

**NOT FOR PUBLICATION
WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS**

CORY BOOKER, in his official capacity as Mayor of the City of Newark, ROBERT MARASCO, in his official capacity as City Clerk of the City of Newark, ANIBAL RAMORS, JR, in his official capacity as a member of the Municipal Council of the City of Newark, AUGUSTO AMADOR, in his official capacity as a member of the Municipal Council of the City of Newark, CARLOS M. GONZALEZ, in his official capacity as a member of the Municipal Council of the City of Newark, LUIS QUINTANA, in his official capacity as a member of the Municipal Council of the City of Newark, and SHANIQUE DAVIS SPEIGHT, in her official capacity as a member of the Municipal Council of the City of Newark

Plaintiffs,

v.

RONALD C. RICE, in his official capacity as a member of the Municipal Council of the City of Newark, RAS J. BARAKA, in his official capacity as a member of the Municipal Council of the City of Newark, MILDRED C. CRUMP, in her official capacity as a member of the Municipal Council of the City of Newark, and DARRIN S. SHARIF, in his official capacity as a member of the Municipal Council of the City of Newark,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION- ESSEX COUNTY
DOCKET NO.: L-8586-12

Civil Action

APPROVED FOR PUBLICATION

JULY 5, 2013

COMMITTEE ON OPINIONS

OPINION

RAS J. BARAKA, DARRIN S. SHARIF,
MILDRED C. CRUMP, RONALD C.
RICE, RAHMAN MUHAMMAD, EARL
BEST, and AMINA BARAKA,

Plaintiffs,

v.

ROBERT MARASCO, in his official
capacity as City Clerk of the City of
Newark, CORY BOOKER, in his official
capacity as Mayor of the City of
Newark, ANIBAL RAMORS, JR, in his
official capacity as a member of the
Newark, LUIS QUINTANA, in his
official capacity as a member of the
Municipal Council for the City of
Newark, CARLOS M. GONZALEZ, in
his official capacity as a member of the
Municipal Council for the City of
Newark, AUGUSTO AMADOR, in his
official capacity as a member of the
Municipal Council for the City of
Newark and CITY COUNCIL of the City
of Newark, a body politic, and
SHANIQUE DAVIS SPEIGHT, nominated
and approved to fill City Council
vacancy,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION- ESSEX COUNTY
DOCKET NO.: L-8536-12

Civil Action

OPINION

Decided: December 11, 2012

Wayne Positan and Scott Reiser for plaintiffs
Cory Booker, Robert Marasco, Anibal

Ramos, Jr., Augusto Amador, Carlos M. Gonzalez, Luis A. Quintana, and
Shanique Davis Speight (Lum, Drasco & Positan LLC, attorneys).

Robert Pickett and Lauren Craig for defendants Ras Baraka, Darrin Sharif,
Mildred Crump, and Ronald C. Rice (Pickett & Craig, attorneys).

CAREY, III, P.J.Cv.

INTRODUCTION

This matter comes before the court upon two verified complaints in lieu of prerogative writ in support of applications by way of order to show cause. Plaintiffs, Mayor Cory Booker, and several other members of the Municipal Council of Newark (“Mayor plaintiffs”), seek a declaratory judgment that the abstention of Councilman Ronald C. Rice (“Rice”), and thereafter the abstention of Councilman Darrin Sharif (“Sharif”), with regard to the appointment of Shanique Davis Speight (“Speight”) to the Council were rightfully decreed to be “negative” votes, which created a “tie” vote that allowed the Mayor to cast his own vote. Plaintiffs, Ras Baraka, and the remaining Council members (“Baraka plaintiffs”), filed their own application to invalidate such actions by the Council and Mayor in the appointment of Speight.

The narrow issue implicated in this matter is the legal effect of abstention, specifically whether the Council has the authority to deem a council member’s abstention to be a “negative” vote in order to create a tie vote that allows for mayoral intervention. The context of abstention here is grounded in the purpose of frustrating the appointment process and preventing the Mayor from exercising his statutory powers.

BACKGROUND

The City of Newark is governed by a mayor-council form of government pursuant to the Faulkner Act, N.J.S.A. 40:69A-1 to -210. The City's charter requires that the Municipal Council have nine members. On November 15, 2012, Donald M. Payne, Jr. resigned as president of the Council, thus leaving a vacancy for appointment of a successor. On November 20, 2012, the Council held a regular meeting, wherein seven of the eight remaining council members were present. Rice, the missing member, did not attend and made media statements that he was "boycotting" the meeting. The Council proceeded with the meeting and Speight was nominated as the ninth member. A majority vote of the "remaining members" of the governing body in issue is required under N.J.S.A. 40A:16-7, meaning that Speight could only be validly appointed to the Council upon receiving five of the eight votes. The Council's Rules of Procedure ("Council Rules") also specify that five confirmatory votes are required for appointment to the Council. At this meeting, council members Ramos, Amador, Gonzalez, and Quintana each voted for Speight, while council members Baraka, Crump, and Sharif each voted "no" as to the appointment of Speight. Rice's abstention was deemed by the Council to be a vote of "no" as to the appointment of Speight, resulting in a four-four tie vote with regard to the vacancy. The Council Rules specify that an abstention on the record during roll call is neither a "yes" or "no" vote. The Mayor then exercised his statutory power pursuant to N.J.S.A. 40A:16-8 to break the assumed "tie" and voted in favor of Speight, thereby providing the fifth vote required to secure an appointment.

Pursuant to an interim order entered by this court, the Council agreed to hold a special meeting with all members in attendance and engage in a “re-vote” on the topic of Speight’s appointment on December 5, 2012, with the result being four votes in favor, two against, and two abstentions on the record by Rice and Sharif. Pursuant to the order, which allowed the Mayor to vote if a tie were again declared by the Council, the Mayor again cast the fifth vote for Speight. The interim order nonetheless preserved the right of the parties to argue as to the legal effect of any abstentions at the December 11, 2012, oral argument.

DISCUSSION

This court is faced with a unique application of an issue devoid of any legal precedent directly on point. The arguments presented by both sides have demonstrated a conflict in the relevant authority as derived from the common law, Council Rules, and the applicable provisions of the Faulkner Act and Municipal Vacancy Law. The Mayor plaintiffs rely upon two principal authorities in support of their position. First, they rely upon N.J.S.A. 40A:9-132 to demonstrate the Mayor’s statutory authority to cast a vote in the event of a tie amongst the Council members. Next, they rely upon a number of common law cases dating back to 1926 regarding the treatment of abstentions, which are grounded in the policy of preventing the manipulation of government business by voting members of the governing body. In turn, the Baraka plaintiffs rely upon the Council’s authority to create its own procedural rules under N.J.S.A.

40:6A-180, with specific attention toward Section XVI of the Council Rules on the treatment of abstentions, coupled with the statutory language of N.J.S.A. 40A:16-8 regarding limitations on the Mayor's power to vote only in the event of a tie.

The governing law in a municipality with a mayor-council form of government with respect to a mayor's power to vote to fill a council vacancy is the Municipal Vacancy Law, N.J.S.A. 40A:16-1 to -23. When a vacancy occurs, the council may, but is not required to, make an appointment within thirty days, otherwise the office is left vacant until the next election. N.J.S.A. 40A:16-13. Under N.J.S.A. 40A:9-132, the mayor shall vote if the council should fail to take any action by reason of a tie or insufficient vote "unless otherwise provided by law." N.J.S.A. 40A:9-132. However, under the Municipal Vacancy Law, the mayor has the express authority to vote to fill a council vacancy only in the event of a tie vote. N.J.S.A. 40A:16-8. It is the interplay of these two statutes that fuels the conflicting arguments by both sides in this matter. Moreover, the issue before this court is further complicated by two additional laws: N.J.S.A. 40:69A-180(a), which specifies parameters for the council's adoption of its own procedural rules, and Council Rule XVI on abstention. This court ultimately arrives at its ruling by reading all four of these laws in pari materia. See Patterson v. Cooper, 294 N.J. Super. 6, 17 (Law Div. 1994). Despite this court's ultimate finding that the common law authority cited by the Mayor plaintiffs does not govern the instant matter, a brief discussion of the common law

variations on the issue of abstention and attempts to frustrate the democratic process is warranted.

State of the Common Law

The current law on the effect of an abstention by a member of a governing body is intricate. The general common law rule is that an abstaining member will be deemed to vote “yes” when a majority of the quorum is required unless he has, among other exceptions, expressly opposed the opposition, in which the latter case his or her vote is counted as “no.” See Aurentz v. Planning Bd. of Twp. of Little Egg Harbor, 171 N.J. Super. 135, 139 (Law Div. 1986); see also Garner v. Mountainside Adj. Bd., 212 N.J. Super. 417, 426 (Law Div. 1986). The New Jersey Law Revision Commission itself has acknowledged that there does not seem to be any case discussing the types of opposition that would be sufficient to render an abstention to count as a “no” vote. See John M. Cannel, Esq., Executive Director, Final Report Relating to Effect of Abstentions, NEW JERSEY LAW REVISION COMMISSION (Apr. 2011), available at www.njlrc.org (last visited Jan. 16, 2013). While the aforementioned cases are still good law, earlier appellate opinions suggested this issue was unresolved. See, e.g., Sliwka v. Franklin Twp. Council, 95 N.J. Super. 249, 250 (App. Div. 1967). In fact, the Appellate Division has not dealt with said issue since Aurentz and Garner were decided. In one appellate opinion, the court counted abstention as a “non-vote”

but failed to discuss the rule. See Comm. for a Rickel Alternative v. City of Linden, 214 N.J. Super. 631 (App. Div. 1987).

Further, under the common law as relied upon by the Mayor plaintiffs, if a statute requires a specific number of affirmative votes, then abstentions are often counted as “negative” votes in such circumstances. The reason for this is often stated that because a specific number of votes are required, there is no difference between a “non-vote” and a “no” vote. See Cannel, supra, at 2. The New Jersey Law Revision Commission recognizes that not only is the common law rule complicated, but it is problematic because “the rule probably does not reflect the expectations of a person who chooses to abstain. A person who abstains does not intend to cast any vote, affirmative or negative.” Ibid. As a result, the Commission has proposed legislation as recent as April 2011 as an attempt to uniformly define the effect of abstention to be a “non-vote.” See id. at 2-3. If adopted, the comments to the proposed statute provide that it would supersede the common law. Id. at 3.

The scenario before this court falls somewhere in between two sets of cases that exist on both ends of a spectrum. On the one end, there are cases that directly address a council member’s intentional frustration of a quorum to prevent a meeting from taking place at all, in which case the members owe fiduciary obligations to the public and could not frustrate government business to serve political purposes. See Kossyk v. Light, 157 N.J. Super. 338 (App. Div.

1978); Smith v. Ghigliotty, 219 N.J. Super. 231 (Law Div.), aff'd sub nom., Smith v. Borough of Barnegat Light, 219 N.J. Super. 11 (App. Div. 1987). On the other end, there are cases that address the issue of counting abstentions as negative votes in a different context for reasons other than frustrating the process when the applicable statute requires a specific, fixed number of affirmative votes to achieve a majority, as well as the rules of procedure adopted by the Newark Council specifying abstentions during roll call are to be considered a “non vote.”

This court is faced with the consideration as to whether the reasons for abstention carry any weight, given the differing treatments of abstention at common law in the land use context. This question was posed because of cases dating back to 1926, which stood for the proposition that remaining silent during voting should be counted with the affirmative vote unless the non-voters expressed opposition to the proposition, the latter of which should be counted with the negative votes. Kozusko v. Garretson, 102 N.J.L. 508, 509-10 (1926); see also Rhinesmith v. Goodfellow, 111 N.J.L. 604, 606-07 (1933) (discussing how expressing dissent prior to quitting the council table justified recording the refusal or failure to vote as a negative vote). The rationale for the general rule that allowed abstention to be counted with the negative votes when opposition was expressed, as opposed to mere silence, was seemingly explained in the Kossyk case as one of maintaining a policy of preventing frustration of the voting process when abstention is purposefully to do same. The Appellate Division in

Kossyk discussed the essential findings of the trial court, importantly that the quorum was “intentionally dissipated when the election item was reached on the agenda ‘for the purpose of frustrating a vote’ with respect to the vacancy.” Kossyk, supra, 157 N.J. Super. at 339–40 (emphasis added). The Appellate Division went on to reason that the only way the “dissenters” could prevent election of the candidate they did not favor was to leave the meeting and disrupt the quorum. Id. at 340. Despite the trial judge having been “unhelped by the absence of precedent,” the Appellate Division agreed with the lower court that “orderly government should not be frustrated by whim and the device of council persons absenting themselves from a position to which they were elected and to the attendance on which they had a solemn duty.” Ibid. (emphasis added).

The facts of Kossyk, however, are not directly on point because the attempts to frustrate the process were aimed at disrupting the quorum required to hold the meeting, whereas here the issue was one of obtaining the majority vote and not obtaining the quorum. Id. at 339–40 (“a quorum had been present at the meeting, had transacted business and had been intentionally dissipated when the election item was reached on the agenda . . .”). The Appellate Division did, however, later acknowledge in the Smith case that the rationale of Kossyk could be applicable to a different factual scenario, assuming that the common law governed. See Smith, supra, 219 N.J. Super. at 235. Ultimately, the Kossyk court found that “impotent, stalemated government must be worse,” and

affirmed the trial judge's ruling without addressing that inquiry. Kossyk, supra, 157 N.J. Super. at 340.

The rationale derived from Kossyk was further discussed in Smith, supra, 219 N.J. Super. 231. The Smith court narrowed the underlying dispute to be the question of whether a meeting must be held at all to exercise the option to fill the vacancy when members purposely do not attend such a meeting to prevent a quorum based on the belief that the vacancy should be filled by the electorate in the next election. Id. at 234. The court noted that, while there was no controlling precedent on the issue, it should order the defendants to participate in such a meeting because of "decisions under the Municipal Vacancy Law and its predecessor concerning related questions, the legislative history, the preference to conduct public matters in a public setting as evidenced by the Open Public Meetings Act . . . and the substantial authority relating to the fiduciary obligation of public officials." Ibid. (emphasis added). The court then looked to the Kossyk case which, despite acknowledged factual differences and potential quorum issue distinctions, served as a key component of the court's ruling because "the rationale of the [Kossyk] holding is that government's business should not be frustrated by the whim and device of council members to serve their political purposes." Id. at 235 (emphasis added). Therefore, the court found Kossyk not only to be "the closest decision on point," but also that the "underlying justification [was] clear" despite any distinctions from the facts of Smith. Id. at

234-35. The Smith court recognized that “attempts to stalemate the workings of government should not be countenanced.” Id. at 235. Therefore, the court indicated that it is the rationale of preventing a frustration of the process for political purposes, or “justifications beyond simple political expediency,” that weaves all such cases together. Ibid.

The Mayor plaintiffs also drew the court’s attention to In re Appointment to Rutherford Borough, 140 N.J. Super. 328 (Law Div. 1976), in which a quorum was established, but three of the council members of the borough refused to cast a vote for any nominee to fill the vacancy because, in part, the council members wanted the vacancy to be filled by the electorate at the upcoming election. The Rutherford court held that “the statute imposes upon all members of the governing body the obligation to consider the nominees in good faith.” Id. at 237 (emphasis added). While the Rutherford court upheld the right of the members to refuse to fill a vacancy based on the electorate preference, it “disagreed with the justification given for the refusal to fill the vacancy.” Id. at 237 (emphasis added). The Smith court more importantly went on to say that the “relevancy of the Rutherford decision is the court’s finding that the members of the governing body must at least participate in good faith in their evaluation of whether or not to fill the vacancy. Smith, supra, 219 N.J. Super. at 237 (emphasis added). The rationales derived from these cases make up one side of the aforementioned

spectrum, specifically the policy concerns of allowing abstention to intentionally frustrate the democratic process.

The other side of the spectrum alluded to by this court is derived from cases that dealt with the issue of abstention being counted as a “negative” vote when a statute requires a fixed specific number of majority votes. The Mayor plaintiffs cited to the Patterson case, wherein the court found an ordinance and tax notes passed at a council meeting to be validly approved when a quorum was present and the mayor cast a vote to avoid a deadlock. See Patterson, supra, 294 N.J. Super. at 18. The Patterson court found that when a statute “requires a specific, fixed number of actual affirmative votes for a majority, as does N.J.S.A. 40:103-5(82), abstentions are considered negative votes.” Ibid. (internal quotation marks omitted) (internal citations omitted) (emphasis added). The court stated that the mayor could vote to break a deadlock due to abstentions after reading N.J.S.A. 40:103-5(82) “in pari materia with [N.J.S.A.] 40A:9-132.” Id. at 17. The court reasoned that the language “unless otherwise required by law” in N.J.S.A. 40:103-5(82) applied to N.J.S.A. 40A:9-132, and a conjunctive reading of the two statutes authorized the mayor to vote. Id. at 17-18. The plaintiffs had argued that the plain language of N.J.S.A. 40:103-5(82) prevented the mayor from counting as part of the quorum and voting as a council member. Id. at 12. The plaintiffs also asserted that nothing in the city charter expressly permitted the mayor to vote. Ibid. The defendants countered that N.J.S.A. 40A:9-132 permitted

the mayor to count as part of the quorum and cast a vote when the council is deadlocked. Id. at 12-13. The court ultimately found that N.J.S.A. 40A:9-132 was the law that “provided otherwise” the authority for the mayor to vote when read in conjunction with N.J.S.A. 40:103-5(82). Id. at 17-18. While N.J.S.A. 40A:9-132 governed this case, the Patterson court was not faced with an in pari materia reading of N.J.S.A. 40A:9-132 with N.J.S.A. 40A:16-8, since no vacancy appointment was involved, which fittingly was the law that “provided otherwise” as an exception for the application of N.J.S.A. 40A:9-132. The Patterson court did, however, voice its concerns over allowing council “standoffs” to continue. Id. at 15.

The Patterson court had derived its reasoning from Garner, supra, 212 N.J. Super. 417. While Garner involved an application for “c” (bulk) variances for constructing an office building, the court’s rationale was similar. The applicant in Garner was advised that two members of the board of adjustment were not at the previous meeting and four affirmative votes, or a majority of those present, would be needed. Id. at 421. The board in that case had seven members, all of whom were present at the meeting when the vote took place. Id. at 422. The court identified the issue before it as whether the abstention of two members had any effect on the variance application. Ibid. (emphasis added). The vote was three-two in favor of granting the variance but with two abstentions. Ibid. The plaintiff contended that approval occurred because only a simple majority of

those actually voting was needed. Id. at 422-23. The defendant countered that four votes were needed since seven members were physically present at the meeting. Id. at 423. The Garner court discussed the common law rule in the context of Municipal Land Use Law, N.J.S.A. 40:55D-1 to -163, when the statute requires only a vote of “the commissioners present,” which is that abstentions are to be counted as affirmative votes subject to exceptions. Id. at 425 (citing Aurentz, supra, 171 N.J. Super. 135). The two recognized exceptions to this rule involve either i) abstention due to a conflict of interest or ii) when a “specific, fixed number of actual affirmative votes” is required for a majority. Ibid. (internal citations omitted). Another limitation on the rule is when the abstaining voters “express the fact that they are opposed to the matter being voted on, their silence should not be considered as affirmative votes, but rather negative votes.” Ibid. (citing Kozusko, supra, 102 N.J.L. 508). The New Jersey Supreme Court said long ago in Kozusko, that in spite of its factual differences, “when a member does dissent, his vote cannot properly be counted in the affirmative. The common sense of the matter seems to be that it should be recorded in the negative.” Kozusko, supra, 102 N.J.L. at 510. Garner and Aurentz, however, involved disqualification for conflict of interest (Aurentz) and disqualification under a statute that required attendance at a prior variance meeting (Garner). The Garner court ultimately approved the application finding that the abstentions should not have counted as “those present.” See Garner, supra, 212 N.J. Super. at 427. The Garner court’s reasoning appeared to be

grounded in the fact that N.J.S.A. 40A:9-132, which granted the mayor authority to vote by reason of tie or insufficient vote, could not be circumvented by N.J.S.A. 40:103-5(82), which required affirmative vote by a majority of council members in office and not disqualified by abstention; rather, the two had to be read together to demonstrate that the mayor's authority fell under the "unless otherwise required by law" language. Patterson, supra, 294 N.J. Super. at 17.

The statute implicated in the instant matter is different, however, than the one at issue in Patterson, which contained the language "majority of the members of council then in office and not disqualified from voting thereon[]"" Patterson, supra, 294 N.J. Super. at 12, 17 (emphasis added). N.J.S.A. 40A:16-7 merely requires a majority of "remaining members" for a valid appointment, with no mention regarding the treatment of abstention. Therefore, Patterson, Garner, and Aurentz all presented different scenarios because those courts treated abstentions as negative votes under the common law exception when a statute requires a "specific, fixed number of affirmative votes." Compare N.J.S.A. 40A:16-7 (only using the language "remaining members"), with N.J.S.A. 40:103-5(82) (using the language "not disqualified from voting thereon").

The Newark Council Rules Trump the Common Law

Ultimately, the Baraka plaintiffs are correct in the sense that none of the common law authority had clear council procedural rules on abstention in play, as in the instant matter, to guide the courts. Moreover, the governing statutes

alone do not address the legal effect of abstention so as to create a conflict or inconsistency with the Council Rules. Essentially, N.J.S.A. 40:69A-180(a) empowered the Council to implement Rule XVI, which specifically deemed abstentions on the record to be a “non-vote,” and Rule XVI must govern in the absence of any conflict with the provisions of the Municipal Vacancy Law. See Council Rules Part XVI. Roll Call for Voting (“A Council Member may abstain from voting on any matter, such abstention shall not be counted as a yes or no vote but shall be recorded in the minutes.”) (emphasis added). The Municipal Vacancy Law does not make any reference to examining the motives underlying such an abstention that would create any type of inconsistency. The common law ultimately conveys, at best, that the state of the law on the issue of the legal effect of abstention is divided. Until such time that legislation, like the one proposed by the New Jersey Law Revision Commission, shall pass creating a uniform definition of abstention, this court must look to the Council Rules.

The Council Rules are clear on the legal effect of abstention without the need for the court to inquire into the motives or reasons for abstaining, despite language used to such effect in the various cases at common law. See Council Rules Part XVI. Roll Call for Voting. When read in pari materia with N.J.S.A. 40:69A-180, 40A:9-132, and 40A:16-8, the Council Rules control in the absence of a conflict with statute or ordinance. The “unless otherwise provided by law” language used in N.J.S.A. 40A:9-132 persuades this court that N.J.S.A. 40A:16-8

“provides otherwise” the exact scenario in which the Legislature intended the Mayor to vote on an appointment— only in the instance of a tie. See Cianciotto v. Milstein, 132 N.J. Super. 83, 85 (App. Div. 1975). (alterations in original) (court rejecting the defendants’ argument that N.J.S.A. 40A:9-132 controlled because “[s]ection 132 specifically provides that it should apply in all cases ‘unless otherwise provided by law.’ The Legislature has in fact provided otherwise by law, and has done so by the provisions of N.J.S.A. 40:87-12”). N.J.S.A. 40A:9-132 is a more general statute addressing the general voting powers of a mayor when either filling a vacancy, adopting an ordinance, or any other instance when the governing body fails to take action. N.J.S.A. 40A:9-132. N.J.S.A. 40A:16-8, however, specifically addresses the power of a mayor to cast a vote when voting on the issue of filling a council vacancy. N.J.S.A. 40A:16-8 (“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.”). The interplay between N.J.S.A. 40A:9-132 and N.J.S.A. 40A:16-8 refutes the Mayor plaintiffs’ alternative argument that the Mayor properly voted in the scenario of an “insufficient vote” as Speight only received four of the required five votes. Moreover, the Baraka plaintiffs persuasively argued that the language “insufficient vote” under N.J.S.A. 40A:9-132 refers to when a mayor can intervene to satisfy the required quorum, as opposed to intervening to provide a sufficient majority vote in the absence of a tie. See Cianciotto, supra, 132 N.J. Super. at 85-86. Reading all four of these laws together, this court arrives at the conclusion that N.J.S.A. 40:69A-

180 empowers the Council to adopt its own procedural rules as long as they are not inconsistent with statute or ordinance, that the Council specifically adopted a rule on the legal effect of abstention, and the Mayor can only vote in the instance of a tie vote. The Council Rules, particularly Rule XVI, do not conflict with any of the governing provisions of the Faulkner Act or Municipal Vacancy Law because such statutes do not address the legal effect of abstention or address the issue of whether the court can consider the motives or reasons for abstentions. Only the common law appears to address the issue of motive and abstaining to frustrate the voting process, but such authority as mentioned is trumped in this instance by the Council Rules.

Even if the common law were directly applicable, this court is not persuaded that N.J.S.A. 40A:16-7 requires a specific number to achieve a majority because the statute merely calls for a majority of “remaining members,” not a “quorum,” or “excluding abstentions,” the latter of which is similar to the statute in Patterson excluding disqualification. N.J.S.A. 40A:16-7 seems to fall in between the common law rules because it does not require a majority of a quorum, which would mean the abstentions should be deemed affirmative votes, and yet does not require a fixed number of votes to so clearly call for abstention to be a negative vote. Under the Municipal Vacancy Law, an appointment to fill a Council vacancy “shall be by a majority vote of the remaining members.” N.J.S.A. 40A:16-7; see also Apgar v. Smith, 169 N.J. Super. 221, 225 (App. Div.

1979) (defining the term “remaining members” as those who remain in office after the departure of others). This court is not persuaded that the aforementioned statute requires a specific, fixed number of votes to constitute a majority as argued by the Mayor plaintiffs to invoke the common law rule requiring abstention in such a scenario to be deemed a “negative” vote. The Council’s Rules actually specify a fixed number of votes required to confirm an appointment– five or more. See Council Rules Part XXIV. Nominations and Actions Thereon. However, the Rules also specify the legal effect of abstention, again bypassing any implementations of the common law rule. See Council Rules Part XVI. Roll for Voting. Had the Legislature added a provision under N.J.S.A. 40A:16-7 using language such as “those who abstain shall not be counted toward ‘remaining members’ for purposes of attaining a majority,” then perhaps an argument could be made that the statute requires a specific number. Regardless, since the Council Rules are clear on the legal effect of abstention and were created within the purview of the Council’s powers under N.J.S.A. 40:69A-180(a), this Court finds the Rules to be controlling.

CONCLUSION

The ultimate concern here is one of balance, specifically ensuring that the Council does not act beyond its legislative purview whilst also protecting the democratic process from members of a governing body that deviate from the fiduciary duties owed to the public and attempt to interfere with government

functions. This court is divided between the danger of empowering the Council to go beyond the applicable statutes and self-adopted Rules and the serious concern of allowing members of the Council to intentionally frustrate the democratic process that is established under those same statutes and Rules. On the one hand, “[i]t is axiomatic that municipal bodies in this State have no powers other than those delegated by the Legislature, and must perform their prescribed activities within the statutory ambit. Skarbnik v. Spina, 125 N.J. Super. 87, 94 (Law Div. 1973) (emphasis added) (citing Scatuorchio v. Jersey City Incinerator Auth., 14 N.J. 72, 85 (1953)). The Faulkner Act requires the Council to determine its own procedural rules but restricts such authority to rules that are “not inconsistent with ordinance or statute.” N.J.S.A. 40:69A-180(a). For instance, the court in Skarbnik refused to allow the suggestions or actions by the council that were “not within the letter or spirit of the applicable statute . . . and the local rules of procedure adopted pursuant thereto.” Skarbnik, supra, 125 N.J. at 95. This court must heed caution in attempting to extend “too far” any similar cases or rationales derived by other courts if affirming the actions of the Newark Council would violate the applicable statutes and procedural rules adopted by the Council.

The Mayor exercised his statutory authority to intervene under the assumed scenario of a “tie” vote. The issue is whether abstention can be deemed to be a negative vote to create such a tie, something not directly addressed under

the common law or applicable statutes when read in isolation. Under the common law, there are cases on one end that directly address a council member's intentional frustration of a quorum to prevent a meeting from taking place at all, in which case the Kossyk and Smith courts were clear that the members owe fiduciary obligations to the public and could not frustrate government business to serve political purposes. On the other end, there are cases that address the issue of counting abstentions as negative votes in a different context for reasons other than frustrating the process when the applicable statute required a specific, fixed number of affirmative votes to achieve a majority. However, these cases do not address the exact scenario before this court and did not implicate council rules of procedure on the legal effect of abstention as the Newark Council has adopted in the matter before this court. The glaring reality is that any case law supporting the Mayor's position is through analogy or extension and ultimately ground in a policy rationale.

The Council has clear procedural rules that abstention shall neither be considered a "yes" or "no" vote. Such a definition of abstention is not unfounded. See, e.g., Mann v. Housing Auth. of Paterson, 20 N.J. Super. 276, 280 (Law Div. 1952) (abstention is "not an expression of the choice or preference of the voter.") (emphasis added). By reading N.J.S.A. 40A:9-132, 40A:16-18, 40:69A-180, and Council Rule XVI in pari materia, this court is persuaded that the Council Rules are clear on the effect of abstention and do not conflict with

any of the governing statutes. Moreover, this court is persuaded that the Mayor may only vote to fill a Council vacancy in the instance of a tie vote. The Newark Council Rules specifically require five confirmatory votes for appointment and, more importantly, indicate that an abstention during roll call shall be neither a “yes” or “no” vote. What the Council Rules and statutes do not address, however, is whether the court must inquire as to the reasons or motives behind abstention because this point has only been assessed under the common law. This court cannot inquire into the minds of Rice and Sharif, irrespective of any clear intent to frustrate the process by preventing a tie vote that would have allowed the Mayor to intervene because the Council Rules are clear on the legal effect of abstention without exception for the reasons.

Therefore, this court finds the actions of the Mayor plaintiffs to be in violation of the Council Rules and the Municipal Vacancy Law provisions. For the reasons discussed herein, this court hereby grants the relief sought by the Baraka plaintiffs, thereby voiding the Council’s declaration of a “tie” vote, nullifying the Mayor’s vote, and invalidating Speight’s appointment. Moreover, the tolling of the thirty day period for the Council to fill the vacancy is hereby lifted as of this date.