



State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY
OFFICE OF THE ATTORNEY GENERAL

ROBERT J. DEL TUFO
ATTORNEY GENERAL

May 7, 1991

Hon. Andrew Weber
Chief Counsel to the Governor
State House
CN 001
Trenton, New Jersey 08625

Re: FORMAL OPINION NO. 3 (1991)

Determination of quorum for meetings of
public body where one or more vacancies
exist in membership.

Dear Counsel Weber:

You have asked how a quorum of members of a public body is determined when one or more vacancies exist in the agency's membership. For the following reasons, it is our opinion that where an act prescribes a specific minimum number of members to constitute a quorum for meetings, that number must be present in all cases despite any current vacancies in the agency's membership. Similarly, where an act defines a quorum as a majority or larger fraction of "all the members" or of "the authorized members," the number constituting a quorum is a fixed one which remains constant irrespective of vacancies. On the other hand, in those acts where a quorum consists of "a majority of the members" or words to that effect, or where the act says nothing at all on the matter, a quorum means a majority of the actual current membership after subtracting any vacancies.

A quorum is the number of members of a body necessary to hold a meeting. 62 C.J.S. §399 at 757. Absent a statute to the contrary, the common law rule in New Jersey and elsewhere is that "a majority of a public body constitutes a quorum." Matawan Teachers Association v. Board of Education, 223 N.J. Super. 504, 507 (App. Div. 1988); see also Edgewater Park v. Edgewater Park Housing Authority, 187 N.J. Super. 588, 597 (Law Div. 1982).

The most common form in which a quorum requirement appears in enabling acts of public bodies is as a fixed, specific number representing a majority of the total membership. See, e.g., N.J.S.A. 52:90-12e (quorum of Capital City Redevelopment Corporation is "five directors" of nine-member board of directors); N.J.S.A. 55:19-4g ("five members, including at least two ex officio members" of nine-member board of directors of Urban Development Corporation); N.J.S.A. 52:18A-78.4d ("seven directors" of 12-member New Jersey Building Authority); N.J.S.A. 11A:2-3 ("three members" of five-member Merit System Board); N.J.S.A. 27:1B-4 ("three members" of five-member New Jersey Transportation Trust Fund Authority); N.J.S.A. 55:14A-6 ("four members" of seven-member local housing authority).

As an alternative to prescribing a specific number of members, there is a second way in which enabling acts may establish a fixed quorum requirement which remains constant at all times despite existing vacancies. In this variant, the act does not use a single number but defines a quorum as a majority or some larger fraction of the agency's total authorized membership. The omission of a specific number in this type of statute merely reflects the fact that the act applies to more than one type of public body, or to a single type of varying size as established in separate legislation. See, e.g., N.J.S.A. 40:81-1 and 40:81-20 ("a majority of all the members" of a municipal council constitutes quorum where council may be comprised of "three, five, seven or nine members"); N.J.S.A. 40:69A-180(a) ("a majority of the whole number of members" of a city council constitutes quorum); N.J.S.A. 40:55D-6 (defining quorum in Municipal Land Use Law as "the majority of the full authorized membership of a municipal agency"). See also N.J. Const. (1947), Art. IV, § IV, ¶2 (in both houses of Legislature "a majority of all its members shall constitute a quorum to do business.").

With both types of statutes (or constitutional provisions), the intent is the same: to establish a fixed number for a quorum which is based on an agency's full statutory membership and which remains constant despite temporary vacancies resulting from death, resignation or expiration of term. The rule in New Jersey is that such provisions must be strictly interpreted and enforced. The leading case on this point is Ross v. Miller, 115 N.J.L. 61 (Sup. Ct. 1935). There, the City of Clifton fell within a class of municipalities for which a city council of seven members was established by State law. The deaths of two members left the council with five current members. A statute provided that "a majority of all the members of the municipal council shall constitute a quorum-...." The common law rule, said the Court, was that "a majority of all the members of a municipal governing body constituted a

quorum," but that in the event of one or more vacancies "a quorum consisted of a majority of the remaining members." 115 N.J.L. at 63 (citations omitted). It concluded, however, that the governing statute, defining a quorum as "a majority of all the members" of the council, required "a majority of the full membership prescribed by law, rather than of the qualified, sitting members for the time being." *Id.* at 64. Hence, a quorum consisted of four members, a majority of the total authorized membership of seven, rather than three members, a majority of the current membership after the two vacancies. Accord, Dombal v. Garfield, 129 N.J.L. 555 (Sup. Ct. 1943).

Twenty-six years later, the Law Division, in Prezlak v. Padrone, 67 N.J. Super. 95 (Law Div. 1961), reaffirmed the Ross rule in construing an East Orange city charter provision which defined a quorum for the transaction of business as "a majority of the whole number, as herein provided, of the members of the city council." The council consisted of ten members but there was a vacancy resulting from a resignation. Citing Ross and other decisions, the Court concluded that an interpretation of the phrase "a majority of the whole number of the members" as requiring "the presence of a majority of all seats of that body, whether filled or not, has been firmly established in our common law." 67 N.J. Super. at 100. Accordingly, a quorum consisted of six members, a majority of the full ten-member council, rather than five, a majority of the nine members remaining after the resignation. *Id.* at 103. See also Aurentz v. Planning Board, 171 N.J. Super. 135, 139 (Law Div. 1979) (under Municipal Land Use Law definition of quorum in N.J.S.A. 40:55D-6 as "the majority of the full authorized membership of a municipal agency," four members of seven-member planning board constituted quorum).

A month before the decision in Prezlak, the Attorney General issued an opinion which, like that decision, followed the rule of Ross v. Miller. We construed various provisions of the State Constitution which require action by a majority or greater percentage "of all the members" of the Senate or General Assembly. One of these provisions, Art. IV, § IV, ¶2, states that "a majority of all its members shall constitute a quorum to do business." We concluded that "constitutional references to a majority or to fractions of 'all the members' of the houses of the Legislature must be construed to refer to fractions of the full membership authorized by law, even though from time to time one or more seats may be vacant." Formal Opinion No. 3 (1961); see also Formal Opinion No. 6 (1978) (phrase "a majority of the members of the entire board or commission" in N.J.S.A. 45:1-2.2d means majority of full membership of professional board); 67A C.J.S. §6 at 619 ("Whenever the number required to constitute a quorum is fixed by

statute or other rule, a diminution in the number of members of the body will not change the number necessary for a quorum.").

In sum, wherever an act expresses a quorum for meetings of a public body as a specific number of members, or as a majority or other fraction of "all the members" or of "the authorized membership" or words to that effect, the quorum requirement must be construed as a fixed number which, based as it is on the agency's total statutory membership, does not vary with any temporary vacancies created by expiration, resignation or death.

Although the kind of provision just discussed -- fixing a quorum as a majority or larger percentage of an agency's full statutory membership -- appears to represent the most common form of quorum provision, it is not the only kind. Enabling acts for public bodies sometimes define a quorum merely as "a majority of the members" or similar language. See, e.g., N.J.S.A. 34:1B-49c ("a majority of the members of the board shall constitute a quorum" for meetings of New Jersey Development Authority for Small Businesses, Minorities' and Women's Enterprise); N.J.S.A. 45:1-2.2d ("a majority of the voting members of such [professional] boards or commissions shall constitute a quorum thereof."). In other instances, the act is simply silent on the matter of a quorum. See, e.g., New Jersey Urban Enterprise Zones Act, N.J.S.A. 52:27H-60 et seq.

In both cases, the rule in New Jersey and most other states is the same: a quorum, absent some clear evidence to the contrary in the act's text or legislative history, consists of a majority of the agency's current membership; in other words, a majority of the authorized membership reduced by any vacancies. As stated in Ross v. Miller, supra: "At common law, a majority of all the members of a [public] body constituted a quorum; and in the event of a vacancy a quorum consisted of a majority of the remaining members." 115 N.J.L. at 63 (citations omitted). In Prezlak v. Padrone, supra, the Court applied this rule in distinguishing between a city charter provision which defined a quorum for the transaction of business as "a majority of the whole number of the members of the city council" and required "corporate action" by the same number, from a second provision which authorized the filling of vacancies without specifying numbers needed for a quorum or vote. The Court found the omission of these details in the second provision "significant" and, ultimately, controlling, holding that action to fill a vacancy could be taken by a majority of the current members remaining after a resignation. 67 N.J. Super. at 109. See also Edgewater Park v. Edgewater Park Housing Authority, 187 N.J. Super. 588, 597 (Law Div. 1982); State v. King, 562 S.W.2d 704, 706 (Mo. Ct. App. 1978) ("The parties agree that in computation of the requisite three-fourths majority,

the number of councilmen to be considered shall be reduced by reason of Councilman Theiss' death."); 62 C.J.S. §399c at 758-759 ("... as a general rule, if there is a vacancy in the council or governing body, a majority of the remaining members will suffice for a quorum, especially where a statute or charter defines a quorum as a majority of the council, or a similar phrase, as distinguished from a majority of the entire board 'elected,' or similar terms.").

In Formal Opinion No. 6 (1978), we discussed the distinction between the two types of quorum provisions in the context of N.J.S.A. 45:1-2.2d. That provision defines a quorum for meetings of professional boards as "a majority of the voting members" but, in an amendment added in 1977, adds that action may be taken "upon the affirmative vote of a majority of the members of the entire board or commission." (Emphasis added.) We concluded that a majority of a board's full authorized membership was required to take formal action as a result of the 1977 amendment, but that for purposes of a quorum only a majority of the current members after any vacancies was necessary. This reading of the act is consistent with the decisions and other authorities discussed above.

It is appropriate to add a final comment on this point. It is possible to hypothesize a situation in which the number of vacancies in an agency's membership might become so large, and the number of remaining members so small, that a quorum comprised of a majority of current members would not constitute a fair representation of the agency. We recognize in this respect that "[t]he requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons." Robert's Rules of Order (1981), p. 16. While in extreme emergencies there might be resort to other legal doctrines such as the "rule of necessity" which could enable a public body to act in rare cases where less than an authorized quorum is available but where a public exigency requires governmental action, we must be mindful of the dictum in Ross v. Miller, supra, that "[i]t would clearly do violence to the legislative purpose and policy to hold that if the membership were ... reduced to one, the surviving member could" act alone. 115 N.J.L. at 66.* This possi-

* The rule of necessity is an ethical doctrine governing public bodies which, under certain limited circumstances, allows a body to act upon a particular matter when less than an a legal quorum of the group is qualified to act. The rule is generally applied when a number of the members of the public body have a conflict regarding a particular item which otherwise would prevent such members from voting upon that matter. In order for the rule to be properly invoked, the body must be unable to act without the

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Chief Counsel

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bility is lessened by the provisions usually included in agency enabling acts by which a member whose term has expired continues in office until a successor is appointed and takes office. In any event, the issue must be addressed by considering the specific factual circumstances in which the issue arises.

For these reasons, it is our opinion that laws which define a quorum for meetings of a public body as a specific minimum number of members must be strictly applied irrespective of any ~~vacancies in the agency's current membership.~~ Laws which define a quorum as a majority or larger percentage of "all the members" or of "the authorized membership," or words to that effect, must likewise be read as requiring a fixed number of members which remains constant despite any vacancies. On the other hand, where an act states that a quorum consists of "a majority of the members" or "a majority of the voting members," or where an act is silent on the question, a quorum means a majority of the current membership after taking into account any vacancies.

Very truly yours,



ROBERT J. DEL TUFO
ATTORNEY GENERAL

members in conflict taking part, no alternative forum may exercise jurisdiction over the proposed action and there must exist a pressing public need for the action to be taken which cannot be postponed to a later date. See Allen v. Board of Educ., 233 N.J. Super. 642 (Law Div. 1989). Under application of the rule, all members of the body, including those with conflicts, are permitted to vote upon the matter in question after placing the nature of their conflict on the record.