

ABSTENTIONS DO NOT COUNT WITH MAJORITY

The Vermont Supreme Court has issued its decision about how abstentions are counted in votes of local boards. *In re Appeal of Reynolds*, No. 98-580 (Feb. 11, 2000). Contrary to the arguments of the town and VLCT as *amicus curiae*, the Court ruled that abstentions do *not* count with the majority.

The case involved a vote of the Planning Commission in the Town of South Hero. The Commission consists of seven members, and six were present for the hearing and deliberation on the project at issue. When the motion was made to approve the project, three members voted in favor of the application, two voted against it, and one abstained. The Planning Commission concluded that the abstention counted with the majority of three in favor, and approved the project. Mr. Reynolds, a neighbor, appealed to the Environmental Court, which ruled that the abstention should not count and thus that the project had not been approved. The Town appealed to the Supreme Court.

The Town and VLCT argued that at common law, abstentions counted with the majority, and that the common law rule had not been changed in Vermont. However, the Supreme Court relied on 1 V.S.A. § 172, which provides, "When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise." This is the familiar "majority of the board" rule that applies in Vermont. The question in this case was whether the word "concurrence" means that a majority of board members must vote *for* the motion, rather than abstaining, in order for the motion to pass. The Court looked at the "plain meaning" of the word, and concluded that "... the term 'concur' means more than silent acquiescence; it requires consent expressed in an overt way. ...concurrence requires expressed assent through a vote for the proposition." Therefore, since the project had received only three affirmative votes, it had not been approved by a majority of the board. The case was sent back to the Town so that the applicant could resubmit the application to the Planning Commission for a vote to be counted consistent with the Court's decision.

Although the Court did not accept the Town's argument, we are pleased that the issue has been clarified. In a practical sense, this decision means that abstentions do not count at all. For any motion to pass, a majority of a board must vote in favor of it. A vote of less than a majority of a board means that no action has been taken. In light of this, it becomes more important than ever for board members to listen carefully at meetings and hearings, weigh the arguments on all sides, and then vote for or against a motion, rather than abstaining.

Of course, if a board member has a conflict of interest, he or she should not participate in any aspect of the hearing or decision. That member should "recuse" himself or herself and not be present at the table with the other board members.

It can sometimes be difficult to make decisions, but there is almost always no good reason to abstain. You are elected or appointed to make decisions and, hard though it may be, it is important to decide every issue after carefully considering it.

VLCT News, March 2000