

# MEMORANDUM

FROM: BOROUGH ATTORNEY GREGORY J. CANNON  
TO: BOROUGH OF BRADLEY BEACH MAYOR & COUNCIL  
CC: BOROUGH CLERK ERICA KOSTYZ  
DATE: OCTOBER 6, 2023  
RE: PROCEDURE FOR FILLING BOROUGH COUNCIL VACANCY

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## RELEVANT BACKGROUND

On September 30, 2023, Councilwoman Meredith DeMarco resigned from her position as Councilwoman of the Borough of Bradley Beach (the “Borough”).

Ms. DeMarco was elected to said office in November 2022 for a three-year term, and she was not elected as the nominee of any political party.

## PROCEDURE TO FILL VACANCY

The New Jersey Municipal Vacancy Law, N.J.S.A. 40A:16-1, *et seq.*, is the authoritative and applicable law that governs the filling of the vacancy resulting from Ms. DeMarco’s resignation from the Borough Council.

According to its charter, the Borough conducts its local elections at the same time as the General Election in November.

Therefore, N.J.S.A. 40A:16-5 is applicable here, as follows:

*Whenever a vacancy occurs as provided in N.J.S. 40A:16-3 in the office of a mayor or in the membership of the governing body of a municipality holding general elections, the vacancy shall be filled in the following manner:*

- a. If the vacancy occurs any time subsequent to September 1 of the next-to-the last year and up to the expiration of the term of the officer whose office has become vacant, the office may be filled for its unexpired term by appointment by the governing body as hereinafter provided;*
- b. If the vacancy occurs at any other time, the vacancy shall be filled for its unexpired term at the next general election to be held not less than 60 days after the occurrence of the vacancy. The governing body may fill the vacancy temporarily by appointment as hereinafter provided.*

Because Ms. DeMarco's resignation occurred prior to September 1<sup>st</sup> of the next-to-last-year of the affected term of office (term expires December 31, 2025, thus, September 1, 2024), the remaining members of the Borough Council have the power to fill the vacancy only temporarily until the next General Election in which the Borough conducts a municipal election.

The next municipal election within the Borough will be conducted at the General Election in November 2024.

Accordingly, the Municipal Vacancy Law provides that the remaining members of the Borough Council may temporarily appoint a qualified citizen to the vacant seat until the results of the November 2024 General Election are certified by the Monmouth County Clerk.

The remaining portion of the unexpired term, from the certification of the November 2024 General Election through December 31, 2025, will be filled by the voters during the November 2024 General Election from amongst any candidates that file petitions to run for the available unexpired term.

Upon election of a candidate to the unexpired term in November 2024, the person temporarily appointed under N.J.S.A. 40A:16-5 shall relinquish said seat.

With respect to the procedure for making the temporary appointment to the vacant seat, N.J.S.A. 40A:16-7 provides the appropriate procedure as follows:

*An appointment to fill a vacancy in the membership of a governing body shall be by a majority vote of the remaining members of the governing body.*

Further guidance is provided by N.J.S.A. 40A:16-12, as follows:

*If the incumbent whose office has become vacant was not elected to office as the nominee of a political party, the governing body may, within 30 days of the occurrence of the vacancy, appoint a successor to fill the vacancy without regard to party.*

Given the foregoing, the remaining members of the Borough Council may appoint any resident of the Borough over the age of eighteen to fill the vacancy, without regard to political affiliation. Failing to appoint a person to fill the vacancy within thirty days shall render the seat vacant until the next municipal election in November 2024.

The parliamentary procedure to temporarily appoint a person to the vacant seat is not specified by the Municipal Vacancy Law.

Further, Robert's Rules of Order provide two possible methodologies by which the remaining members of the Borough Council may make the appointment.

In either event, any remaining councilmember may place into nomination the name of any person qualified to fill the vacant seat. Then another councilmember must second said nomination for that nominee to be eligible for voting by the remaining councilmembers.

The two methods presented by Robert's Rules of Order then diverge into two options:

- (1) The names of all potential candidates for the vacant seat can be placed in nomination and seconded, and then the Borough Council can be roll-called to vote for one of the candidates by name. Voting continues until a candidate receives three votes; or
- (2) The name of a potential candidate for the vacant seat can be placed in nomination and seconded, and then the Borough Council can be roll-called as to an affirmative or negative vote on said candidate. The first candidate to receive three affirmative votes is appointed to the vacant seat.

I would note that the second option is most commonly used in New Jersey municipalities insofar as it allows the governing body to coordinate in such a way that none of their citizens (who have presumably volunteered for an already thankless job) receive a negative vote or "lose" during the rounds of voting.

That being said, which methodology is utilized under Robert's Rules of Order is left to the sound discretion of the legislative body itself – that is, the Borough Council can decide how the selection process takes place in their sole discretion.