



STATE OF KANSAS

Office of the Attorney General

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June 23, 1977

ATTORNEY GENERAL OPINION NO. 77-221

Mr. John T. Bird
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Re: Cities--Zoning--Amendments

Synopsis: Abstention by a member of the city planning commission from voting upon a proposed zoning amendment does not constitute acquiescence in the will of the majority of votes which are cast, or an affirmative vote in favor of the action. Approval of a motion to disapprove a zoning amendment by three members of a seven member commission, all of whom are present, two voting no, one disqualifying himself because of a pecuniary interest, and one abstaining, constitutes approval of the motion by fewer than a majority of all members present, and constitutes a "failure to recommend" under K.S.A. 12-708.

* * *

Dear Mr. Bird:

You advise that several years ago, the City of Ellis, Kansas, adopted a zoning ordinance pursuant to K.S.A 12-701 et seq. Recently, a request for a zoning amendment was duly filed, asking that certain property be rezoned from residential to light industrial. Proceeding under K.S.A. 12-708, the planning commission met and considered the application. Acting on a motion to recommend disapproval of the application, three members voted in favor of the motion, two voted against the motion, one member disqualified himself because of a pecuniary interest in the property involved, and one member abstained.

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Pursuant to ruling of the chairman that an abstention is counted with the prevailing side, the vote of the planning commission was reported to the city commission as four in favor of the motion, two opposed, and one disqualified. Subsequently, the city council approved, 4-3, a motion to return the recommendation to the planning commission with a statement of disapproval. At this point, the applicant contends that the vote of the planning commission constituted a "failure to recommend" because fewer than a majority of the members present voted in favor of the motion, not counting the abstention and the disqualified member.

K.S.A. 12-708 provides in pertinent part thus:

"The procedure for the consideration and adoption of any such proposed amendment shall be in like manner as that required for the consideration and adoption of the original zoning ordinance except where hereinbefore or hereinafter modified. For action on zoning amendments, a quorum of the planning commission is more than one-half of all the members. A vote either for or against an amendment by a majority of all of the planning commissioners present constitutes a recommendation of the planning commission; whereas a vote either for or against an amendment by less than a majority of all of the planning commissioners present constitutes a 'failure to recommend.' When the planning commission submits a recommendation of approval or disapproval of such amendment, the governing body if it approves such recommendation may either adopt such recommendation by ordinance or take no further action thereon, as appropriate. In the event the planning commission submits a 'failure to recommend' to the governing body, the governing body may take such action as it deems appropriate."

You inquire whether the abstention is properly counted as an affirmative vote under these circumstances. The effect of abstentions from voting by a municipal council member has been discussed in an exhaustive annotation at 63 A.L.R.3d 1072.

The language quoted above from K.S.A. 12-708 substantially codifies the common law rule that a majority of the membership of the body constitutes a quorum, and that the vote of a majority of all members

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present, e.g., a majority of a quorum, constitutes a recommendation of approval or disapproval. Thus, if a quorum is present, abstention from voting by one or more members present does not obstruct the conduct of business, so long as the action which is taken is taken by a majority of the quorum. See, e.g., State ex rel. Young v. Yates, 19 Mont. 239, 47 P. 1004 (1897), in which the court described the rationale thus

"It is an exploded notion that a member of a legislative body such as a city council can be present at a meeting, thus helping to make a quorum of the body, yet defeat the progress of legislation by refusing to vote when the roll is called. Experience has demonstrated that it is unreasonable to permit the physical to be disunited from the official being under such circumstances. Such practice oftentimes might give to one member, and frequently to an attending minority, an opportunity to accomplish by silence what could not be done by speech, and often render presence, though inactive, more powerful than entire absence. The courts, as well as law writers and parliamentarians generally, have adopted the more rational rule that if a member of such a body join in making a quorum, and sit, his duty is to vote (unless excused for cause), and he will be counted as present whether or not he refuses to answer to the roll call. 'What the propriety of giving to a refusal to vote more potency than to a vote cast, -- of allowing a gain from violation of duty, in making the refusing to vote of more effect in governing the action of the body of which one is a member than voting?' Launtz v. People, 113 Ill. 144." 47 Pac. at 1005.

In several cases, the court has not only applied this rule, but also considered the specific effect to be given an abstention. The common view, generally cited as the common law rule, is that "those present but not voting are regarded as having voted affirmatively." Napier v. Gay, 264 Ky. 359, 94 S.W.2d 682 (1936). In Rushville Gas Co. v. City of Rushville, 121 Ind. 206, 23 N.E. 72 (1889), the court stated the basis for the rule thus:

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"The doctrine is thus stated by one of the earliest writers on municipal corporations: 'After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body, and if the neglect to vote it is their own fault and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote.' Willcock, Mun.Corp. pt. 1, § 546. . . . 'Those who are present, and who help to make up the quorum, are expected to vote on every question, and their presence alone is enough to make the vote decisive and binding, whether they actually vote or not. The objects of legislation cannot be defeated by the refusal of any one to vote when present. If eighteen are present, and nine vote, all in the affirmative, the measure is carried, the refusal of the other nine to vote being construed as a vote in the affirmative so far as any construction is necessary.' Horr. & B. Mun. Ord. § 43." 23 N.E. at 73.

In some instances, if a member of a body has indicated his or her opposition to the measure to be voted upon, the member's subsequent abstention will not be construed as an acquiescence in the vote of the majority. See, e.g., Kozusko v. Garretson, 102 N.J.L. 508, 134 A. 614 (1926). But see, Martin v. Ballenger, 25 Cal.App.2d 435, 77 P.2d 888 (1938).

In other cases, however, the courts have strictly interpreted requirements that action by a municipal council be taken by a majority vote of the members present to require the actual affirmative votes of the majority, and have declined to view abstention as acquiescence or as an affirmative vote. See, e.g., Livesey v. Secaucus, 97 A. 950 (N.J. Super. 1916).

There appears to be no decision of the Kansas Supreme Court involving this question. Given the apparent prevalence of the common law view as the weight of authority, there is no reason to believe that the court would not apply it in an appropriate case, absent a statutory provision which warranted a contrary result. If the case involved the usual question of the effect of an

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abstention, where an abstention could be regarded in only two ways, first, as an effort to obstruct the conduct of business by withholding a vote, and secondly, as acquiescence in the votes cast by those present who do vote, it is reasonable to anticipate that the Kansas court would follow the prevailing view, that an abstention is to be treated as an acquiescence.

However, under K.S.A. 12-708, there is no reason to construe abstention as acquiescence. A vote may be withheld not merely for the purpose of preventing passage of a proposed zoning change, but a member might abstain for the specific purpose of causing a "failure to recommend." A "failure to recommend" is not mere inaction by the commission, but action which has a specific legal consequence. The planning commission is authorized to submit to the city governing body either a recommendation of approval, a recommendation of disapproval, or a "failure to recommend." K.S.A. 12-708 specifies the action which may be taken by the governing body in each instance. In the event of a recommendation of approval or disapproval, the governing body "if it approves such recommendation" may either 1) adopt such recommendation by ordinance or 2) take no further action thereon, as appropriate. Upon receipt of a recommendation to approve or disapprove which the governing body wishes to disapprove, it shall return the recommendation to the planning commission with a statement specifying the basis of disapproval, and the commission shall consider that recommendation in like manner as for original zoning recommendations which are returned to the commission. In the event the planning commission submits a "failure to recommend," the governing body "may take such action as it deems appropriate." Ordinarily, an abstention is deemed to be an acquiescence in the will of the majority of those members who do vote, because to do otherwise is to countenance the obstruction of business. That is not the alternative, however, under K.S.A. 12-708, for withholding of a vote may lead to a specific commission action, the submission of a "failure to recommend," a statutorily provided action by the commission to be submitted to the governing body: "[A] vote either for or against an amendment by less than a majority of all of the planning commissioners present constitutes a "failure to recommend." By withholding a vote, a member may cause a proposed zoning amendment to receive the votes of less than all of the planning commissioners present, and thus lead to a "failure to recommend."

In my judgment, thus, abstention by a member of the planning commission from a vote upon a proposed zoning amendment under K.S.A. 12-708 should not be regarded either as an acquiescence in the vote of the majority or as an affirmative vote, but rather as precisely what it is, an abstention. In this instance, the motion

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to disapprove the proposed zoning amendment received three affirmative votes cast out of seven members present. Thus, the votes against the amendment were cast by fewer than a majority of all the planning commissioners present, constituting, in my judgment, a "failure to recommend."

You also inquire what procedure is to be followed when the governing body disapproves a planning commission recommendation and returns it to the commission with a statement of the reasons for its disapproval. K.S.A. 12-708 prescribes that "[s]uch recommendation shall be considered in like manner [by the planning commission] as that required for the original zoning recommendation returned to the planning commission." This reference is presumptively to the procedure to be followed for the adoption of original zoning recommendations, rather than amendments. In that original process, the governing body may also disapprove the zoning recommendations of the planning commission and return them to the commission for further consideration:

"The planning commission, after reconsidering the same, may submit its original recommendations giving the reasons therefor or submit new and amended recommendations. Upon the receipt of such recommendations, the governing body may adopt or may revise or amend and adopt such recommendations by ordinance, or it need take no further action thereon. If the planning commission fails to deliver its recommendations to the governing body within ten (10) days after receipt of the governing body's statement specifying disapproval, the governing body shall consider such course of inaction on the part of the planning commission as a resubmission of the original recommendation and proceed accordingly."

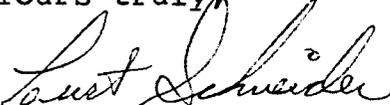
To "proceed accordingly" means, presumably that the governing body may take the same action it may take upon return to it from the planning commission of its reconsidered recommendations, i.e., the governing body may "adopt or may revise or amend and adopt such recommendations" The revisory power which the governing body may exercise at this point appears to be unlimited, i.e., the revision may convert an adverse recommendation into one of approval for adoption by the city commission. Thus, once the governing body has disapproved and returned a recommendation

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concerning a proposed zoning amendment to the planning commission, and the planning commission resubmits its original recommendation, with the reasons therefor, or submits new and amended recommendations, the governing body may proceed to 1) adopt the resubmitted or revised recommendation, or 2) revise or amend the resubmitted recommendation, and adopt the recommendation finally accepted by ordinance. If no recommendation is submitted to the governing body after ten days, the governing body may likewise proceed to adopt the original recommendation, or revise and amend that recommendation, and adopt by ordinance the recommendation which it finally approves.

In this instance, where the original action of the planning commission constituted a "failure to recommend," as I believe it does, the governing body may, in the language of the statute, "take such action as it deems appropriate," which presumably includes either approval or disapproval of the proposed zoning change.

Yours truly,


CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj