

## MEMORANDUM

**TO: Supervisor Ivy A. Pool and Members of the  
Town of New Castle Town Board**

**FROM: Keane & Beane, P.C.**

**RE: Filling of Vacant Town Supervisor Position**

**DATE: May 14, 2021**

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This Memorandum outlines the options available to the Town Board and the applicable procedures for addressing the vacancy in the office of the Town Supervisor that will occur upon the resignation of Supervisor Pool.

### Options

The Town of New Castle has not adopted any local laws with respect to filling vacancies in public offices. Accordingly, the controlling statutes are the New York Town Law and New York Public Officers Law.

Under Town Law § 64(5), there are essentially two options available to the Town Board with respect to addressing a vacancy in the Office of Town Supervisor.

First, the Town Board can decide to take no action and leave the position vacant. In that case, pursuant to Town Law § 42, Deputy Supervisor Saland would perform the duties of the Town Supervisor. Town Law § 42 states in relevant part:

During the absence or inability to act of the supervisor, or while the office of supervisor is vacant, the deputy supervisor shall preside, when present, at the meetings of the town board and shall be vested with all of the powers and may perform all of the duties of the supervisor under this chapter or any other law...

Although Deputy Supervisor Saland would “perform all of the duties of the supervisor” during the vacancy, he would not formally serve in the office of Town Supervisor. Instead, the Deputy Supervisor would retain his position as Council Member. The vacancy in the Office of Supervisor would be filled at the upcoming general election on November 2, 2021. Upon taking the oath of office, the Supervisor-

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elect would begin serving in the Office of Town Supervisor. *See* Public Officers Law § 10. Deputy Supervisor Saland would complete his term as Council Member.

Because the Supervisor-elect would be filling an existing vacancy, she would enter office upon receiving her certificate of election and taking the oath of office pursuant to Public Officers Law § 4. That statute, which deals with the commencement of the term of office for elective officers, provides as follows:

The term of office of an elective officer, unless elected to fill a vacancy then existing, shall commence on the first day of January next after his election, if the commencement thereof be not otherwise fixed by law.

(emphasis added). This provision has been interpreted to mean that if there is a vacancy existing in an office, the person elected to that office commences her term immediately upon her election and qualification. *See* 1956 N.Y. Op. Att’y Gen. No. 89 (Nov. 15, 1956).

Second, the Town Board can appoint either a qualified resident or a member of the Town Board to serve as Town Supervisor through December 31, 2021. Upon taking the oath of office, the Supervisor-elect would begin serving in the Office of Town Supervisor.

Under this option, the appointee serves through December 31, 2021 pursuant to Town Law § 64(5). That provision states that the appointee to an elective office serves “until the commencement of the calendar year next succeeding the first annual election at which the vacancy may be filled.” Town Law § 64(5).

If the Town Board appointed a current Council Member to the position of Town Supervisor, their seat as Council Member would become vacant. Once again, the Town Board would have the options of either appointing an individual to fill that vacancy or allowing the seat to remain vacant. An individual appointed to fill the vacancy would serve until December 31, 2021. *See* Town Law § 64(5). The vacancy would be filled at the upcoming general election on November 2, 2021, provided that the vacancy occurred before August 2, 2021. Vacancies in elective town offices occurring within three (3) months of a general election cannot be placed on that ballot. *See* Public Officers Law § 42.

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### Procedural Rules

Any appointment to the office of Town Supervisor must be carried by an affirmative vote of at least three (3) Council Members. *See* Town Law § 63 (“Every act, motion or resolution shall require for its adoption the affirmative vote of a majority of all the members of the town board”); General Construction Law § 41 (defining majority in relation to total number of a fully constituted board, without vacancies).

If a current Council Member seeks appointment to the vacant office of Town Supervisor, Town Law § 64(5) further requires that said member resign “prior to such appointment.” Specifically, Town Law § 64(5) states in relevant part:

5. Vacancies. Whenever a vacancy shall occur or exist in any town office, the town board or a majority of the members thereof, may appoint a qualified person to fill the vacancy . . . A person, otherwise qualified, who is a member of the town board at the time the vacancy occurs may be appointed to fill the vacancy provided that he shall have resigned prior to such appointment.

(emphasis added).

The language of Town Law § 64(5) is not clear with respect to whether the current Council Member must resign their position prior to a vote on their appointment to a vacant office, or prior to their appointment becoming effective, *i.e.*, prior to taking the oath of office. However, the weight of authority rests with the former interpretation.

We begin this analysis with the general rule that “[i]t is contrary to public policy for an appointing board to appoint one of its members to a position.” 1987 N.Y. Op. Att’y Gen. (Inf.) 162 (1987). This policy has been explained as follows:

When public officers, such as the members of a town board, are vested by the Legislature with power of appointment to office, a genuine responsibility is imposed. It must be exercised impartially, with freedom from a suspicion of taint or bias which may be against the public interest. An appointing board cannot absolve itself from the charge of ulterior motives when it appoints one of its own members to an office. It cannot make any difference whether or not his own vote was necessary to

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the appointment. The opportunity improperly to influence the other members of the board is there. No one can say in a given case that the opportunity is or is not exercised .... This is the possibility, which the law should remove by determining such appointments to be illegal.

*Wood v. Town of Whitehall*, 120 Misc. 124, 125, 197 N.Y.S. 789, 790 (Sup. Ct. Wash Co.), *aff'd*, 206 A.D. 786, 201 N.Y.S. 959 (3d Dep't 1923). *See also People ex rel. Shirey v Pearson*, 121 Misc. 26 (Sup Ct. Cayuga Co. 1923) (invalidating appointment by a Town Board of a former member thereof where it appeared that the appointee had previously resigned from the Board in order to qualify for the appointment and his successor had been appointed to the Board with the understanding that the latter would vote for his appointment to the new office), *aff'd*, 207 A.D. 888 (4<sup>th</sup> Dep't 1923).

Additional authority may be gleaned from the Attorney General's opinion that a current council member may not tender his resignation, effective at some future date, and then vote on the appointment of his replacement to the town board. *See* 1989 N.Y. Op. Att'y Gen. (Inf.) 92 (1989). Likewise, in the context of village offices, the Attorney General has opined that a village trustee should recuse himself from participating in any deliberations of the village board on his potential appointment to fill a vacancy in the office of mayor. *See* 1988 N.Y. Op. Att'y Gen. (Inf.) 150 (1988); *see also* 1985 N.Y. Op. Att'y Gen. (Inf.) 82 (1985) (village mayor may not fill a vacancy in the position of village justice by appointing himself to the position, even if he resigns his position as mayor prior to taking the oath of office as village justice).

We also note that the Association of Towns has advised that under Town Law § 64(5), a council member must have resigned before they may be considered for appointment to fill a vacant town office.

However, the question is not free from doubt. When the Legislature amended Town Law § 64(5) in 1952 to allow the appointment of town board members to other public offices, it abrogated, at least in part, the common law principles set forth in *Wood*. *See Valentin v. Simon*, 98 Misc.2d 5, 14-15, 413 N.Y.S.2d 266, 273 (Sup. Ct. N.Y. Co. 1979) ("To the extent that *Wood* enunciated correct common law, those principles have been codified and where different from applicable statutory law, the common law principles stated in *Wood* have been specifically abrogated by legislative enactment"); *Gigliotti v. Berg*, 40 A.D.2d 182, 183, 338 N.Y.S.2d 706 (4<sup>th</sup> Dep't 1972) (observed that "the authority of the *Wood* case has been limited" by the amendment of Town Law § 64(5)).

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There is plainly tension between the common law principles articulated in *Wood* and the legislative exception created by Town Law § 64(5). As a practical matter, we believe that the interests of transparency and good governance could be served by eliminating the uncertainties and challenges associated with forcing a prospective appointee to resign from office in order to make themselves eligible for an appointment they hope to receive, and allowing a vote upon the appointment to occur prior to the resignation. The prospective appointee could abstain from voting on his/her appointment.

Nevertheless, we appreciate that the appearance of a sitting board member potentially voting in favor of his/her own appointment to another public office could raise legitimate questions about the propriety of doing so. Numerous opinions issued by the Attorney General's Office and State Comptroller after Town Law § 64(5) was amended in 1952 continue to cite and rely upon the public policy considerations articulated in *Wood*. See, e.g., 1996 N.Y. Op. Att'y Gen. (Inf.) 1009 (1996). This weight of authority leads us to conclude that under Town Law § 64(5), a current council member should resign from their office and submit themselves to a vote on their appointment by the remaining board members.

\* Note: Keane & Beane, P.C. is counsel to the Town of New Castle. This Memorandum may not be relied upon by any other party as legal advice.