

MEMORANDUM

TO: Town of New Castle
FROM: David McConaughy, Town Attorney
RE: Council/Mayor Vacancies
DATE: April 19, 2016

Mayor Bob Gordon has recently announced that he will be moving out of Town, which will disqualify him from continuing to serve as Mayor. We understand that Mayor Gordon intends to announce his resignation effective at tonight's Town Council meeting.

Section 3.6 of the Town Charter addresses vacancies. Different rules apply depending on whether there will already be an election within 90 days. The next general election is on November 8, 2016, which is of course more than 90 days from tonight. Therefore, the Council has the following duties and options:

The Council has 60 days to appoint a replacement to fill the vacancy, or until **June 18, 2016**. Therefore, the last regular meeting to take action would be **June 7, 2016**.

The Council can appoint a citizen at large meeting the 1-year residency requirement, or it could appoint one of its own members as Mayor.

An appointed Mayor serves only until the next general election (November 8, 2016). Therefore, any newly-elected Councilor filling this seat would effectively give up most of his or her remaining term of office unless re-elected.

If a current Councilor is appointed Mayor, that Councilor's seat becomes vacant on the effective date of the appointment. Assuming this happens on or before June 7, this would still be more than 90 days to the general election, so Council would then need to appoint a replacement to fill the Councilor's seat, who would serve the remaining term of the vacated seat (ie, 2 or 4 years depending on when the appointed Councilor was elected).

If Council fails to appoint a replacement to either seat within 60 days after the vacancy, then Council must set a special election within 90 days after such failure, unless a general election is already scheduled within that time period. Therefore, hypothetically, if a Councilor is appointed as Mayor on the June 7 regular meeting date, the deadline for appointment would be August 6, which would be just a few days shy of 90 days prior to the November 8 general election. If Council instead held a special meeting to appoint the Mayor on June 14, then it could leave the vacated Council seat vacant, and both the Mayor and a replacement Councilor could be elected on November 8. Otherwise, Council could appoint both replacements and have only the Mayor's seat be addressed in the November election.

When vacancies have occurred in the past, New Castle has generally issued a press release and other public information to solicit applications before making any decision.

April 28, 2016

MEMORANDUM

TO: New Castle Town Council

FROM: Town Attorney

RE: Mayoral Appointment Procedures

INTRODUCTION

At the April 19, 2016, New Castle Town Council meeting, former mayor Bob Gordon announced his resignation effective immediately in light of his moving out of the Town of New Castle. As explained more fully in the memorandum this office provided regarding filing the mayoral vacancy, the Town Council must fill the vacancy by (a) appointing someone within 60 days of April 19, 2016, to be mayor or (b) holding a special election to elect the new mayor. If Council chooses to appoint a current councilmember to the mayor position, Council will also need to appoint someone to fill the newly vacant Council seat. The purpose of this memorandum is to address the procedural issues that may arise if Council decides to appoint the new mayor as provided in the New Castle charter.

ANALYSIS

1. **Appointment Procedure.** As a general matter, appointments must comply with all applicable laws. In the absence of any specific law on the subject, a governing body can adopt any appointment method “which is appropriate to obtain fairly the will of the [Council], in accordance with parliamentary practice. 3 MCQUILLIN MUN. CORP. § 12:138 (3d ed.). While the Charter states that a mayoral or councilmember vacancy shall be filled by appointment or special election, the Town Charter does not explain the procedures that must be followed to effectuate a valid appointment. It does provide that “all actions of the Council shall be by ordinance, resolution, or motion,” and requires a roll-call vote when adopting an ordinance. Aside from those provisions, the Charter is silent as to whether the appointment must be done by roll call vote, ballot, or otherwise.

Additionally, there is little guidance from state statutes or case law specifically regarding appointment procedures or voting methods. However, the Colorado Open

Meetings Law, C.R.S. §§ 24-6-401, *et seq.* (“COML”), prohibits a local public body from taking “formal action” by secret ballot, i.e. a vote cast in such a way that the identity of the person voting or the position taken in such vote is withheld from the public. C.R.S. § 34-6-401(2)(d)(IV). Notwithstanding that subsection’s exempting a vote to elect leadership of a local public body by that same public body from the secret-ballot prohibition, at least one court has suggested that filling a vacant council seat using secret ballots may be a violation of the COML. *See Weisfield v. City of Arvada*, 361 P.3d 1069 (Colo. App. 2015).

2. **Tie-Break Procedure.** Similarly, the Charter does not establish a tie-break provision in the event of a tie-vote for the appointee candidates. Under the Municipal Election Code, C.R.S. §§ 31-10-101, *et seq.*, in the event of a tie among candidates after an election, the clerk “shall determine by lot the person who shall be elected.” C.R.S. § 31-10-1204. There is no state law regarding appointments specifically, and it is not clear that the MEC would apply because this is not technically an election.

3. **Recusal.** Whether a sitting councilmember must reuse himself or herself from voting on the appointment in the event said councilmember is a candidate implicates certain ethical considerations. Unlike in a general or special election, a councilmember’s appointment vote constitutes an action taken in his or her official capacity, not as an individual. While neither the charter nor state statute expressly bar an appointee candidate from voting, councilmembers should consider the ethical implications of doing so. For example, under state statute, “any member of the governing body of any city or town who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body, shall not vote thereon, and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.” C.R.S. § 31-4-404(2). Additionally, the Town mayor’s compensation is greater than that of the other council members, which arguably gives the councilmember-appointee candidate a financial interest in the outcome of the vote. Finally, voting for oneself for the position of mayor may also raise the appearance of impropriety, which councilmembers are generally advised to avoid.

PROPOSED PROCEDURE

Considering the foregoing legal authority, this office proposes that the Council follow the procedures outlined below if it chooses to appoint a new mayor and, if necessary, a new councilmember:

1. Properly notice the appointment.
2. Use either a roll-call vote or ballot when voting on the appointment.
 - a. If a ballot is used, the ballot should include the councilmember’s name to comply with the COML; and
 - b. All ballots should be retained pursuant to CORA; and
 - c. The Town Clerk should announce the results

3. If a councilmember is among the candidates for the mayor position, that councilmember should abstain from voting in light of the ethical concerns explained above. If two councilors are seeking appointment, they should both recuse themselves, which means the other four would vote.

4. To be appointed, the candidate must receive a majority of the non-conflicted votes. In other words, if two councilors are seeking appointment, three votes would be necessary by ballot or motion. If neither candidate receives a majority, then the Council should seek other candidates unless someone drops out of consideration or a councilor changes his or her vote. The Council can vote as many times as necessary on the same evening if there is a tie on the first round.