
Coates' Canons Blog: Failures to Vote by Board Members Participating Remotely

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[UPDATE: Section 4.31 of Session Law 2020-3 amends G.S. 160A-75 to apply the default “yes” rule discussed below to the unexcused failures to vote of council members who attend meetings electronically during a state of emergency declared by the Governor or General Assembly. In that situation, the default “yes” rule applies only while “simultaneous communication” is maintained with a remote member. If the member loses or terminates the connection, the rule doesn’t apply.]

The city council’s rule has been that only members who are physically present may vote. In response to the Coronavirus state of emergency, the council has begun allowing members to vote, even when they participate by conference call, Zoom, Skype, or other electronic means. Council Member Smith decides to join this month’s regular meeting by Skype.

Scenario 1: Just prior to the vote on a proposed noise ordinance amendment, Council Member Smith loses internet service. He misses the rest of the meeting.

Scenario 2: Council Member Smith doesn’t want to take a position on the proposed noise ordinance amendment. He remains silent during the voting.

How should Council Member Smith’s failure to vote be treated in each scenario? In my view, the answer is a big “It depends.”

As my colleague Frayda Bluestein has noted in the blog post available here and the Local Government Law Bulletin found here, we don’t have clear law on the authority of city councils, boards of county commissioners, and other local government boards to conduct business electronically. This blog post assumes that those bodies may take action by electronic means, at least in some circumstances. (Perhaps the need for remote participation created by the Coronavirus state of emergency will prompt the General Assembly to enact clarifying legislation.)

The presumption in parliamentary law is that members of deliberative bodies may abstain from voting. North Carolina law expressly eliminates that presumption for members of city councils and boards of county commissioners. Council members and county commissioners have a statutory duty to vote except when they have been excused from voting for a legally permissible reason. (For a discussion of valid grounds for excusal, please see the blog post found here.)

Failures to Vote by Virtually Present City Council Members

The city council voting statute spells out the consequences of a member’s unexcused failure to vote: “[A] failure to vote by a member who is physically present in the council chamber, or who has withdrawn without being excused by a majority vote of the remaining members present, shall be recorded as an affirmative vote.” G.S. 160A-75. The basic rule, then, is that if a city council member who’s physically present fails to vote without being excused, she must be recorded as voting for the motion under consideration. Additionally, if a member leaves the meeting without being excused, he must be recorded as voting for any motions disposed of while he is gone. I call this provision of G.S. 160A-75 the default “yes” rule. (Note: G.S. 160A-75 exempts votes on proposed zoning ordinance changes from the default “yes” rule. Thus, a council must treat a member’s unexcused failure to cast such a vote as an abstention.)

How does the default “yes” rule apply in the context of a council member who participates electronically? In my opinion, it probably doesn’t apply at all. The statutory language expressly refers to a member who’s “physically present in the council chamber.” A member who takes part by electronic means isn’t physically present. Accordingly, the statute doesn’t direct the council to treat her unexcused failure to vote as a vote in the affirmative. Similarly, because the term “physically

present” appears in the statute, I think that, when the statute refers to a member’s withdrawal from the council chamber, it has in mind a member who literally steps out of the meeting room.

If I’m interpreting the statute correctly, the potential for absurdity exists at a council meeting where some members attend in person and others remotely. If a member who’s physically present refuses to vote without being excused, the default “yes” rule applies. But if a member who’s virtually present does the same thing, his failure to vote counts as an abstention. Likewise, a member who walks out of the chamber without being excused is subject to the default “yes” rule, but not a member who takes part by phone and suddenly hangs up.

May a council avoid the absurdity just described by adopting its own default “yes” rule for remote members? I’d like to think so, but there’s no definitive answer to that specific question in the statutes. City councils do have express authority, however, to adopt their own rules of procedure, provided those rules aren’t “inconsistent with the city charter, general law, or generally accepted principles of parliamentary procedure.” G.S. 160A-71(c). I’ll go out on a limb and opine that a council doesn’t violate general parliamentary principles by adopting a default “yes” rule for members who participate remotely. Assuming that remote participation is legally permissible in the first place, I can’t imagine that a court would deny a council the authority to apply the same voting rules to all members.

If the council already has a local “default” yes rule that essentially restates the statutory language, the fix could be quite simple. The council might replace the phrase “physically present” with “physically or electronically present.”

A default “yes” rule for remote participants does raise some practical issues. What if a member involuntarily “leaves” a meeting because of a bad connection? Is it fair to impose a default “yes” rule in that situation? After all, the member didn’t leave the meeting to avoid voting. She also didn’t have an opportunity to ask to be excused. On the other hand, the other board members have no way of immediately knowing whether the member’s virtual departure was deliberate. In my view, the charitable approach would be for the remaining members to assume technical difficulties and excuse the member. A council may even want to provide in its local default “yes” rule that, when a connection with a remote member is lost, the member should be excused unless grounds exist for thinking that she left the meeting on purpose.

Depending on the method of remote participation, it’s not always easy to tell whether a member has voted. Suppose that a member takes part by conference call. If the mayor simply asks all members to vote by saying “Aye” or “Nay,” it might not be apparent whether the member on the phone voted at all. To avoid that problem, the mayor should call on the member and ask him to state his vote.

Failures to Vote by Virtually Present County Commissioners

Although county commissioners have the same duty to vote as city council members, their voting statute doesn’t say anything about the consequences of a commissioner’s unexcused failure to vote. G.S. 153A-44. Many boards of county commissioners have adopted local default “yes” rules that track the statutory rule for city councils. In so doing, they have relied on their express authority to adopt local rules “in keeping with the size and nature of the board and in the spirit of generally accepted principles of parliamentary procedure.” G.S. 153A-41.

Boards that have adopted local default “yes” rules should examine them for the phrase “physical presence.” Where that phrase is used, the board may want to consider amending its rule to ensure that the consequences of a member’s failure to vote are the same regardless of how a member attends a meeting.

Failures to Vote by Virtually Present Appointed Board Members

Many city and county appointed boards have local rules that they’ve adopted or that their respective city councils or boards of county commissioners have adopted for them. Some of those rules contain default “yes” provisions. The relevant bodies should consider whether changes are needed to clarify that those provisions apply to members who attend by electronic means.

Now back to the two scenarios at the beginning of this blog post. I don’t believe that G.S. 160A-75’s default “yes” rule applies in either situation because Council Member Smith never physically attended the meeting. Unless the council has adopted a local rule extending the default “yes” rule to members who participate remotely, the minutes in the first scenario should simply indicate that Smith’s Skype connection was lost. They should not record any votes by Smith on matters considered following Smith’s departure. In the second scenario, the minutes should record that Smith abstained from



voting.

Links

- www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S704v6.pdf
- www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/lglb133.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-75.html
- www.ncleg.gov/EnactedLegislation/Statutes/HTML/BySection/Chapter_160a/GS_160a-71.html
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-44.pdf
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