VILLAGE OF JOHNSBURG
JANUARY 20, 2013 SPECIAL MEETING OF THE
PRESIDENT AND BOARD OF TRUSTEES
Draft Copy/Not Approved

President Hettermann called the meeting to order at 10:04 a.m. in the Village Hall.

Attendees
Trustee John Huemann
Trustee Kevin McEvoy
Trustee Hutchinson
Trustee Janice Sisk
Trustee Ron Zanko
Trustee Rich Janusz
Village Attorney Michael Smoron
Police Chief Keith VonAllmen

FROM THE FLOOR – Joseph Majercik of 3711Fairview Avenue addressed the board regarding the clerk's position. He stated that he does not believe the Village needs to add another layer of government and another salary when the administrator has been handling the duties and doing a good job. He stated if it's not broke, don't fix it.

William Wiltse of 2620 Knob Hill Road referred to a recent article in the newspaper regarding action taken by McHenry County on a similar matter. Mr. Wiltse explained that following the referendum question regarding an Executive Director which was on the ballot in the fall and failed, the County Board considered placing a question on the ballot at the last minute regarding the position of County Board Chairman. He explained that the County Board did not approve placing the matter on the ballot and it was stated that if there is a desire to pursue the matter further it should be done through a petition. Mr. Wiltse offered that the same applies here noting that the Board is being asked to take action at the last minute to place a question on the ballot which should be done by petition. He highly recommended that it be pursued by petition. Mr. Wiltse stated that if the concern is as Trustee Zanko stated in the newspaper regarding the administrator having too much power, then the Village can address that concern by appointing tasks to other employees. Mr. Wiltse remarked that three trustees were adamant that some past pay increases were too much but they have no issue spending more money on another position.

Laurie Cwerenz of 4110 Pitzen Road stated that, upon reading about the matter in the paper, she researched the Illinois Compiled Statute which states that a petition is required to put the referendum question on the ballot. She further explained that the statute also states that the election of the clerk takes place at the same time as the election of the president. That being the case, an elected clerk would take office at the same time if the question were placed on the ballot by petition as opposed to by ordinance. She added that by placing the question on the ballot by petition, the board would not be creating the position illegally as would be the case in approving the ordinance before them. Ms. Cwerenz stated that she does not believe this is about transparency in government but that it is about either a single individual trying to promote their political campaign by trying to create an issue where there is none, or supporting an individual's personnel vendetta. Ms. Cwerenz stated that she hopes each board member has done their homework and stressed that if they cannot provide legal support to go against the Illinois Compiled Statutes they are placing the Village in an illegal position for strictly political gain. She questioned the motives of any board member who feels they are above the law and have the right to rewrite the law for their own personal political reasons. Ms. Cwerenz stated that after the appointment of the last trustee she overheard a trustee state "it was nothing personal, it was politics". She explained that the Village does

not need people who put politics above what is in the best interest of the Village. She added that it is a real disservice to the Village to even attempt to pass the ordinance.

Walter Steffens of 2110 Church Street explained that he is a longtime member of the Public Works Committee and stated that he agrees with Mr. Majercik's statement that if it isn't broke, don't fix it. Mr. Steffens added that Ms. Peters has done a good job over the years and explained that she has worked to get Church Street reclassified so that it is eligible for federal funding and has obtained grants for improvements. Mr. Steffens questioned the benefit of reinventing the wheel every couple of years.

Charlene Bliss Beyer of Wauconda, Illinois was in attendance and stated that the issue isn't about the individual person it is about the village clerk's position. She explained that the statute provides for the appointment of the clerk in municipalities with less than 5,000 in population. She added that the Village has a village clerk and an ordinance that provides for the job duties and pay for the clerk's position. She offered that the Election Code clearly states that petitions for a municipality or residents of a municipality can go for a referendum and they turn them into the board. She added that the Village attorney has stated that the number of signatures required is 10% of the electors from the last local election however the Election Code was amended effective July 5, 2011. She further offered that the Illinois Constitution doesn't counter municipal ordinances but authorizes the board to change and offer that as a referendum issue for the voters. She stated that the Village is already paying for someone and it is about exercising authority under the Illinois Constitution to let the voters have the clerk, the mayor and trustees on the ballot.

President Hettermann closed the public comment portion of the meeting.

Ms. Peters confirmed that notice for the special meeting was provided to the Northwest Herald and was posted at the Village Hall and on the Village's website.

VILLAGE CLERK POSITION– President Hettermann asked Mr. Smoron to address the questions raised at the January 17, 2013 meeting. Mr. Smoron cited the Koerner case which provides that in the event of a conflict between the Constitution and Illinois Municipal Code, the Code controls. Additionally, in response to references made regarding Section 28.6 of the Election Code, Mr. Smoron stated that he does not believe it is applicable because of Subparagraph C which states "Local questions of public policy authorized by this Section and statewide questions of public policy authorized by Section 28.9 shall be advisory public questions, and no legal effects shall result from the adoption or rejection of such propositions". He stated that Section 28.6 of the Election Code does not apply to this situation.

DISCUSSION REGARDING ORDINANCE 12-13-23 - Trustee Hutchinson questioned that in light of the information provided by the Village Attorney if anyone on the board believes they should consider action on the ordinance. Trustee Zanko stated that after reading the information provided by the Village attorney he felt it was pretty clear however over the weekend he came across a letter regarding a similar question raised on behalf of the Village of Lake Zurich. Trustee Zanko stated that the letter written by Lake Zurich's attorney, Ruth Ann Schlossberg offers a decision to their board citing constitutional law and other court cases which give the board the authority to pursue a resolution or a petition. He further stated that the Lake Zurich matter related to the possibility of pursuing a referendum to change the clerk's position from elected to appointed. Trustee Zanko read partial exerts from the letter as follows: "*Illinois Constitution gives all municipalities the ability to change the method of selection of their officials through a referendum. The Illinois Supreme Court has stated that the language used in the Constitution will permit changing between appointing and electing officers in cases where the Constitution does not mandate a particular method"*. Trustee Zanko stated that the letter makes specific references. He went on to read, *"The state Supreme Court also has upheld the ability of a home rule municipality to have a*

referendum to have its clerks appointed rather than elected and the Illinois Attorney General's office has concluded that the same reasoning could apply to a non-home community and that the Constitution was designed to give municipalities control over their internal governance". Trustee Zanko stated that the letter further cites additional court cases. He explained that the letter references a similar situation in Vernon Hills and read as follows: "The Vernon Hills resolution states that it is putting the question to the voters of whether or not the clerk should be elected or appointed. It properly cites section 28-2 of the Election Code for its authority to initiate a referendum….. and Article 7, Section 7 of the Constitution as the authority for the underlying authority for the question being put to the public". Trustee Zanko offered that the letter provides a justifiable legal defense for the Village. Trustee Hutchinson asked where the information was obtained. Trustee Zanko stated that he obtained the letter off of the internet. Mr. Smoron stated that he had not reviewed the opinion letter however he is comfortable with the legal opinion he has rendered on this matter. He further explained that he is not attempting to provide the Village an answer to provide the Village a legal defense or justification. Mr. Smoron stated that he is addressing the question put to him which is, "what does the law provide". Mr. Smoron stated that he believes the statute in question is clear in that the only method provided in the statute is by voter initiated petition. He further stated that the statute speaks for itself and that the city of McHenry went through a different situation to change the position from elected to appointed in the interest of efficiency which is the current trend. He restated the Koerner case which states that if there is a conflict, the Municipal Code controls.

Trustee Hutchinson referred to a situation that occurred a year ago regarding the replacement of a trustee. She explained that Trustee Zanko proposed amendments to an ordinance which would change the authority of the Village President which was not legal because it was in conflict with the Illinois Municipal Code which governed. Trustee Hutchinson offered that at that time the board was faced with having to address the same question of why they are considering action on something that they have been advised is not legal. She added that there may be many other attorneys with different opinions or defensible positions however we should rely on the Village attorney as he is liable to the Village. She explained that the Village has no recourse when relying on another attorney.

Attorney Smoron restated what he is relying on. He explained that the local paper said that the Lakemoor attorney had come to a different conclusion. In response, Mr. Smoron followed up with the Lakemoor attorney who stated that the representation in the paper was not his opinion which is supported by the fact that, Lakemoor is not taking action on this matter to place the question on the ballot. He also followed up with the legal counsel for the Illinois Municipal League and the McHenry County Clerk. Trustee Hutchinson questioned if something has changed in the last year that gives the Village the authority to circumvent the Illinois Municipal Code. Mr. Smoron stated this matter goes back several years and he has consistently stated that the village clerk can be appointed and that there is a specific method for the position to be subsequently elected which the statute clearly states is only by voter initiated petition.

Trustee Sisk questioned if it is absolutely illegal to pursue the matter as a resolution or is it only Mr. Smoron's opinion. Mr. Smoron stated that if what she means by illegal is that it is in conflict with the statute, yes. Trustee Sisk stated that it is not illegal in terms of the Constitution or the Election Code but it is in conflict with how the Illinois Municipal Code states that it must be done. Mr. Smoron again stated that to pursue the matter by board action is in contravention with the statute. He further stated that he contacted the Illinois State Board of Elections who were adamant that they do not provide opinions and are prevented by law to even rendered advisory opinions. Trustee Sisk stated that she was told the same thing. Mr. Smoron stated that he does not believe the action is proper under the Constitution. He restated that the appellate court ruled that when a conflict exists between the Constitution and the Illinois Municipal Code, the Municipal Code controls.

Trustee Hutchinson questioned what legal authority the Village has to take action on this matter. She stated that to take this type of action would be nothing more than a power grab and pointed out that the individual that has brought this matter before the board sued the Village over a perceived power grab where she alleged that the Village stole her property and now she is demanding that the board take action in the form of a power grab. Trustee Hutchinson offered that when someone comes before the board for a variance, they have to offer some reasoning and testimony for the Village to go beyond the boundaries of the normal scope of how things are done. She added that the individual has not come forth with an army of people asking the Village to do something outside of the normal scope of how we do things and she has yet to hear any thorough investigation as to the pros and cons. She stated that one of the cons she can anticipate is that the Village ends up with someone who does not have a competency level to carry out the duties required of the position. She emphasized that we are not currently paying for the position. Trustee Hutchinson stated that she is not necessarily against the idea of an elected clerk but questioned why the Village should not require the matter to go through the process that is provided and is not debatable. Trustee Hutchinson pointed out if the individual spent as much energy in obtaining signatures on a petition as she has in trying to convince the board to do this, the matter would not even be up for discussion. She stated that she does not understand the motivation other than it being political. She offered that it is irresponsible of the board to take action on anything for which a thorough investigation has not been done. She questioned when the matter could be placed on the ballot. Mr. Smoron stated that the question could be placed on the ballot in March of 2014 therefore there is plenty of time to circulate a petition. He added that the clerk runs with the mayor therefore the election would not occur until 2017.

Trustee Janusz stated that the board is faced with two different opinions from the same law firm. Trustee Hutchinson pointed out that it is a matter of interpretation. Trustee Janusz stated that he is not an attorney however one opinion references the Constitution and Mr. Smoron's does not. Attorney Smoron clarified that the appellate court has provided very clearly that if a conflict exists between the Constitution and the Illinois Municipal Code, the Municipal Code controls. He again pointed out that the board did not ask him to find a way to defend or justify some action, he was simply asked what the legal means is to pursue the matter and explained that the statute clearly states the only means is by voter initiated petition.

Trustee Hutchinson questioned the urgency in the matter. Trustee Zanko stated that the urgency is that there is a cut off for the matter to be placed on the ballot. Trustee Hutchinson stated that the board is being asked to take action on a matter that it is not within the purview of what the Village can do. Trustee Zanko stated that there is not enough time to circulate a petition for this spring. Trustee Hutchinson questioned how many election cycles are available before the position could even be voted upon. Mr. Smoron stated that the referendum question could be placed on the ballot in March of 2014 but the position would not be voted upon until 2017. He explained that even if someone wanted to argue that the clerk could be placed on the ballot in 2015, there is still the opportunity to circulate a petition for the question to be placed on the ballot in March of 2014. Trustee Hutchinson questioned the dates as the paper indicated the matter would be voted on this fall. Mr. Smoron stated that McHenry County Clerk Katherine Schultz stated that there is no election in the fall of 2013 but there is an opportunity in March of 2014.

Trustee Huemann agreed with the comments made by Trustee Hutchinson regarding the need for a proper analysis of the situation. He stated that he is uncomfortable with the rushed manner in which the board is being asked to take action on this matter without a thorough analysis. He pointed out that other municipalities are shifting from elected positions to appointed positions and we need to understand the reasons for that. He further stated that we are elected to represent the people and he is uncomfortable with the timing of this matter. He added that when rash decisions are made, usually they are regretted.

Trustee McEvoy agreed and restated that the board represents everyone in the Village and a petition is more representative of what the residents want. He also questioned the sense of urgency and stated that we should follow the proper process.

Trustee Zanko questioned if a ruling from the Supreme Court overrules the Illinois Municipal Code. Mr. Smoron stated that the Supreme Court does control however he does not believe the Supreme Court has addressed this issue. Trustee Zanko stated that we pay the firm of Zukowski, Rogers, Flood and McArdle and therefore we rely on the firm as a whole in their rulings therefore he has difficultly dismissing what the firmed ruled one municipality could do versus what the Village can do. Trustee Zanko questioned if the board can pass a resolution or if it has to go through a petition. Trustee Hutchinson stated that for that question the law is clear. Trustee Zanko pointed out that there is a conflicting opinion from the same law firm. Attorney Smoron restated that he was not asked for a defense or justification for a specific action he was asked what the proper course is to pursue a specific action. Trustee Hutchinson stated that she does not believe it is proper for the Village to pursue matters in a manner for which we have to find a defense or justification. She further stated that there is a proper method defined in the Illinois Municipal Code that provides a mechanism to place the matter on the ballot. She questioned why someone does not wish to follow that and why the board should do something against the Village attorney's advice and against the statute in the form of a power grab. She questioned the motivation behind the request.

Trustee Sisk referred to case law out of Cook County that stated that municipalities have authority to place advisory referendum on the ballot. Trustee Sisk stated that she has performed a lot of research and to place the question on the ballot it not illegal. Mr. Smoron stated that the question being asked of the Village is not an advisory question as is referred to in the cited case law. He pointed out that Mrs. Haney provided that statute but it controls advisory questions. He read from the statute as follows "Local questions of public policy authorized by this Section and statewide questions of public policy authorized by Section 28.9 shall be advisory public questions, and no legal effects shall result from the adoption or rejection of such propositions". The question before the Village is a binding question not an advisory question. He pointed out that the only means is by petition and if a referendum is placed on the ballot by petition and is approved, the question does not come back before the Village, it is immediately binding.

Trustee Hutchinson stated that she appreciates the research pursued by Trustee Zanko and Trustee Sisk but pointed out that they are drawing legal conclusion without the legal expertise necessary to sort through the nuances that occur in law. Trustee Sisk stated that she pursued the research in order to understand the matter. She pointed out that Mr. Smoron stated that it is not illegal to pursue a resolution on the matter. Mr. Smoron disagreed emphasizing that placing the matter on the ballot by resolution is not authorized by law and therefore it is not legal.

Trustee Zanko questioned if the opinions offered in the letter to Lake Zurich could be similarly relied upon by the Village in defense of its actions. Mr. Smoron stated that he does not believe it would be a suitable defense. He questioned why the Village would want to place itself in a situation of needing a defense. Mr. Smoron explained that a circuit court judge is going to look at the statute which provides that the only means to place the matter on the ballot is by voter initiated petition. There is no controversy and case law on this matter because it is not controversial as the statute provides a means for placing the question on the ballot.

Mr. Smoron pointed out that in the case of Electric Aggregation, the statute provides for the opportunity of placing the question on the ballot by board action. He explained that if it was the Illinois legislature's intent to do that in the context of the Village Clerk, it could easily add that in the statute.

Trustee Hutchinson again questioned the rush in this matter. She stated that she is against taking action to support the matter without first understanding the financial and other impacts on the Village. She

questioned the rush for action when there is a mechanism in place to pursue the matter. She questioned why Mrs. Haney doesn't simply circulate a petition rather than ask the board to take illegal action on something. Trustee Hutchinson stated that for the board to take action on the matter would be overreaching their boundaries. Trustee Zanko interjected that Trustee Hutchinson statements reflect her opinion and not those of all the board members.

Trustee Janusz stated that he does not see the harm of asking the question. He pointed out that we can ask the question but after doing the research we don't feel it should be done, the Village does not have to pursue the elected position. Mr. Smoron disagreed and explained that the decision is binding and it does not come back before the Village Board.

Trustee Sisk stated that if the question was placed on the ballot by petition and approved, the Village would be bound by that decision. Trustee Hutchinson agreed but emphasized that there is a difference when the matter is pursued by petition as compared to being asked to take action on a matter without fully analyzing its impact.

President Hettermann questioned if everyone agrees that there are several opportunities to place the question on the ballot in advance of the first opportunity to vote on the position. Trustee Zanko stated that he understands the timeframe.

Trustee Sisk questioned the wording of the ordinance before the board and asked if the question should simply read "should the clerk be elected". Mr. Smoron pointed out that the required language is spelled out in the statute and the ordinance is correct.

President Hettermann stated that the question should be looked into as it relates to the impact an elected clerk may have on the Village if someone wishes to pursue the question in the future. Trustee Hutchinson stated that the Illinois Municipal Code already defines the duties of the clerk. She pointed out that it would be beneficial to understand the reasons why other municipalities are moving away from electing their clerk. She further explained that it would helpful to understand all of the implications so when asked what our thoughts are on the matter we can respond in an informed manner. Trustee Zanko stated that there is a salary in Chapter 3 for the position. Trustee Hutchinson stated that it is not being paid. Trustee Zanko stated that the salary is allowed for in the ordinance. Trustee Hutchinson agreed that it is allowed for but the Village is not currently paying out that salary. She questioned if there is a benefit to having someone elected to the position. She explained that if they do a poor job the board has no authority over them as opposed to an appointed position for which the board has some control over if the individual doesn't do their job.

President Hettermann stated that the matter should be looked into further and questioned if everyone agrees that it is not a time sensitive matter. Trustee McEvoy agreed and Trustee Zanko disagreed. He stated that if the matter were put on the ballot this spring, there is a lot of time to work out the details about the position. President Hettermann questioned why the Village would pursue it in a manner inconsistent with what is allowed by law when time is not of the essence.

Trustee Zanko questioned if someone circulated a petition, would it be placed on a ballot in November. Attorney Smoron stated that Kathy Schultz confirmed that the next election to place the question on the ballot would be March of 2014. Mr. Smoron confirmed that the position would then not be placed on the ballot until the spring of 2017. Trustee Sisk stated that would be the case either through a petition or if the board took action on the ordinance.

Trustee Zanko asked the board to take a straw vote to determine the position of each trustee on the issue. Mr. Smoron explained that the only permissible action on the matter would be to consider action on the ordinance included on the agenda.

Trustee Zanko moved to approve Ordinance 12-13-23 An Ordinance directing the placement of the following question on the April 9 2013 ballot "Shall the position of the Clerk be elected rather than appointed". Trustee Janusz seconded the motion. Motion failed with Trustees Janusz, Sisk and Zanko voting aye and President Hettermann and Trustees Hutchinson, McEvoy and Huemann voting no

ADJOURNMENT - Trustee Huemann moved to adjourn the meeting. Trustee Janusz seconded the motion. All Trustees present voted aye. Motion carried at 11:15 a.m.

Respectfully Submitted

Claudett E. Peters
Village Administrator