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## Coates' Canons Blog: I Second that Amotion

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Article: <https://canons.sog.unc.edu/i-second-that-amotion/>

This entry was posted on October 28, 2009 and is filed under Board Member Powers & Authority, Board Structure & Procedures, Ethics & Conflicts, Miscellaneous

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### UPDATE September 2013: A superior court judge affirmed the power of amotion for removal of a county commissioner. The judge's order is summarized here.

With apologies to **Smokey Robinson and the Miracles**, and with assurances that I haven't left out the space in "a motion," this post addresses a question about whether a North Carolina local governing board has authority to oust one of its members. As noted in **Fleming Bell's earlier post**, state law now requires local governments to enact codes of ethics. A question that arises is whether a local code can include a provision for removal of a member who violates the code or engages in other behavior deemed sufficient for removal. There is no specific authority for such removal by the body itself.

David Lawrence wrote an article in 1980 that discusses three possible grounds for removing local elected officials from office. *Removing Local Elected Officials from Office in North Carolina*, Wake Forest L. Rev. Vol. 16, No. 4 (1980), pp. 547-561. One of the grounds he discusses is "amotion," which has its roots in English common law and is based on an inherent right of a corporation to remove an officer for specific types of malfeasance. As David notes in his article (the pertinent section is **excerpted here**), several North Carolina cases applied the doctrine in local government settings 100 years ago. The most recent North Carolina case to mention the doctrine was in 1935, though the case involved the removal of an appointed, rather than an elected official. (*Stephens v. Dowell*, 208 N.C. 555, 561 (1935), "The power to remove a corporate officer from his office for reasonable and just cause is one of the common law incidents of all corporations." *emphasis in original, citing* Burke v. Jenkins, 148 N.C. 25, 27 (1908), and 1 Dillon Mun. Corp. (4 ed) sec. 240.)

The current edition of McQuillin's treatise on Municipal Corporations recognizes the basic power of amotion, and states that "in the absence of either express grant or of express or implied limitation of authority, a municipal corporation...possesses the incidental power to remove corporate officers for cause, whether elected by the corporation or by the people." Section 12.230, 3<sup>rd</sup> ed. (2002). Still, it's hard to find cases within the last 50 years that rely solely on the common law authority for removal, especially since many local governments have state statutes or charter provisions that provide for removal on other specified grounds. The most recent case I found that cites to the power of amotion does so in reference to a private, rather than a municipal corporation. See, *State ex rel. Smith v. Evans*, 547 S.E.2d 278, W.Va.(2001).

It's unclear whether a North Carolina court would uphold removal of a board member based on amotion as enunciated in these old cases. Despite their vintage, and in the absence of a specific legislative displacement of the common law, a court might find that the inherent power still exists, especially if a case presented a clear need to preserve the integrity of the board and serve the public interest, with no other available remedy. (North Carolina provides no general right of public recall of elected officials, though a few cities have charter provisions allowing it.)

Should removal be included in a local code of ethics as a remedy for violation of the code or other misdeeds? Adopting a local code that includes the power of removal cannot legally create authority that doesn't otherwise exist. It may serve to restate the common law grounds for removal, but it would still be up to a court, in the event of a legal challenge, to determine whether the authority exists and whether it has been properly exercised.

If a local board chooses to rely on common law authority for removal, a local ethics code could establish the standards for



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removal of a board member, and set out the process that would be used. This would be extremely important. The common law grounds for removal by motion as delineated in the original case (in 1758) are quite specific. As summarized in the Lawrence article, they are: "1) Offenses not related to the office but so 'infamous...as to render the offender unfit' for any public office; 2) Offenses amounting to noncriminal misconduct in office; and 3) Offenses that both are criminal and constitute misconduct in office." Lawrence, p. 555, citing *Rex. V. Richardson*, 97 Eng. Rep. 426, 438 (K.B. 1758). Since there is no authority for removal based on any other grounds (removal "for cause" is a common standard in other states), a local code might need to set out these grounds as guidance about the allowable bases for removal. In addition, the cases from North Carolina and elsewhere make clear that summary removal is not a proper exercise of this inherent power. A local code allowing removal should lay out the process for providing notice and an opportunity for a response.

Removal isn't the only remedy for code of ethics violations. Indeed, codes may be aspirational rather than prohibitive (See, Bell, *Ethics, Conflicts, and Offices: A Guide for Local Officials*, p. 36), and in such cases, no remedy for a violation would be necessary. State law creates independent liability for some types of board member misdeeds, especially those involving financial interests. (See, e.g., **G.S. 14-234, 234.1**, and **G.S. 133-32**.) A separate statute, **G.S. 14-230**, creates liability and possible removal as a sanction for willful failure to discharge the duties of the office. Other actions may cause a person to lose his or her eligibility for office (such as not being a resident or committing a felony), in which case an action may be brought to determine the person's right to remain in office. (See section I of the Lawrence article discussing the civil action in the nature of "*quo warranto*.")

And finally, a board is free to censure a fellow member, that is, to express in a resolution its displeasure or disapproval of a member's actions. While this may not seem to be much in the way of sanction it does provide information relevant to the public at large, which may choose to use its power of removal when the board member is up for reelection.

## Links

- [canons.sog.unc.edu/?p=7299](https://canons.sog.unc.edu/?p=7299)
- [en.wikipedia.org/wiki/I\\_Second\\_That\\_Emotion](https://en.wikipedia.org/wiki/I_Second_That_Emotion)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_14/GS\\_14-234.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-234.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_14/GS\\_14-234.1.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-234.1.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_133/GS\\_133-32.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_133/GS_133-32.html)
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