

Fwd: Re: Filling Vacancies on Elected Boards

From: **breenalitzenberger@townoforiental.com**

Monday, Aug 25 at 5:57 PM

To: **Allison DeWeese** | allison@towndock.net

Lawyer email 2 of 2

From: **Scott Davis** | scott.davis@dhwlegal.com To: "**sallybelangia@townoforiental.com**"

Wednesday, Aug 20 at 9:06 AM

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Cc: Diane Miller <Manager@TownOfOriental.com>

Mayor and Board of Commissioners -

Commissioner Crossover asked a question yesterday that is worth sharing with the group as it may have crossed your minds as well.

1. When and how should the Board facilitate a discussion of the procedure to fill the vacancy?

There are 2 obvious answers: (1) At the regular meeting in September; or (2) At a special meeting prior to the September meeting.

Presently there is no adopted rule or procedure as to how the fill a vacancy as Rule 38 in Trey Allen's book wasn't clarified as to which procedure would be used, nor is there any direction as to how to break a tie. Under the nomination method, the Mayor does not vote, even to break a tie. So as I mentioned yesterday, in addition to adopting the procedure to fill a vacancy, the Board needs to adopt a procedure to resolve a tie if the Board prefers the nomination method. Unfortunately, the state statute does not provide any direction, although I'm working on that in upcoming legislative sessions. (You may have seen in the press that New Bern has had a board vacancy for over a year as the vote has always tied and there is no procedure to break the tie, and the Board cannot agree on a procedure to break the tie. Regrettably, there is no caselaw as to what remedies the public has to require a governing board to fill a vacancy. At some point, there will be litigation to

resolve the question absent a legislative solution, and I'd prefer that none of our local government clients be involved in that litigation!)

As long as the Board adopts a procedure to resolve a tie, I don't see any practical difference with adopting a new Rule of Procedure (which would be Rule 38) to fill vacancies at a properly called special meeting, or doing it at the September regular meeting. I would strongly caution against adopting a new Rule of Procedure at a special meeting if it doesn't provide for a solution to break ties. If the Board prefers the motion and vote method, the Mayor can break a tie. If the Board prefers the nomination method, then in the event of a tie after a few rounds of nominations, the procedure would need to offer a solution to break a tie such as reverting to the motion and vote method.

Note that if the Rules of Procedure are amended to add a Rule 38 to make appointments and fill vacancies, the amendment per the Rules requires a majority of the council members voting in favor, excluding vacancies and the Mayor. So if addressed prior to September, the Rules may be amended with 3 members voting in favor. After September, it will still require 3 votes (a majority), but from only 4 council members. So if there is a deadlock on filling the vacancy in September, I would expect there to be a deadlock on amending the Rules of Procedure as well. In such a case, the vacancy does not get filled.

2. Also note that I don't find it legally unreasonable to leave the seat vacant until the election. It may be that landing on a procedure to fill the upcoming vacancy is a heavier lift than the Board can pull off within a matter of a few weeks. As a practical matter, IF the Board can fill the vacancy, the newly appointed member could theoretically be sworn in at the September meeting (although that could be a bit awkward in that all candidates would be present, with one emerging successful to be sworn in and the others left potentially disappointed). So it may be wise to fill the vacancy at the end of the September meeting with the expectation that the new member would be sworn in at the October meeting, and then only participate in the October and November meetings. (I don't think it makes any sense for multiple candidates to be expected to study the September agenda and be prepared to vote on all issues in the event they are seated and sworn in at the September meeting). The point being that there would be an election within 64 days of the vacancy, so if there isn't a smooth path to filling the vacancy, the voters will do it within a reasonable time of the vacancy. As a matter of efficiency, and in the spirit of transparency, if the

Board is inclined to leave the seat vacant for 2 months, then the Board could approve a motion to that effect at a properly called special meeting, or at the regular meeting in September.

Feel free to reach out to me individually with any questions, and please refrain from replying to the group so that we avoid deliberating any public business. If another good question is raised like the one above, I'll share and respond to the entire group.

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From: **Scott Davis** | scott.davis@dhwlegal.com

Tuesday, Aug 19 at 3:20 PM

Afternoon folks -

I've had a number of questions regarding the process to fill the

vacancy on the Board of Commissioners that will be created on September 1, 2025. In the spirit of efficiency, I thought I'd include everyone on one thread so that everyone is hearing the same thing.

From:

1. G.S. 160A-63 makes it clear that the governing board fills the

vacancy. There is no other option (such as a referendum).

From:

2. The appointed person serves the remainder of the unexpired term.

(Meaning the appointment will not override the results of the upcoming election).

From:

3. There are 2 general methods to make the appointment. The “purple

book” indicates a preference for the “nomination method” over the “motion and vote method.” (More about the “purple book” at the end).

From:

4. For what little it’s worth, I also recommend the nomination

method when there is more than one likely candidate, although my reasoning differs from Trey Allen’s (author of the purple book). In some communities, finding a replacement public official can be very difficult. Convincing just one person to fill a vacancy can be a challenge. In those situations, the “motion and vote method” is perfectly reasonable as it’s clear to everyone that there is no alternative. However, many times there is more than one interested candidate to fill the vacancy, and there may also be “rumblings” that there are even more who are willing to serve. This is where my methodology reasoning differs from Trey’s. Trey points out that the motion and vote method may put an elected official in an uncomfortable position of voting “against” a candidate, rather than voting “for” their preferred candidate. First, I don’t find that distinction terribly persuasive in that voting “for” one’s preferred candidate is the same as voting “against” the other nominees. What I find more persuasive is that when there are multiple candidates, the nomination method ensures that all Board members are made fully aware of all of the possible candidates. A voting official isn’t left wondering who else might be interested? Should they withhold their support for the first motion to make their own motion? If they make their own motion and it fails, would they then have voted for the first person, etc. All of that confusion is resolved with the nomination method. (It could also be resolved with a robust discussion before the motion and vote method). However, in jurisdictions where the Mayor ONLY votes to break a tie, the nomination method can result in a stalemate since there is technically not a “vote” in the affirmative or negative with the nomination method. So the Mayor can’t vote to break the tie since there wasn’t a vote, just the verbalization of support for a specific candidate. If there is a downside to the nomination method, it’s in jurisdictions where the Mayor only votes to break a tie which creates the possibility of a stalemate (as is the case in Oriental).

From:

5. Next steps? There is nothing to do at the moment, or that can or

should be done until there is a vacancy. The public officials constituting the governing body at the time of a vacancy determine how to move forward. “Out-going” public officials have no say in determining their replacement as there is no vacancy until the “out-going” member is actually gone. Likewise, until there is a vacancy, the governing body need not take up the issue. Again, the out-going member has nothing to do with the process as there is no process to determine until there is a vacancy.

From:

6. How long does the Board have to fill a vacancy? The statute

doesn't specify. However, the comparable County statute requires the vacancy to be filled within 60 days, so I use that as a benchmark. Not the law, just a period that seems “reasonable” since it tracks the County statute. (And that time may be extended if the meeting schedule falls such that it cannot reasonably be met).

From:

7. Final step. The Board of Commissioners will take up the issue at

its September meeting. I'd recommend first having a discussion to confirm the Board's procedure. If the Board prefers the nomination method, the remaining details to clarify would be that each member, excluding the Mayor, gets 1 nomination, and that each member has 1 vote for the entire field of nominees. A candidate must receive a majority of votes to be appointed, rather than the highest number. So if there are 4 remaining Commissioners, it will take 3 votes to be appointed. The Board will also need to address what happens in the event of a tie? Shall there be another nomination and vote round so that other candidates may be added? Or require one more round to allow a Commissioner to change their vote? And if there is a continued stalemate, should it go to a motion and vote method so the Mayor can break a tie? Or should the Board just sit tight until the election and let the voters decide? Once those procedures are understood, I'd recommend a motion and adoption of those procedures so that it's clear what the rules will be. Once the rules are in place, carry out the process. Written ballots may be used, but if used, the clerk will collect the ballots and record each public official's vote. The ballot isn't to make the voting secret (it cannot be), but to simply have the nominations on a piece of paper so

that it's easy to see the options. If there is no written ballot, then each Member will cast a vote for their preference by naming their preference. The Board may also decide to use the motion and vote method at the outset in lieu of the nomination method. The shortcomings of the motion and vote method I addressed above can be addressed by the Board having a discussion of all of the nominees from each Commissioner so the playing field could be set, then simply vote by majority vote with the Mayor breaking any tie.

From:

8. The "purple book." I understand that the Board "adopted"

the purple book as its Rules of Procedure. If that's the case, I'd strongly recommend that the Rules of Procedure be documented separately and adopted by the Board. The purple book is a manual of how to craft rules of procedure. Many of the rules are straight from the statutes. Some of the rules in the book contain blank spaces so that boards can customize them. And some of the rules have alternates. So adopting the book may resolve the rules that are required by statute (which are the rules by default as the law is always the law), but if there are blanks, and alternative options that the Board hasn't addressed, then there is no rule in place as the Board hasn't specified its preference. Note that the most recent version of the book contains a link to digitally download the rules so that they can be customized and adopted. I'd do that in the coming months. It's not that heavy a lift, and it would be nice to have the Rules in one document that's easy to follow.

From:

Any questions, please feel free to reach out.

Links:

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