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Please respond to Quincy

March 27, 2014

FIRST CLASS MAIL

Mr. Richard T. Reed, Town Manager
Town of Bedford
Town Hall
10 Mudge Way
Bedford, MA 01730

RE: Quorum and Quantum of Vote

Dear Mr. Reed:

You requested a legal opinion regarding the quorum and quantum of vote requirements for Bedford boards and commissions. Additionally, you requested a legal opinion concerning the Rule of Necessity.

I. QUORUM

The Massachusetts Open Meeting Law defines "Quorum" as follows: "a simple majority of the members of the public body, unless otherwise provided in a general or special law, executive order or other authorizing provision." M.G.L. c. 30A, § 18. Thus, the general rule is a board or committee must have a simple majority present to act or conduct business.

When there is a vacancy on a public body the general rule is a quorum is still measured by the number of members of the public body as constituted by statute or by-law, regardless of any vacancies. See Gamache v. Town of Acushnet, 14 Mass. App. Ct. 215, 219 (1982)(Noting

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that a Town bylaw established a board of appeals of five members, and a temporary vacancy did not alter that bylaw.),

Example:

A public body has seven (7) members, therefore a quorum is four (4) members. If the same seven-member public body has two (2) vacancies, then there are only five (5) members serving on the public body. By default, a quorum is still measured as four (4) members.

However, as an exception to this general rule, a general or special law, executive order, or other authorizing provision may provide for the quorum of a public body to be a majority of the members serving on the body. In Bedford, the only exception to the general rule for determining a quorum that we are aware of is the quorum of the Bedford Conservation Commission. The definition of quorum for conservation commissions under the regulations of the Wetlands Protection Act ("WPA") is "a majority of the members **then in office.**" 310 CMR 10.05(2)(Emphasis added). Article 19.2 of the General Bylaws of Bedford states in pertinent part that the "Conservation Commission shall consist of seven [7] members." Thus, if all positions have been filled, a quorum of the commission would be four (4) members. If there were two (2) vacancies, then then there would be five (5) members then in office, therefore, the quorum would be three (3) members.

II. QUANTUM OF VOTE

The general rule for the quantum of vote required to pass a motion is a majority of the quorum. The Supreme Judicial Court has held: "In the absence of statutory restriction the general rule is that the majority of a council or board is a quorum and a majority of the quorum can act." McElderry, Jr. et al v. Planning Board of Nantucket, 431 Mass 722, 725 (2000); quoting Clark v. City Council of Waltham, 328 Mass. 40, 41(1951); quoting Merrill v. Lowell, 236 Mass. 463, 467 (1920). Where a statute or regulation sets forth another quantum of vote for a particular board, such statute or regulation will trump the general rule. McElderry, 431 Mass. at 725.

Please note for a board to vote to enter into Executive Session the Attorney General, Division of Open Government, recommends that the best practice is to have a majority of the body as constituted vote to enter executive session. M.G.L. c. 30A, § 21(b)(2)("[A] majority of members of the body have voted to go into executive session and the vote of each member is recorded by roll call and entered into the minutes.") The Division of Open Government acknowledges that the language in the statute may be interpreted as a majority of the quorum, however, the Division of Open Government offers no further guidance until they receive a complaint and make a decision on this issue.

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As will be discussed in detail below, there are exceptions to the general quantum of vote requirements that will affect the Conservation Commission, Zoning Board of Appeals and the Planning Board in Bedford.

A. Bedford Conservation Commission

Pursuant to the WPA and the above regulations for all actions taken by the Conservation Commission, such as approving meeting minutes and scheduling meetings, the requirement is only that action must be taken by **more than half of the “members present at the meeting.”** (Emphasis added).¹ This follows the general rule. On the other hand, the WPA and its regulations require that a **“majority of the Conservation Commission then in office”** must sign Orders of Conditions or Notifications of Determinations of Applicability, Certificates of Compliance, extensions of Orders of Conditions, and Enforcement Orders.² The Department of Environmental Protection has interpreted their regulations to mean that only a majority of **“the members present at a meeting”** of a quorum must vote in favor of such actions at the meeting. Therefore, while some documents must be signed by a majority of the conservation commission, the vote at the meeting only requires more than half of the members present at the meeting.

B. Bedford Zoning Board of Appeals/Special Permit Granting Authorities

The quantum of vote requirements are altered by statute for special permits issued by special permit granting authorities, variances, the reversal of any order or decision of any administrative official, or reapplications within two years of an unfavorable decision. These decisions require: “a vote of at least four members of a five member board.” MGL c. 40A, § 9, 15, 16. Article 21.2 of the General Bylaws of Bedford states the Bedford Zoning Board of Appeals shall consist of five (5) full members and three (3) associate members. Associate members are not counted when calculating votes. Therefore, the Bedford Zoning Board of

¹ 310 CMR 10.05(2) provides in pertinent part: “Where M.G.L. c. 131, § 40 states that a particular action (except receipt of a request or notice) is to be taken by the conservation commission, that action is to be taken by more than half the members present at a meeting of at least a quorum.”

² M.G.L. c. 131, § 40 (The WPA requires that Orders of Conditions or Notifications of Determinations of Applicability “shall be signed by . . . a majority of the conservation commission.” 310 CMR 10.05(2), second paragraph (“Where M.G.L. c. 131, § 40 states that an order or notification shall be signed by a majority of the conservation commission, that action is to be taken by a majority of the members then in office, who need not convene as a body in order to sign, provided they met pursuant to the open meeting law, M.G.L. c. 39, §§ 23A through 23C, when voting on the matter.”). Similarly, the regulations to the WPA provide Certificates of Compliance, extensions of Orders of Conditions, and Enforcement Orders “shall be signed by a majority of the commission.” 310 CMR 10.05(9)(a); 310 CMR 10.05(8)(c), and 310 CMR 10.08(3).

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Appeals would need four (4) votes in favor special permits, variances, the reversal of any order or decision of any administrative official, and reapplications within two years of an unfavorable decision.

C. Bedford Planning Board

Finally, the quantum of vote requirement is altered by statute for approval of a definitive subdivision plan by a municipal planning board and requires an affirmative vote by a majority of the members of that board. M.G.L. c. 41, § 81L (“certification or endorsement signed by a majority of the members of a planning board”); McElderry, 431 Mass 722 (2000) Mass at 726 (“In view of the fact that a [planning] board must indorse a plan that has been approved, it would be illogical to hold that less than a majority of the members of a board may approve a plan, while indorsement of the plan requires the signatures of a majority of members.”). Article 9.2 of the General Bylaws of Bedford states that the Planning Board shall consist of five (5) members. Therefore, the quantum of vote necessary for approval of a definitive subdivision plan would be three (3) members voting in favor.

III. RULE OF NECESSITY

There is no Rule of Necessity under the Massachusetts Open Meeting Law. The Attorney General Division of Open Government takes the position that if a board or committee lacks a quorum due to vacancies then that entity should either fill the vacancies or change the required amount of members of the entity before taking any action.

The Rule of Necessity under the Massachusetts Conflict of Interest Law applies when one or more members of a board or committee are disqualified because of an actual conflict of interest and the board is not able to act because it does not have a quorum. In these instances, as a matter of last resort, the board can use what is called the rule of necessity to permit the participation of the disqualified members in order to allow the board to act. Prior to invoking the Rule of Necessity, the Ethics Commission's Primer on Self-Dealing, Financial Interests and the Rule of Necessity should be reviewed or the individual should contact Town Counsel or the Ethics Commission. Massachusetts Ethics Commission Advisory 05-02.

We hope you find this information useful. Please do not hesitate to contact us if you have any questions.

Very truly yours,



Lauren Galvin
Office of the Bedford Town Counsel