

HOW TO: FILL A VACANCY IN ELECTED BOROUGH OFFICE

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According to section 901 (a) of the Borough Code as amended by Act 37-2014, vacancies in elected borough office (council, mayor, tax collector, auditor, or controller) may occur for any one of the following five reasons:

- Death;
- Resignation;
- Removal from the borough or ward if election is by ward;
- 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 and the effective date to fill the vacancy is 30 days from the date of death.

If there is a resignation, the effective date of the written “resignation” is now clearly explained in section 901 (a) of the Borough Code. “A vacancy shall not be created by a resignation until the date that resignation is accepted by a majority vote of a quorum of council at a public meeting or the effective date of the tendered resignation, whichever is later.” A quorum is defined in section 1001 (b) of the Borough Code as “a majority of membership of council then in office.” And if council accepts the resignation at the same public meeting that it is tendered then council has 30 days to fill the vacancy with a registered elector of the borough who has resided one year continuously in the borough or ward, prior to the date of the appointment.

If council has not accepted the resignation then it must do so no later than 45 days after it has been tendered in writing to council, unless it is withdrawn in writing prior to acceptance.” So this actually means council has a total of 75 days in the situation when council has not accepted the resignation.

A third reason for a vacancy is the official moves outside the borough or outside the ward. 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. Residency is not determine by words, it’s not where a person says he lives, but where he is physically domiciled. The following actions do not equal residency: maintaining a business in the borough, keeping a post box in the borough, owning property, but living outside the borough or ward. Section 901 does not provide for a temporary removal from the borough due to a separation or divorce. There is a court proceeding called a Aquo warranto action to remove the individual from the office if the official is no longer a resident of the borough.

PSAB is often asked whether an official who lives in Florida during the winter is still a registered elector of the borough. If the official retains his residence in the borough (has not abandoned or sold his home in the borough) and returns in the spring then that does not constitute removal from the borough.

The fourth reason for a vacancy is that the candidate fails to provide a notarized Affidavit of Residency and therefore cannot take the oath of office and according to sections 901 (b) and 903 of the Borough Code, the person fails to qualify within the statutory ten days.

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 unless they sign checks, handle funds or have the right to transfer funds electronically.

After council has accepted the written resignation letter at a duly advertised public meeting it has 30 days to fill the seat by resolution with a qualified candidate a registered elector of the borough who has resided in the borough one year continuously from the date of the appointment. The Sunshine Act states that all discussions dealing with filling a vacancy in elected office must occur in an open meeting. Should the borough advertise in the newspaper when there is a vacancy? The Borough Code is silent.

All interviews and voting are conducted 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 bylaws 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. 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 for any reason, 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 a public meeting and has 15 days to make the appointment. The chairperson 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 or 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.

The other important provision of section 901 of the Borough Code is the length of the appointment. (Remember that municipal elections are held in the odd numbered year). 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 January 2014 and he resigns in March-council cannot appoint a registered elector to fill the rest of the unexpired term (three years and nine months). While there is a mayoral vacancy the president of council shall serve as acting mayor and does not have the right to vote as a council person under section 10A08 of the Borough Code and the vice president will run the meetings. After a newly appointed mayor is confirmed and taken the oath of office, the president of council/acting mayor would turn the office over to the new mayor and resume as president and the newly appointed mayor would serve until the first Monday in 2016 and council must notify the county board of elections to place a two-year council seat on the ballot in 2015. The appointee would be required to run for election in the municipal election in 2015 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.

The above article is informational only and not legal advice. Please contact your borough solicitor for his/her legal opinion.

As mentioned in the article the borough council must make appointments by resolution. This resolution does not require advertising. PSAB is providing a sample resolution for your use however please refer this

document to the borough solicitor for his legal review. PSAB cannot ensure its legality.

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 was 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 _____ (month) _____ (year).

Attest:

Borough Secretary

President of Council