

Subject: 2020 Council Vacancy – Ward One**Recommendation:**

BE IT RESOLVED THAT Council receive Report #2020-0060-Clerks;

AND THAT Council of the Town of Pelham, in accordance with section 262 of the *Municipal Act, 2001*, S.O. 2001, c. 25, hereby declares one Ward One Councillor seat for the Town of Pelham to be vacant, effective immediately;

AND THAT such vacancy be filled through Option # _____ as detailed herein.

Background:

Section 259(1) of *The Municipal Act, 2001*, S.O. 2001, c.25 (The Act) addresses the issue of Vacant Seats. The section specifically states that the office of a member of council of a municipality becomes vacant if the member:

(a) becomes disqualified from holding the office of a member of council under section 256, 257 or 258;

(b) fails to make the declaration of office before the deadline in section 232;

(c) is absent from the meetings of council for three successive months without being authorized to do so by a resolution of council;

(d) resigns from his or her office and the resignation is effective under section 260;

(e) is appointed or elected to fill any vacancy in any other office on the same council;

(f) has his or her office declared vacant in any judicial proceeding;

(g) forfeits his or her office under this or any other Act; or

(h) dies, whether before or after accepting office and making the prescribed declarations. 2001, c. 25, s. 259 (1).

The Act requires that if the office of a member of council becomes vacant under section 259, the council shall at its next meeting declare the office to be vacant, except if a vacancy occurs as a result of the death of a member, the declaration may be made at either of its next two meetings. 2001, c. 25, s. 262(1).

On Monday, April 13, 2020 the Town of Pelham was advised of the sudden and unfortunate passing of Mike Ciolfi, Councillor, Ward One. The seat will be declared vacant through the recommendation as contained in this report, the second meeting.

When a vacancy on Council does occur, Council is faced with the decision on how to fill the vacant seat for the remainder of the term. The Act provides the following two options:

263(1) Filling Vacancies – *If a vacancy occurs in the office of a member of council, the municipality shall, subject to this section,*

(a) fill the vacancy by appointing a person who has consented to accept the office if appointed; or

(b) require a by-election to be held to fill the vacancy in accordance with the Municipal Elections Act, 1996. 2001, c. 25, s. 263 (1).

263(5) Rules applying to filling vacancies – *the following rules apply to filling vacancies:*

1. Within 60 days after the day a declaration of vacancy is made with respect to the vacancy under section 262, the municipality shall,

i. appoint a person to fill the vacancy under subsection (1) or (4), or

ii. pass a by-law requiring a by-election be held to fill the vacancy under subsection (1).

Historical Experience in Pelham: The Town of Pelham has experienced council vacancies previously.

- 1972 due to the death of an Alderman (now known as Councillor);
- 2008 Ward One Councillor, Malcolm Allen, elected to House of Commons;
- 2011 Ward One Councillor, Debbie Urbanowicz resigned seat;
- 2013 Ward One Councillor, W. Larry Clark resigned seat; and
- 2017 Ward One Councillor, Marvin Junkin resigned seat.

The 1972 vacancy was not filled as the regular municipal election occurred within 90 days and as such, the municipality was not required to fill the vacancy as provided in The Act.

In 2008, approximately one half of the term had lapsed and the sitting Council opted to appoint the candidate who placed third in the 2006 Municipal Election for Ward One, James Lane. Mr. Lane consented to accept that appointment and served out the remainder of the 2006-2010 term.

Subsequent to that appointment, Mr. Lane vied for a Ward One seat in both the 2010 and 2014 Municipal Elections. Following the resignation of Ms. Urbanowicz in 2011, Council directed that a by-election be conducted, at which time Richard Rybiak was elected to fulfill the remainder of the 2010-2014 term.

Mr. Lane was also a candidate in this by-election, placing second of the five candidates. When Mr. Clark resigned later during the 2010-2014 term, Mr. Lane was appointed to fill that vacancy.

Following the 2017 resignation of Mr. Junkin, Mr. Lane, who placed third in the 2014 Ward One election, was again appointed and served out the remainder of the 2014-2018 Term.

A copy of the full 2018 Election Results is appended to this report, for Council reference. Following is a summary of the 2018 election results pertaining specifically to the Ward One election:

Finish	Candidate	Total Votes
3	BAY, Mark	656
4	BEAMER, Sidney	487
1	CIOLFI, Mike	1,012
6	LANE, James	168
5	RYBIAK, Richard	331
2	STEWART, Marianne	946

Options Available to Fill the Vacancy:

As noted above, Council has two options available under The Act to fill the vacancy, with varying alternatives for appointment options. Each option is analyzed for council consideration. A third option is also included for consideration.

- Option 1: Appointment (three appointment alternatives are outlined)
- Option 2: By-Election

Option 3: Postpone Under Ontario Regulation 50/20

Under normal circumstances, rules applying to filling vacancies require that appointments to fill the vacancy occur within 60 days of the declaration, meaning Council must appoint by July 3, 2020. Please refer to discussion pertaining to the Provincial Order in Council 518/2020 (O.Reg. 50/20) regarding this deadline.

Analysis:

Appointment Process – Discussion of Options

The Act does not set out any specific requirements relating to the appointment of an individual to fill a council vacancy, other than those relating to qualifications. In order to be considered for appointment, individuals must meet the following qualifications, as outlined in the MEA:

- Reside in or be owner/tenant of land in the municipality, or spouse
- Canadian Citizen
- At Least 18 years of age
- Not be prohibited from voting under section 17(3) of MEA or otherwise by law

Council is advised that an appointee cannot be one who is disqualified from holding office by this or any other Act. The Clerk is aware of two individuals who would not be qualified for appointment or to be a candidate in a by-election due to failure to file required documents, i.e. financial statements, resulting in a default with the penalty of ineligibility for election or appointment to any office to which the MEA applies until after the next regular municipal election. These two individuals, therefore, would not be eligible for appointment or as a candidate until the 2022 municipal election. In the event Council opts for a by-election or appointment by application, the Clerk will monitor candidates/applicants in this regard.

A further qualification applies to a by-election, under section 65(4)(2.1), wherein a candidate must have been qualified for nomination for the regular election and on the day of nomination for the by-election.

The most cost efficient and timely mechanism to fill this vacancy would be to appoint from the 2018 municipal election candidates with the next candidate being Mark Bay. Roughly as inexpensive, although somewhat longer is the option of Council interviewing potential candidates and appointing the successful applicant. Conducting a public presentation as part of that process at a Council meeting would demonstrate aptitude for public speaking and political acuity.

Option #1(a) – Appointment From Municipal Election Candidates:

As outlined above, previous Pelham Councils have opted to appoint the next-place finisher in the most recent municipal election, although this process has not been exclusive given the by-election conducted in 2011. Much of the decision rationale related to the length of term remaining.

According to the certified 2018 Ward One results, the third place candidate is Mark Bay. Should Council opt to consider appointment of the third place candidate from this most recent election, the Clerk would seek written confirmation of qualification and determine if Mr. Bay has an interest in accepting the appointment. This process could result in an Oath of Office being administered as soon as May 19th, or June 1st if the appointment by-law is enacted at a separate, preceding meeting.

Option #1(a) Timeline – Appointment of Next Candidate :		
May 4, 2020	Regular Council	Declare Ward One Seat Vacant Recommend to Fill Vacancy with Option 1(a), Appointment of third Place Candidate
May 5, 2020	Clerk	Contact Mark Bay, Third Place Candidate; Confirm Eligibility; Complete Necessary Paperwork
May 19, 2020	Regular Council	Presentation of By-law to Appoint New Councillor
May 20, 2020	CAO/Clerk/Mayor	Orientation
June 1, 2020	Regular Council	New Councillor Takes Oath of Office
Note: Council could opt to pass appointment by-law, immediately followed by Oath of Office on May 19, 2020.		

Option #1(b) – Appointment by Call for Applications:

Because The Act does not prescribe an appointment process to fill a council vacancy, Council may approve an appointment process which would permit interested, eligible persons to submit an application for appointment to Council. This open call for applications would be placed through a newspaper advertisement, augmented by publication on the Town's municipal website. The process would include an application, declaration of qualifications, and if the procedure is approved by Council, inclusion of a public meeting component to allow deputations from the applicants. This specific format is based on practices adopted throughout Ontario. Because this method was considered in 2011, draft procedures were developed. Please see Appendix #1.

This method of appointment has been used in various Ontario municipalities to fill a council vacancy, including the Town of Wasaga Beach, the Municipality of West Gray, Tay Township and the Township of Lake of Bays.

Initially, Council in 2011 considered this approach however community feedback at that time was not supportive of this method. Council then opted for a by-election, and later in the term, for a second vacancy, by appointment of the next candidate.

Option #1(b) Timeline – Appointment by Application:		
May 4, 2020	Regular Council	Declare Ward One Seat Vacant Recommend to Fill Vacancy with Option 1(b), Appointment by Application Process
May 19, 2020*	Regular Council	Adoption of Council Vacancy Appointment Policy
May 20, 2020	Clerk	Initiate Notice for Application for Appointment Newspaper Ad Date: May 26, 2020, June 2, 2020
June 8, 2020	Clerk	Applications Due to Clerk
June 15, 2020	Regular Council	Applicant Deputations to Council
June 22, 2020	Special Council	Presentation of By-law to Appoint New Ward One Councillor
June 23, 2020	CAO/Clerk/Mayor	Orientation
July 27, 2020	Regular Council	New Councillor Takes Oath of Office
Note: *Council could opt to convene Special Council May 11, 2020 to Adopt Vacancy Appointment Policy; moves all dates up accordingly.		

Option #1(c) – Direct Appointment by Council:

As previously noted, The Act does not prescribe an appointment process. Council could appoint an eligible individual without an application process and without referencing recent election results. In the opinion of the Clerk, while this might achieve the fastest possible result, this would represent the least favourable option in terms of transparency and democracy. This method, although available, is not recommended.

Option #1(c) Timeline – Appointment by Council :		
May 4, 2020	Regular Council	Declare Ward One Seat Vacant Recommend to Fill Vacancy with Option 1(c), Appointment by Council
May 5, 2020	Clerk	Contact Council Nominee; Confirm Eligibility; Complete Necessary Paperwork
May 19, 2020	Regular Council	Presentation of By-law to Appoint New Councillor
May 20, 2020	CAO/Clerk/Mayor	Orientation
June 1, 2020	Regular Council	New Councillor Takes Oath of Office
Note: Council could opt to pass appointment by-law, immediately followed by Oath of Office on May 19, 2020		

Option #2 - By-Election:

Council may decide to fill the vacancy by directing that a by-election be conducted. In accordance with Section 263(5) of the Municipal Act, a by-law must be enacted within sixty (60) days after the seat is declared vacant. Subsequent to the enactment of a by-election by-law, nomination day must be not less than 30 days and not more than 60 days thereafter. Voting day shall then be 45 days after nomination day.

The seat will be declared vacant May 4, 2020, so under normal circumstances, a by-election by-law would be required prior to July 3, 2020. Should the decision be made to conduct a by-election, the Clerk must set Nomination Day within 60 days of passing a by-law requiring the by-election. Please refer to the timeline chart included as Appendix 2 and 3. All dates will depend on the enactment of the by-law and as such, are subject to change.

A 30 day nomination period would set Voting Day as early as August 31, 2020. A 60 day nomination period would set Voting Day as September 28, 2020, again depending on enactment of the by-law.

Based on the 2011 by-election, the costs associated with a By-Election are estimated to be approximately \$20,000 given additional considerations relating to conducting an election during or immediately following a worldwide pandemic. Extra measures will be required to protect the health and safety of election workers, candidates and electors alike.

According to current available information, the number of eligible voters in Ward One is 4,408. During the 2011 by-election in Ward One, there were 3,642 registered electors with 805 ballots cast resulting in a voter turnout of 22%. Five candidates registered and the total cost to run the 2011 By-election amounted to approximately \$8,000, for hard costs only.

Two timeline scenarios have been prepared based on a 60 day nomination period and a 30 day nomination period, both assuming a by-law enactment date of June 15, 2020. These timelines are estimates only and will be finalized at a future date.

In anticipation of the possibility of a by-election, the Clerk has contacted various suppliers that would form an integral part of ensuring the election is conducted in the same manner as a regular municipal election, as is required in accordance with the MEA. Each provider has indicated that proposed timelines can be accommodated. If this direction is pursued, an early by-election date of August 31,

2020 presents an extremely aggressive timeline and some significant logistical challenges given the current state of emergency.

Considerations for Conducting a By-Election:

When a vacancy on Council occurs, the business of the corporation must continue, uninterrupted. Council is mandated to make a decision on how the vacancy will be filled within 60 days after declaration, which declaration occurred at the May 4th Council meeting. It is the Council that is charged with determining the best method to fill the vacancy while considering factors such as time to complete the process, costs associated with implementing the selected solution, representative democracy and duration of the vacancy. Unique to Council at this time is the added layer of being amidst a worldwide declared pandemic, Novel Coronavirus COVID-19.

A Provincial Order declaring a state of emergency was issued on Tuesday, March 17, 2020, specifically relating to the pandemic. This Order provides Council with some latitude as it pertains to the statutory deadline to make a decision on whether to appoint or pass a by-law directing the Clerk to conduct a by-election within 60 days of the vacancy declaration. This Provincial Order indicates the suspension of "any limitation period" in any statute, and also the suspension of "any period of time within which a step must be taken in any proceeding" in any statute for the duration of the emergency, "subject to the discretion of the decision-maker responsible for the proceeding". In this case, the decision-maker is Council.

The Clerk, in consultation with Ontario Clerks who are in various stages of council vacancies, is of the opinion that Council has the authority to postpone the decision regarding filling the vacancy in Ward One for the duration of the declared emergency, most specifically as it relates to conducting a by-election. Also of note, under the provisions of the MEA, s. 53(1), the Clerk is authorized to amend the statutory timelines in the case of any emergency. Further, the Clerk, pursuant to s. 12(1) may provide for any matter or procedure not set out in the MEA but that is, in the clerk's opinion, necessary or desirable for conducting the election.

Subsection 11(2) of the MEA provides that the Clerk's responsibility for conducting an election includes the following:

Duties of Clerk

- (a) preparing for the election;*
- (b) preparing for and conducting a recount in the election;*
- (c) maintaining peace and order in connection with the election; and*

(d) in a regular election, preparing and submitting the report described in subsection 12.1(2) [relating to the identification, removal and prevention of barriers that affect electors and candidates with disabilities].

Section 12 of the MEA allows the City Clerk to provide for any matter or procedure that is not otherwise provided for in an Act or regulation, and that is, in the Clerk's opinion, "necessary or desirable" for conducting the election, as follows:

Powers of Clerk

12(1) A Clerk who is responsible for conducting an election may provide for any matter or procedure that,
(a) is not otherwise provided for in an Act or regulation; and
(b) in the Clerk's opinion, is necessary or desirable for conducting the election.

Additionally, Section 53 of the MEA authorizes the Clerk to declare an emergency when circumstances have arisen that are likely to prevent the election from being conducted in accordance with the MEA, and further allows the Clerk to make arrangements that (s)he considers advisable for conduct of the election, as follows:

Emergency

53(1) The Clerk may declare an emergency if he or she is of the opinion that circumstances have arisen that are likely to prevent the election being conducted in accordance with this Act.

To achieve representative democracy, a by-election is optimal. Of significance however, given the current pandemic situation, this method presents the most challenges in terms of ensuring the health and safety of all stakeholders. A by-election must be conducted under the MEA in the same way as the 2018 election. This means that the Clerk would be required to schedule advance polling opportunities and conduct at least one polling station voting on election day. In Ward One during a regular election, two polling stations are utilized.

The Clerk has also considered the potential to conduct a by-election through electronic means, such as internet voting. While this option was explored in previous regular elections, it has not been recommended or fully embraced by previous Councils due to the inability to ensure an uncompromised internet connection within the rural parts of our community, many located in Ward One. This method is not recommended at this time.

Other options to minimize person-to-person contact would be through either a vote by mail or telephone voting approach. While it is recognized that the MEA states the by-election must be conducted in the same manner as the most recent regular election, the Clerk is also responsible to deliver an election in the most practicable manner in the circumstances. During a pandemic, it would be challenging to deliver an in-person election process. Some of the challenges to deliver an in-person voting opportunity for electors include the difficulty in recruiting election workers for fear of the potential to contract the virus, as well as a reduced voter turnout for the same reasons. That stated, a vote-by-mail option would require development of all new election procedures which is not practical in the circumstance. Further, there have been noted delays in postal delivery which could call into question the election process overall. While pricing is being obtained to enable the Clerk to make a decision on the best method to deliver a by-election within the expected budget allotment, it is unlikely this approach will be undertaken given the extensive work that will be required to develop new election procedures. The Town of Pelham has not conducted a vote by mail election in the past. Vote By Mail is not recommended at this time mainly due to the requirement to develop all new procedures to accommodate such an election and the cost increases.

If Council's preferred method is a by-election, specific health and safety precautions would need to be incorporated throughout the polling place to ensure that physical distancing is maintained throughout the voting process, if the pandemic is not yet concluded. Additional measures, such as purchase/rental of clear acrylic screen barriers for use between the election personnel and the electors, ensuring that only the elector touches the ballot once it has been issued, monitoring and policing the number of people permitted in a polling station at any one time, additional and stringent cleaning protocols and potential consultation with Niagara Region Public Health, etc. must all be considered. To minimize contact on the paper ballots, pricing for a ballot on demand approach is being explored which will reduce the number of people touching the ballot, as well as saving the cost of pre-printing ballots to accommodate voter turnout. Associated costs would include rental of ballot printers that are compatible with current vote counting equipment. Additional cost implications will be explored by the Clerk so as to incorporate all reasonable measures to protect election stakeholders.

Of primary concern relating to this specific council vacancy is the presence of a declared emergency, the Novel Coronavirus COVID-19 which has rapidly changed the environment to convene a polling station election. The entire population within Canada is required to adhere to physical distancing and gatherings of more than five people are prohibited.

At this time, the logistics for conducting a by-election present challenges for candidates who would need to collect the nomination signatures and campaigning door-to-door or face-to-face would be prohibited. Recruitment of election workers may also present some challenges.

The cost to conduct a by-election for Ward One is estimated at \$20,000 which would include the hard costs of equipment, supplies, advertising, etc. as well as soft costs such as labour. The funds would be drawn from the Election Reserve Fund and would result in an increased 2021 and 2022 transfer amount to ensure the necessary funds are available for the 2022 municipal election.

Option #3 – Defer Decision on Whether to Appoint or Elect Vacancy

Council will need to consider a number of unique circumstances in filling the Ward One Vacancy while in the midst of a global pandemic. One option, pursuant to the Provincial Order, is to defer making the decision until there is more information about the potential re-opening of the Province, while also considering the timing of when a second wave of the virus might occur. Pursuant to The Act, under normal circumstances, Council would need to make such a determination by July 3, 2020. This timeline now has some flexibility given the Provincial Order.

The relevant portions of the Provincial Order read as follows:

*Whereas an emergency has been declared pursuant to Order in Council 518/2020 (Ontario Regulation 50/20) on March 17, 2020 at 7:30 a.m. Toronto time pursuant to section 7.0.1 of the Emergency Management and Civil Protection Act (the "Act");
And Whereas the criteria set out in subsection 7.1 (2) of the Act have been satisfied;*

Now Therefore, an Order is made pursuant to subsection 7.1 (2) of the Act, the terms of which Order are the following:

- 1. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any limitation period shall be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.*
- 2. Any provision of any statute, regulation, rule, by-law or order of the Government of Ontario establishing any period of time within which any step must be taken in any*

proceeding in Ontario, including any intended proceeding, shall, subject to the discretion of the court, tribunal or other decision-maker responsible for the proceeding, be suspended for the duration of the emergency, and the suspension shall be retroactive to Monday, March 16, 2020.

The duration of this Order is subject to any renewal required under subsection 7.1 (4) and, if applicable, subsection 7.1 (5) of the Act.

Given this Provincial Order, it is the Clerk's opinion that Council has the authority to defer the decision with respect to filling the vacancy for the duration of the state of emergency. This interpretation has been taken in other areas of the Province, including Ottawa, Cambridge and Windsor, all of which were in the midst of by-elections prior to the pandemic and declaration of emergency. Each municipality is in a different stage of the by-election process, all of which began before the pandemic emerged.

The option to defer does not have to be specific to the end of the pandemic. For example, Council could defer until such time as public health officials and/or the Province of Ontario define a process to return to a new form of normal and providing guidelines that will assist in running a polling station as it pertains, for example, to easing the restrictions of the number of people allowed to gather in one place. Council could defer their decision and request a further report providing additional details as to how a by-election would take place given the pandemic status of the Province.

Financial Considerations:

Option 1(a)(c) – Appointment of Third Place Candidate or Qualified Elector – Costs would relate mainly to staff time for orientation purposes. No direct election costs for this option; no advertising costs; most time efficient method.

Option 1(b) – Appointment By Application: Main expense will be advertising, estimated at \$300 maximum. No direct election costs other than advertising for applications. Second fastest option.

Option 2 – By-election is estimated between \$10,000 and \$15,000 plus soft costs related to staffing/overtime. The Election Reserve would accommodate this expense, however would impact negatively on the 2022 Election Budget.

Option 3 – No financial implications to defer.

Alternatives Reviewed:

Council can choose to Appoint from the 2018 Election Candidates, Appoint a Qualified Elector, Appoint Through Application, or direct the Clerk to conduct a By-Election. For the purposes of the recommendation, Council will need to present a motion to fill the vacancy by selecting one of the following:

- Option 1(a) – Appointment from 2018 Candidates – Mark Bay
- Option 1(b) – Appointment by Call for Applications
- Option 1(c) – Direct Appointment by Council
- Option 2 – Direct Clerk to Conduct a By-Election
- Option 3 – Defer Decision to Appoint or Conduct by-Election

Strategic Plan Relationship: Communication and Engagement

While a by-election fully ensures representative democracy, community engagement can still be satisfied through the appointment process. Council will make a determination as to the preferred method to fill the vacancy in the circumstances present, taking into consideration community engagement as it pertains to the election process as well as from the perspective of a candidate and an elector, as well as election officials.

Consultation:

In the preparation of this report, the Clerk consulted with the local Ministry of Municipal Affairs and Housing Policy Advisor as well as several municipal resources relating to the appointment process. In addition, consultation with Election Officials from Ottawa, Cambridge and Windsor.

Other Pertinent Reports/Attachments:

Appendix 1: Procedure for Appointment by Application

Appendix 2: By-Election Timeline – 60 day nomination period

Appendix 3: By-Election Timeline – 30 day nomination period

Appendix 4: Declaration of Qualifications – 2020 By-Election

Appendix 5: Declaration of Election – 2018 Regular Municipal Election

Prepared and Recommended by:

Nancy J. Bozzato, Dipl.M.M., AMCT
Town Clerk

Prepared and Submitted by:

David Cribbs, BA, MA, JD, MPA
Chief Administrative Officer