



City of Rockville  
111 Maryland Avenue  
Rockville, Maryland  
20850-2364  
www.rockvillemd.gov

240-314-5000  
TTY 240-314-8137

December 19, 2016

The Honorable Brian E. Frosh  
Attorney General for the State of Maryland  
200 St. Paul Place  
Baltimore, Maryland 21202

Re: Request by the City of Rockville for an advisory opinion

Dear Mr. Frosh: *Brian*

This letter is sent on behalf of the Mayor and Council of Rockville ("City") to request an Attorney General opinion interpreting § 4-302 of the Land Use Article of the Annotated Code of Maryland which sets forth the provisions for membership on a legislative body's Board of Appeals. Specifically, the City is asking for the following questions to be answered:

- 1. May the Mayor and Council appoint an alternate member of the Board of Appeals for a one-year term?**
- 2. Is the Mayor and Council required to appoint an alternate?**

The opinion of the City Attorney on these questions is attached for your review. There does not appear to be any express legal guidance on this issue. Since these questions involve the interpretation of State law that apply to all similarly situated legislative bodies, the answer to these questions may be helpful to other local governments as well.

The City appreciates your consideration of this request.

Sincerely,

*Bridget*

Bridget Donnell Newton  
Mayor

Enclosure

MAYOR  
Bridget Donnell Newton

COUNCIL  
Beryl L. Feinberg  
Virginia D. Onley  
Julie Palakovich Carr  
Mark Pierzchala

ACTING CITY MANAGER  
Craig L. Simoneau

CITY CLERK  
DIRECTOR OF COUNCIL OPERATIONS  
Kathleen Conway

CITY ATTORNEY  
Debra Yerg Daniel



City of Rockville

## MEMORANDUM

December 19, 2016

TO: Mayor and Council of Rockville  
FROM: Debra Yerg Daniel, City Attorney  
SUBJECT: Questions Regarding the Alternate on the Board of Appeals

### I. Issue

The Mayor and Council, on behalf of the City's Board of Appeals, has posed the following two questions:

1. Whether the Mayor and Council may appoint an alternate member of the Board of Appeals for a one-year term?
2. Whether the Mayor and Council is required to appoint an alternate?

### II. Legal Analysis

#### Relevant Statutory Provisions

Section 4-302 of the Land Use Article of the Annotated Code of Maryland sets forth the provisions regarding membership on the Board of Appeals. In particular, § 4-302 reads, in pertinent part, as follows:

#### § 4-302. Membership.

- (a) *Composition.* – A board of appeals consists of at least three members.
- (b) *Appointment.* – A member of a board of appeals shall be appointed by the local executive and confirmed by the legislative body.
- (c) *Tenure.* – The term of office of a member of the board of appeals is 3 years.

\* \* \* \*

- (f) *Alternate member.* – (1) A legislative body shall designate one or more alternate members for the board of appeals who may sit on the board when another member of the board is absent or recused.
- (2) When an alternate member is absent or recused, the legislative body may designate a temporary alternate.

#### Term of Alternate Member

While § 4-302(f) is silent as to the specific term of office length for an alternate member, it does designate the alternate as a “member” of the board. Section 4-302(c) provides that the term of office of a “member” of the board is 3 years. As such, it is my opinion that the term of an alternate member is also 3 years.

#### Requirement to Designate an Alternate Member

Section 4-302(f)(1) states that “[a] local legislative body *shall* designate one or more alternate members for the board of appeals . . . .” (Emphasis added.) Under Maryland law, the word “shall” is sometimes directory, not mandatory. Whether the term “shall” is directory or mandatory “turns upon the intention of the Legislature as gathered from the nature of the subject matter and the purposes to be accomplished.” *Resetar v. State Board of Education*, 284 Md. 537, 547 (1979). One of the considerations is whether a penalty is provided for noncompliance. See *Resetar*, 284 Md. at 548.

Section 4-302(f)(1) does not provide a penalty for not appointing an alternate member of the board. In addition, the purpose of an alternate is to allow the board to conduct business if a member is absent or must recuse him/herself. Since two members of the board may conduct business on behalf of the board and since there is no penalty provided for noncompliance, it is my opinion that the requirement for an alternate member is directory and not mandatory.