

February 2007

Legal Q&A

By Laura Mueller

TML Legal Counsel

Q: What constitutes a quorum of city councilmembers?

A: Under Section 22.039 of the Local Government Code, a quorum for a type A city is a majority of the number of aldermen (either three out of five if the aldermen are elected at large, or a majority of aldermen under the ward system). However, when a type A city council meets for the imposition of taxes or a special called meeting, a quorum is two-thirds of the members (four out of five aldermen).

Under Section 23.028 of the Local Government Code, a quorum for a type B city consists of three aldermen and the mayor, or four aldermen if the mayor is not present.

Under Section 311.013 of the Government Code, which contains a general definition of quorum (a majority of the members of a governmental body), a type C city must have two in attendance to constitute a quorum.

A quorum for a home rule city is determined by the city's charter. If the charter is silent, a quorum is a majority of members as defined in Section 311.013 of the Government Code (see above).

Q: How many votes are needed to pass a general measure?

A: While no case is directly on point in this issue, the cases suggest that a majority vote of those present at the meeting and voting on the measure is sufficient to pass a general item. In *State v. Ethridge*, the court gave a definition of "governing body" for voting purposes:

The governing body does not mean, generally speaking, all the members of such body elected and qualified. It only means such a number of the governing body as under the law constitute a quorum authorized to speak for the governing body.

32 S.W.2d 828, 830-31 (Tex. Comm. App. 1930). Thus, so long as a quorum is present, general measures pass if they receive a majority vote of those *present and voting*.

Additionally, if a city has officially adopted *Robert's Rules of Order* or other similar parliamentary procedures that define majority vote as a vote of the majority of those present and voting, then general measures are passed by a majority of those present and voting if a quorum is present. See Op. Tex. Att'y Gen. No. GA-0412 (2006) (holding that where a hospital board had adopted *Robert's Rules of Order* to govern its meetings, majority vote meant a majority of those present and voting); *State v. City of McAllen*, 91 S.W.2d 688, 690 (Tex. Comm. App. 1936) (holding that an ordinance is passed by a majority vote of those present and voting and quoting

the charter provision allowing such a vote).

However, statutory and charter provisions may require additional affirmative votes, so city officials should consult with legal counsel in specific cases.

Q: How many councilmembers does it take to pass a measure that is required by state law or charter provision to receive a certain percentage of votes?

A: When a statute, or other provision, calls for a certain percentage of affirmative votes, the vote requires that the number of affirmative votes be measured against the entire council, with a reduction in seats for vacancies and disqualifications. All sitting members' seats are counted, including those who are absent or choose not to vote, but vacant seats or seats of those who are disqualified from voting are not counted.

For example, in *Nalle v. City of Austin*, the city council consisted of fourteen members. 93 S.W. 141 (Tex. Civ. App.—Austin 1906, writ denied). At the vote in question, one seat was vacant due to death, one member was absent, five members voted no, and seven members voted yes. *Id.* at 144. The city's charter required a vote of a majority of the "whole council" to pass a tax ordinance. *Id.* The court counted the absent member's seat when determining whether the measure passed, but did not count the dead member's seat, holding that the measure passed because seven out of thirteen members had voted for the measure. *Id.* at 144-45. *See also, e.g., City of Northlake v. East Justin Joint Venture*, 873 S.W.2d 413, 417-18 (Tex. App.—Fort Worth 1994, writ denied) (holding that Section 6.012 of the Local Government Code, which requires a vote of "two-thirds of the governing body," meant a vote measured against all qualified members of the governing body); *Truman v. Irwin*, 488 S.W.2d 907, 908 (Tex. Civ. App.—Fort Worth 1972, no writ) (assuming that less than a three-fourths vote of the entire qualified council was insufficient to pass a rezoning measure, even though three-fourths had voted affirmatively if only the members present and voting were measured); *City of Alamo Heights v. Gerety*, 264 S.W.2d 778, 778-80 (Tex. Civ. App.—San Antonio 1954, writ ref'd n.r.e.) (holding that rezoning statute requiring "the favorable vote of three-fourths of all the members" was measured against all seats, excluding vacancies, but not excluding the seat of a member who was simply absent).

Put simply, if an ordinance, charter provision, or statute requires a certain percentage of affirmative votes to pass a measure, the number of affirmative votes must be measured against the entire qualified council, not just the number present and voting.

Q: When are vacant council seats or council seats of those disqualified from voting counted in determining whether a measure passes?

A: Some statutes and charter provisions require that votes be measured against the entire possible membership of the governing body. The court in *City of Alamo Heights v. Gerety* stated:

Some statutes, in stating a necessary vote, contemplate an irreducible number of positions, a full and unreduced complement of the total body. That result is achieved in the case of a statute which refers not only to all the members, but also

adds words to show it speaks of the total number of positions which always remains constant. This is illustrated by cases which have construed provisions requiring a specified fraction of a whole body 'elected.'

264 S.W.2d at 779. The primary example of language that triggers such a count is the use of the word "elected" to describe the voting membership. One court held that Local Government Code Section 22.077, which provides that "[t]he removal is effective only if two-thirds of the elected alderman [vote for removal]," required two-thirds vote of *all possible seats*. *Johnson v. City of Dublin*, 46 S.W.3d 401, 408-09 (Tex. App.—Eastland 2001, pet. denied). If a statute or other provision includes "elected" in describing officials, and requires a certain percentage of affirmative votes, then the city council must measure the vote against the entire possible number of aldermen, disregarding vacancies or disqualifications.

Consequently, if a certain measure has statutory or charter voting requirements, local counsel should be consulted to determine what vote is required to pass the measure.