

JUNE 2020

## **LTN 8 | ELECTIONS AND CO-OPTION**

1. This Legal Topic Note explains matters relating to elections, both ordinary and casual, and the co-option of local councillors. This note should be read in conjunction with NALC's legal briefing L03-20.
2. The Local Elections (Parishes and Communities) (England and Wales) Rules 2006 ("the 2006 Rules") applies to the election of councillors to a parish or community council. Elections are run by the principal authority and there is no role for a local council in relation to ordinary elections. Where there is a casual vacancy (see paragraphs 16 to 22 below) the initial role of the local council is public notification of the vacancy. If an election is required to fill a casual vacancy it is run by the principal authority. If no election is required the local council controls the process of co-option (see paragraphs 23 to 28 below). Up to date information about the running of an election can be found at: <https://www.electoralcommission.org.uk/i-am-a/electoral-administrator/local-elections-england-and-wales>.

### **Qualifications for election and holding office as a councillor**

3. Section 79(1) of the Local Government Act 1972 ("the 1972 Act") provides, unless disqualified (see paragraph 7 below) a person is qualified to be elected and to be a councillor if he is a qualifying Commonwealth citizen or an EU citizen and on the day on which he is nominated and, if there is a poll, the day of the election he is 18 years of age or over and:
  - a) on that day he is and thereafter he continues to be a local government elector for the area of the authority; or
  - b) he has during the whole of the 12 months preceding that day occupied as owner or tenant any land or other premises in that area; or
  - c) his principal or only place of work during that 12 months has been in that area; or
  - d) he has during the whole of those 12 months resided in that area; or

- e) in the case of a member of a parish or community council he has during the whole of those 12 months resided either in the parish or community or within three miles of it. [The Electoral Commission's interpretation of this provision (namely section 79(1)(e) of the 1972 Act) is that all persons qualify to be elected and to be a member of a parish or community council if they have resided for the relevant 12 months in the parish or community or within three miles of it.]
- 4. A person is a qualifying Commonwealth citizen if he is a Commonwealth citizen who either:
  - a) is not a person who requires leave under the Immigration Act 1971 ("the 1971 Act ") to enter or remain in the United Kingdom, or
  - b) is such a person but for the time being has (or is, by virtue of any enactment, to be treated as having) indefinite leave to remain within the meaning of the 1971 Act.
- 5. A person is not a qualifying Commonwealth citizen if he does not require leave to enter or remain in the United Kingdom by virtue only of section 8 of the 1971 Act (exceptions to requirement for leave in special cases).
- 6. A person is qualified for re-election under paragraph 3(c) if he is already a councillor. The Court of Appeal held in *Parker v Yeo* (1992) that being a councillor was "work" and that the work was carried on in the area where the councillor was an elected member.

#### **Disqualifications for election and holding office as a councillor**

- 7. In accordance with section 80 of the 1972 Act, a person is disqualified from being elected or being a councillor if he:
  - a) holds any paid office or employment (other than the office of chairman, vice chairman or deputy chairman) to which he has been appointed by the council or any committee or sub-committee of the council, or by a paid officer of the council, or by any joint committee on which the council is represented; or

- b) is the subject of a bankruptcy restrictions order, an interim bankruptcy restrictions order, a debt relief restrictions order or an interim debt relief restrictions order under Schedule 4ZB of the Insolvency Act 1986;
  - c) has within five years before the day of election or since his election been convicted of any offence and sentenced to a term of imprisonment of at least three months (whether suspended or not) without the option of a fine; or
  - d) has been found guilty of corrupt or illegal practices, or was responsible for incurring unlawful expenditure and the court orders his disqualification.
8. In relation to paragraph 7(a) above, when dealing with an office of profit, it is irrelevant that no profit was actually received.

### **By-elections**

9. A by-election of a whole council takes place:
- a) where a new council comes into existence in a year other than that in which the principal authority councillor for the parish or community is elected – sections 89(2) and 95 of the Local Government and Public Involvement in Health Act 2007; or
  - b) where an election is declared void following an election petition – section 135 of the Representation of the People Act 1983 (“the 1983 Act”); or
  - c) where a principal authority orders a new election under reserve powers – section 39 of the 1983 Act.
10. A by-election to fill a particular vacancy can occur when the membership of the council is increased.
11. The remainder of this LTN covers situations in which the parish or community council has a role.

## **Costs of holding elections**

12. The cost of holding a local council election is paid by the local council if the principal authority so requires. Where a local council election is combined with a principal council election the cost of the combined polls (excluding the costs attributable solely to one election) is apportioned equally between the elections (section 36(3B) of the 1983 Act).

## **Insufficiency of candidates at ordinary election**

13. Section 21 of the Representation of the People Act 1985 provides that where an insufficient number of candidates is validly nominated at an ordinary local council election to fill the vacancies on the council, those who have been validly nominated are automatically elected as councillors. Provided that those elected constitute at least a quorum (three or one third of the total number of councillors, whichever is the greater), the council (e.g. those elected unopposed) may co-opt any person or persons to fill the vacancies. If the power of co-option is not exercised within 35 days (in calculating which, Saturday, Sunday, Christmas Eve, Christmas Day, Good Friday, a Bank Holiday and a day appointed for public thanksgiving or mourning are excluded), the principal authority may then exercise its powers to hold a further election or to take other appropriate action to fill the vacancies. A principal authority has wide reserve powers to do anything necessary to constitute a council properly (section 39(4)(b) of the 1983 Act), including the temporary appointment of councillors pending a further election (section 91 of the Local Government Act 1972 ("the 1972 Act")).
14. Before exercising the power of co-option, the council does not have to give public notice of the vacancy or vacancies, although it may do so if it wishes. In practice, the giving of public notice is a sensible way to attract possible candidates for co-option.
15. Legal Topic Note 7: *Non-Councillor Members of Committees* provides guidance about the appointment of non-councillors to a council's committees.

## **Casual vacancies**

16. According to section 87 of the 1972 Act, a casual vacancy occurs when:

- a) a councillor fails to deliver his declaration of acceptance of office at the proper time (see paragraph 17 below); or
- b) a councillor resigns; or
- c) a councillor dies; or
- d) in the case of a councillor who is disqualified by virtue of a criminal conviction, under section 79 of the Local Government Act 2000 (Wales) or under section 34 of the Localism Act 2011 (England), the expiry of the period for making an application or appeal or, if an appeal or application has been made, the date that any such application or appeal process comes to an end;
- e) on the date of a report or certificate of an election court that declares an election void;
- f) a person ceases to be qualified to be a councillor for a reason not mentioned above; or
- g) a councillor fails to attend meetings for six consecutive months.

### **Declaration of acceptance of office**

17. In accordance with section 83(4) of the 1972 Act, on being elected to office, a councillor must sign a declaration of his acceptance of office, in the presence of another councillor or the clerk. The declaration must be delivered before or at the first meeting of the council after election or, if permitted by the council at that meeting, before or at a later meeting fixed by the council. If a councillor fails to deliver the signed declaration at the due time, he thereupon vacates office and a casual vacancy arises. There is no provision allowing a declaration to be delivered retrospectively. A councillor who is elected as the chairman of a local council must sign and deliver a separate declaration of acceptance of the office of chairman (see paragraph 32 below). In England, the declaration of acceptance of office is in the form prescribed in the Local Elections (Declaration of Acceptance of Office) Order 2012/1465. In Wales, the declaration of acceptance of office is in the form prescribed in the Local Elections (Declaration of Acceptance of Office) (Wales) Order 2004/1508.

## **Failure to attend meetings**

18. Under section 85 of the 1972 Act, a councillor vacates office if he fails to attend a relevant meeting for six consecutive months after his last attendance, unless before the expiry of that period the council approves a reason for his absence. The following constitute a relevant meeting:
  - a) a meeting of the council, or any of its committees or sub-committees; or
  - b) a meeting of a joint committee, joint board or similar body by which any of the council's functions are for the time being discharged or which are advising the council on any matter relating to the discharge of its functions
  - c) a meeting of any body of persons at which the attendance of the councillor is as a representative of the council (e.g. the annual meeting of the County Association counts as attendance at a council meeting).
19. A council cannot approve a reason for a councillor's absence from a meeting if no reason is given. To simply record in the minutes of a meeting that a councillor was absent does not amount to approval for his absence. A councillor must give a reason for his absence from a meeting and the minutes of that meeting must document that approval for a councillor's absence was agreed by resolution and, where appropriate, the reason for absence. Further guidance about the data protection implications of this is explained in Legal Topic 5 (Parish and Community Council Meetings).
20. Under section 87(2)(b) of the 1972 Act, in most instances of a casual vacancy arising, the local council must give public notice of it as soon as practicable after the casual vacancy is deemed to have occurred and in accordance with the requirements of section 232 of the 1972 Act. Section 232 confirms public notice of a casual vacancy is effected by the council giving notice in conspicuous place(s) in its area and in any such other manner, if any, as appears to the council to be desirable for giving publicity.
21. Where a casual vacancy arises in any of the three circumstances set out below the council must (i) forthwith declare the office vacant (unless the High Court has already done so) (section 86(1) of the 1972 Act) and (ii) give

public notice of the vacancy in accordance with the requirements of section 232 of the 1972 Act (see paragraph 14 above) immediately after it declares the office vacant (section 87(2)(a) of the 1972 Act). The three circumstances are that a member of a local council:

- a) ceases to be qualified to be a member of the council;
- b) becomes disqualified for being a member of the council otherwise than under section 79 of the Local Government Act 2000 (Wales) or section 34 of the Localism Act 2011 (England) or by virtue of a conviction or a breach of any provision of Part II of the Representation of the People Act 1983; or
- c) ceases to be a member of the council by reason of failure to attend meetings for six consecutive months without approval of his absence from the council (see paragraph 18 above).

### **Filling a casual vacancy**

22. In accordance with rule 5 of 2006 Rules, if within 14 days (calculated by excluding those days specified in paragraph 13 above) after public notice has been given, at least 10 electors give written notice to the proper officer of the principal authority of a request for an election to fill the vacancy, then a by-election must be held *except* where the vacancy occurs within six months before the date when the councillor in question would have regularly retired (e.g. four days after the next ordinary election). If a by-election is called, and an insufficient number of candidates is nominated those nominated are elected (see section 39(5)(b) of the 1983 Act) and the district council must call a further by-election to fill the remaining vacancy or vacancies (see section 39(1)(b) of the 1983 Act).

### **Co-option**

23. If no by-election is called, the council must as soon as practicable after the expiry of the 14 day period fill the vacancy by co-option. If the vacancy falls within the six month period the council may but need not, fill the vacancy. It must still, in the latter case, give public notice of the vacancy.

## **Eligibility for co-option**

24. A person is eligible to be co-opted provided he is qualified to be a councillor (see s.79 of the 1972 Act) and is not disqualified by s.80 of the 1972 Act.
25. Candidates standing in local council elections must submit to the Returning Officer a form (prescribed by Part 7 of paragraph 1 to Schedule 2 of the 2006 Rules) which (a) confirms their consent to nomination and (b) includes a declaration that they meet the aforementioned statutory qualifications to stand for election. Candidates who wish to be co-opted on to a local council are not subject to such requirements. To ensure that councils consider for co-option only those candidates who are eligible to be councillors, NALC recommends that councils require candidate(s) for co-option to declare or certify in writing that they meet the criteria for eligibility set out in s.79 of the 1972 Act and are not disqualified under s.80 of the 1972 Act. A council may need to investigate or obtain evidence about a candidate's eligibility to be a councillor if this is challenged.
26. A local council may wish to indicate that people with specific skills and expertise (e.g. accountancy, HR, Planning) are particularly welcome to apply. This should not be part of the formal notice and it must be clear that people without those skills are still eligible to apply. In cases where there are more candidates than vacancies, a council will need to fairly consider who to co-opt and such skills and expertise may be taken into account according to a council's particular needs.
27. Where the number of candidates is less than or equal to the number of vacancies, the candidates shall be appointed to the council if they meet the s.79 eligibility criteria and they are not disqualified under s.80.

## **Decision-making**

28. Decisions made by a local council about whether or not to co-opt when vacancies remain unfilled after an ordinary election and who to co-opt when any casual vacancy arises should be transparent. In NALC's view it would be difficult for a local council to argue that there are special reasons which justify excluding the public during a council meeting when it is making decisions about a matter of public interest such as co-option. Decisions about co-option which are made at council meetings when the public have



been excluded will not eliminate the need for a council to explain, for example to unsuccessful candidates, the reasons for its decisions.

### **Registration of interests**

29. Within 28 days of becoming a councillor in England, a person must notify the Monitoring Officer of any "disclosable pecuniary interests" as defined in the Relevant Authorities (Disclosable Pecuniary Interests) Regulations 2012/1464. The definitions of disclosable pecuniary interests are given in Legal Briefing L10-12. In England, the code of conduct adopted by a council under section 27(2) of the Localism Act 2011 Act may require a councillor to give notification of interests which are not disclosable pecuniary interests within 28 days of his election to office. This will be case if a council has adopted NALC's template code of conduct (see Legal Briefing L09-12). Upon re-election or re-appointment, a councillor in England must also within 28 days notify the Monitoring Officer of 'disclosable pecuniary interests' not already included in his or her register of interests. Further guidance is given in Legal Topic Note 80 (Members' conduct and the registration and disclosure of their interests (England)). In Wales, within 28 days of becoming a councillor, a person must notify the Monitoring Officer of the personal interests set out in paragraph 10(2)(a) of the schedule to Local Authorities (Model Code of Conduct) (Wales) Order 2008/788 and any other financial interests required by his council's code of conduct.

### **Election of chairman**

30. Sections 15 and 34 of the 1972 Act (for England and Wales respectively) provide that the Chairman of a local council must be elected from among the councillors as the first business of the annual council meeting in May. He remains in office until his successor is elected (at the following meeting unless in the interim he resigns, dies or otherwise vacates office).
31. Schedule 12, paragraphs 11 and 27 of the 1972 Act (for England and Wales respectively) provide that since the chairman of the council must preside at all council meetings which he attends, he must if present preside at the election of his successor (who may, following re-election, be himself). As chairman, he has, as well as his ordinary vote, a casting vote, in the event of a tie between candidates for his post and he must exercise the latter. Section 15 of the 1972 Act provides, where following an ordinary election, the chairman ceases to be a councillor he nevertheless remains chairman of the council until his successor takes office. If present at the annual council

meeting he must preside at the election of his successor but has only a casting vote. As soon as his successor is elected, he vacates office and can no longer participate as a councillor in the meeting.

32. Upon election to the office of the chairman of a local council, the councillor must sign a declaration of his acceptance of that office, in the presence of another councillor or the clerk. The chairman's declaration of acceptance of office must be delivered at the meeting at which he is elected or, if permitted by the council, before or at a later meeting fixed by the council. Failure to deliver the signed declaration at the due time results in automatic vacation of office of chairman. A chairman is elected annually and therefore a declaration must be made every year by whoever is elected as chairman – see section 83(4) (a) of the 1972 Act.

### **Vice-chairman**

33. Section 15(6) and 34(6) of the 1972 Act provides that a council may but need not elect a vice-chairman.
34. A councillor elected to the office of vice-chairman does not have to sign and deliver a declaration of acceptance of that office (although he must deliver his signed acceptance of office as a councillor (see paragraph 17 above)).

### **Other Legal Topic Notes (LTNs) relevant to this subject:**

LTN	Title	Relevance
2	The chairman of local councils	Explains the election process of the chairman at the annual meeting.
7	Non-councillor members of committees	Sets out the powers of councils to appoint non-members to committees.
80	Members' conduct and the registration and disclosure of their interests (England)	Explains the provisions of the Localism Act 2011.