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Memorandum

VIA E-MAIL

To: Donna Gayden
Fr: John B. Murphey
Date: April 25, 2016
Re: What is the legal effect when a Trustee abstains, passes or fails to vote on a measure?

Illinois follows what's called the "Prosser Rule," named after the 1982 Illinois Supreme Court decision of Prosser v. Village of Fox Lake, 91 Ill.2d 389 (1982), in order to determine the legal effect when a Village trustee votes to "pass," or "abstain," on a particular matter called for a vote, or fails to vote on the measure all together. Actually, in the Prosser case, the Illinois Supreme Court set forth a series of rules. Here they are:

1. The Illinois Municipal Code provides for the taking of only two types of votes – "aye" (or "yea" or "yes") or "nay" (or "no").
2. Therefore, an attempt to vote in a manner other than aye or nay – for example, "abstain" or "present," is not deemed to be a vote.
3. The Prosser case is very firm in holding that "if a quorum is present, the municipal legislators cannot avoid their voting responsibilities by refusing to vote when present at a meeting." *Id* at 394.
4. The Court further held that a "legal significance or effect must be given to each failure to vote by a municipal legislator who is present at a Board meeting in order to prevent frustration or abuse of the legislative process." *Id*.

5. An elected municipal official “should not be allowed to have his physical presence counted toward the constitution of a quorum and at the same time be allowed to deny in effect his official presence by a failure to vote.” *Id.*

6. Therefore, a Village trustee’s failure to vote on a proposed matter must be interpreted to have the same effect as either an aye or a nay vote.

Let’s pause here for a second. Often times, elected municipal officials vote “present” or “abstain” in order to avoid being held accountable to the public on a tough issue or have some other motive for not wanting to vote on a particular matter. The Prosser Rules cited above prohibit a trustee from abdicating his or her responsibility on a particular measure by voting to abstain or pass. Such inaction will be given the effect of a vote. Abstentions must be counted as votes.

7. The impact of a vote to abstain or pass depends on the language of the governing state law. The vast majority of measures coming before the Village Board require the “concurrence” of a majority of members of the Board of Trustees. For example, 65 ILCS 5/3.1-40-40 provides that the passage of ordinances and any resolution or motions creating any liability against the Village “shall require the concurrence of a majority of all members then holding office” on the Village Board, including the Village President “unless otherwise expressly provided by this Code or any other act regarding the passage of any ordinance, resolution or motion.”

8. Where the “concurrence” of majority is required, a vote of pass, present or abstain or a complete failure to vote by a trustee “constitutes an acquiescence or concurrence” by that trustee “with the members of the majority who did vote on the question involved.” This determination reflects the general view “that those members present at a meeting consisting of a quorum must vote against a proposal in order to defeat it. If members are present and refuse to vote, they are deemed to have consented to the majority decision.”

Let’s provide an example of this rule. Assume there is a motion to approve an ordinance or to pass a resolution authorizing an intergovernmental agreement. Three trustees vote in favor of the measure, one votes against it, and two trustees abstain on the measures. As these two items fall within the general “concurrence” rule, the law deems that the abstentions go with the majority. Therefore, these measures are deemed to have passed by a 5-1 vote and the abstention votes should be recorded by the Clerk as yes votes. This is the general rule.

Let’s now turn to a couple of situations to illustrate the application of the “affirmative vote” rule. Let’s assume there is a proposal that the Village vacate (meaning giving up control) of a portion of a Village street like 177th Street in order to accommodate a proposed expansion of South Suburban Hospital. The governing

statute on vacation of streets or alleys, Section 11-91-1, provides that in order for the Village to vacate a public street, the authorizing ordinance “shall be passed by the affirmative vote of at least three-fourths of the . . . trustees . . . then holding office.”

Let’s return to our voting example discussed above. Assume three trustees vote in favor of vacating 177th Street, one trustee votes no, and two trustees abstain. Because this is an “affirmative” vote situation, the two abstentions are considered to be no votes and the measure fails. Let me once again emphasize that the “affirmative vote” situation is rare; in the vast majority of situations, the “concurrence” rule will apply and abstentions will be deemed to run with the majority.

Finally, there is what might be called the “Joseph Bertrand Rule.” In People ex rel. Madigan v. Bertrand, 2012 Ill. App. (1st) 111419 365 Ill. Dec. 426 (1st Dist. 2012), the Appellate Court examined the vote of a settlement agreement reached between Mr. Bertrand, one of the elected Bremen Township School Trustees and the Township School Trustees themselves. At that time, the Trustees were a 3-member Board. At the particular meeting, one trustee was absent (a motion was made and seconded to pay Bertrand the settlement sum). One trustee voted yes and Bertrand abstained. They concluded that the matter passed under the Prosser Rule.

The Appellate Court disagreed and held that the Prosser Rule did not apply to a circumstance where one of the members of the governing body has a financial interest in the matter and hence a conflict of interest. Once again, the Bertrand situation would be exceedingly rare, especially in a Village where there are six trustees and a Village president.

In summary:

A. Abstentions, passes and other similar failures to vote have no legal effect. Any such attempt will be treated as a vote.

B. In the vast majority of circumstances, an abstention or similar failure to vote will be treated as a concurrence with the majority vote on a particular measure. The minutes should so reflect.

C. In rare circumstances when the law requires an “affirmative vote,” an abstention will be treated as a no vote.

JBM/sml