HOW TO FILL A VACANCY IN ELECTED BOROUGH OFFICE (Act 43-2012)

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According to section 901 of the Borough Code as amended by Act 43-2012, vacancies in elected borough office (council, mayor, tax collector, auditor, controller, or assessor) occur for any one of the following six reasons:

- death;
- resignation;
- removal from the borough or ward if election is by ward office;
- failure to take the oath of office or present a notarized copy of the Affidavit of Residency;
- failure to give bond as provided by law or ordinance, or
- in any other manner whatsoever.

The first reason for a vacancy - death is self explanatory. The second reason resignation - requires an in depth look. Resignations can occur due to changes in work schedule, illness, or the due to the complexity of the elective office. The courts have ruled that a resignation is not effective until the governing body has accepted the resignation by making a motion at a public meeting. Commonwealth v. Krapf, 249 Pa. 81, 84, 1915 and Commonwealth ex. Rel Gast v. Kelly, 255 Pa. 475, 484, 1917 and more recently in Triffin v. Thomas 462 A.2d 1346, 1983 and Borough of California v. Horner, 565 A. 2d 1250, Commonwealth 1989. This means that if a resignation is tendered to the borough secretary at her home on the weekend, it is not yet effective until the borough council has held a public meeting to accept the resignation by a motion and then there is a vacancy. On occasion, there is a controversial issue in the borough and an official has resigned prior to adjournment, but returns to the next meeting. If council did not accept the resignation, the official can withdraw his resignation.

A third reason for a vacancy is the official move outside of the borough or out of the ward in the cases of ward offices. The Pennsylvania State Supreme Court opined in 1938 that an official cannot declare residency inconsistent with his actions, Commonwealth ex rel. Fortney v. Bobrofskie, 196 A. 489. In other words, it’s not where a person says he lives, but where he is physically domiciled or where does he goes to at the end of the day. The following actions do not equal residency: maintaining a business in the borough, maintaining a post box in the borough, owning property, but living outside the borough or ward. The statutes also do not provide for a temporary removal from the borough due to a separation or divorce.

What happens if the official has removed himself from the borough and he refuses to tender his resignation? There is a court proceeding called an “Aquo warranto” action to remove the individual from the office. PSAB cannot give legal advice so we recommend that you contact your borough solicitor for details on that procedure.

Section 903 of the Borough Code states that council (in a majority action) can remove an official from office if he fails to qualify (for instance, take the oath of office or present a notarized Affidavit of Residency). Borough council must send a notice of its intention to declare the seat vacant by certified mail prior and it must hold a due process hearing (and allow the official to
explain his actions) prior to declaring the seat vacant.

And the final reason to declare a vacancy is if the official fails to give bond. This is a requirement for the elected tax collector and not usually the members of council or mayor unless they sign checks, handle funds or have the right to electronically transfer funds.

Once an official has tendered his resignation then council has 30 days to fill the seat by resolution. The candidate must be a registered elector and have resided in the borough one year continuously from the date of the appointment (Act 56-2001 which amended section 901 of the Borough Code). The executive session clause of the Sunshine Act states that all discussions dealing with filling a vacancy in elective office must occur in an open meeting. Should the borough advertise in the newspaper when there is a vacancy? There are no provisions in the Borough Code that address this issue and there are no court cases.

All actions leading up to (interviews) including the vote are done at a duly advertised public meeting. The president of council announces that he is entertaining nominations to fill the vacancy. (According to Robert’s Rules of Order nominations do not need a second, but your own by-laws and rules might require it). After the nominations are made the president closes the nominations and reads the first name and asks for a voice vote. If the first person receives the majority vote, then voting is concluded. (As you can see, there is a distinct advantage to being the first council member to nominate a candidate). If there is a tie vote or split vote, then the mayor at his option may cast his vote or can request that it be tabled and a special meeting must be held not less than five or more than ten days at which time council can reconsider the vote and if the tie still exists then the mayor may break the tie (section 1003 of the Borough Code). Borough council shall comply with filling the vacancy within the 30-day time frame.

If council is unable to fill the vacancy within the initial 30 day time frame then, the vacancy board which is composed of the rest of council plus one registered elector of the borough (who serves as chair person of the vacancy board) convenes and has 15 days to fill the appointment. The chair person does vote and the mayor does not have a role in this proceeding.

Finally, if the vacancy board is unable to fill the seat within 15 days, the chair person petitions the court of common pleas to fill the seat. If there is a vacancy in the chair of the vacancy board, then the remaining members of council petitions the court to fill the vacancy. (Please note that a vacancy in the chair’s position does not follow this procedure).

The other important provision of section 901 of the Borough Code is the length of the appointment. (First, it’s important to remember that municipal election years are held in the odd number years). The language on the term is as follows: The board shall appoint a registered elector of the borough, (or ward in the case of a ward office), to hold such office, if the term thereof continues so long, until the first Monday in January after the first municipal election occurring more than sixty days after the vacancy occurs, at which election an eligible person shall be elected to the office for the remainder of the term.

If a mayor’s term started in 2002 and he resigns in March-council cannot appoint a registered elector to fill the rest of the unexpired term (three years and nine months). The newly appointed
mayor would serve until the first Monday in 2004 and council must notify the county board of elections that they have a two-year council seat. The appointee would be required to run for election in the municipal election in 2003 for the remaining two years. By contrast, if a term expires in two years or less then the appointee could fill out the complete term.

In the rare event that a majority of council seats are vacant, the court of common pleas will fill the vacant council seats upon petition of not less than fifteen registered electors of the borough.

As mentioned in the article the borough council must make appointments by resolution. This resolution does not require advertising and because this is not a resolution of legislative character it does not need the mayor’s approval. We are providing a sample resolution for your solicitor to review. Please refer this document to the borough solicitor for his legal review. PSAB cannot ensure its legality.

The above article is informational only. If you need a legal opinion please contact your borough solicitor for his/her legal expertise.
RESOLUTION NO._______

BOROUGH OF ____________________, ________________ COUNTY, PENNSYLVANIA

A RESOLUTION TO FILL THE VACANCY IN THE BOROUGH MAYOR’S OFFICE

WHEREAS Mayor ____________________ , passed away on ______________(month, day, year);

WHEREAS the vacancy in the Mayor’s office as recognized at the regular, monthly borough council meeting held on (date);

WHEREAS a Special Meeting was held on (date) to appoint by this resolution a registered elector of the borough to fill the recognized vacancy;

NOW THEREFORE BE IT RESOLVED by the Council of the Borough of ____________________, ________________ County, that __________________________ is hereby appointed to fill the vacancy which currently exists in the Borough Mayor’s Office.

Resolved this day__________.

Attest:

________________________________________   ______________________________
Borough Secretary                        President of Council