

Calculation of Majority Vote

Prepared for the Massachusetts Municipal Association Meeting, January 2020

We are often asked to determine whether the vote of a municipal body is valid. Questions often arise when one or more members of a board were absent or had abstained from voting. This memorandum outlines the approaches that Massachusetts courts have taken in their interpretation of what constitutes a valid majority vote.

I. General Rule – Vote of a Majority is Sufficient

The general common law rule is that, in the absence of an express statute or regulation to the contrary, a simple majority vote (i.e., one vote more than fifty percent) will prevail. Shrewsbury Edgemere Assocs. v. Board of Appeals of Shrewsbury, 409 Mass. 317, 321 (1991). Further, when a quorum is present, a majority of that quorum has the right to take any action which is within the power of the entire body. District Attorney for the Northwestern Dist. v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663, 665 (1981), quoting from FTC v. Flotill Prod. Inc., 389 U.S. 179, 183 (1967).

Majority of Members Present

Massachusetts courts have applied this general rule to hold that a requisite majority vote is calculated based on the number of members present, not on the entire membership, present or absent. Ellison v. Haverhill, 309 Mass. 350, 351 (1941). Thus, when a statute states that a valid vote requires “a majority of the Board,” a municipality should not read this as requiring that a majority of the full membership must vote in favor. Instead, as long as a quorum is present, the calculation of a “majority” should be based on only those members present. Absent members of the board do not affect the vote.

The most common example is that of a five-member board. If three members are present (which is a quorum), then a 2-1 vote is a valid, majority vote of the board.

Abstentions are Not Counted

Furthermore, the general common law rule is that, given the presence of a quorum, a majority of the votes actually cast is sufficient. It is not essential that at least a quorum should actually vote. Nor is it required that the action receive the favorable votes of a majority of all members present. A board member who is present for the vote may abstain from voting and not affect the outcome.

The Massachusetts Supreme Judicial Court implicitly applied this common law rule when it approved a city council vote in Clark v. City Council of Waltham, 328 Mass. 40 (1951). The council consisted of eleven members, ten of whom were present to vote, but only five councilors voted: four in favor, one opposed. In declaring that the four-

to-one vote carried, the court did not count the five abstentions in its determination of the majority. Instead, the court counted only the votes cast.

Some statutes, ordinances or by-laws specify that a vote is valid if a majority of the members present and voting are in favor of the action. To calculate a vote based on the number of members present and voting, a municipality should count only those members present at the meeting who have actually voted. The absence or abstention of a member does not affect the calculation. Doherty v. Mayor of Everett, 13 Mass. App. Ct. 202 (1982).

Three-Member Boards

A Massachusetts case involving a three-member board focused on the particular issues presented by this smaller board. See District Attorney for the Northwestern Dist. v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663 (1981). In this case, as a result of two abstentions, the final vote was one-to-zero in favor of the motion. The court stated, “Under no circumstances can one vote constitute a majority of a quorum of a three-member board.” at 666. In these limited circumstances of a three-member board, an abstention has the effect of a negative vote.

II. Express Stipulations as to Requisite Majority

For some municipal matters, the basis for computing the requisite voting majority has been fixed by statute, by-law or ordinance and thus supersedes the common law rule. Statutes containing language such as the “majority of the members then in office” or “vote of four members of a five-member board” have been interpreted by the courts as follows.

“Majority of the Members”

Sometimes it is clearly specified that a vote requires the majority of the entire membership either of the board or then in office. For example, G.L. c.40C, sec. 11, governing the activities of history district commissions, requires “the concurring vote of a majority of the members of the Commission” to issue permits. Similarly, the Wetlands Protection Act Regulations specify that an order or notification shall be signed by a “majority of the members then in office.” 310 CMR 10.05(2). In these situations, the specific wording must be followed.

Some municipal by-laws or ordinances may specify situations in which the vote of a majority of the entire membership is required. You may wish to review your by-laws or ordinances to identify any such situations.

Explicit Provision for More than Simple Majority

Some statutes explicitly provide for the number of votes required for a municipal body’s approval, and courts interpret these statutes literally. If a law states that a certain number of members must vote in favor of a motion, a municipality must follow the literal language of the statute. For example, if a statute requires that five-member boards can effect action only by a vote of four or five members, the temporary vacancy of a member does not work a metamorphosis of the board into one of fewer than five members. Gamache v. Acushnet, 14 Mass. App. Ct. 215 (1982) (interpreting G.L. c.40A, sec. 15).

In interpreting these statutes strictly, the Massachusetts Appeals Court has struck down a town by-law requiring fewer concurring votes than mandated by the statute. Mullin v. Planning Board of Brewster, 17 Mass. App. Ct. 139 (1983). In Mullin, the Town of Brewster had enacted a zoning by-law requiring only a concurring vote of four or more members of the seven-member Planning Board in order to grant a special permit. The Zoning Act, however, requires a two-thirds vote of a special permit granting authority with more than five members. The Court struck down the Brewster by-law concluding that the requirement of only four votes was inconsistent with the statute's mandate of a favorable vote of at least five members of the seven-member board.

III. Calculation of Percentage Vote Resulting in a Fraction

Occasionally the question arises as to how many votes constitute a valid two-thirds or three-quarters vote. The issue arises when a percentage vote results in a fraction. For example, two-thirds of 100 Town Meeting voters would require 66.6 votes. The question is whether to round the fraction up (so as to require an additional vote to achieve the majority) or down.

Although the Massachusetts courts have not directly addressed this issue, other jurisdictions have stated that, when a percentage vote of municipal body results in requiring so many whole votes and a fraction, "it is always necessary to count the fraction as a whole vote.... The fraction cannot be lopped off or ignored." Bonney v. Smith, 147 P.2d 771, 773 (Okl. 1944) (all three members of a three-member board must vote in favor of a motion in order for it to be a valid three-quarters vote).

We recommend that municipalities follow this procedure and round the votes required for a majority up to the next whole vote. For example, a requirement of a two-thirds vote of a board with seven members voting would require the affirmative vote of five members.

Please visit our website at www.k-plaw.com or contact any attorney at the firm with questions.

Disclaimer: This information is provided as a service by KP Law, P.C. This information is general in nature and does not, and is not intended to, constitute legal advice. Neither the provision nor receipt of this information creates an attorney-client relationship with KP Law, P.C. Whether to take any action based upon the information contained herein should be determined only after consultation with legal counsel.