

RESOLUTION NO. 728

**BOROUGH OF MALVERN
CHESTER COUNTY, PENNSYLVANIA**

A Resolution for the Borough of Malvern, Chester County, Pennsylvania, regarding the Public Hearing conducted on February 7, 2017 in the matter of absences of Borough Council President, David Bramwell.

BACKGROUND

Section 211 of the Home Rule Charter of the Borough of Malvern ("Borough") provides for the forfeiture of the office of a Member of the Borough Council ("Council") for cause and a procedure for the determination thereof by the Council.

The means and circumstances of forfeiture under Section 211 of the Home Rule Charter, at subsection A.(4), includes a circumstance where the Council finds that a Member of Council "*fails to attend three (3) consecutive Regular Meetings of the Council or forty percent (40%) of all scheduled Council meetings in a twelve (12) months [sic] period.*"

At their public meeting on January 3, 2017, it came to the attention of the Council that Council President, David Bramwell, was not present at the previous three consecutive public meetings.

In accordance with Section 211 B. of the Home Rule Charter, having duly publicly advertised and provided notice of the same to Mr. Bramwell via registered mail, the Council convened a Public Hearing on February 7, 2017 to decide whether the office of Mr. Bramwell had been forfeited for cause.

The testimony, evidence, and comments of the public were duly recorded and transcribed during the said Public Hearing.

FINDINGS OF FACT

1. Mr. Bramwell was not present for the meetings on November 15, 2016; December 6, 2016; and December 20, 2016 (the "Missed Meetings").
2. The Missed Meetings were "consecutive" in that there were no intervening public meetings between them.
3. The reason for Mr. Bramwell's absence on November 15, 2016 was a previously-scheduled business trip.¹

¹ Tr. 7:4-5.

4. The reason for Mr. Bramwell's absence on December 6, 2016 was an unforeseen and unavoidable business trip.²
5. The reason for Mr. Bramwell's absence on December 20, 2016 was a family holiday vacation which had been scheduled long in advance.³
6. Mr. Bramwell was present for the meeting on November 1, 2016, immediately preceding the period of the Meetings.⁴
7. Mr. Bramwell was present for the meeting on January 3, 2017, immediately following the period of the Meetings.⁵
8. In each case of Mr. Bramwell's absence from the Missed Meetings, including the unforeseen and unavoidable absence on December 6, 2016, Mr. Bramwell provided advance notice of his absence to the Borough Manager and fellow members of Council as early as possible and coordinated with the Borough Manager and the Vice President of Borough Council in order to assure that the business of the Borough was not disrupted by Mr. Bramwell's absences.⁶
9. Mr. Bramwell's absences were not harmful to any specific action or other business item of the Borough.
10. The Missed Meetings took place over the holiday period between the meeting immediately preceding the Thanksgiving holiday through the meeting immediately preceding the Christmas holiday.
11. Until April of 2016, the current Council's practice had been to hold one work session each month during which no official action was taken, and separately conduct one Regular Meeting each month where official action was taken.⁷
12. On December 22, 2015, Council published its annual meeting schedule for 2016 in accordance with the Home Rule Charter, wherein the meetings schedule for November 15, 2016 and December 20, 2016 were advertised as Regular Meetings and the meeting scheduled for December 6, 2016 was advertised as a work session.⁸
13. On April 6, 2016, at a work session attended by Mr. Bramwell, Council discussed the possibility of having two Regular Meetings per month.

² Tr. 7:5-6.

³ Tr. 7:7-9.

⁴ Minutes of Malvern Borough Council Meeting held November 1, 2016.

⁵ Minutes of Malvern Borough Council Meeting held January 3, 2017.

⁶ Tr. 10:5-9.

⁷ Exhibit C-5.

⁸ Affidavit of Publication of Marcia B. Burns, 21st Century Media, dated December 30, 2015.

14. On April 19, 2016, the Council changed its previous practice and thereafter held two Regular Meetings per month.⁹
15. Council's decision to change its previous practice to take official action at two meetings each month was made by motion without objection and effectuated by the Borough Manager, at Council's direction, by merely re-advertising the entire schedule of Borough Council meetings as Regular Meetings on April 25, 2016.¹⁰
16. Mr. Bramwell was not present for the April 19, 2016,¹¹ but testified that he was aware of the dates of the Missed Meetings and that they were Regular Meetings.¹²
17. At the time of Mr. Bramwell's election to the Borough Council, Mr. Bramwell owned his own business which he subsequently sold to another entity in 2015.¹³ As a result, Mr. Bramwell no longer had the same flexibility with his work commitments as in prior years.¹⁴
18. Mr. Bramwell has been instrumental in several important initiatives of Council on behalf of the Borough including the acquisition of the property for the John and Marion Herzak Park, the search for and engagement of the Chief of Police, and the successful renegotiation of the collective bargaining agreement for the Police Department.¹⁵
19. Mr. Bramwell has demonstrated an strong commitment and dedication of time to activities with or on behalf of the Borough and its residents and taxpayers via the foregoing initiatives, numerous committee meetings, and many other meetings and interactions with, or on behalf of, Borough residents and taxpayers.¹⁶

CONCLUSIONS OF LAW

20. The Home Rule Charter provides that a Member of Council forfeits his or her office, for cause, if that Member fails to attend any three, consecutive Regular Meetings.
21. The Home Rule Charter requires the Council to publish its annual calendar of meetings at least once.
22. Regular Meetings are unambiguously defined by the Home Rule Charter as Meetings which are not advertised as work sessions.
23. Where any meeting is advertised as a work session, the Home Rule Charter does not provide a mechanism for such meeting to be re-classified as a Regular Meeting.

⁹ Minutes of Malvern Borough Council Meeting held April 19, 2016.

¹⁰ Affidavit of Publication of Kathy Viscey, 21st Century Media, dated April 25, 2016.

¹¹ Minutes of Malvern Borough Council Meeting held April 19, 2016.

¹² Tr. 6:4-21.

¹³ Tr. 7:22-23.

¹⁴ Tr. 7:23-8:1.

¹⁵ Tr. 8:11-9:5.

¹⁶ Tr. 29:2-8.

24. The meetings held on November 15, 2016 and December 20, 2016 were Regular Meetings.
25. The meeting held on December 6, 2016 was not a Regular Meeting because it had been previously advertised as a work session.
26. Mr. Bramwell did not miss three consecutive Regular Meetings.
27. Mr. Bramwell has not forfeited his office as a Member of Borough Council.
28. To the extent that any ambiguity exists with respect to the definition of Regular Meetings under the Home Rule Charter:
 - a. Where any provision of the Home Rule Charter is ambiguous, but only in such circumstance, Council is required to effectuate the intent of the provision.
 - b. The provisions of Section 211 A.(4) of the Home Rule Charter were intended to address the problem of substantial acute and chronic absenteeism among the Members of Council.
 - c. The Borough's imposition of a minimum standard of attendance for Members of Council is not derived from the Pennsylvania Borough Code, but rather the Home Rule Charter itself.
 - d. The Home Rule Charter requires that Regular Meetings be held at a minimum frequency of once per month.
 - e. The standards, circumstances, and procedures for the removal of duly-elected officers in municipalities which are subject to the Borough Code are of considerably greater gravity than mere non-attendance at several meetings over a period of thirty-five (35) days.
 - f. The intent of Section 211 A.(4) of the Home Rule Charter was not to cause a Member to forfeit their office for missing three meetings over a period of thirty-five (35) days, but rather over a period approximately three times longer, or approximately ninety (90) days.
 - g. For all of the foregoing Reasons, Council construes of the purpose of Section 211 A.(4) to find that it is not applicable to the facts of this matter.
 - h. Council President David Bramwell has not forfeited his office as a Member of Council for cause.

DISCUSSION

There is no question that Mr. Bramwell was not present for three consecutive meetings of the Borough Council. The essential question before Council is what, if anything, the Home Rule Charter says must, or may, be done about it. A recurring theme among the public comments received by Council during the public hearing in this matter, and the Council's own inclination, is to interpret and apply the Home Rule Charter as it is, whatever the outcome. That approach is also consistent with Pennsylvania law.

General rules of statutory construction are applicable in interpreting provisions of a home rule charter.¹⁷ The purpose of the construction of constitutional documents like the Home Rule Charter, is to ascertain and effectuate the intention of the law itself.¹⁸ Under Pennsylvania law, "when the words of a [law] are clear and free from all ambiguity, the letter of [the law] is not to be disregarded under the pretext of pursuing its spirit."¹⁹

In pertinent part, Section 211 of the Home Rule Charter reads:

- "A. *The office of a Member of Council shall be forfeited, for cause, if Council determines, in accordance with the Procedure set forth in Section 211.B., that the Member of Council: [...]*
- (4) *Fails to attend three (3) consecutive Regular Meetings of the Council or forty percent (40%) of all scheduled Council meetings in a twelve (12) months [sic] period."*

The language of Section 211 A., specifically the clause "... shall be forfeited, for cause...", suggests an automatic mechanism for removal in the event that a Member of Council is absent from three consecutive Regular Meetings. It is therefore a reasonable interpretation of the plain language of the Home Rule Charter to conclude that Section 211 A.(4) provides a basis for

¹⁷ See *Spencer v. City of Reading Charter Bd.*, 97 A.3d 844.

¹⁸ 1 Pa.C.S.A. § 1921

¹⁹ *Id.*

Borough Council to determine whether a forfeiture has occurred – even if the absences in question were beyond the control of the Member in question.

However, Pennsylvania Law also requires that every law be interpreted, if possible, to give effect to all of that law’s provisions.²⁰ Thus, having committed to applying the clear and unambiguous letter of Section 211, Council is bound to likewise apply the clear and unambiguous language of the remainder of the Home Rule Charter, even if that result may lead to a bad outcome or appear to be inconsistent with a conventional understanding of the purpose of the law.²¹

“Regular Meeting” is defined by Section 105 N. of the Home Rule Charter as:

“Any prearranged gathering of the Council not advertised as a work session which is attended or participated in by a quorum of the members of Council held for the purpose of deliberating Borough business or taking official action.”
(Emphasis added).

The notion of a “Regular Meeting” being distinct from a “work session“ is not applied formally elsewhere in Pennsylvania Law relating to municipal governance. The term “work session” is not defined in the Home Rule Charter or by other Pennsylvania Law applicable to the Borough; and the defined term “Regular Meeting” is unique to the Borough’s Home Rule Charter. However, the definition of “Regular Meeting” in the Home Rule Charter closely parallels the definition of “Meeting” under the Pennsylvania Sunshine Act.²² In fact, the insertion of the phrase “*not advertised as a work session*” into the definition of Regular Meeting is the sole distinction between the definition of a Regular Meeting under the Home Rule Charter and the definition of a “Meeting” under the Sunshine Act.²³ Therefore, while both work sessions and Regular Meetings are Meetings under the Sunshine Act, Regular Meetings are simply a specially-defined subset of

²⁰ *Id.*

²¹ See *MacDougall v. MacDougall*, 155 A.2d 358, 360.

²² 65 Pa.C.S. § 703.

²³ *Id.*

Meetings, unique unto the Borough, which are not advertised as work sessions and which are referenced only within the Borough's Home Rule Charter. The Home Rule Charter's notion of Regular Meetings has no legal import beyond the boundaries of the Home Rule Charter.

The Home Rule Charter does not require that each meeting of the Council be exclusively either a work session or a Regular Meeting. The Home Rule Charter also does not define a Regular Meeting as any meeting advertised as such. Instead, the Home Rule Charter defines a Regular Meeting in the negative, that is (in practice), a Meeting under the Sunshine Act which is not advertised as a work session. The Home Rule Charter also does not provide a mechanism for such a meeting, once advertised as a work session, to subsequently be recast as a Regular Meeting. Therefore, once a meeting is advertised as a work session – by definition of the Home Rule Charter – that meeting is not, and cannot become, a Regular Meeting.

There is no question that Borough Council's meeting on December 6, 2016 was a duly advertised and constituted "Meeting" under the Sunshine Act; that a quorum of Council was present for the meeting; and that deliberations and other official actions were undertaken during the meeting. So, the December 6, 2016 meeting was not a work session. However, the December 6, 2016 meeting was, in fact, originally advertised as a work session on December 22, 2015. That the meeting was also separately and subsequently advertised as a Regular Meeting on April 25, 2016 is of no consequence when interpreting the plain language of the Home Rule Charter. Once advertised as a work session, no amount of re-advertisement could remove the taint of that meeting's advertisement as a work session and make the December 6, 2016 meeting a "Regular Meeting" under the plain language of the Home Rule Charter. Thus, the December 6, 2016 meeting was neither a work session, nor was it a Regular Meeting as defined by the Home Rule

Charter. It was, however, nevertheless a Meeting as defined by the Sunshine Act and the actions undertaken there were lawful and valid.

More than mere sophistry, when read together with the remainder of the Home Rule Charter, the definition of Regular Meeting serves to protect the public and their duly-elected or appointed officials. In addition to the provisions of Section 211 relating to the forfeiture of office by a Member of Council, other key timing mechanisms in the Home Rule Charter relating to the governing body and officers – including the filling of vacancies on Council²⁴ or the office of Mayor²⁵, the requirement that Council meet and take official action at least once per month²⁶, the procedures relating to Mayoral veto and return of legislation²⁷ – each require action to be taken at a “Regular Meeting.” However, under Section 214 A. of the Home Rule Charter, Council is only required to publish its meeting schedule just once per year. After that publication, an unscrupulous Council seeking to oust a duly-elected Council Member, or undermine the Mayor’s veto, or perhaps simply to conduct business with minimal public oversight, might advertise a schedule including work sessions and then quietly re-advertise one or more of those meetings as a Regular Meeting and the affected Council Member, Mayor, or public would be none the wiser. Clearly, that could not be the outcome intended under the Home Rule Charter.

To be clear, such dramatic subterfuge did not exist here. Mr. Bramwell admitted that he knew that official actions would be taken at the meetings and was generally aware of the change in the schedule. However, Council must render its decision in this matter with an eye to precedent in future cases and the importance of preserving just outcomes for the public and future duly-elected or appointed officials.

²⁴ Home Rule Charter Section 210 A.

²⁵ Home Rule Charter Section 408

²⁶ Home Rule Charter Section 214.

²⁷ Home Rule Charter Section 304.

Thus, the Council finds that, under the plain language of the Home Rule Charter, Mr. Bramwell has not forfeited his office as a Member of Borough Council because the meeting on December 6, 2016 was advertised as a work session and was therefore not a Regular Meeting as defined by the Home Rule Charter.

When the language of a home rule charter is clear and free from all ambiguity, any further deliberation as to its meaning is unwarranted.²⁸ While Council does not believe any ambiguity to exist in the language of the Home Rule Charter, an analysis of the intent of Section 211 is nevertheless instructive because it confirms the same result.

Among the factors to be considered in ascertaining the intent of an ambiguous provision are the mischief it seeks to remedy and the object to be attained, which are related.²⁹ In this case, the mischief which Section 211 of the Home Rule Charter seeks to remedy is clear from the text: absenteeism among members of the Borough's governing body. The objective of the provision was stated succinctly by Woody Van Sciver's testimony as assuring that the Council Members "show up" and "do the work of Council."³⁰

However, what level of absenteeism rises to a level that necessitates removal of the Member under the Home Rule Charter? In order to answer this more difficult question, it is helpful and appropriate to examine statutes upon the same or similar subjects.³¹ The Borough's Home Rule Charter is different from Pennsylvania's Borough Code because the Home Rule Charter provides for the removal of an elected official if the Member fails to maintain a certain level of attendance at meetings. The Pennsylvania Borough Code provides for the removal of any elected

²⁸ *Meier v. Maleski*, 670 A.2d. (Pa.Cmwth. 1996), *aff'd*. 700 A.2d 1262.

²⁹ 1 Pa.C.S.A. § 1921 (c)(2).

³⁰ Hearing Tr. 11:21-22.

³¹ 1 Pa.C.S.A. § 1921 (c)(5).

Borough official only via: impeachment, or by the Governor for reasonable cause after notice and a full hearing and upon the advice of two thirds of the Senate, or upon conviction of misbehavior in office or of an “infamous crime.”³² Therefore, the removal of an elected official within the Boroughs of the Commonwealth is of considerable gravity and moment. It should not be undertaken lightly; without substantial deliberation; and in the absence of some specific, real, and discernable harm to the public.

Section 214 of the Home Rule Charter dictates that the Council convene Regular Meetings “not less than once a month.” Thus the minimum Regular Meeting frequency contemplated by the Home Rule Charter would dictate the removal of a Member of Council after absence from three consecutive months of Regular Meetings. Such absenteeism would almost certainly rise to the level of dereliction of a Member’s duty to serve on behalf of the Borough and suggest that the Member step aside for someone else to take on the work. However, there is a clear and significant practical difference between a Member missing three consecutive meetings held over a period of a quarter of a year, and that same Member missing three consecutive meetings held over a period of just slightly more than one month. When read in concert with the Home Rule Charter’s minimum meeting frequency, and coupled with the grave circumstances required elsewhere in Pennsylvania to remove a duly-elected or appointed official, it is clear that the intention of Section 211 was to remove a Member of Council after a period of sustained absence which is longer than that of Mr. Bramwell in this matter.

³² 8 Pa.C.S.A. § 904.1(a).

NOW THEREFORE, Borough Council hereby RESOLVES as follows:

1. Borough Council President David Bramwell has not forfeited his office as a Member of Borough Council for cause; and
2. The Borough Council hereby endorses the Findings of Fact, Conclusions of Law, and Discussion as set forth herein; and
3. The Borough Manager shall cause a copy of this Resolution to be mailed to Council President Bramwell, as well as any other interested party who filed a request to receive this written decision, within 48 hours of the adoption of this Resolution.

Passed by Borough Council,

this 21 day of February, 2017.



Zeyn Uzman, Vice President

Approved by the Mayor,

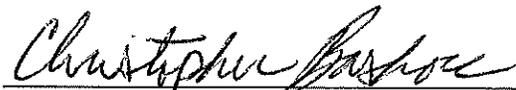
this 21 day of February, 2017.



David B. Burton, Mayor

Enacted,

this 21 day of February, 2017.



Christopher Bashore, Secretary

