

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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A “Majority” Means A Majority Of The Membership For Purposes Of The Zoning Enabling Act

By Shannon Ozga

If there was any confusion as to what constitutes a “majority” vote of a Zoning Board of Appeals under the Michigan Zoning Enabling Act, the Michigan Court of Appeals has cleared up that confusion by way of its recently issued decision in *EDW C. Levy Co v Marine City Board of Zoning Appeals*, ___ Mich App ___ (2011), wherein the Court of Appeals found that MCL 125.3603(2) requires a decision of the ZBA to be supported by a majority of the members of the ZBA, not just the members present at that particular meeting.

In *Levy*, the St. Clair Road Commission owned property along the St. Clair River in Marine City that it used for storage. In 1999, Marine City rezoned the property from I-2 to Waterfront Recreation, but the property retained its industrial status as a prior nonconforming use. After a neighboring property owner, St. Clair Aggregates (SCA), unsuccessfully attempted to purchase the Road Commission property, the Road Commission decided to lease the property to another commercial operator on the condition that the lessee obtain a business license from Marine City. Initially the Marine City’s Manager recommended rejection of the license application, but later certified that the proposed use was allowable, and the City Commission eventually granted a conditional business license.

SCA filed an appeal with the Marine City Board of Zoning Appeals (ZBA), which consisted of five members, seeking review of the City Manager’s certification of the proposed use on the property. Following a hearing, the ZBA denied SCA’s appeal by a 3-2 vote, and SCA appealed the ZBA’s decision to the circuit court. In lieu of ruling on the merits of the appeal, the circuit court found that one of the members of the ZBA, who was also a member of the City Commission, should have recused himself from voting pursuant to MCL 125.3601(13) of the Zoning Enabling Act, which precludes a ZBA member from voting on a matter that the member previously voted on while a member of

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The question of what constitutes a “majority” of the ZBA for purposes of final decision making has been definitely answered by the Court of Appeals. It takes a majority of the members sitting on the ZBA to make a binding decision on a matter, not just a majority of the members present at that meeting. So, where there is a 5-member ZBA, three votes are required to decide an appeal or grant a variance. Where there is a 7-member ZBA, four votes are required. If a local ZBA has not already done so, it should consider adopting bylaws or rules of procedure that require the requisite majority vote for all of its decisions to prevent invalidation of any decision upon a court challenge.

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another commission or the legislative body. Thus, the circuit court vacated the ZBA decision and remanded the matter to the ZBA for a new decision. Upon remand, only three members of the ZBA were present at the hearing, and they voted 2-1 to reverse the City Manager's decision and grant SCA's appeal. SCA thereafter filed an amended claim of appeal in the circuit court and the circuit court ruled that, pursuant to MCL 125.3603(2), in order for SCA to prevail in its appeal, it was required to get votes "from a majority of all of the zoning board of appeals members, not just those present at the time the vote was taken." Accordingly, the circuit court ruled that the ZBA's decision was effectively a denial of the appeal and the City Manager's decision was still effective. The court also found that the ZBA's decision was properly supported by competent and material evidence on the record. SCA thereafter appealed.

MCL 125.3603(2) provides "the concurring vote of a majority of the members of the zoning board of appeals is necessary to reverse an order, requirement, decision, or determination of the administrative official or body, to decide in favor of an applicant on a matter upon which the zoning board of appeals is required to pass under the zoning ordinance, or to grant a variance in the zoning ordinance." The Court of Appeals found the language of the statute to be unambiguous and to require a majority of the members of the ZBA to reverse the certification granted by the City Manager. Thus, three members out of a five member ZBA would have to vote to reverse an administrative decision. According to the Court, if the Legislature intended otherwise, it would have stated such in the statute – "the Legislature is capable of indicating when it intends a different result, such as in the state construction code where it adds the language 'present at the meeting' to allow the sort of quorum voting that SCA argues constitutes a majority here." The Court went on to find that there was substantial evidence in the record to support the ZBA's denial of SCA's appeal and to affirm the City Manager's decision.

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