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Coates' Canons NC Local Government Law

Filling a Vacancy on the Town Council

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Judy Bailey was not just a member of the town council. She was well-known in town for her dog training business and often entertained at local events with her troupe of trained poodles. So it was no surprise when she – literally – ran off and joined the circus. Once the excitement settled down, questions arose about how to fill the vacancy on the town council. State law clearly provides that the city council is responsible for filling vacancies. But the timing and method are not spelled out. This blog post provides answers to the following questions, which often arise when a vacancy occurs: 1) Must the council fill the vacancy (and if so, how long do they have to do it), or can they decide to allow the vacancy to remain until the next election? 2) Does the law require the council to use any particular process to select the person to fill the vacancy? 3) Are records relating to applicants or nominees to fill the vacancy subject to public access? 4) May the council meet in closed session to discuss candidates under consideration to fill the vacancy? 5) Must the council vote “yes” or “no” for each candidate, or can they vote from a slate of candidates? 6) If there are two votes for one candidate and two for another, can the mayor break the tie? 7) Is an appointment to fill a vacancy for the remainder of the term or only until the next election?

1) Must the council fill the vacancy (and if so, how long do they have to do it), or can they decide to allow the vacancy to remain until the next election?

G.S. 160A- 63says: “A vacancy that occurs in an elective office of a city shall be filled by appointment of the city council.” Does the “shall” in this sentence mean that they are required to fill the vacancy or does it mean that if it is to be filled, the council is the body to fill it? There appears to be no case

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interpreting this provision, so it could be read either way. I think the safest and most appropriate reading is that the council must fill the vacancy.

The statute does not set a time frame within which this must be done. In contrast, the statute directing county commissioners to fill vacancies clearly requires them to do it, and provides for the clerk of superior court to do it if the commissioners fail to within 60 days after the vacancy occurs. See, **G.S. 153A-27**. It could be argued that the difference suggests a legislative intent to allow cities an indefinite amount of time to fill the vacancy, but it's hard to square that with the statute's provision that city councils "shall" fill a vacancy. If there is no time within which the appointment must be made, in effect, they never have to make it. If the legislature intended this result, it seems that the statute would say they "may" fill the vacancy.

City council members sometimes suggest that they would prefer to leave it to the electorate to choose a new council member – essentially making a decision not to fill the vacancy before the next election. While this may reflect a genuine desire to avoid displacing the public's opportunity to choose a council member, it opens the process up to manipulation. For example, in the case of an odd-numbered board operating with one less member, a decision not to fill the vacancy increases the role of the mayor in breaking ties. To avoid this, and to provide citizens with the benefit of deliberation and action by the full complement of members called for in the charter, the vacancy should be filled as soon as reasonably possible.

What is the risk of refusing to fill the vacancy, or waiting too long to do it? Citizens may raise concerns, and ultimately, could file a lawsuit, giving a court the opportunity to determine what the "shall" in the statute means. If the court reads the statute as creating a duty to fill the vacancy, the court might order the council to carry out that duty – probably within a "reasonable" time, since no other time is specified. A court would not, however, order the council to appoint a particular person. Courts generally won't interfere with governmental discretion on things like this. See, *In Re Alamance County Court Facilities*, 329 N.C. 84, 105 (1991) ("In matters involving the exercise of discretion, mandamus will lie only to compel public officials to take action; ordinarily it will not require them to act in any particular way.") On the other hand, if a court interprets the statute to allow, but not require the council

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to fill the vacancy, or if a court finds that it is mandatory but there is no time within which it must be done (essentially reaching the same result), there would be no grounds for a court order requiring the council to act.

2) Does the law require the council to use any particular process to select the person to fill the vacancy?

No. Some city charters may have provisions dictating how vacancies are filled. Under the general law, however, there are no specific rules about who must be appointed or how they are selected. Some cities decide to appoint the next highest vote-getter in the most recent election, though, again, unless provided for in the charter, there is no legal requirement to do this. Some boards may ask for nominations and applications from the community, while others may create a nominating committee to develop names, or simply make nominations themselves.

3) Are records relating to applicants or nominees to fill the vacancy subject to public access?

Yes. Whatever method the council uses to identify candidates for appointment, the city may receive or create records of the names and qualifications of those candidates. These materials are public records, and are probably *not* protected under the personnel privacy statutes. There is a case (*Durham Herald Co. v. County of Durham*, 334 N.C. 677 (1993)) in which the court held that records of applicants for appointment as sheriff were confidential under the county personnel privacy statute. The sheriff is an elected official, like a council member. But a sheriff is more like a regular employee than is a council member. David Lawrence argues in his book on North Carolina's public records law, that certain types of council member records (such as tax records) may be protected, but that council members (and candidates for appointment to the council) are otherwise unlikely to be considered employees for personnel record privacy purposes. See, ***Public Records Law for North Carolina Local Governments***, pp.148-149. The exception in the public records law that protects individual identifying information and social security numbers (**G.S. 132-1.10**) protects some information that might be in these records, but bear in mind that home addresses and phone numbers are not covered by this exception. So the

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point here is: Make sure to include in the process (and in any application forms) fair warning about the public nature of the information provided by or about applicants, and avoid asking for private, personal information from applicants that the council doesn't really need.

4) May the council meet in closed session to discuss candidates under consideration to fill the vacancy?

No. As noted earlier, it isn't really accurate to characterize these applicants as potential employees.

More directly, the open meetings law specifically says, "A public body may not consider the qualifications, competence, performance, character, fitness, appointment, or removal of a member of the public body or another public body and may not consider or fill a vacancy among its own membership except in an open meeting." **G.S. 143-318.11(a)(6)**.

5) Must the council vote "yes" or "no" for each candidate, or can they vote from a slate of candidates?

Again, the statutes don't say anything about this, but there does not appear to be any bar to voting from a ballot containing multiple names, and appointing the person who receives the most votes. Indeed, there are some distinct advantages to the "ballot" approach, which are described in Fleming Bell's publication, ***Suggested Rules of Procedure for a City Council***. Anyone considering how to approach voting on appointments would be well-served by reviewing his discussion of the alternatives (see, Rule 31 Appointments, pp.37-39). If the ballot approach is not used, then the votes are by individual motion with members voting "yes" or "no" for each nominee. This approach can be difficult to manage if there are multiple nominees.

6) If there are two votes for one candidate and two for another, can the mayor break the tie?

No, unless a provision in the city's charter specifically allows it. Under **G.S. 160A-69**, the mayor votes "only when there are equal numbers of votes in the affirmative and in the negative." If the city's mayor has the right to vote on all matters, the issue does not arise and the mayor is free to vote for his or her preferred candidate. If the mayor is "non-voting" and can't break the tie, the members will have to continue to vote until one person gets a majority. Of course, if the voting is by motion on each nominee rather than by ballot, the votes would be "yes" or "no" and the mayor would have authority to break a tie.

7) Is an appointment to fill a vacancy for the remainder of the term or only until the next election?

This is one of the few things about appointments to fill vacancies that the statute actually addresses. The basic requirement is that the person appointed serves until the next election, even if the original term would extend beyond the next election. The person appointed may run for the seat and be reelected, but otherwise, the appointment will end when someone else is elected to that seat. The one exception to this rule provides that if the vacancy actually occurs within 90 days of the next election, the person appointed will serve for the entire remaining term, even if it extends beyond the next

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election. I've always found the wording of this statute to be a bit confusing, but I believe the intent is to limit the term of a person appointed to fill a vacancy and to let the electorate choose a new person at the next election, except in cases where the vacancy occurs too soon before the election to allow time for the actual conduct of the election.

For more on the process for filling vacancies, see: **[How to Fill a Vacancy on an Elected Board.](#)**

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