

ORLEANS CHARTER REVIEW COMMITTEE
for RESOURCE FOLDER
5/19/21 gml

**March/April 2010 The Newsletter of the Massachusetts Association of
Conservation Commissions Volume XXXX Number 2**

**“Quorum, Quantum of Vote, and Other Procedural Quandaries for Conservation Commissions
By Kate Connolly, Esq.**

This season’s frequently-asked question has come to MACC in several variations, but is, essentially, what constitutes a quorum of a Conservation Commission for conducting meetings and taking action. Necessarily, this question leads to further inquiry as to what quantum of vote is required for a commission to act; what to do if a voting member has missed a hearing; and how many commissioners must sign a decision once it is voted.

For Conservation Commissions.... the WPA Regulations are actually more stringent with respect to quantum of vote, because under 310 CMR 10.05(2), an action “taken by the Conservation Commission” must be taken by “more than half the members present at a meeting of at least a quorum.” (310 CMR 10.05(2) also expressly states that all permits must be signed by a majority of the commission, even though a bare majority of a quorum is adequate to vote whether to issue the permit.)

So, for example, if 4 members of a Conservation Commission are present and that constitutes a quorum, 3 must vote in the affirmative for the commission to act. Two in favor, one opposed and one abstaining will be insufficient for an affirmative vote to pass by “more than half the members present.” The law on this issue is, nonetheless, somewhat unsettled, as shown by a 2000 decision by the Supreme Judicial Court which addresses this issue with respect to Planning Boards. See, *McElderry v. Planning Bd. Of Nantucket*, 431 Mass. 722 (2000).

Until a court case deals directly with the quantum of vote under the WPA, commissions’ decisions by a majority of a quorum that are unchallenged have support in the language of the WPA and Regulations. Still, the most cautious approach is to base commission decisions on a majority vote of the sitting commission, not just a majority of a quorum of the commission: certainly this “McElderry Rule” should be followed when issuing decisions under your bylaws or ordinances, provided you otherwise act in conformance with your bylaw or ordinance requirements. But when acting under the WPA, note the distinctions that can be made between Conservation Commissions and other municipal boards based on the express language of the WPA regulations at 310 CMR 10.05(2), which allows votes to be taken by the reduced number of members, that is, by a majority of a quorum. In the end, any irregularities in Conservation Commission practice under the WPA can be cured by an appeal to the Massachusetts Department of Environmental Protection (DEP). The quantum of vote relates to the substantive decisions of a Conservation Commission as to whether to issue or deny a permit. The WPA regulations also contain a quorum requirement that is purely ministerial, that is, the signing majority requirement mentioned above. Who is Eligible to Vote?

ORLEANS CHARTER REVIEW COMMITTEE
for RESOURCE FOLDER
5/19/21 gml

Other factors that frequently arise when commissions are considering the necessary quorum and quantum of vote are the eligibility of a member who has missed a hearing session to vote, the role of associate or alternate members, and “holdover” members. These topics are addressed in the MACC Handbook.

Whenever possible, votes by a municipal board on permit applications should be made by the same people who attended all sessions of a hearing on a particular matter or application. This rule is based on an Appeals Court decision in *Mullin v. Planning Board of Brewster*, 17 Mass. App. Ct. 139 (1983), and applies to “quasi-judicial” decisions of boards.

This again raises the distinction of whether a commission is acting under the WPA or a local bylaw or ordinance. Some counsel that a commission’s review of an application under WPA is not “quasi-judicial” because the process of appeals to DEP results in a wholly new hearing process, separate from that of the commission.

Where the commission is acting under its local bylaw or ordinance, that is clearly quasi-judicial because appeals of those commission decisions are to superior court. On appeal, the court reviews the record to determine whether a commission acted arbitrarily or capriciously or based on an error of law. In other words, the court’s review is limited to how the commission handled the proceeding, rather than starting anew in reviewing the project.

The cautious approach here is to attempt to always have the same members voting who attended all hearings; however, a 2006 statutory amendment partially overturns the precedent set by *Mullin*. Chapter 79 of the Acts of 2006, entitled "An Act further Regulating Meetings of Municipal Boards," became effective August 10, 2006. The Act inserts a new section in G.L. c.39, G.L. c.39, §23D, which, upon acceptance by a municipality authorizes a member of a board, committee or commission holding an adjudicatory hearing to vote in the matter even though the individual has missed one session, provided that certain conditions are met. Assuming that the board properly adopts the statute, the member who missed a hearing will be allowed to vote provided that he or she missed only one session; that the missed session was due to absence rather than, e.g. disqualification due to conflict; that the missed session is available by transcript or recording; and that the member certifies in writing that he or she has examined all evidence from the missed session. If all of these conditions of Chapter 39, §23D are not met, then the *Mullin* rule otherwise applies and the member who missed a session should not vote.

Under the Conservation Commission Act (G.L. c. 40, §8C) only 3 to 7 officially appointed commissioners may vote. Some commissions identify additional associate or alternate members which are, in essence, members in training. Only through a charter provision or a special act of the Legislature may alternates obtain the power to vote, and only a dozen or so municipalities in the Commonwealth have thus far sought such special legislation. If a commission has obtained special legislation or a charter provision allowing alternate members to vote, those members’

ORLEANS CHARTER REVIEW COMMITTEE
for RESOURCE FOLDER
5/19/21 gml

authority will be expressed by the terms of the legislation. For example, the Town of Bourne obtained the requisite legislation in 2004 (Chapter 339 of Acts of 2004) and under that Act, the associate member is only allowed to “sit” in the case of absence, inability to act (or conflict of interest), or where there is a vacancy on the board...

...The potential problem is the possibility of a tie vote due to the remaining number of commission seats becoming an even number. A tie vote can be considered either a denial or interpreted as “no action,” which is equivalent to a denial and appealable to MassDEP. Presumably bylaws and ordinances would not have different language on this point and would also consider a tie to be akin to a denial. The solution to this problem is to ensure that your commission has an odd number of seats in order to avoid tie votes. Typically, that will mean that you need to find a member to fill one last seat, as most cities and towns set up their commissions properly with an odd number of seats. If a commission finds itself with an even number of members and just can’t fill that last seat, it may be time to consider reducing the number of seats by a vote of the city council or town meeting, provided it can be reduced to an acceptable and reasonable number (i.e. from 7 to 5, or even from 5 to 3), and provided that the remaining three members are not left overwhelmed with responsibility!). Overall, the solution for many of the potential problems in getting a quorum and determining the quantum of vote is to ensure that your commission has a reasonable number of seats, and that they are filled with knowledgeable members who have the time and inclination to serve in their duties as commissioners.

Kathleen Connolly is an environmental and land use attorney with Murtha Cullina LLP, and an MACC Officer.

1 These issues are also discussed at MACC’s Advanced Law Core Day Training presented by an MACC Attorney at the Annual Environmental Conference and at other workshops.

2 To add to the confusion as to whether a holdover has voting rights are certain statutory requirements of holding office; for example, under c. 41§107, each time a member is reappointed, he or she must be sworn in by town clerk. Thus, the question arises of whether a holdover who has not been sworn in, may vote. This, of course, applies to any member who has not been sworn into office. We are not aware of any case law in which a decision issued by a commission whose members have not been sworn into office has been overturned, but as with our other advice on procedural issues, it is best to be safe and follow your municipal oath.

“Sit

To hold court **or perform an act** that is judicial in nature; to hold a session, such as of a court, [Grand Jury](#), or legislative body.”

West’s Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.