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SUPERIOR COURT OF NEW JERSEY  
HUDSON COUNTY  
LAW DIVISION  
DOCKET NO. L-3957-18

COMMITTEE OF PETITIONERS FOR  
REFERENDUM ON JERSEY CITY  
ORDINANCE 18-057,

Plaintiff,

CIVIL ACTION

v.

OPINION

CITY OF JERSEY CITY, ROBERT BYRNE,  
in his official capacity as clerk for the city  
of Jersey City, and the CITY COUNCIL OF  
THE CITY OF JERSEY CITY

Defendants.

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ARGUED: October 19, 2018

DECIDED: October 19, 2018

William C. Matsikoudis, Esq. for plaintiff (Matsikoudis & Fanciullo, LLC, attorneys).

Stevie D. Chambers, Esq. for defendants (Jersey City Corporation Counsel's Office, attorneys).

Bariso, A.J.S.C.

**Factual Background and Procedural History**

This matter arises out of an order to show cause seeking emergent restraints. Plaintiff Committee of Petitioners for Referendum on Jersey City Ordinance 18-057 ("Committee of Petitioners") asks this court to declare that Jersey City's City Council's ("City Council") vote of

3-0-5 on the first reading of the ordinances constitutes enough passing votes to send the ordinances to a second reading and public hearing.

Jersey City's Mayor and City Council want to move the Katyn Forrest Massacre Memorial (the "Memorial") from its current location at Exchange Place to a new location on York Street. To move the Memorial, City Council promulgated Ordinance 18-057. In response, Committee of Petitioners was established to challenge Ordinance 18-057 by collecting enough petition signatures to either temporarily stop the ordinance from becoming effective or cause a referendum whereby residents would vote to determine the placement of the Memorial.

Once the petition gained enough signatures pursuant to N.J.S.A. 40:69A-184, the City Council had two options: (1) repeal Ordinance 18-057 or (2) submit it to voters to decide whether it would become effective via referendum. The City Council chose option one and at the September 12, 2018 meeting, it considered two new ordinances, No. 18-111 and No. 18-112, ("the Repeal Ordinances") that would repeal Ordinance 18-057. City Council, with eight out of nine members present, voted: three affirmative, zero against, five abstentions. The City Clerk and Corporation Counsel determined the 3-0-5 vote constituted a defeat of the Repeal Ordinances on first reading, thus requiring a referendum.

Committee of Petitioners disagrees with the City Clerk and Corporate Counsel's determination. Committee of Petitioners seeks to obtain (1) a court ruling that the 3-0-5 vote constitutes passage of the repeal ordinances; (2) an order requiring the repeal ordinances be placed on an upcoming agenda for public hearing and second reading; and, (3) City Council's acts, which deprived the Petitioners a right to speak at a public hearing deprives them of a substantive right under the New Jersey Civil Rights Act.<sup>1</sup>

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<sup>1</sup> The third argument is not discussed as Committee of Petitioners fails to plead sufficient facts to support its claim. Also, since neither an injunction nor attorney's fees are proper here, this opinion will not address those arguments.

## **Committee of Petitioners' Argument in Support of Order to Show Cause**

The Council's 3-0-5 vote on the Repeal Ordinances was sufficient for those ordinances to pass to a second reading and public hearing. For an ordinance to be introduced on first reading, there must be a majority of quorum. Pursuant to City Council rules, abstentions do not count as "no" votes. Jersey City Code of Ordinances, § A350-16(F). Also, New Jersey statutes and case law distinguish what is required to adopt an ordinance from what is necessary to move the ordinance to a second reading.

N.J.S.A. 40:69A-180 requires the affirmative vote of a majority of all members of the Council to adopt an ordinance and such adoption only occurs after its second reading. Since there is no statute discussing the process of moving an ordinance from first to second reading, the common law rule will apply. Under common law, a majority of a quorum is required for a governing body to take action. Ross v. Miller, 115 N.J.L. 61, 63 (NJ 1935). Since no legislature has changed this rule, it still stands that a majority of a quorum is all that is needed for an ordinance to pass on first reading.

Additionally, the City Council may create their own rules that supplement common law or a statute. Here, the City Council's Rules state that an abstention "shall not be deemed either as an 'aye' or 'nay' vote" and "the Council member abstaining from the vote shall be deemed to have taken a strict neutral position on the matter." Jersey City Code, § A350-16(f). See Booker v. Rice, 431 N.J. Super. 548 (App. Div. 2013) (holding abstentions must not be deemed as no votes).

City Council rules state, a "majority of the full membership of the Council shall constitute a quorum." Jersey City Code, § A350-13. Since Jersey City has a nine-member Council, the quorum is five and a majority of quorum is three. Therefore, three votes in favor of introducing the repeal ordinances is sufficient to move it to a second reading and public hearing. On September

12, 2018, five members abstained instead of voting no, so the three aye votes lead to an “ayes have it” conclusion. Accordingly, the City Council’s 3-0-5 vote on the repeal ordinances must be deemed an affirmative vote in favor of introduction.

Moreover, even if the math is incorrect, New Jersey case law demands this court view the five abstention votes as yes votes. New Jersey has long recognized the common law rule that, “the vote of a member present who declined to vote at all should be counted in the affirmative.” Kozusko v. Garretson, 102 N.J.L. 508, 510 (N.J. 1926) (citing Mount v. Parker, 32 N.J.L. 341 (N.J. 1867)).

Whether the abstentions, for which there was no stated justifications, are counted as neutral votes or yes votes, the conclusion is the same: the repeal ordinances passed on first reading.

#### **Defendants’ Argument in Opposition to Order to Show Cause**

At issue is whether three affirmative votes, zero votes against, and five abstentions on the first reading of an ordinance is sufficient for an ordinance to pass to second reading. The Faulkner Act states that a city council “shall determine its own rules of procedure, not inconsistent with ordinance or statute.” N.J.S.A. 40:69A-180. The Jersey City Council, pursuant to the Faulkner Act, established rules of procedure, known as the City Council Rules of Order (“Council Rules”), which provide a clear answer to the issue posed by Committee of Petitioners. The Council Rules contain two provisions that control the number of votes required to pass matters not controlled by state law. Jersey City Code, Section A350-13(a), states that a quorum is established by a majority of the full membership of the Council. Jersey City Code, Section A350-7(b) states that all matters before the City Council that are not governed by state law require a majority vote of Council present. Adopting an ordinance requires the affirmative vote of a majority of the full membership

and all other matters will be adopted by a majority of *members present*. Jersey City Code, § A350-13(a) (emphasis added).

The interplay of the Faulkner Act, the Council Rules, and common law is clear. When a municipality has set forth rules of order, common law is irrelevant. The Council Rules comprehensively sets forth that all matters before it, not governed by state law, require a majority vote of Council present. See Jersey City Code, § A350-7. Since eight members of the Council were present in the instant matter, a majority vote of the Council would have consisted of five affirmative votes. Both repeal ordinances only received three votes in favor of introduction. Thus, pursuant to the Council Rules, the ordinances failed introduction.

Committee of Petitioners is incorrect in its argument that the abstentions from five Council members should be counted as affirmative votes. Jersey City Code, Section A350-16(f) states,

A member of the Council may abstain from voting on any matter. An abstention, for all purposes, shall not be counted either as an "aye" or "nay" vote. An abstention shall not be counted either as a vote for or a vote against the particular matter in which the abstention is given. The Council member abstaining from the vote shall be deemed to have taken a strict neutral position on the matter

Committee of Petitioners' reference to common law regarding the status of abstentions is erroneous because common law is irrelevant when the governing body adopted its own rules. The Council Rules should govern and be interpreted and enforced as written. If the Council's September 12, 2018 abstentions are counted in the affirmative, as Committee of Petitioners contends, the Council members who abstained would no longer be counted as taking a neutral position, which violates the City Code. Changing the Councilmembers' votes would frustrate the purpose of allowing abstentions in the first place. As such, it would be improper to determine that the five abstentions were effectively "yes" votes.

### Committee of Petitioners' Reply

Common law is law and the Council Rules do not require a vote of the majority present to introduce an ordinance on first reading. New Jersey common law clearly holds that a majority of quorum is required to introduce an ordinance on first reading. Ross v. Miller, 115 N.J.L. 61, 63 (N.J. 1935). Applied to Jersey City's nine-member council, three votes are needed to introduce an ordinance if there are not an equivalent or greater number of "no" votes.

Despite Defendants' argument that the Council Rules override common law, these provisions, by their own terms, do no such thing. The relevant rule states, a "majority vote of the members of the Council present shall govern except as *specifically provided otherwise by law.*" Jersey City Code, § A350-7 (emphasis added). The problem with the Defendants' argument is that common law "provides otherwise," as it has required only a majority of quorum for decades. Defendants' brief interprets "law" as meaning only statutory law. However, common law is also law. Thus, the Council Rules, by their own terms, require only a majority of quorum because Section A350-7 of the Code recognizes that it is subservient to "law," which includes common law.

Even if this court were to interpret the Council Rules as being contradictory to common law, the City Council cannot adopt rules that conflict with common law. See Traino v. Mc Coy, 187 N.J. Super. 638, 648 (Law. Div. 1982) (holding a municipal board could not override common law by internal rule). Although the State Legislature can override common law with a statute, City Councils do not have that same authority and cannot trump common law through ordinance or resolution.<sup>2</sup>

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<sup>2</sup> Committee of Petitioners cites to a case that defines common law but does not support this proposition.

Defendants cite to Booker v. Rice to argue that, where an ordinance addresses an issue and that ordinance does not conflict with any statutory authority, that ordinance will control. 431 N.J. Super. 548 (App. Div. 2013). However, the notion that an ordinance can trump common law if it does not violate a statute is not supported anywhere in New Jersey jurisprudence, including the Booker case. The court in Booker addressed the same issue as here: whether abstentions by councilmembers count as ‘aye,’ ‘nay,’ or ‘neutral’ votes. Id. at 550-52. There, the council counted them as ‘neutral’ despite common law saying abstentions should count as affirmative votes. Ibid. The court in Booker stated that City Councils are permitted to adopt rules that are not “inconsistent with ordinance or statute.” Id. at 553. However, unlike in Booker, the issue here is not whether the rule in question requiring a majority of council members present to vote ‘yes’ violates an ordinance or statute, but whether a different standard is “provided otherwise by law” pursuant to the language of the Council Rule itself. Since Council Rules recognize the supremacy of “law” in its own terms, and common law only requires a majority of a quorum to introduce an ordinance on first reading, Council Rules require same.

Moreover, there is substantial precedent supporting Committee of Petitioners’ argument that abstentions should be deemed ‘yes’ votes or votes that support the majority.<sup>3</sup> The reasoning is to deter councilmembers from evading their duties by abstaining. See Kossyk v. Light, 157 N.J. Super. 338, 339-40 (App. Div. 1978); Smith v. Ghigliotty, 219 N.J. Super. 231, 239-40 (Law Div.), aff’d 219 N.J. Super. 11 (App. Div. 1987).

The cases cited by Defendants are distinguishable as they both dealt with voting to fill a vacancy. There, the courts determined that there were three meaningful choices a councilmember could make: vote in favor of the candidate, oppose him, or oppose filling the vacancy with anyone.

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<sup>3</sup> Plaintiff cites to no case law supporting its argument that there is “substantial precedent.” Instead, he only argues against Defendants’ case law.

See Zimmer v. Castellano, 432 N.J. Super. 412, 420 (App. Div. 2013); Booker, 431 N.J. Super. at 557-58. Here, there is no basis for the abstentions and the council members offered no rationale for abstaining. Accordingly, the abstentions should be deemed as ‘aye’ votes.

### Legal Standard

**Jersey City Code, § A350-7. - Rule VI: Presiding officers; president; temporary president pro tem; duties.**

- b. The presiding officer shall preserve strict order and decorum at all regular and special meetings of the Council. He or she shall state every question coming before the Council and announce the decision of the Council on all matters coming before it. **A majority vote of the members of the Council present shall govern except as specifically provided otherwise by law.** The President shall sign all ordinances and resolutions adopted by the Council during his or her presence. In the event of the absence of the President, such ordinances and resolutions shall be signed by the temporary President Pro Tem. In the absence of the President Pro Tem, the temporary presiding officer shall sign such ordinances and resolutions adopted by the Council.

**Jersey City Code, § A350-13. - Rule XI: Quorum.**

- a. **A majority of the full membership of the Council shall constitute a quorum. No ordinance shall be adopted by the Council without the affirmative vote of a majority of the full membership thereof, and all other matters may be adopted by a majority of the members present, except as specifically provided otherwise by law.**

**Jersey City Code, § A350-16. - Rule XIV: Rules of debate.**

- f. Roll call. Upon any roll call there shall be no discussion or explanation given by any member voting, and he or she shall vote yes or no unless he or she shall first receive special permission from the Council to explain his or her vote. **A member of the Council may abstain from voting on any matter. An abstention, for all purposes, shall not be counted either as an "aye" or "nay" vote. An abstention shall not be counted either as a vote for or a vote against the particular matter in which the abstention is given. The Council member abstaining from the vote shall be deemed to have taken a strict neutral position on the matter.**

### Legal Conclusion

Jersey City Code, Section A350-13 states, “A majority of the full membership of the Council shall constitute a quorum. No ordinance shall be adopted . . . without the affirmative vote of a majority of the full membership thereof, and *all other matters may be adopted by a majority*



*of the members present, except as specifically provided otherwise by law.*” (Emphasis added.) The Council included the catch-all phrase, “all other matters” to capture anything that the clear language of the Code failed to state, including moving a proposed ordinance from first to second reading. Therefore, moving Ordinance Numbers 18-111 and 18-112, the Repeal Ordinances, to a second reading required a “majority of the members present” to vote affirmatively. See Jersey City Code, § A350-13.

Here, only three of the eight present Councilmembers voted in the affirmative. Therefore, the votes were not sufficient to pass the ordinances to a second reading and public hearing. Committee of Petitioners cited to Kozusko v. Garretson to argue that the vote of a member present who declined to vote at all should be counted in the affirmative. See 102 N.J.L. 508, 510 (1926) (citing Mount v. Parker, 32 N.J.L. 341 (1867)). However, Kozusko held that the non-voting members actually counted against the vote because those members spoke out against the resolution. Nonetheless, Kozusko is distinguishable because there, members did not vote to abstain; they failed to vote entirely. Here, the five abstaining Councilmembers did not fail to vote for the repeal ordinances. Instead, they did vote and their vote was to abstain, as is allowed under Council Rules and case law. See Booker, 431 N.J. Super. at 554-57; Jersey City Code, § A350-16(f). Also, according to the Council Rules, abstentions “shall not be deemed either as an ‘aye’ or ‘nay’ vote.” Jersey City Code, § A350-16(f). Therefore, the repeal ordinances only received three ‘aye’ votes after the first reading, which is not a majority of the members present (eight) and is not sufficient to pass to the second reading.

Further, Committee of Petitioners argues that Traino v. Mc Coy, 187 N.J. Super. 638, 648 (Law Div. 1982), held that a municipal board could not override common law by internal rule. See Pl. Reply 3. However, that Burlington County case, which is not binding on this court, had a much

more limited holding. There, the court said, “[b]y common law, a majority of a board . . . constitutes a quorum. This rule can be changed only by general law or charter, not by internal rule, even when the body in question is given general rule making powers.” Traino, 187 N.J. Super. at 648. The Court’s limited holding only addresses that a quorum must be at least a majority of the total members of a board, which is the exact language of Jersey City Code, Section A350-13. The Court never discussed other common law rules that may or may not be changed by a municipal government, such as whether abstentions should count as ‘aye’ or ‘nay’ votes. Thus, Committee of Petitioners’ argument is flawed.

Committee of Petitioners further argues “there is substantial precedent supporting the concept that abstentions should be deemed ‘yes’ votes or votes that support a majority. The basis of the rule is that council members should not shirk from their duties by abstaining.”<sup>4</sup> Pl. Reply 5 (citing Kossyk, 157 N.J. Super. at 340; Smith, 219 N.J. Super. 231). Neither of the cases cited by Committee of Petitioners dealt with councilmembers abstaining; in Kossyk and Smith, the members failed to attend the vote in general. Therefore, no recent case cited by Plaintiff held that abstentions should count as “yes” votes.

The court in Kossyk dealt with a group of councilmembers who walked out in the middle of a meeting and stood in the hallway, attempting to disrupt a quorum so that a vote could not take place. 157 N.J. Super. 338. There, the appellate court upheld the trial court’s decision that a quorum continued, despite the walk-out of some councilmembers who refused to partake in a vote. The appellate court also noted that the “narrow circumstances of the dispute” persuaded the court that the determination of the trial judge was correct.” Id. at 340. The “narrow circumstances” at issue in Kossyk are easily distinguishable from this case. Here, the councilmembers did not walk

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<sup>4</sup> The opposite is true. In Zimmer, the Appellate Division stated that members of the council may abstain when voting and doing so would NOT make them “in dereliction of their duties.” 432 N.J. Super. at 420.

out to frustrate the vote; they participated in a vote and their votes were to abstain. Clearly a quorum existed as eight members participated in the meeting and voted and, in accordance with Council Rules, a majority of the members present would be five. Committee of Petitioners cannot change the rules of a quorum by arguing that the five abstentions do not count towards a quorum and, as such, the three ‘yes’ votes constitute a majority of a quorum. If that were the case, and the five abstentions did not count toward a quorum, then the three ‘yes’ votes would not be enough votes to reach a quorum since at least five members are required.

Plaintiff’s premise regarding common law was rejected in Booker, where the Appellate Court stated, New Jersey’s jurisprudence regarding the meaning of abstentions is “rather nuanced and confusing” and there is “no clear or definitive rule suggesting the treatment of abstention [that] can be ascertained from the cases.” Booker, 431 N.J. Super. at 554.

As the court concluded in Booker, “our common law demonstrates there is very little clarity or consistency in the judicial treatment of abstentions by members of municipal governing bodies.” Id. at 556. Accordingly, Committee of Petitioners’ argument that Jersey City Code, Section A350-7 should not be applied because it is contrary to common law is unpersuasive. More importantly, because the City Code does not conflict with any statutory authority, including the Faulkner Act, it does not violate N.J.S.A. 40:69-180.

In light of the determination that the City Council acted in accordance with State Law and Council Rules, this court will not address Committee of Petitioners’ Civil Rights claim.

For the reasons stated above, Committee of Petitioner’s order to show cause is denied and the Verified Complaint is dismissed with prejudice.