

# Legal Q & A

By BETH ANNE JANICKI, Chief Legal Counsel, IML and  
LORI ANN VERKUILEN, Paralegal, IML

(March 1997)

This monthly column examines issues of general concern to municipal officials. It is not meant to provide legal advice and is not a substitute for consulting with your municipal attorney. As always, when confronted with a legal question, contact your municipal attorney as certain unique circumstances may alter any conclusions reached herein.

*Q: How does an abstention from voting by a council or board member count?*

A: For various reasons, city council and village board members frequently find themselves abstaining from voting on a particular matter or matters. The question then arises as to how that vote should be treated. The Illinois Municipal Code is silent regarding how a vote in abstention should be counted. Thus, we are left to look elsewhere to determine whether an abstention counts as a "yea" or a "nay" vote.

The Illinois Supreme Court case of Prosser v. Village of Fox Lake is the prevailing authority on this issue.[1] In Prosser, a village trustee sought to have the operation of two village ordinances enjoined because the trustee claimed that three "aye" votes (of a six member board) did not constitute a "concurrence of the majority" of the board members.[2] In Prosser, three board members voted "yea," one voted "nay" and one abstained. The court was faced with the issue of whether the abstention counted as a "yea" or a "nay" vote. The court held that where a concurrence of a majority is required by statute for the passage of a measure, when a member abstains from voting it would be assumed that he or she concurred with the majority.[3] The Prosser court reasoned that:

If a quorum is present, municipal legislators cannot avoid their voting responsibilities by refusing to vote when present at a meeting. (see Launtz v. People ex. rel. Sullivan (1985), 113 Ill 137, see also People ex. rel. Anderson v. Chicago and Northwestern Ry. Co. (1997) 396 Ill 466.) A legal significance or effect must be given to each failure to vote by a municipal legislator who is present at a board meeting in order to prevent frustration or abuse of the legislature process (State ex. rel. Young v. Yates (1897) 19 Mont. 239, 47 p. 1004) He should not be allowed to have his physical presence counted toward the constitution of a quorum and at the same time be allowed to deny in effect, his official presence by a failure to vote.[4]

The Prosser court distinguished between situations where a statute requires an "affirmative vote" and where a "concurrence of the majority" is required holding, that in the first instance any abstention would have the effect of a "nay" vote and in the second instance it would constitute an acquiescence with the majority.[5] Thus, the general rule is that if a statute requires a "concurrence of the majority," the abstention is counted with the majority vote. The situation,

however, may be different if a council member abstains because of a personal or pecuniary interest in the matter being voted upon. This situation was discussed in an ISBA Local Government Law newsletter:

Where a member either has been disqualified or abstained because of interest in the subject matter under consideration, his vote in abstention does not seem to fall within the general rule of acquiescence, although some courts have applied that rule. 63 A.L.R. 3d 1072, 1080. While the corporate authorities of a city or village have the power under state statutes as well as the Illinois Constitution to adopt their own rules of order to govern proceedings and voting procedures - and usually have done so - those rules may not be inconsistent with state statutes. In the event the municipality possessed home rule powers, it could adopt the better rule, treating an abstention in these circumstances as if a vacancy had occurred by reason of death, resignation or disqualification; i.e.: the total number of members of the corporate authority would be regarded as having been reduced by the number of members abstaining because of conflict of interest.[6]

Thus, if a member abstains because of prohibited conflict of interest as defined in 65 ILCS 5/3.1-55-10 or 50 ILCS 105/3 and 105/4, a question arises as to the effect of that abstention. There is no case law in Illinois which directly addresses this point. However, a public officer can violate these provisions without actually voting since the prohibition is against any interest in a "contract or the performance of any work in the making or letting of which such officer may be called upon to act or vote.[7] An officer cannot escape from being called upon to act or vote. Therefore, any officer having such an interest must effectively resign from office, since he cannot avoid the prohibition by abstaining from voting.[8] Any conviction of the conflict provisions constitutes a class IV felony and, among other penalties, results in removal from office. Thus, a close examination must be made to determine whether an actual conflict of interest exists since in the event he or she has an actual conflict, such an official must resign or risk prosecution from committing a Class IV felony. In the event of such resignation, obviously the total membership of the board or council would be reduced accordingly, very likely changing the total needed for a majority or extraordinary majority vote, as the case may be.[9] Further, the conflict of interest provisions provide several exceptions wherein the member is permitted to abstain from voting. In these situations and also in situations involving common law conflicts, the abstention would most likely be treated as an abstention for any other reason within the reasoning set forth in Prosser.

In conclusion, whenever a statute requires the concurrence of a majority of a public body, an abstention vote is counted as acquiescence with the majority vote. If an affirmative vote is required, then nothing more than an actual "aye" or "nay" vote will count, and any attempt to abstain from voting or failing to vote will have the effect of a "nay" vote. In some situations, however, the statutes will require something different, such as a "favorable vote" of the aldermen or trustees or a conflict will prevent a member from voting. The best advice to follow under those circumstances is that of your city or village attorney.

---

## NOTES

1. 91 Ill. 2d 389 (1982).
2. Section 3.1-40-40 of the Illinois Municipal Code requires that all ordinances be passed by a concurrence of a majority of all members holding office, unless otherwise provided. (65 ILCS 5/3.1-40-40).
3. Prosser, 91 Ill. 2d at 395.
4. *Id.* at 394
5. *Id.* at 395. *See also* Lake County Forest Preserve District v. Northern Trust Bank, 207 Ill. App. 3d 290, 265 N.E. 2d 715 (2d Dist. 1990).
6. John T. Zimmerman, The Effect of Abstention Voting by Municipal Officials 25 ISBA Local Government Law, Vol. 6 (March 1989).
7. 50 ILCS 105/3.
8. Peabody v. Sanitary District of Chicago, 330 Ill. 250 (1928).
9. *See supra*, note 6.