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## Coates' Canons Blog: Voting Calculations When a Simple Majority is Not Enough to Decide a Zoning Matter

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*Update: The zoning protest petition for municipal rezonings discussed in this post was repealed in 2015 (S.L. 2015-160). All rezonings now only require a simple majority vote of the city council (the protest petition provision was never applicable to county zoning). Note however that with zoning amendments, G.S. 160A-75 provides that a member who is present but does not vote is not counted as an affirmative vote.*

Consider these two situations.

1. Maggie Greene has applied for a variance in order to locate her new garage 5 feet into the required 20-foot side yard setback. The variance request is being considered by the Woodbury board of adjustment, which has five members. Lorrie Grimes, a dedicated member of the board, is home taking care of a sick child. After hearing all the testimony, the board votes 3-1 to grant the variance. Can Maggie celebrate and tell her contractor to start work?
2. Daryl Dixon has applied to have a four-acre parcel rezoned from single-family residential to multi-family residential in order to build a 180-unit apartment complex. The town staff and planning board have recommended approval. Despite numerous informal meetings, several of the immediate neighbors remain adamantly opposed. The week before the city council hearing those neighbors filed a protest petition objecting to the rezoning. The city council has seven members. One member, Carol Peletier, is a partner in Daryl's development company and because of that conflict of interest, does not vote on rezoning. The council votes 5-1 to approve the rezoning? Was the rezoning adopted?

There are two situations in North Carolina land use law where a simple majority is not sufficient for a board to approve an application. The first is a decision on a variance and the second is a rezoning subject to a valid protest petition. The rules discussed below apply to all calculations of what constitutes the "majority" of the board. These calculations, however, take on a particular importance when a supermajority is required since the presence or absence of a single vote often has a significant impact on the outcome.

### Variations

State law requires a four-fifths majority of the decision-making board to issue a variance. G.S. 153A-345(e); 160A-388(e). The requirement for a supermajority has been in the North Carolina zoning statute since its adoption in 1923. When strict application of the terms of the ordinance imposes an unnecessary hardship, variances allow, in extraordinary cases, a landowner to be granted relief short of having the ordinance amended or going to court. Since a variance authorizes an action contrary to the requirements that apply to everyone else, the requirement of a supermajority helps assure these are only granted when there is a strong consensus of the reviewing board that the rigorous standards for a variance have been met. Recent legislation removed this supermajority requirement for board of adjustment decisions on appeals and special or conditional use permits (S.L. 2013-126, discussed in this **post**), but it still applies for variance decisions.

The question posed in our first problem deals with the impact an absent member has on calculation of the required supermajority. If the board has five members and one is absent, does the variance applicant need four-fifths of five (the full membership of the board) or four-fifths of the four (the number of members present and voting)? The answer depends on why the member is not voting.

The statutes state that the four-fifths vote is based on "the members of the board." Therefore, as a general rule the

computation of the supermajority for a variance is based on the full complement of a board's membership. Simply multiply the number of board members by 0.8 (80% being the same as "four-fifths") to determine how many affirmative votes are needed.

In our case, there are five members of the board, so you need four votes to approve a variance. The vote was 3-1 in favor so Maggie did not receive the necessary four votes. The variance was denied. It does not matter whether the member's absence is "excused" due to an illness. (See Frayda Bluestein's post on excused and unexcused absences [here](#).) For this reason many local governments set the quorum for boards making these decisions at four-fifths of the membership. It is also a reason most of these boards have alternate members who can step in for absent members. Many boards, when faced with only having four of five members present, will offer a variance applicant the opportunity to continue the hearing to a future meeting in order to avoid having to get unanimous support of the four members present and voting.

There are two instances, however, where the legislature has determined that this usual calculation would be unfair. Suppose one of the seats on the board of adjustment was vacant. In that case there is no vote to be had from that seat one way or the other. Or suppose that one of the members had a conflict of interest and is ineligible to vote (a constitutional and statutory limitation on voting in quasi-judicial matters). Again there is no vote to be had from that seat. The legislature has concluded that it is not fair to count a seat from which no vote is possible in the calculation of the required majority. In 2005 the General Assembly amended the zoning statute to provide that vacant seats and members who are disqualified from voting on a quasi-judicial matter are not considered "members of the board" for purposes of the four-fifths vote computation if there are no qualified alternate members available to take the place of such members. G.S. 160A-388(e).

In our example, Lorrie did not vote because she was absent from the meeting tending to a sick child. But a vote was possible from her seat so it is considered in the supermajority calculation. If she had been ineligible to vote due to a conflict of interest, however, her seat would not have been considered. In that case the variance applicant would have needed four-fifths of the four potential votes. Unfortunately for Maggie, four-fifths of four (four times 0.8) equals 3.2, so three votes would still be insufficient and the variance would still have been denied. But depending on the size of the board involved, not counting a seat can produce a different outcome on the variance decision.

### **Protest Petitions {Note: *The protest petition provision was repealed in 2015 and the italicized material below no longer applies.*}**

*When a valid protest petition has been filed, G.S. 160A-385(a) provides that adoption of a proposed zoning map amendment requires the favorable vote of three-fourths of "all the members of the city council." The rationale for this supermajority requirement is that the landowner and immediate neighbors have relied on the current zoning of the property and if they object to a proposed change in sufficient numbers, there needs to be a strong consensus of the city council in favor of making the change. The protest petition has been included in the city zoning statutes since 1923, but has never been applied to county zoning. (See pp. 11-12 of this **report** for information on the use of protest petitions in N.C.) The legislature discussed but did not enact a bill to eliminate the protest petition in 2013 (see this **post** for details).*

*As with a variance, a question arises as to how the supermajority should be calculated when less than the full complement of a board's membership is voting on a rezoning that is subject to a protest petition. As is the case with the variances, the reason why a member is not voting affects whether their seat is counted in the supermajority calculation.*

*If a member is simply absent, that seat is counted as a member of the board for supermajority computation purposes. As with variances, it does not matter whether the member's absence is "excused." They are still a member of the council and their seat is considered in the three-fourths calculation.*

*A council member may be present but voluntarily not voting. In this situation there is a statute (which is applicable to elected boards in cities, but not to appointed boards like the board of adjustment) that comes into play. G.S. 160A-75 provides that where a city council member is present but does not vote (without being excused from voting by the board), the member is counted as having cast an affirmative vote. [Note: **The G.S. 160A-75 provision on the vote of a member who is present but does not vote does not apply to zoning amendments.**]*

*What about the elected official is excused from voting for one of the allowed reasons under G.S. 160A-75? As with variances, the zoning statutes were amended in 2005 to expressly deal with the impact on supermajority calculations when there is a seat on the council from which no vote is possible. G.S. 160A-385(a)(1) provides that for purposes of the protest petition, vacant positions on the board and members who are excused from voting due to a conflict of interest are*

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*not to be considered as “members of the board” in computing the requisite supermajority. So if a city council member (whether present or not) is excused from voting due for any of the reasons allowed under the statute, that seat is not counted in the supermajority calculation.*

*In the second scenario described above, there is a seven member city council considering Daryl’s rezoning request. A valid protest petition has been filed, triggering the three-fourth supermajority requirement. Multiply the number of board members by 0.75 (75% being the same as “three-fourths”) to determine how many affirmative votes are needed. With a seven member board, six votes would normally be needed for a rezoning subject to a protest petition (since 7 times 0.75 equals 5.25, five votes would be insufficient). Since the council vote was 5-1 in favor, the rezoning would have failed if Carol was simply absent. However, in our example Carol was ineligible to vote because of a conflict of interest. So her seat is not counted. The appropriate calculation is based on the six members eligible to vote. 6 times 0.75 equals 4.5. The rezoning would have failed if the vote in favor had been 4-2. But the 5-1 vote is sufficient and the rezoning was adopted.*

*In summary, the general rule is that when the zoning statutes require the majority to be calculated based on the full number of members of a board, the calculation is based on the number of members of the board, not the number of members present and voting. But an exception to the general rule requires you to know why a member of the board did not vote. If no vote was cast because the seat was vacant or because the member was ineligible to vote due to a conflict of interest, that seat is not counted when making the required calculation.*

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