

**VOTING REQUIREMENTS:
ABSENCES, VACANCIES, ABSTENTIONS AND DISQUALIFICATIONS**

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VOTING REQUIREMENTS: ABSENCES, VACANCIES, ABSTENTIONS AND DISQUALIFICATIONS

Advising the council about voting requirements may seem mundane, yet no area of our work can hold greater pitfalls because of the possibility that some impropriety in voting may invalidate an ordinance, resolution or action.

1. QUORUM REQUIREMENTS

Most California cities are general law cities with a city council composed of five members. (Gov. Code, §§ 34102, 36501). A quorum of at least three members, which is a majority of the five members, must be present before the council has legal authority to act. (Gov. Code, § 36810.) In the absence of a contrary statutory provision, the number of votes required to take action is a majority of a quorum. The general rule is stated with identical language in Civil Code § 12 and Code of Civil Procedure § 15:

“Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the act giving the authority.”

This rule has been followed in California since as long ago as 1883 when in People v. Harrington (1883) 63 Cal. 257, 260, the State Supreme Court stated:

“We . . . regard the law as well settled that . . . the action of a quorum is the action of the board, and that a majority of the quorum present could do any act which a majority of the board if present might do.”

Conversely, “Without the presence of a ‘quorum’, a deliberative body cannot transact business other than to: (1) fix the time to which to adjourn, (2) adjourn, (3) recess, or (4) take measures to obtain a quorum.” (*Roberts’ Rules of Order* (rev. 2000), § 40, p.336) Although many cities have not adopted *Robert’s Rules of Order*, it seems apparent that these are not the only actions that can be taken without a quorum present. Government Code § 36810 provides that “[l]ess than a majority may adjourn from time to time, and compel attendance of absent members in the manner and under the penalties prescribed by ordinance.” Since it takes three votes to adopt an ordinance, one would hope that the city had adopted such an ordinance in advance of any dispute at which the minority sought to compel attendance of any absent members. Furthermore, if all council members are absent from any regular meeting, the city clerk shall declare the meeting adjourned to a stated day and hour. (Gov. Code, § 36811.)

2. VOTING REQUIREMENTS

Applying the rules governing a quorum, the council meeting can proceed when only three councilmembers are present, and if two of those three councilmembers vote in favor of a motion, the motion passes unless otherwise provided by law. Voting requirements can vary depending on the action that the council proposes to take. A number of other state law provisions impose

voting rules requiring affirmative votes or more than a majority of a quorum in order for the legislative body to take action.

A. Resolutions, Orders for the Payment of Money and Ordinances

Government Code § 36936¹ sets forth an exception to the general rule that a motion will pass on a two to one (2-1) vote, stating:

“Resolutions, orders for the payment of money, and all ordinances require a recorded majority vote of the total membership of the city council.”

This section requires three votes for the passage of all ordinances, resolutions, and orders for the payment of money. Consequently, if the vote on any ordinance, resolution, or order for the payment of money is two to one (2-1), the motion will not pass. The Government Code requires ordinances to be introduced at one meeting and then passed at a second meeting held at least five days thereafter, a procedure commonly known as “first reading” and “second reading”. Theoretically, the first reading could take place on a two to one (2-1) vote, but the second reading or passage must have a majority vote of the total membership of the Council, which is at least three votes (3-0) in a general law city. However, this is one of those issues that has not, to our knowledge, been resolved by the courts. Prior to the 2002 amendment to Government Code § 36936, three votes were not required for all resolutions, but only resolutions for the payment of money. Now, all resolutions require a recorded majority vote of the total membership, which is three votes in a general law city.

B. General Plan and Specific Plan

General plans must be adopted and amended by resolution, which shall be adopted by an affirmative vote of not less than a majority of the total membership of the city council. (Gov. Code, § 65356.) Likewise, the planning commission must make a written recommendation on the adoption or amendment of a general plan, most likely by resolution, by affirmative vote of not less than a majority of the entire commission. (Gov. Code, § 65354) Specific plans must also be adopted or amended by resolution or ordinance by a majority of the entire legislative body. (Gov. Code, § 65453.)

C. Urgency Ordinances and Urgency Interim Zoning Ordinances (“Moratoria”)

Urgency ordinances can only be passed by a four-fifths vote of the city council. An urgency ordinance is an ordinance “for the immediate preservation of the public peace, health or safety, containing a declaration of the facts constituting the urgency.” (Gov. Code, § 36937(b).) Similarly, urgency interim zoning ordinances (“moratoria”) require a four-fifths vote to adopt the ordinance. (Gov. Code, § 65858.) Likewise, any extension of such ordinance also requires a four-fifths vote for adoption. (Id.) In Clark v. City of Hermosa Beach, (1996) 48 Cal.App.4th

¹ Previously, this section read “Resolution and orders for the payment of money, and all ordinances, require the votes of at least three councilmembers for passage.” We understand that the consultant that drafted the amendment was under the mistaken impression that all city council resolutions already required at least 3 votes, as is the case for county board of supervisors and special district boards.

1152, the Court found that the city had attempted, but failed to enact a moratorium on the construction of buildings higher than 30 feet, with the measure failing by one vote short of the four votes needed. Yet, shortly thereafter, the council and the planning commission denied permits on three projects involving 35 foot structures. The court found that “This sequence of events indicates that the city was attempted to do, by a majority vote on a project-by-project basis what the law required a four-fifths vote of the Council to accomplish. At a minimum, this evidence establishes that the Council was not impartial to the Clarks’ project.” (Id. at 1167-1168.)

D. Resolution of Necessity

A resolution of necessity to initiate condemnation proceedings must be passed by a vote of two-thirds of all the members of the legislative body, which in a general law city equals four votes, unless a greater vote is required by statute, charter or ordinance. (Code of Civ. Proc., §§ 1245.220, 1245.240.)

E. Brown Act

Discussion and action on an item not appearing on the posted agenda may occur if the legislative body determines by a two-thirds vote of the members of the legislative body present at the meeting (or a unanimous vote if less than two-thirds of the members are present) there is both: (1) the need to take action immediately; and (2) the need for action came to the attention of the agency after the agenda was posted. (Gov. Code, § 54954.2(b)(2); Cohan v. City of Thousand Oaks (1994) 30 Cal. App. 4th 547.)

Discussion and action on an item not appearing on the posted agenda may occur if a defined statutory emergency situation is determined to exist by a majority vote of the legislative body. (Gov. Code, §§ 54954.2(b)(1) and 54956.5.) The legislative body may meet in closed session for an emergency meeting if agreed to by a two-thirds-vote of the members of the legislative body present, or if less than two-thirds of the members are present, then by a unanimous vote of the members present. (Gov. Code § 54956.5(c).)

F. General Taxes

Enactment of general taxes requires a two-thirds vote of the legislative body and a majority vote of voters voting in an election on the tax. (Gov. Code, §§ Code § 53724(b), 53723.) No local government may impose, extend or increase any general tax until such tax is submitted to the electorate and approved by a majority of the electorate voting on the tax. (Cal. Const. art. XIIC, § 2(b).) The election to approve a general tax must be consolidated with a regularly-scheduled general election for members of the governing body of the local government except in cases of emergency declared by unanimous vote of the governing body. (Cal. Const. art. XIIC, § 2(b).)

G. Redevelopment Plan

The legislative body must adopt the redevelopment plan by ordinance, making explicit findings. (Health & Safety Code §§ 33365, 33367.) The redevelopment plan must be adopted

by a majority vote of the legislative body unless either the planning commission or project area committee has recommended against approval. If either has recommended against adoption, approval must be by a two-thirds vote of the entire legislative body. (Health & Safety Code § 33366.) If a project area committee recommends against the adoption of a proposed amendment to the redevelopment plan, the legislative body must adopt the amendment by a two-thirds majority of the entire membership eligible to vote on the amendment. (Health & Safety Code § 33385.5.)

H. Exceptions to Competitive Bidding

Contracts may be awarded without competitive bidding if the legislative body makes a finding by a four-fifths vote that an emergency exists. (Pub. Cont. Code §§ 1102, 20168, 22050.) If all bids are rejected and the legislative body resolves by a four-fifths vote the project can be performed more economically by day labor or through open market purchases of materials and supplies, it may dispense with further public bidding. (Pub. Cont. Code § 20167.)

I. Surplus Sale of Property

State law provides an optional procedure for cities to use in disposing of real property. (Gov. Code, §§ 37420 - 37430.) The procedure involves finding the public interest and convenience require the sale and adopting a resolution of intent to sell. (Gov. Code, § 37421.) A four-fifths vote of the city council is needed to override any protests to sale. (Gov. Code, § 37425.)

J. Disposition of Parkland

With certain restrictions, a general law city may convert a park to a different municipal purpose. (Gov. Code, §§ 37111, 37111.1.) State law provides for conversion of land purchased for park purposes or land used for park purposes upon adoption of an ordinance by a four-fifths vote. (Gov. Code, §§ 37111, 37111.1.)

K. Appeal of EIR

If the decision-making body is not elected (e.g., the planning commission), the certification of the EIR may be appealed to the elected decision-making body (e.g., the city council). (Pub. Res. Code § 21151(c); 14 Cal. Code Regs. § 15090(b).) An appeal from the certification of an EIR by an unelected planning commission must be decided by the majority vote of the elected governing board. On appeal, the elected governing board itself must consider and approve the EIR and make findings; a tie vote by the governing board does not certify the EIR. (Pub. Res. Code § 21151(c); Vedanta Society of Southern California v. California Quartet Ltd., (2000) 84 Cal. App. 4th 517.)

L. Overrule an Adverse Determination of ALUC

Public Utility Code section 21676 provides that “Prior to the amendment of a general plan or specific plan, or the adoption or approval of a zoning ordinance or building regulation within the planning boundary established by the airport land use commission pursuant to Section 21675, the local agency shall first refer the proposed action to the commission. If the

commission determines that the proposed action is inconsistent with the commission's plan, the referring agency shall be notified. The local agency may, after a public hearing, overrule the commission by a two-thirds vote of its governing body if it makes specific findings that the proposed action is consistent with the purposes of this article stated in Section 21670."

The adoption and a amendment of a general plan by a city requires "the affirmative vote of not less than a majority of the total membership of the legislative body." (Gov. Code, § 65356.) The Attorney General has concluded that "a two-thirds vote of the members of a city council constituting a quorum overrides an adverse determination made by an airport land use commission concerning the city's proposed amendment of its general plan." (75 Op.Atty.Gen. 47.)

The Attorney General acknowledges that fewer affirmative votes might be necessary for the council's override under the "two-thirds" standard than for the general plan amendment itself under the "majority" standard, but that it is matter for the Legislature to address if it deems appropriate. With a seven-member council having four members present, for example, three could override the commission's adverse decision under section 21676, while four would be required to amend the general plan under Government Code section 65356.

M. Local Rules

Some city charters contain provisions requiring a majority vote of the entire council, not merely a quorum of the council, before any action can be taken, relying upon procedural rule making authority granted by statute. (Gov. Code, § 36813.) Moreover, some general law cities in San Diego County have adopted rules requiring at least three votes to take council action taken by two votes will not be reversed at the next council meeting. On the other hand, because of the specific language of Civil Code § 12 and Code of Civil Procedures § 15 (see discussion, *supra*, at page 1), there is an issue as to whether a general law city has authority to adopt in all circumstances, thus replacing the rule that certain actions can take place in a two to one (2-1) vote.

3. ABSENCES

A councilmember must be physically present at a council meeting to vote on items before the council for action at that meeting. The Brown Act permits a councilmember to participate from a teleconference location. (Gov. Code, § 54953(b).) However, all votes taken during a teleconferenced meeting shall be by rollcall. (*Id.*) A majority of the councilmembers present could, as a matter of courtesy, decide to continue or defer action on a particular item until a subsequent meeting in order to allow the absent councilmember to participate in the final vote on the matter. This assumes, of course, that there exists no legal or other compelling reason requiring that action be taken at a given meeting and not deferred.²

In general, a councilmember who is absent from a particular meeting at which action on

² The deadlines for action which may be imposed by the Permit Streamlining Act, Gov. Code § 65920 *et seq.*, Subdivision Map Act, Gov. Code § 66410 *et seq.*, and other state laws are beyond the scope of this paper.

an item is continued may vote on the item at a subsequent meeting if the councilmember has reviewed the tapes from that meeting and is otherwise informed of the issues involved in that item. One court has stated that “In the absence of a showing that any member of an administrative board did not read or was not familiar with the evidence at a hearing, the law presumes that the decision of the board was made after consideration of the evidence.” (Stiger v. Board of Supervisors (1956) 143 Cal.App.2d 352, 359.) Nevertheless, many cities have adopted procedural rules requiring that absent members desiring to vote must watch or listen to the tape recording and read minutes and all documents involved prior to voting on the matter.

Prior to deliberations, councilmembers who have been absent typically make a statement that, for example, “I was absent at the previous meeting in which this item was discussed, but have listened to the tape of the meeting or have read the minutes and staff reports and am prepared to participate.” If a councilmember forgets to make such a statement, he/she can find comfort in Old Santa Barbara Pier Co. v. State of California (1977) 71 Cal.App.3d 250, 255. This case involved a coastal commission rule requiring members absent at a hearing to declare familiarity with the materials prior to their vote. Certain members failed to so declare, but the failure was held to be technical and excusable where the record demonstrated that the members were familiar with the matter on which they were voting.

4. VACANCIES

What happens to the voting requirements if there is a vacancy on the council? A council vacancy may not be filled by appointment if the appointment would result in a majority of the council members having been appointed; in this circumstance, the office must be filled by election. (Gov. Code, § 36512(d)(1).) All of the quorum and voting requirements set forth in Parts 1 and 2 above continue to apply. The council may hold a legal meeting as long as three members are present. The council may take action if three members vote in favor, one is opposed, and abstains (2-1-1).

The problem arises when the council votes two to two (2-2) on a particular item. A two to two (2-2) vote amounts to “no action” on the nature and status of the item being voted upon, and the wording of the particular local ordinance or state law governing the matter in question. For example, if the item before the council involved an appeal of a decision would otherwise be final in the absence of the appeal, a two to two (2-2) vote would have the effect of denying whatever action the applicant or proponent of the item was requesting. For example, a rezoning which is an ordinance and must be adopted by three votes, or a general plan amendment, which requires three votes, could not be adopted.

It is important to remember the potential danger that a two to two (2-2) vote will result in a project being “deemed approved” under the automatic approval provisions of the Permit Streamlining Act or Subdivision Map Act. For example, if your planning commission makes recommendations but does not have authority to make a final decision on a tentative map, a two to two (2-2) vote by the council on a tentative map could result in the map being deemed approved, even if the planning commission had recommended denial, if the council takes no further action within specifies time limits. (Gov. Code § 66452.2.)

Since a two to two (2-2) vote amounts to no action on any particular item, after such a vote has occurred, further motions regarding the item could be entertained by the council. A majority of the council (three or four) could vote on some other motion. For example, if the tie vote occurs because one of the councilmembers is absent the remaining councilmembers could vote to bring the item back for action when the fifth councilmember would be present, unless there is some legal reason why final action on a particular item cannot occur at some later date. The motion to continue the matter is not a motion to reconsider because no action has been taken. Consequently, the motion can be made by any councilmember, but it must be passed by a majority vote.

5. ABSTENTIONS AND DISQUALIFICATIONS

Abstentions and disqualifications present the most complex and also the most common voting issues that city attorneys are likely to encounter. The most important rule to remember is that when councilmembers are disqualified from voting because of a conflict of interest, they are no longer counted as part of the quorum.

In Farwell v. Town of Los Gatos, (1990) 222 Cal.App. 3d 711 (subsequently ordered not published), the Town by a vote of two in favor, two abstentions, and one absent (2-0-2-1), passed four preliminary resolutions initiating formation of a downtown parking assessment district. The Town later completed formation of the district and the plaintiffs sued. Plaintiffs sued on every possible theory including the assessment formula, determination of benefit, appealed, the only issue that troubled the appellate courts was the way the preliminary votes were taken.

Under the traditional rule, councilmembers who abstain are counted for purposes of determining a quorum and the abstentions are simply not counted in tallying the votes. Thus, where four of five board members were present, two members voted in favor of the motion, one voted against it, and one abstained (2-1-1-1), the motion passed. Dry Creek Valley Assn., Inc. v. Board of Supervisors (1977) 67 Cal.App.3d 839.³ Likewise in Martin v. Ballinger (1983) 25 Cal.App.2d 435, a motion was validly passed by a vote of two in favor, two abstentions and one vacant position (2-0-2-0). The case stated the applicable rule:

“Where there is a quorum present, and a majority of the quorum votes in favor of a proposition, it is carried, notwithstanding an equal number refuse or fail to vote” (25 Cal.App. 2d at 437.)

See, also, 62 Ops. Atty. Gen 698 (1979), reaching the same conclusion.

However, Farwell makes it clear that this is not the rule when the councilmembers are disqualified because of conflict of interest. The court specifically held “for purposes of making this quorum of three, no member disqualified because of a conflict of interest may be counted.” 222 Cal. App.3d 711. Farwell is the first judicial decision which expressly states this principle

³ Unlike city councils, boards of supervisors are required to take action by a majority of the members. “No act of the board members concur therein.” (Gov. Code § 25005.) The Dry Creek case involved a local rule construing an abstention as a vote with the majority.

as the law in California.⁴

This result can be a trap for the unwary: suppose you have a five-member council and four members attend the meeting with one councilmember absent. If two members abstain for some reason other than conflict of interest, the motion passes. (A quorum is present and a majority of the quorum votes in favor of the motion (2-0-2-1.) If, however, two members disqualify themselves because of conflict of interest, the motion fails (2-0-0-3).⁵ The motion fails because of lack of a quorum: the two disqualified members are not counted for purposes of the quorum. Therefore, there are only two members present who are legally qualified to take action, and the council cannot consider the matter until the absent member is present to constitute a quorum of three.

6. THE RULE OF NECESSITY (LEGALLY REQUIRED PARTICIPATION)

There are certain limited circumstances in which disqualified councilmembers may, nevertheless, participate under the Rule of Necessity, codified in Gov. Code § 87101, which provides:

§ 87101. Legally Required Participation in Governmental Decision.

Section 87100 does not prevent any public official from making of a governmental decision to the extent his participation is legally required for the action or decision to be made. The fact that an official's vote is needed to break a tie does not make his participation legally required for purposes of this section.

The Fair Political Practices Commission has adopted an administrative regulation construing the meaning of "legally required participation." (2 C.C.R. § 18708.) The failure of a board member to attend a meeting that habitually creates quorum problems is not sufficient to create the requisite legal necessity for participation of a conflicted member. "Resolution of the problem created by the member's failure to attend meetings is a political or legal issue which is beyond the jurisdiction of the Act." (Cohen Advice Letter, No. A-94-274; 2 C.C.R. § 18708(c)(2).) Thus, a council cannot invoke the Rule of Necessity merely because one member is absent. Likewise, a council cannot invoke the Rule merely to break a tie. (2 C.C.R. § 18708(c)(1).) There are instances in this state where legislative bodies have been deadlocked two to two (2-2) for months, with the fifth vote disqualified because of conflict of interest.

⁴ In 1979, in the opinion cited above, the Attorney General opined that a motion passes if two vote in favor, two abstain and one is absent (2-0-2-1) but included the following statement: "A quorum refers to the number of members present, not to the number of members actually voting on a particular question; however, the quorum members must be entitled to vote." A footnote adds: "A member who is not entitled to vote because of a conflict of interest, for example, is not counted for purposes of establishing a quorum on a particular question." 62 Ops. Atty. Gen at 700.

⁵ The numerical formula used in this paper corresponded to: (1) yes votes, (2) no votes, (3) abstentions, and (4) absences (1-2-3-4). When a person is disqualified for a conflict, the vote is no longer a simply abstention; it becomes similar to an absence.

Participation by the smallest number of officials with a conflict that are “legally required” in order for the decision to be made shall be reinstated by lot or some other impartial method. (Hudson opinion, 4 FPPC Ops. 13 (1978), 2 C.C.R. § 18708(c)(3).) In Hudson, three members of a five-member board were disqualified because of conflict. The FPPC concluded that “allowing only one of the three disqualified members to participate means that a quorum can be achieved and a decision therefore made. But it will be a decision reached by a board that consist of two members without financial interest and only one member with such an interest.” (4 FPPC Ops. at 17.)

The best random method of selecting which disqualified member should participate is by lot. Other means of random selection that may be used include “such activities as flipping coins, drawing cards, and throwing dice or having the members take turns based upon a predetermined order, and other impartial and equitable means of selection include making a qualitative evaluation of the particular interests involved.” (78 Ops. Atty. Gen. 332.)

Whatever method is used, all disqualified officials must participate in the random selection and all must have an equal likelihood of being chosen. (Heisinger Advice Letter, No. A-95-333.) However, the “legally required participation” exception does not require including persons barred from taking part in a decision by laws other than Section 87100. For instance, “if the city can assert a right (such as the lawyer-client privilege at California Evidence Code sections 950 et seq.) to bar participation in litigation decisions by an opposing party, it is not necessary to include [that] council member in the selection process mandated by section 87101.” (Steele Advice Letter, No. A-05-071.) In that situation, the city was not required to include the councilmember suing the city in the random selection, but only the two councilmembers being sued.

When an official is selected, the official is selected for the duration of the proceedings, in all related matters until the official’s participation is no longer legally required, or the need for invoking the exception no longer exists. (2 C.C.R. § 18708(c)(3).) The random selection procedure need not to be repeated with respect to a series of decisions involving the same general subject matter and the same disqualifying interests. (Hill Advice Letter, No. A -87-110.) The disqualified member or members chosen to convene the quorum are “authorized to participate in making, a governmental decision, i.e. to vote on the matter.” (78 Ops. Atty. Gen. 332.)

Besides selecting a disqualified member to participate in the decision, the members may postpone the decision regarding the matter depending upon the individual circumstances involved. However, in some cases this may constitute an abuse of discretion as “The possible detriment to the general public of having otherwise disqualified Board members participating in governmental decisions must be weighed against the right of an individual to have the Board timely perform its duties with respect to a particular matter.” (Id.)

CONCLUSION

In resolving issues about voting, a council is sometimes caught between two conflicting policies. On the one hand, public officials “should perform their duties in an impartial manner, free from bias caused by their . . . financial interests.” (Gov. Code § 81001 (b).) On the other, “members of public bodies have a duty to vote on issues before them, so that the public is

represented and receives the services that the public bodies were created to provide.” (61 Ops. Atty. Gen. 243, 253 (1978).) Under the present state of the law, the scales seem to tip more readily toward disqualification, which may leave city councils unable to make decisions or take actions on critical issues facing the community.