



FAQs

Abstentions

A city council had a rule of its own that provided that an alder had to vote on every issue unless, of course, s/he was in a conflict of interest. On one occasion an alder refused to vote on the grounds that s/he was not sufficiently informed to cast an intelligent ballot. Since there was no conflict of interest, the mayor followed council policy and issued a reprimand and levied a small fine. The alder took the city to court claiming that the city had no right to require her/him to vote.

If you were the judge, how would you have decided the case?

This situation occurred in Madison, Wisconsin in 1983 (*Wrzeski v. City of Madison* 558 F. Supp. 664 [W.D. Wis.198]). The judge ruled that the alder was correct—the body could not require one of its members to vote. To do so would be, in effect, compelling one to speak, which would violate the U.S. Constitution’s first amendment guarantees of free speech. Robert’s agrees that the body cannot compel one of its members to vote. (RONR [11th ed.], p. 407, 11-19).

Although Robert’s refers to the “Right of Abstention,” the right to abstain does not mean that abstaining is the right thing to do. [Remember that we are talking about situations in which one is abstaining when not in a conflict of interest.] Although, abstaining from voting when not in conflict deprives constituents of representation on the matter in question, a more serious concern is that an abstaining member can affect the outcome of a vote without actually taking a position on the issue. To understand how this can happen requires a review of the various ways in which the voting requirements of passage of an issue may be stated.

First, we must keep in mind that when local governments in Wisconsin are acting on important matters such as ordinances, certain resolution or budgetary matters, a quorum of the body must cast either a “yes” or “no” vote—i.e., “a quorum must vote” (*Board of Supervisors of Oconto County v. Hall*, 47 Wis. 208, 213, 2 N.W. 291, 297 [1879]). Assuming no statutory or local rule to the contrary, the “default” requirement is that a measure will pass if it receives an affirmative vote of a majority or supermajority (e.g., 2/3) of the **votes cast**. Consider an 11-member body in which a quorum is set at a majority, i.e., six. If only six attend and all vote, the affirmative vote of 4 out of the total membership of 11 would constitute a majority of the votes cast.

Occasionally, statutes or local rules will stipulate that certain measures must receive a majority or supermajority of the members present. This rule might increase the number of votes required if more than a mere quorum of the members of the body are in attendance. If nine of the 11 attend, five would constitute a majority of the members present.

The most common statutory or local rule provision for important matters is that passage will require a majority or supermajority of the entire body. This provides that no measure will be adopted without the

affirmative vote of at least a majority of the entire body. In the case of the 11-member body, at least 6 affirmative votes would be required.

In all of the voting requirements, members who abstain can affect the outcome without actually voting on the measure in question. Under both the “members present” and “entire body” rules, a specific number of affirmative votes are required and an abstention has the same effect as voting “no.” Also, in all of the voting rules, an abstention might deny a sufficient number of votes cast to satisfy the “quorum must vote” requirement. Suppose we need only a majority of the votes cast. If six attend an 11-member body, a quorum is present. On a particular matter, four may vote for adoption, one votes no, and one abstains. In this case, the matter is not adopted because only five—not the required quorum of 6—actually voted. However, if the abstainer had voted “no,” a quorum would have voted and the measure would have passed.

The circumstances in which a member, by abstaining from voting, may exercise an ability to prevent passage other than simply voting against it has been frowned on by many involved in local government. Under traditional parliamentary procedure, abstentions may have the effect of a “no” vote but they are not officially counted as either “yes” or “no” votes. Occasionally, bodies have taken it upon themselves, presumably without a rule of their own, to officially count abstentions one way or the other—as either “yes” or “no” votes. Courts have supported some bodies that counted abstentions as “no” votes, and they have also supported other bodies that have counted abstentions as “yes” votes. It appears that it is within the purview of local government bodies to come up with rules of their own as to the handling of abstentions should they so desire. Without clear and consistent guidance from courts, it may be advisable to do so—but it should be remembered that bodies cannot require that a member vote. Also, “...a municipality enacting any content-based regulation as part of its procedural rules should be ready to face the court’s strict scrutiny and be prepared to explain how the regulation furthers the efficient functioning of the legislative body and ensure that the regulation is closely drawn to serve that end.” (League of Wisconsin Municipalities, Governing Bodies #346-R1, October 31, 2006).

At least two local government bodies have taken steps to declare how abstentions will be officially counted in certain circumstances. The City of Madison, Wisconsin provides, “any member present who, when a matter is put to a roll call vote, passes, fails to vote or refuses to vote shall be recorded as voting “no” for the sole purpose of determining the Mayor’s entitlement to vote. This rule shall not apply where a member abstains from voting by reason of a conflict of interest.” (Madison General Ordinances sec. 2.1692).

The code of another municipality provides, “No member may be compelled to vote. When a member abstains from voting, the effect is the same as if the member voted with the prevailing side. The “prevailing side” is defined as the votes accumulated which resulted in carrying or defeating a question. In case of a tie vote (not including the abstention), the abstaining vote is considered a “nay.” In case of a vote requiring approval by more than a simple majority, an abstaining vote is considered an “aye.” (New Glarus, Wisconsin Municipal Code, 82-16 D). This village has determined that permitting an abstention to have the effect of a “no” vote is acceptable except on measures requiring a supermajority in which case the abstention is counted in the affirmative. Presumably, the village does not want a measure requiring a supermajority to be defeated if at least a majority of the members favor it, which could happen if the abstention is counted as a “no.”

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