

# What Is an Abstention under the Municipal Vacancy Law?



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In July 2013, the Appellate Division issued two opinions applying the Municipal Vacancy Law, N.J.S.A. 40A:16-1 to -23, with respect to a mayor's authority to fill a vacancy when no majority vote of the governing body is reached, and when certain members of the governing body abstain from voting.

The Municipal Vacancy Law sets forth procedures for filling vacancies for public office in municipalities. It permits appointments to fill vacancies in a governing body by a majority vote of the body's remaining members. N.J.S.A. 40A:16-7. The governing body has 30 days to fill the vacancy. N.J.S.A. 40A:16-12. If it is not filled, the seat remains vacant until it can be filled by the voters. N.J.S.A. 40A:16-13. Moreover, N.J.S.A. 40A:16-8 provides that for certain municipalities governed by the Optional Municipal Charter Law (i.e. mayor-council plan or mayor-council-administrator plan), "a mayor shall be permitted to vote to fill a vacancy in the membership of a governing body only in the case of a tie vote." These cases shed light on the

mayor's authority and the effect of abstentions in such situations, but do not answer every scenario that may occur when there are abstentions and ties in filling municipal vacancies.

In *Booker v. Rice*, Newark Municipal Councilmember Donald M. Payne, Jr. resigned from the Council, leaving a vacancy, which could be filled by appointment by a majority of the eight remaining council members. While five votes are required for a majority to name a successor, Shanique Davis Speight received only four "yes" votes. Three councilmembers voted "no" and one councilmember left the meeting, and thus abstained from voting. Believing that the abstention counted as a "no" vote, Mayor Booker voted in favor of Speight, to break what appeared to be a tie vote. A court order was later issued which required a special meeting to be held again and a new vote to be taken. Ms. Speight again received four "yes" votes, and this time two "no" votes and two abstentions. However, a Superior Court Judge ruled that an abstention is neither a "yes" nor "no" vote, and thus there was no tie that would allow the Mayor to vote. Therefore, the seat had to remain vacant until it could be filled by the voters.

Upon review, the Appellate Division looked to N.J.S.A. 40:69A-180(a), which allows governing bodies to determine their own procedural rules, so long as they don't conflict with an ordinance or statute. In turn, a provision in the Newark Council's own internal rules states that "A Council Member may abstain from voting on any matter, such abstention shall not be counted as a yes or no vote." On this basis, the court upheld the decision, holding that under such procedural rules, no tie had been created which would allow the Mayor to vote to fill the seat, and it did not conflict with any statutes.



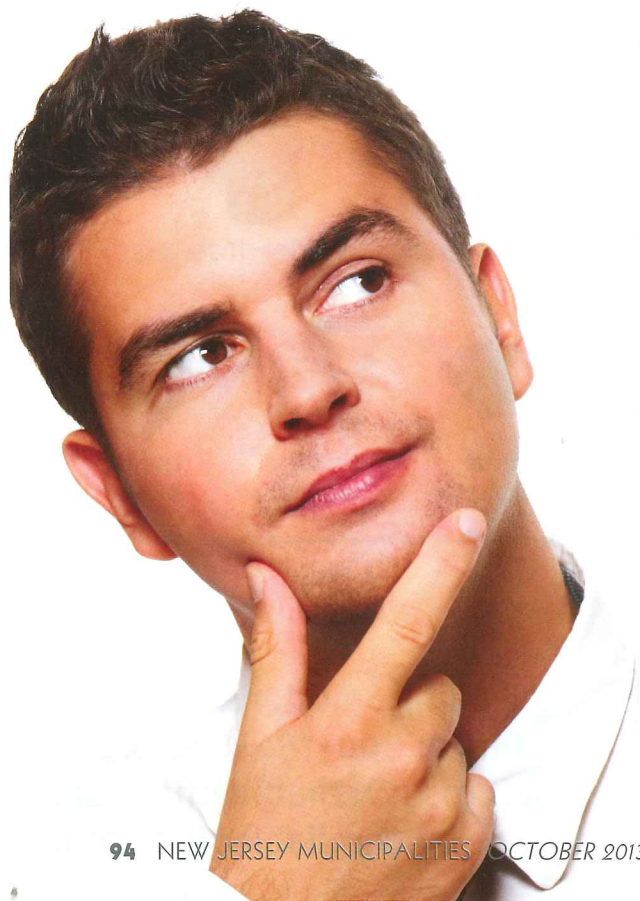
yes



no



maybe





In *Zimmer v. Castellano*, Hoboken Councilmember Carol Mars resigned, similarly creating a vacancy that could be filled by majority vote of the eight remaining council members. At a meeting to fill the vacancy, only seven council members were present. One member was absent, there were four "yes" votes, two "no" votes, and one abstention to nominate James Doyle to fill the position. Believing the abstention and absence to be "no" votes, Mayor Zimmer attempted to break what she thought was a tie vote, by voting for Mr. Doyle. When the full council met, another vote was held with the same result, except that the absent member abstained from voting. Mayor Zimmer again attempted to break the deadlock by voting for Mr. Doyle.

A complaint was filed to contest the appointment, and the Superior Court held that there was no tie vote. This decision was not appealed. However, before receiving the Order, a separate action was filed attempting to extend the 30-day limit to fill a vacancy, and to hold a special meeting and allow abstentions to be counted as "no" votes. The judge delayed the 30-day limitation and ordered a meeting to revote. Another meeting was held 105 days after the vacancy was created, resulting in four "yes" votes, two "no" votes, and two abstentions, and another tie-breaking vote by the Mayor in favor of Mr. Doyle. This time the Superior Court held that the abstentions were to be treated as "no" votes, and thus the Mayor's tie-breaking vote was permissible.

The Appellate Division reversed. Because the Superior Court's initial decision vacating the initial votes was not appealed (as a new action was ini-

tiated instead), any subsequent vote to fill the vacancy was outside the 30-day statutory limit, and therefore invalid. As in *Booker*, the court emphasized that the council was not required to fill a vacancy, and thus, the court could not compel the council to vote.

After invalidating the vote on procedural grounds, the Appellate Division also held that such vote should be invalidated because the abstentions could not be interpreted as "no"

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votes. Similar to *Booker*, the court recognized that the council could adopt procedural rules that speak to the effect of an abstention. However, unlike in *Booker*, here the Hoboken Council's rules were silent on this issue. Yet, the Council's rules required that where no specific rule was provided, *Robert's Rules of Order* were to be applied. In turn, *Robert's Rules of Order* provide that an abstention means "not to vote at all." The court stated that "yes" and "no" votes were not the only choices, as council members could choose not to fill the

vacancy with anyone by abstaining.

While in both cases abstention votes to fill a vacancy were not considered "no" votes which would allow for a mayor to break the tie, this may not be the case for all municipal governing bodies. These cases demonstrate that those municipal governing bodies whose procedural rules deem an abstention vote to be neither a "yes" nor a "no" vote, will likely be decided in the same manner. Similarly, if there is no specific procedure declaring that an abstention is neither "yes" nor "no", the Court will look for such provisions in the default procedural rules, as was the case in *Zimmer* with Robert's Rules of Order. On the other hand, if a municipal governing body's rules counted abstentions as "yes" votes, then a tie vote would likely be found, allowing the mayor to break the tie.

However, the scope of the Appellate Division's holding is not entirely clear. For example, it is unclear how the analysis would be conducted if the governing body's internal rules and any default rules were silent on abstentions. In fact, the court specifically stated that the case law was inconclusive on the issue of abstentions, finding that "very few clear patterns can be discerned from these various decisions." While language in the opinions might suggest that an abstention is not a "yes" nor a "no" given the governing body's discretion not to fill the vacancy, this issue was not before the court and was not decided.

However, what we do know is that the court will look first to the procedural and default rules when interpreting an abstention with respect to filling vacancies pursuant to the Municipal Vacancy Law. Therefore, each municipal governing body should be aware of, and/or amend its procedural rules to clarify the manner in which an abstention will be interpreted. Moreover, municipalities might consider lobbying the Legislature to amend the law in accordance with proposed changes suggested in a Final Report Relating to the Effect of Abstentions issued by the New Jersey Law Revision Commission in April 2011. The proposed change would declare that an abstention or failure to vote by a member of a public body "shall not...count[] as voting either for or against the matter." ▲

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NJMDA Reception:  
The Palm Restaurant at the Latin Quarter,  
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2801 Pacific Avenue  
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Commercial District Services  
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League Session:  
Thursday, November 21, 2:00-3:40 pm  
"Getting the Good Word Out: BIDs and the Net, the News and Social Media"  
Moderator: Victor DeLuca  
Mayor, Maplewood  
Atlantic City Convention Center, Rm 313

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