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VACANCY OR REMOVAL FROM OFFICE BY REASON OF  
PROLONGED BOARD MEMBER ABSENCE

By Jonathan E. Drill and Jay Bently Bohn\*

The authors of this article recently had occasion to provide an opinion on the question of when the seat of a planning board member becomes vacant due to the absence of the member and under what circumstances a governing body could remove a planning board member from office by reason of non-attendance at meetings. The opinion also touched on the question of whether a board and/or a governing body has the power to make rules with regard to this subject. This article expands on that opinion.

**A LOCAL BOARD MAY DEEM PROLONGED ABSENCES TO  
BE A VACATION OF A SEAT**

Vacancies on local municipal boards, including planning boards, are governed by N.J.S.A. 40A:9-12.1. The section relevant to the present inquiry provides:

The office of any person appointed to a specified term . . . by the governing body . . . shall be deemed vacant:

\* \* \*

g. In the case of a member of a board whenever the member, without being excused by a majority of the authorized members of such body, fails to attend and participate at meetings of such body for a period of 8 consecutive weeks, or for four consecutive regular meetings, whichever shall be of longer duration, at the conclusion of such

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period, provided that such body shall notify the appointing authority, in writing, of such determination; provided, further, that such board may refuse to excuse only with respect to those failures to attend and participate which are not due to legitimate illness.

More simply stated, a board member's seat may be deemed vacant if the board notifies the governing body in writing that it refuses to excuse a member's continuous absence over the longer of eight consecutive weeks or four consecutive regular meetings. The board may excuse any absence by a vote of the majority of the authorized membership and must excuse any absence caused by legitimate illness. The vacancy would not be automatic; the board would have to notify the governing body that the absences have occurred and have not been excused.

Currently, a number of local boards utilize a practice of excusing absent members at the time the roll is called for each meeting. This "excuse" is not the excuse provided for in the statute. The statutory excuse must be: 1) voted upon at the conclusion of the four consecutive meetings or eight consecutive weeks; and 2) approved by a vote of the majority of the authorized membership (a vote of four out of seven is required). The member in question cannot vote on the excuse but alternates may vote as on other questions.

N.J.S.A. 40A:9-12.1g gives a board discretion in deciding on whether or not to excuse an absence, except that an absence caused by legitimate illness must be excused. N.J.S.A. 40A:9-12.1 was adopted in 1979 as an apparent legislative response to Golaine v. Cardinale, 142 N.J. Super. 385 (Law Div. 1976) (Pressler, J.C.C., temporarily assigned), affirmed on opinion below, 163 N.J. Super. 452 (App. Div. 1978), certif. den. 79 N.J. 497 (1979). Golaine held that a prolonged eleven month board member absence from planning board meetings (due to a temporary business transfer to Germany) did not constitute "neglect of duty" within the intendment of N.J.S.A. 40:55-1.4 (the statute that governed removal from office) and, as such, the member could not be removed from office by the governing body under that statute. N.J.S.A. 40:55-1.4 was repealed in 1976 by the adoption of the Municipal Land Use Law ("MLUL") and was replaced by N.J.S.A. 40:55D-23b and 69, which substituted a "for cause" removal provision in place of the "neglect of duty" standard. While the change in the language of the removal statute may not have changed the Golaine result, the adoption of N.J.S.A. 40A:9-12.1 in 1979 effectively overruled Golaine in some respects.

The most significant aspect of the Golaine decision which was effectively overruled was the implication that non-attendance at meetings by a board member would have to

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be excused if same was "reasonable" under the circumstances and not unduly prejudicial to the public. The legislature, through the adoption of N.J.S.A. 40A:9-12.1g, elevated prolonged board member absences to the status of being almost per se prejudicial to the public welfare. Hence, local boards have been granted a large measure of discretion in determining whether or not to excuse such absences.

As stated by the New Jersey Supreme Court in the oft-quoted Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965), as local officials are thoroughly familiar with their community's interests, they must be allowed wide latitude in the exercise of delegated discretion. "Even when doubt is entertained as to the wisdom of the action there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved." Id. Under the standards established in N.J.S.A. 40A:9-12.1g, a board has broad discretion to refuse to excuse a member's prolonged absence, provided that the absence meets the statutory duration criteria and is not due to legitimate illness. No such broad discretion existed under Golaine.

PROLONGED ABSENCE AS "CAUSE" FOR REMOVAL BY  
THE GOVERNING BODY.

N.J.S.A. 40A:9-12.1g governs only in situations where a board desires to have a member's seat deemed vacant by reason of prolonged absence. The question of removal of a board member by the governing body is controlled by N.J.S.A. 40:55D-23b (for planning board members) and N.J.S.A. 40:55D-69 (for board of adjustment members). These provisions of the MLUL authorize the governing body to remove a board member "for cause". Thus, the question arises as to whether a prolonged absence of a member can be deemed "cause" for the governing body to remove that member from the board. Certain aspects of the Golaine decision deal with this issue and, to this extent, Golaine appears to remain good law.

The Golaine court held that removal for cause necessitates "misconduct or culpability on the part of the office holder." 142 N.J. Super. at 396. As Golaine held, non-attendance which is excused or excusable is not cause for removal. Id. at 398. In contrast, the vacation of an office for any of the reasons set forth in N.J.S.A. 40A:9-12.1 (with the exception of subsection h which is "for cause") relates to non-culpable circumstances. As such, an absence which may be excusable (i.e., a matter of reasonable

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necessity from the point of view of the officer and at the same time not unduly prejudicial to the public) but which has not been actually excused by a board (i.e., the formal grant of an excused absence pursuant to N.J.S.A. 40A:9-12.1g) may not be used as the basis for removal by the governing body under N.J.S.A. 40:55D-23b or 69. Likewise, while the governing body may not believe that an absence is excusable, if the Board has actually excused it under N.J.S.A. 40A:9-12.1g, the absence may not be used by the governing body as the basis for removal under N.J.S.A. 40:55D-23b or 69.

The only circumstance under which the governing body could remove a board member by reason of non-attendance is if that non-attendance is both unexcused and unexcusable. While the Golaine court held that an eleven month prolonged absence due to a temporary business transfer to Germany did not constitute culpable conduct and, therefore, was excusable under the circumstances, the court went on to say that "this is not to suggest that any prolonged, continuous absence for whatever reason could not constitute grounds for removal" Id. at 400. This statement appears to be valid today.



**LOCAL RULEMAKING RELATING TO PROLONGED ABSENCES.**

While N.J.S.A. 40A:9-12.1 does not specify any particular procedure to be followed in the situation of a prolonged absence of a board member, it appears that the board may adopt rules governing the procedure to be followed. See N.J.S.A. 40:55D-8. This much being said, however, neither a board nor a governing body may change the substantive statutory conditions governing when a seat becomes vacant as same have been established by our State Legislature and appears to preempt any local regulation to the contrary.

A noted land use law commentator states that a municipality may adopt more stringent attendance requirements than those set forth in N.J.S.A. 40A:9-12.1. Cox, *New Jersey Zoning and Law Use Administration*, Section 2-4.3, at 11 (1991). If he means that the governing body could authorize a board to remove a member for failure to attend fewer meetings than specified in N.J.S.A. 40A:9-12.1, Cox's comment appears to be incorrect. (If, on the other hand, Cox means that the governing body may view non-compliance with stricter attendance requirements as "cause" for removal under N.J.S.A. 40:55D-23b or 69, his comment may be correct provided that the local board has not excused the absence).

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A municipality, which is an agent of the State, cannot act contrary to the State. Overlook Terrace Management Corp. v. West New York Rent Control Board, 71 N.J. 451, 461 (1976). Two pertinent questions in the preemption analysis are whether the State legislation was intended to be exclusive and whether the subject matter demands uniformity. Id. The scope of N.J.S.A. 40A:9-12.1 is indeed comprehensive and there is further evidence in the legislative history that municipal refinement was not invited. The Assembly committee statement which accompanied the bill was considered adequate by the Senate committee. That statement indicated that the purpose of the bill was to establish "a uniform statutory scheme for determining vacancies in certain appointed offices." Municipal variation is inconsistent with the express legislative goal of uniformity.

We have taken the liberty of preparing a proposed rule governing prolonged absences of planning board members and have included same in the appendix to this article. We suggest that the rule be considered by all planning board and board of adjustment attorneys for consideration by their boards.

APPENDIX

**PROPOSED RULE OF PROCEDURE  
REGARDING BOARD MEMBER PROLONGED ABSENCES**

Procedure regarding prolonged absences of members.

1. Whenever a member fails to attend or participate in four consecutive regular meetings, the secretary shall notify all notification by the secretary, the member who is the subject of the notice shall be given an opportunity to explain the absences. The Board shall thereafter determine whether any or all absences shall be excused. An absence shall be excused if a majority of the authorized membership determines either that the absence was caused by legitimate illness or should otherwise be excused.

2. If the Board refuses to excuse a member's failure to attend or participate in four consecutive regular meetings, the secretary shall notify the Township Committee in writing of that fact.