

Memorandum

TO: San Mateo County Harbor District Commissioners

FROM: Steven D. Miller, District Counsel

DATE: August 1, 2014

RE: **Determining a Majority Vote When There are Absences and/or Abstentions**

Dear Commissioners,

At the Harbor District meeting on July 16 2014, an issue arose concerning the counting of votes for a motion to place an item on a future meeting agenda. After the meeting, your General Manager requested that I draft a memo explaining how the District must count votes to determine if an action passes or fails.

The issue of counting votes, in particular when there are absences and/or abstentions, is a complicated one, made even more complicated by the fact that the rules applicable to the Harbor District are different from most other government agencies.

In this memo, after describing the legal background, I will explain the applicable rules, apply them to a number of scenarios, including the one that arose at the July 16 meeting, and finally offer a number of conclusions and recommendations. After you have had a chance to review, I welcome any questions or concerns you may want to discuss.

A. Legal Background

The Harbor District is a creature of statute and its powers derive from the authority granted in its enabling legislation found in Harbors and Navigation Code sections 6000 et seq. Many other government agencies have enabling legislation that explicitly prescribes the manner in which the governing body acts. For example, San Mateo County, and the San Mateo County Transit District, may only act by majority of the entire Board. (Govt. Code § 25005; Public Utility Code §103105) City resolutions, ordinances, and orders for the payment of money also require a majority of the entire City Council. (Govt. Code §36936) County water districts may only act by majority of the entire Board. (Water Code § 30525) However, some water districts, enabled through the California Water District Law and not the County Water District Law may act by a vote of a majority of the directors present at a meeting. (Water Code § 34806).

The Harbor District enabling legislation contains no statutory requirement concerning the counting of votes. Given this silence, the District adopted its own ordinance number 2.1.3, which states that "meetings of the Board of Harbor Commissioners shall be governed by the latest edition of Robert's Rules of Order on all matters pertaining to parliamentary law[.]" In addition, with specific regard to the placing of items on a future agenda, the District's Resolution No. 5-94, as amended, states "if a commissioner wishes to place an item on a future agenda, he

or she . . . shall make a motion to that effect. If the motion is successful by majority vote the item will be placed on a future agenda."

Resolution No. 5-94, as amended, does not answer the fundamental question of what constitutes a majority—a majority of the full Commission, a majority of a quorum, or a majority of those present at a meeting? To answer that question, in the absence of statutory requirements, one must look both to Roberts Rules of Order and to California law.

B. The Rules

There are three rules that apply to the matter at hand:

1. In order for the District to take action, there must be a quorum present. A quorum for the District is a majority of the governing body— in other words three members. (Robert's Rules of Order, 11th Edition, Section 40, p.346)
2. A member who abstains from voting is nevertheless counted for purposes of achieving a quorum, unless the abstention is because the member is disqualified from voting because of a conflict of interest. A member abstaining due to a conflict of interest is not counted for purpose of achieving a quorum. In such a case, abstention is essentially the same as absence. (California Attorney General Opinion 10-901, opining that a "a disqualified member is, legally speaking, not 'present' for the body's deliberations on the disqualifying matter, and the disqualified member may not be counted toward attaining a quorum necessary to act on the matter.")
3. Assuming a quorum exists, approval of an action must be by "majority vote," defined as "more than half of the votes cast by persons entitled to vote, excluding blanks or abstentions." (Robert's Rules of Order, 11th Edition, Section 44, p. 400, emphasis added)

C. Application of the Rules.

As the above discussion indicates, there must be at least three members present for the District to take an action. A member who abstains may nevertheless be counted for purpose of establishing a quorum unless the abstention is a result of a disqualifying conflict of interest. In case of disqualification, an abstention is no different from an absence for purposes of establishing a quorum.

Once a quorum is established, a majority of those voting—not counting abstentions-- is required for a motion to pass. The rationale for not counting abstentions is that if an abstention were counted, it would therefore have the same effect as a "no" vote, thus denying a member the right to maintain a neutral position by abstaining.¹ (Robert's Rules of Order, 11th Edition, Section 44, p. 403)

¹ We note that as a matter of public policy, courts disfavor abstentions absent a conflict of interest. (See Kunec v. Brea Redevelopment Agency (1997) 55 Cal.App. 4th 511, 520, stating that "there is a strong public policy that members of public legislative bodies take a position, and vote, on issues brought before them.")

Following are a few hypothetical scenarios illustrating the above rules.

1. Five members present:

a. A vote is 2-1 with two abstentions. Regardless of the reason for abstention, there is a quorum of at least three. A majority of the three votes was yes. The motion passes.

b. A vote is 2-0 with three abstentions. In order for there to be a quorum of three, one of the abstentions must be for reasons other than disqualification due to conflict of interest. If all three abstentions were for a conflict of interest, then there was no quorum and the motion does not pass. But if there is a quorum of three because at least one of the abstaining members did not have to abstain, but only chose to, then a quorum exists. A majority of the two votes was yes. The motion passes.

2. Four members are present:

a. A vote is 2-0 with two abstentions. In order for there to be a quorum of three, one of the abstentions must be for reasons other than a disqualifying conflict of interest. If both abstentions were for a conflict of interest, then it would be as if both members were absent and there was no quorum-- the motion does not pass. But if there is a quorum of three because at least one of the abstaining members did not have to abstain, but only chose to, then a quorum exists. A majority of the two votes was yes. The motion passes.

b. A vote is 2-1 with one abstention, There is a quorum of three regardless of the reasons for abstention. A majority of the three votes was yes. The motion passes.

3. Three members are present

a. A vote is 2-0 with one abstention. If the abstention is because a member is disqualified due to a conflict of interest, a quorum is lacking and the motion does not pass.

b. A vote is 2-0 with one abstention due to reasons other than disqualification. There is a quorum of three. A majority of the two votes was yes. The motion passes.

These scenarios were implicated twice at the meeting on July 16. Item No. 19 concerned agenda setting for future meetings. Two similar motions were made and seconded to place on a future agenda an update/informational report regarding (a) an ongoing fish buying fee audit, and (b) a separate ongoing audit conducted by the Dornbusch firm. The roll call of the vote was two in favor and one opposed, with one abstention and one absence. Under the rules discussed in this memo, a quorum existed regardless for the reason for abstention (which was not stated). A majority of those voting voted for the motion. The motion therefore passed.

However, after the vote on the first of the above two motions, a determination was made, and confirmed by me in error, that the motion failed. Commissioner Brennan questioned that determination and asked that I reconsider it. I agree with Commissioner Brennan that a majority, as defined by Roberts Rules, voted for the motions and that they indeed passed.

Memorandum To:
San Mateo County Harbor District Commissioners
August 1, 2014
Page 4

Accordingly, at my request, the minutes for the August 6, 2014 meeting will reflect that the motions passed. The two informational reports will be placed on a future agenda.

D. Conclusion

I hope this memo is helpful in clarifying the rules by which votes of the Commission are counted. Please note that adherence to Roberts Rules of Order is a matter of Commission policy, and so the Commission could change its rules, for instance to require that a majority of the entire Commission (ie three members) is required to pass any item, or any resolution or ordinance.² Because the ramification of an abstention may be critical, and because understanding the reason for abstention is necessary in order to determine how to count a vote, I also suggest that Commissioners abstaining from a vote state for the record if they have a disqualifying conflict of interest.

cc: Peter Grenell, General Manager

² Such a change in the rules could serve to prevent the result of action on an important item by a 2-0 vote if all other members abstain for non-disqualifying reasons.