to appoint municipal officers and employees can be construed to cover the situation.”<sup>13</sup>

The question of whether the County Council may enact a law providing for filling interim council vacancies by temporary appointment pending a special election, therefore, is essentially a question of whether the State Constitution, the Express Powers Act, and the Charter of Montgomery County authorize such appointments.

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<sup>8</sup> *Kenneweg v. Allegany County Commissioners*, 102 Md. 119, 132 (1905).

<sup>9</sup> *Howard County Commissioners v. Matthews*, 146 Md. 555, 561 (1924).

<sup>10</sup> *Ritchmount Partnership v. Board of Election Supervisors*, 283 Md. 48, 56 (1978).

<sup>11</sup> *Id.*, 283 Md. at 57. And although the General Assembly, by general or local law, may authorize a charter county to enact a local law on any matter outside the area covered by the Charter Home Rule Article of the Constitution and the Express Powers Act, there is no such authority with regard to the filling of county-council-interim vacancies because that subject is addressed by both the Constitution and the Express Powers Act.

<sup>12</sup> *Montgomery County Commissioners v. Supervisor of Elections of Montgomery County*, 192 Md. 196, 211 (1949).

<sup>13</sup> 3 McQuillin, MUNICIPAL CORPORATIONS § 12.74 (1990 Revised Volume).

As you know, the cardinal rule for interpreting a law is to ascertain and carry out the intent of the lawmakers.<sup>14</sup> And the beginning point is the language of the law itself.<sup>15</sup> What the lawmakers “have written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal.”<sup>16</sup> Indeed, the language of the law itself is the primary source of this intent, and the words used are to be given their ordinary and popularly understood meaning, absent a manifest contrary legislative intention.<sup>17</sup>

“But ascertainment of the meaning apparent on the face of a single statute need not end the inquiry.”<sup>18</sup> Maryland courts “look to the context surrounding the enactment of a statute to determine the intention of the legislature.”<sup>19</sup> We, thus, may and often must consider other external manifestations or persuasive evidence of legislative intent: a bill's title and function paragraphs; the cause or necessity of the law; its objectives and purposes; its history; applicable reports; amendments that occurred as it passed through the legislature; its relationship to earlier and subsequent legislation; the statute read as a whole; prior and contemporaneous statutes; and other material that fairly bears on the fundamental issue of legislative purpose or goal.<sup>20</sup>

With one notable qualification, these rules generally apply to the interpretation of organic law such as the Constitution of Maryland:

‘[T]he cardinal rule of statutory interpretation is to ascertain and effectuate legislative intent.’ In applying this rule to constitutional provisions, we seek ‘the construction that effectuates the intent of its framers.’ To determine intent, we first examine the language of the provision, ‘with each word being given its ordinary and popularly understood meaning.’ If the words are not ambiguous, we generally construe the provision to effectuate the clear meaning expressed by its words. If the words are ambiguous, however, we look to other sources to determine the purpose for which the framers included the provision. In this regard, we have stated:

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<sup>14</sup> *Tucker v. Fireman's Fund Ins. Co.*, 308 Md. 69, 73 (1986).

<sup>15</sup> *Morris v. Prince George's County*, 319 Md. 597, 603 (1990).

<sup>16</sup> *Kaczorowski v. Baltimore*, 309 Md. 505, 513 (1987).

<sup>17</sup> *Williams v. State*, 329 Md. 1, 15 (1992).

<sup>18</sup> *Kaczorowski*, 309 Md. at 514.

<sup>19</sup> *Comptroller v. Jameson*, 332 Md. 723, 733 (1993).

<sup>20</sup> *Kaczorowski*, 309 Md. at 514-515. See also *In re Kemmo N.*, 315 Md. 193, 200 (1989), in which the Court reviewed a statute's legislative history to confirm its meaning despite finding that the measure “could not be more clear” on its face.

[I]t is permissible to inquire into the prior state of the law, the previous and contemporary history of the people, the circumstances attending the adoption of the organic law, as well as broad considerations of expediency. The object is to ascertain the reason which induced the framers to enact the provision in dispute and the purpose sought to be accomplished thereby, in order to construe the whole instrument in such way as to effect that purpose. The Court may avail itself of any light that may be derived from such sources, but it is not bound to adopt it as the sole ground of its decision.<sup>21</sup>

“While statutes are sometimes hastily and unskillfully drawn, [however,] a constitution imports the utmost discrimination in the use of language . . . ; we should therefore be careful not to depart from the plain language of the instrument.”<sup>22</sup> And because “[a] home rule county charter is a local constitution,”<sup>23</sup> this qualification also applies to the construction of the Charter of Montgomery County.

***A. The Maryland Constitution Does Not Authorize a Temporary Appointment to a Charter County Council Pending a Special Election.***

The language of Article XI-A speaks only to special elections:

[T]he County Council of said County, subject to the Constitution and Public General Laws of this State, shall have full power to enact local laws . . . as expressly authorized by statute, to provide for the filling of a vacancy in the County Council by special election . . . .

Nothing on the face of this provision addresses, much less authorizes, temporary appointments pending special elections. There is no ambiguity. The ordinary and popularly understood language of this provision is limited to special elections. On its face, this language does not authorize appointments of any kind.

Neither does anything in the legislative history of this measure reflect an intention to authorize appointments of any kind. The bill file on S.B. 524 (1996 Session) at the State Department of Legislative Services includes: (1) the statements of the primary sponsor, Senator Leo Green, before the Senate Environmental & Economic Matters Committee and before the House Commerce and Government Matters Committee; the Bill Analysis of the

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<sup>21</sup> *Fish Market Nominee Corp. v. G.A.A., Inc.*, 337 Md. 1, 8-9 (1998) (quoting *Brown v. Brown*, 287 Md. 273, 277 (1980), quoting *Perkins v. Eskridge*, 278 Md. 619, 640-41 (1976) (emphasis in *Perkins*) (citations omitted throughout). See also *Redmond v. Redmond*, 123 Md.App. 405, 413-4 (1998).

<sup>22</sup> *Buchholtz v. Hill*, 178 Md. 280, 286 (1940)

<sup>23</sup> *Board of Election Laws v. Talbot County*, 316 Md. 332, 341 (1989).

Senate Committees and Floor Report in the Senate; and (3) the fiscal note.<sup>24</sup> The file also contains, among other things, the comments of the Maryland Association of Counties, Inc., and Montgomery County, Maryland. None of these documents—or any other document in the file—addressed temporary appointments pending a special election.

The only potentially pertinent piece of legislative history is an amendment—adopted in the Senate, further amended in the House, then struck in the House—concerning appointments and “other alternatives” to special elections. After stating that the legislation was introduced “for the purpose of authorizing a charter county to enact local legislation permitting a special election to fill a vacancy in the County Council,” Senator Green’s written comments before the House noted that the bill had been amended in the Senate “to provide for other alternative means to fill a vacancy, as well.” The “other alternative means” language had been offered by Senator Cade and adopted, on second reading, on the floor of the Senate. In the House, however, the Commerce and Governmental Matters Committee amended the bill to strike “other alternative means” and substitute “appointment” as a constitutionally authorized alternative to a special election. On the floor of the House, Delegate Schisler successfully offered an amendment to strike both the Committee amendment and the Senate amendment, thereby returning the bill, in this regard, to its original state.<sup>25</sup> The legislative history does not address whether the ultimate rejection of the “alternative means/appointment” amendments was because the General Assembly decided to limit the proposed constitutional amendment to the filling of in interim-county vacancy by special election—the narrow purpose for which the measure was introduced—or a broader decision to supercede “appointment” authority already vested in charter counties by the Express Powers Act. In the absence of any specific legislative history to the contrary, we read these amendments to indicate merely that the framers’ saw no need to provide for an appointment power that the Court of Appeals already had recognized as granted by the Express Powers Act, and chose, instead, merely to provide for the alternative special-election power that the Court said did not exist. These amendments, therefore were designed merely to return the bill to its original limited purpose, as introduced: to provide a basis for authorizing special elections without in any manner impairing charter counties’ pre-existing authority to provide for filling such vacancies by appointment absent a “special-election” requirement.

These amendments do, however, demonstrate clearly that the framers did not intend the constitution authorize a county to fill an interim-council vacancy temporarily by amendment pending a special election. And the ballot question by which this proposed constitutional

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<sup>24</sup> “The realities of the legislative process in Maryland suggest that some parts of the legislative history—sponsor testimony, committee bill analyses, and committee floor reports—are likely to be especially reliable evidence of the purpose or goal underlying a statute.” Jack Schwartz and Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 Md. L. Rev. 432, 445-46 (1995). So, too, “a fiscal note often can be important evidence of a bill’s scope or intended effect.” *Id.* at 441.

<sup>25</sup> See *Laws of Maryland* (1996) ch. 81.

amendment was put to the electorate is consistent with this construction. It described the proposal as:

Amend[ing] the Constitution of Maryland to allow charter counties, as expressly authorized by statute, to enact local legislation permitting a special election to fill a vacancy in the county councils of charter counties.<sup>26</sup>

Indeed, nothing in the legislative history of this provision supports the conclusion that it was intended to allow charter counties to provide not only for special elections, but, also, for temporary appointments pending those special elections. And such authority is not to be implied in the power to fill these interim vacancies by special election.

The constitutional grant of authority to enact a local law providing for a “special election” to fill an interim vacancy on the County Council, consequently, does not include the authority to provide for a temporary appointment pending that special election.

***B. The Express Powers Act Does Not Authorize a Temporary Appointment to a Charter County Council Pending a Special Election.***

Giving the language of the Express Powers Act its ordinary and popularly understood meaning, the Act authorizes a charter county to provide for filling an interim vacancy in the Council only by permanent appointment (*i.e.*, appointment for the remainder of the term of the member whose vacancy is being filled) or by special election. Nothing on the face of the Act contemplates a temporary appointment pending a special election. The legislative history of this law is equally unresponsive.<sup>27</sup>

Prior to 1996 amendment, “the only authority granted by the Express Powers Act to fill county offices and positions [was] the authority to provide for appointments.”<sup>28</sup> There was no authority to provide for filling such offices by special elections, and thus no appointment power to provide for a temporary appointment pending a special election. In amending the Express Powers Act in 1996, the General Assembly gave charter counties the additional power to provide for a special election to fill an interim vacancy on a county council. This special-election power does not expressly include ancillary “temporary” appointment authority, and such authority is not implicit in a special-election power. The Council’s interim-vacancy-appointment power, therefore, remains precisely the same as it was prior

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<sup>26</sup> Ballot Question Number 4, 1996 General Election.

<sup>27</sup> The bill file on S.B. 666 (1996 Session) includes, in pertinent part: (1) the statements of the primary sponsor, Senator Leo Green, before the Senate Environmental & Economic Matters Committee and the House Commerce and Government Matters Committee; the Bill Analysis and Floor Report in the Senate; and (3) the fiscal note. The file also contains, among other things, the comments of the Maryland Association of Counties, Inc., and Montgomery County, Maryland. None of these documents—or any other document in the file—addressed temporary appointments pending a special election or indicated a legislative intent to grant charter counties the authority to make such appointments.

<sup>28</sup> *Prince George’s County v. Board of Elections*, 337 Md. 496, 506-07, 654 A.2d 1303 (1995).

to the 1996 amendment. It was and is only the authority to fill an interim vacancy by a “permanent” appointment, *i.e.*, an appointment for the remainder of the term of the vacancy.

The express statutory authorization to enact a local law providing for a “special election” to fill an interim vacancy on the County Council, thus, does not include the power to provide for a temporary appointment pending a special election.

***C. The Charter of Montgomery County Contemplates the Filling of an Interim Council Vacancy In One of Two Ways: By Special Election or By Appointment for the Remainder of the Unexpired Term.***

The Charter of Montgomery County, which does not give the County Council a general appointment power,<sup>29</sup> also reflects the view that the Council may fill a Council vacancy by appointment for the remainder of the term or may provide for a special election, but may not appoint temporarily (or provide for a temporary appointment) pending a special election.

Prior to 1998, the interim-council-vacancy provision of the Charter provided for filling a vacancy by appointment of the Council. That appointment necessarily was for the remainder of the vacant term, there being no authority for a special election and, therefore, no Charter authority for a temporary appointment pending a special election. In response to the amendments of the Constitution and the Express Powers Act authorizing local laws providing for special elections to fill interim Council vacancies, the Charter was amended in 1998 to qualify the Council’s council-vacancy appointment power by making it contingent upon the absence of a special election law:

*Unless the Council has provided by law for filling a vacancy by special election, the following process for filling a vacancy [on the County Council by appointment] shall apply.*

The 1998 amendment, thus, did not attempt to enlarge the Council’s interim vacancy appointment authority to include the power to now make temporary appointments pending a special election. It merely kept the original appointment authority in place in the absence of a special-election law.

On its face, therefore, the Charter does not contemplate temporary appointments to the County Council pending a special election. Rather, the 1998 amendment merely accommodates the special election authority newly granted the Council by the 1996 State enactments. Thus, the appointment power to which the Charter speaks is the same power the Council had prior to the 1998 adoption of the special election alternative. That power was and necessarily remains only the power to appoint a “permanent” replacement, and not a temporary-pending-special-election replacement. A vacancy on the Council, consequently, is to be filled—whether by appointment or election—only on a permanent basis, *i.e.*, for the

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<sup>29</sup> The Charter vests the general appointment power in the County Executive. § 215.

remainder of the term of the vacancy. This view is supported by the legislative history of the 1998 Charter amendment.

In its 1998 Report, the Charter Review Commission addressed the question of “Filling a Vacancy on the County Council or for the County Executive,” and recommended “(1) that the County Council adopt legislation to provide for a special election in the event that a vacancy occurs on the Council and (2) that such legislation be contingent upon ratification of [certain proposed] amendments to §§ 106 and 205 of the Charter.”<sup>30</sup> In pertinent part, the Commission recommended that § 106 be amended to make certain changes to the appointment process for Council vacancies and to mandate that amended appointment process, “[u]less the Council has provided by law for filling a vacancy by special election . . . .”<sup>31</sup>

When the proposed amendment was presented to the County Council in a work session, Council staff recommended against requiring an interim appointee to be selected from a list submitted by the appropriate County Central Committee, and offered an alternative merely clarifying that a special-election law would preempt the Council’s interim-council-vacancy-appointment authority:

The Council could reformulate this amendment simply to clarify that, if the Council adopts legislation to fill either or both of these vacancies [*i.e.*, County Executive or County Council vacancies] by special elections, that legislation would supplant the Council appointment process which the Charter now mandates.<sup>32</sup>

The Council tentatively approved the suggested alternative. Subsequently, the amendment, with minor stylistic changes, came before the Council at an action session under an agenda that described the proposed provision as:

Very different [from the] amendment recommended by the Charter Review Commission. This version simply clarifies that if the Council decides by law to use special elections to fill Council vacancies, the special election process supplants the appointment process now in the Charter.<sup>33</sup>

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<sup>30</sup> In passing, we note that the 1996 constitutional amendment and state legislation did not give county councils the authority to provide for special elections to fill a county-executive vacancy. The lesson of *Prince George’s County v. Bd. of Elections* would apply equally to a special election for a County Executive. In Montgomery County, consequently, a vacancy in that office still must be filled by appointment pursuant to § 205 of the Charter.

<sup>31</sup> 1998 Report of the Charter Review Commission (May 1998), pp. 16-20.

<sup>32</sup> Agenda Item 7: July 7, 1998, worksession memorandum from Michael Faden, Esq., to the County Council regarding “Proposed Charter amendments and recommendations of the Charter Review Commission,” p. 3.

<sup>33</sup> Action Agenda #5: August 4, 1998, memorandum from Mr. Faden to the Council regarding “Resolution to place Charter amendments on ballot,” pp. 1 and 2.

The Council approved the amendment and put before the voters a ballot question that presented only the clarifying proposal:

[To a]mend Section 106 of the County Charter to recognize that under state law the County Council may provide for a special election to fill a vacancy on the Council.<sup>34</sup>

The appointment power vested in the Council by the Charter, thus, continues to apply only to “permanent” interim appointments, and now is contingent upon the absence of an applicable local law providing for the filling of such vacancies by special election. If the Council enacts an unqualified special-election law, the Council loses all authority to fill interim-council vacancies by appointment. If the law, however, is qualified so that it applies only to vacancies of a specified minimum duration (*e.g.*, vacancies in which there is 18 months or more remaining in the term following the special election), then the Council retains the authority to fill by “permanent” appointment interim-council vacancies not within the scope of the qualification, *i.e.*, vacancies in which the remainder of the term is less than the minimum.

This interpretation of the Charter is consistent with the general view expressed in McQuillin:

If the governing law permits either appointment or election, using one method precludes the other.<sup>35</sup>

## CONCLUSION

The County Council does not have the inherent authority to provide for temporary appointments pending a special election. That authority would have to come from either the State—through the State Constitution or the Express Powers Act—or the Charter. Because neither the language nor the legislative history of the county-council-interim-vacancy provisions of the Constitution, the Express Powers Act, or the Charter reflect an intent to authorize the County Council to make (or enact a law authorizing it to make) a temporary appointment pending a special election, the Council lacks the authority to enact such a law or make such an appointment.

We trust that this advice is fully responsive to your inquiry.

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<sup>34</sup> Question C, 1998 General Election.

<sup>35</sup> McQuillin, § 12.10.1.