
Coates' Canons Blog: Excusing Board Members From Voting

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State law creates an affirmative duty for local governing board members to vote on matters that come before the board. Last week's post discussed provisions that allow members to be excused from voting for specific reasons. In all other cases, the assumption is that they must vote. The statutes are mostly silent about the process for deciding whether a board member must vote, or whether instead, the circumstances meet one of the grounds for being excused. There is ample opportunity for mischief here. In close cases or controversial votes, a lot may ride on whether a particular member votes.

Process for Excusing a Member From Voting

The issue of a conflict may be raised in a number of different ways. Generally, either the member raises it, or someone else does. The "someone else" could be another board member, a citizen, the press, or the local attorney, just to name a few. The statutes give little or no guidance about a process for determining whether a board member may be excused. The county voting statute says, "The board may excuse a member from voting" but only for those reasons listed in the statute. In contrast, the city voting statute, uses the ever-ambiguous passive voice, so we know that a member "may be excused from voting" for those specified reasons, but we don't know by whom. The provision dealing with quasi-judicial land use decisions, (G.S. 160A-388(e1), says that if an objection is raised (it doesn't say who can raise the objection) and the member does not recuse himself or herself, the remaining board members shall by majority vote, rule on the objection. Presumably, a person could recuse himself or herself even without an objection or a vote of the board. Case law based on constitutional due process principles holds that a lack of impartiality in these types of quasi-judicial decisions by even one member of the board can invalidate the decisions. This provision codifies the due process standards, and provides the board the opportunity to prevent a violation with a vote on the issue. Outside of this context, there isn't much in the cases or statutes about the process for dealing with apparent conflicts in voting.

A Locally Adopted Process?

Can a city or county create a process for excusing members from voting, perhaps through a local policy or ethics code? This would seem to provide at least some predictability and avoid manipulation. There are several possible choices for how this could be done. The board could adopt a policy that the final decision rests with the individual, or that the board decides by majority vote, or the board could agree to abide by the recommendation of counsel, essentially delegating to the local attorney the responsibility for determining whether a basis exists under the law for being excused from voting. In his book on ethics and conflicts of interest (a new edition will be out soon), School of Government faculty member Fleming Bell raises concerns about whether a board can be given the power to grant or deprive a member of his or her right to vote. As noted above, however, for quasi judicial decisions and under the county voting statute, the statutes create a role for the board in this area. A local policy might address this by providing that the board's vote is preliminary and the individual has the final decision about whether to vote, or a policy might simply delegate to the individual power to decide for him or herself (ideally, upon advice of counsel). In any case, where there is disagreement about a member's ability to vote (or not vote), a board member may choose to vote (or not vote) to preserve his or her position for the record, despite the decision of a majority of the board. Whether or not an individual is legally bound by a vote of the board, either under the statute or under a local policy, there would seem to be a value in creating a process to avoid last minute confusion about, or manipulation of, the voting process.

Need For Legal Determination by Local Attorney

Regardless of how the board chooses to handle the process, it's clear that when the possibility of a voting conflict is raised, it is necessary to determine whether the applicable statutory basis for being excused exists. This is a matter of identifying the relevant facts and applying the pertinent statutory standard. I believe that, at a minimum, the board should



create a local process that provides for obtaining an opinion from the local attorney. Information should be provided to the attorney in advance of the vote and he or she should render an opinion to the entire board. Whether the board or the affected individual chooses to rely on the opinion is, as always, up to them. But creating a predictable and informed process might encourage better decision-making and more consistent adherence to the statutory requirements.

Links

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-44.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-75.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-388.html