



**TOWN OF HARRISBURG, NORTH CAROLINA
HARRISBURG TOWN HALL
BOARD OF ADJUSTMENT MEETING**

**April 2, 2024
6:00 PM**

AGENDA

1. CALL TO ORDER

A. SPECIAL PRESENTATIONS

1. PUBLIC PARTICIPATION VIA ZOOM* - Harrisburg Town Hall's Council Chambers will be open for the public to attend the meeting in person. The public has the option to join the meeting virtually via the Zoom platform using the following link:

[Click Here for Zoom Meeting Link](#)

Webinar ID: 839 0121 0697

Passcode: 476569

Or One tap mobile:

+19292056099,,83901210697#,,, *476569# US (New York)

+13017158592,,83901210697#,,, *476569# US (Washington DC)

Or by phone

312.626.6799

301.715.8592

*Anyone who wishes to participate in the meeting proceedings must be present.

B. ROLL CALL

C. AGENDA ADOPTION

D. SPECIAL PRESENTATIONS

2. CONSENT AGENDA

3. PUBLIC HEARINGS - NONE

4. OLD BUSINESS - NONE

5. NEW BUSINESS

- A. Variance Training

6. ADJOURNMENT

Vision Statement

Harrisburg will be a distinctive, family-focused community where memories are made.

Mission Statement

Together, we enhance our quality of life by collaborating, planning, and investing to create our community of choice.



TOWN OF HARRISBURG

Agenda Item Details

Title:

Variance Training

Presenting Personnel:

Shelley DeHart, Assistant Planning Director

Suggested Motion or Action:

Training participation

Description/Background:

Planning staff will present a practice variance case as a training exercise.

Recommendation:

Training Participation

Fiscal Impact:

N/A

Attachments:

1. Harrisburg UDO Adopted 08.09.21 298
2. GS_160D-705
3. Calculating the Majority Vote Required for Variances and Development Regulation Amendments - Coates' Canons
NC Local Government Law

§ 145.04 Quasi-Judicial Review Procedures

Contents:

145.04.01 Variance

145.04.02 Variance, Floodplain

145.04.03 Special Use Permit

145.04.04 Appeal of Administrative Decision

145.04.01 Variance

- A. Applicability.** A Variance provides limited relief from the requirements of this UDO related to height, width, length, or location of structures, and the size of setbacks and open spaces, in those cases where strict application of a particular requirement will create an unnecessary hardship by preventing the use and development of land in a reasonable manner that is otherwise allowed under this UDO. A Variance is not a right. It may be granted to an applicant only if the applicant establishes compliance with the hardship criteria established in this Section.
- B. Exemptions.** Some requests for relief are not within the jurisdiction of the Board of Adjustment (BOA), and are therefore, either prohibited or not subject to this Section. These requests are:
1. *Use and Sign Type Variances.* Variances are prohibited that would allow a use or a sign type in a zoning district in which the use or sign type is prohibited.
 2. *Variances to Other Laws or Regulations.* Variances to State or federal laws are prohibited unless such authority is expressly granted to the Town.
 3. *Conditions of Approval.* An applicant may seek modifications to conditions of approval with a new application submittal, rather than a Variance.
 4. *Parking Credits and Reductions.* Adjustments to the amount of parking spaces required may be authorized in accordance with Section 141.03.02.F, *Modification to Required Number of Spaces*.
 5. *Floodplain Variances.* Variances to the requirements of Chapter 143, *Environmental Management*, may be authorized in accordance with Section 145.04.02, *Variance, Floodplain*.
- C. Specific Review Criteria.** In determining whether to approve, approve with conditions, or deny a Variance, the applicable review bodies shall consider the provisions of Section 145.01.07, *Common Decision Criteria*, together with the following:
1. *Unnecessary Hardship.* Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the Variance, no reasonable use can be made of the property.
 2. *Conditions Peculiar to the Property.* The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a Variance.
 3. *Actions Taken by the Applicant or the Property Owner.* The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a Variance is not a self-created hardship.
 4. *Spirit, Purpose, and Intent.* The requested Variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.
- D. Federal Fair Housing Act.** In accordance with NCGS §160D-705, A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- E. Vote.** The concurring vote of four-fifths of the members of the Board of Adjustment shall be necessary to approve a Variance.
- F. Effect.**

1. **Particular Variation.** Issuance of a Variance shall authorize only the particular variation that is approved in the Variance request. A Variance shall run with the land and not be affected by a change in ownership.
2. **Other Approvals.** Development authorized by the Variance shall not be carried out until the applicant has secured all other development approvals required by this UDO or any other applicable provisions of the Town. Approval of a Variance does not guarantee that the development shall receive subsequent approval for other development review applications unless the relevant and applicable portions of this UDO or any other applicable provisions are met.

145.04.02 Variance, Floodplain

A. Applicability.

1. **Generally.** A Floodplain Variance provides limited relief from the requirements of [Chapter 143, Environmental Management](#), where strict application of a particular requirement would create an unnecessary hardship by preventing the use and development of land in a reasonable manner that is otherwise allowed under this UDO.
2. **Other Structures.** Floodplain Variances may be issued for:
 - a. The repair or rehabilitation of historic structures upon the determination that the proposed repair or rehabilitation will not preclude the structure's continued designation as a historic structure and that the Floodplain Variance is the minimum necessary to preserve the historic character and design of the structure;
 - b. Functionally dependent facilities, if determined to meet the definition as stated in under [§148.02, Definitions](#), of this UDO, and such facilities are protected by methods that minimize flood damages during the base flood and create no additional threats to public safety; and
 - c. Any other type of development, provided it meets the requirements of this Section.

B. Exemptions. A request for relief not related to the standards of [Chapter 143, Environmental Management](#), may be eligible for review under Section [145.04.01, Variance](#).

C. Specific Review Criteria. In determining whether to approve, approve with conditions, or deny a Floodplain Variance, the applicable review bodies shall consider the provisions of Section [145.01.07, Common Decision Criteria](#), together with the following.

D.

1. **Swept Materials.** The danger that materials may be swept onto other lands to the injury of others;
2. **Danger.** The danger to life and property due to flooding or erosion damage;
3. **Susceptibility.** The susceptibility of the proposed facility and its contents to flood damage and the effect of such damage on the individual owner;
4. **Importance of Services.** The importance of the services provided by the proposed facility to the community;
5. **Waterfront Location.** The necessity to the facility of a waterfront location as defined under [§148.02, Definitions](#), as a functionally dependent facility, where applicable;
6. **Alternative Locations.** The availability of alternative locations, not subject to flooding or erosion damage, for the proposed use;
7. **Existing and Anticipated Development.** The compatibility of the proposed use with existing and anticipated development;
8. **HALUP.** The relationship of the proposed use to the HALUP and floodplain management program for that area;
9. **Safety of Access.** The safety of access to the property in times of flood for ordinary and emergency vehicles;
10. **Expected Characteristics of Floodwaters.** The expected heights, velocity, duration, rate of rise, and sediment transport of the floodwaters and the effects of wave action, if applicable, expected at the site; and

1. **Administrative Applications.** If the application is for a review procedure addressed in §145.02, *Administrative Review Procedures*, then Town staff shall approve, conditionally approve, or deny the application, as appropriate. Applications receiving approval may subsequently undergo the processes established in Subsection 145.01.10, *Post-Approval Provisions*.
 2. **Legislative, Quasi-Judicial, and Subdivision Applications.** If the application requires a public meeting or public hearing prior to a final decision, then the applicable Town staff shall forward a recommendation to the next development review body in the review process, according to Section 145.01.14, *Development Review Summary*, who will consider it for further recommendation or final decision.
- E. Common Decision Criteria.** In addition to all other applicable provisions of this UDO, development review bodies shall consider the provisions of 145.01.07, *Common Decision Criteria*, when making a recommendation or a final decision.
- F. Continuing Review Process.** Applications requiring a public meeting or hearing, according to Section 145.01.14, *Development Review Summary*, shall subsequently undergo the processes established in 145.01.08, *Public Notice*, and 145.01.09, *Public Meetings and Hearings*, as applicable.

145.01.07 Common Decision Criteria

- A. Generally.** In determining whether to approve, approve with conditions or modifications, or deny an application, the applicable development review bodies shall consider the basic review criteria denoted in Table 145.01.07-1, *Common Decision Criteria Applicability*. Additional review criteria may apply and are enumerated in the specific review procedures of this Section.

Table 145.01.07-1, Common Decision Criteria Applicability			
Common Decision Criteria	All Applications ¹	Legislative Applications	Quasi-Judicial Applications ¹
The request complies with the applicable standards of this UDO and the Town Code, and the applicant has provided proof of compliance with any preceding and applicable county, state, or federal requirements.	♦		
The request substantially conforms to any associated prior approval for the development, including, but not limited to: Special Use Permit, Conditional Zoning, Site Development Plan, etc.	♦		
The request promotes the purposes of this UDO as established in 144.01.02, <i>Purposes</i> , and in other applicable purpose statements in this UDO.	♦		
The establishment, maintenance, or operation of the proposed use shall not be detrimental to or endanger the public health, safety, or general welfare	♦		
The administrative body has considered the recommendation of Staff in the public meeting or hearing.		♦	♦
The request is consistent with applicable policies of the most recently adopted HALUP, any applicable utility plans, and adopted capital improvements plans; or, if it addresses a topic that is not contained or not fully developed in the HALUP, the request does not impair the implementation of the HALUP.		♦	♦
Adequate facilities, including public or private utilities, solid waste service, roads, drainage, and other improvements are present or are planned to be provided.		♦ ²	♦ ³
The request demonstrates compatibility with surrounding conforming and permitted land uses and structures and with the essential character of the general vicinity of design, façade treatment, setbacks, building materials, and reasonably anticipated negative impacts.		♦ ²	♦
TABLE NOTES: ♦ = Basic review criteria applies ¹ Excluding Appeals of Administrative Decisions ² Excluding UDO Text Amendments ³ Excluding Variances			

Table 145.01.14-1, Summary of Procedures

Development Application (Reference Standards)	Submittal Timing	Expiration ¹	Review Responsibilities		Public Notice
			Recommendation	Final Action	
LEGISLATIVE APPLICATIONS: Involve the adoption, amendment, or repeal of a regulation this UDO and the decision to establish or change the way the use, design, or development of land will occur on a site-specific, Town-wide, or intermediate scale. Elected and appointed administrative bodies make final decisions based on general considerations of fostering and preserving the public health, safety, and general welfare, including the Town's fiscal well-being. Such final decisions are characterized by the exercise of broad discretion.					
UDO Text Amendment (145.03.01)	None	N/A	1st: Director 2nd: PZB	TC	Pu, M
Zoning Map Amendment (145.03.02)	Prior to establishing or expanding a building type or use prohibited in the current character district	N/A	1st: Director 2nd: PZB	TC	Pu, Po, M
Conditional Zoning Approval (145.03.03)	Prior to any development approval requiring this change	N/A	1st: DRC 2nd: Director 3rd: PZB	TC	Pu, Po, M
Preliminary Plat (Minor Subdivision 145.05.01 or Major Subdivision 145.05.02)	Prior to Construction Plan or Final Plat Submittal	24 months ²	Minor: DRC Major: 1st: DRC 2nd: Director 3rd: PZB	Minor: Director Major: TC	N/A
Certificate of Appropriateness (145.03.04)	Prior to the alteration of the exterior appearance or demolition of any existing structure, or construction of a new structure or portions of a new structure in a historic district.	12 months	1st: Director 2nd: HPC	TC	Pu, Po, M
QUASI-JUDICIAL APPLICATIONS: Involve final decisions involving the finding of facts regarding a specific application of a development regulation in this UDO and that requires the exercise of discretion when applying the standards of the regulation.					
Variance (145.04.01)	Prior to any development approval requiring a variance	12 months	Director	BOA	Po, M
Variance, Floodplain (145.04.02)	Prior to any establishing any structure requiring a floodplain variance	12 months	Floodplain Director	BOA	Po, M
Special Use Permit (145.04.03)	Prior to establishing any use requiring a Special Use Permit	12 months	1st: DRC 2nd: Director	BOA	Pu, Po, M
Appeal of Administrative Decision (145.04.04)	Within 30 days of the official decision	12 months	Director	BOA	Po, M
SUBDIVISION APPLICATIONS: Require final decisions related to dividing larger tracts of land into smaller lots. City staff or legislatively appointed administrative bodies take final action based on regulations in this UDO and on technical requirements of various Town departments, local and state agencies, and utilities. Such final decisions are characterized by limited discretion.					
Final Plat (Minor Subdivision 145.05.01 or Major Subdivision 145.05.02)	Prior to developing a Minor or Major Subdivision or making a minor modification to a recorded plat, after Preliminary Plat approval, and after either: 1) Acceptance of public improvements; or 2) Approval of performance bond.	30 days ³	DRC	Director	N/A

§ 160D-705. Quasi-judicial zoning decisions.

(a) Provisions of Ordinance. – The zoning or unified development ordinance may provide that the board of adjustment, planning board, or governing board hear and decide quasi-judicial zoning decisions. The board shall follow quasi-judicial procedures as specified in G.S. 160D-406 when making any quasi-judicial decision.

(b) Appeals. – Except as otherwise provided by this Chapter, the board of adjustment shall hear and decide appeals from administrative decisions regarding administration and enforcement of the zoning regulation or unified development ordinance and may hear appeals arising out of any other ordinance that regulates land use or development. The provisions of G.S. 160D-405 and G.S. 160D-406 are applicable to these appeals.

(c) Special Use Permits. – The regulations may provide that the board of adjustment, planning board, or governing board hear and decide special use permits in accordance with principles, conditions, safeguards, and procedures specified in the regulations. Reasonable and appropriate conditions and safeguards may be imposed upon these permits. Where appropriate, such conditions may include requirements that street and utility rights-of-way be dedicated to the public and that provision be made for recreational space and facilities. Conditions and safeguards imposed under this subsection shall not include requirements for which the local government does not have authority under statute to regulate nor requirements for which the courts have held to be unenforceable if imposed directly by the local government, including, without limitation, taxes, impact fees, building design elements within the scope of G.S. 160D-702(b), driveway-related improvements in excess of those allowed in G.S. 136-18(29) and G.S. 160A-307, or other unauthorized limitations on the development or use of land.

The regulations may provide that defined minor modifications to special use permits that do not involve a change in uses permitted or the density of overall development permitted may be reviewed and approved administratively. Any other modification or revocation of a special use permit shall follow the same process for approval as is applicable to the approval of a special use permit. If multiple parcels of land are subject to a special use permit, the owners of individual parcels may apply for permit modification so long as the modification would not result in other properties failing to meet the terms of the special use permit or regulations. Any modifications approved apply only to those properties whose owners apply for the modification. The regulation may require that special use permits be recorded with the register of deeds.

(d) Variances. – When unnecessary hardships would result from carrying out the strict letter of a zoning regulation, the board of adjustment shall vary any of the provisions of the zoning regulation upon a showing of all of the following:

- (1) Unnecessary hardship would result from the strict application of the regulation. It is not necessary to demonstrate that, in the absence of the variance, no reasonable use can be made of the property.
- (2) The hardship results from conditions that are peculiar to the property, such as location, size, or topography. Hardships resulting from personal circumstances, as well as hardships resulting from conditions that are common to the neighborhood or the general public, may not be the basis for granting a variance. A variance may be granted when necessary and appropriate to make a reasonable accommodation under the Federal Fair Housing Act for a person with a disability.
- (3) The hardship did not result from actions taken by the applicant or the property owner. The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance is not a self-created hardship.
- (4) The requested variance is consistent with the spirit, purpose, and intent of the regulation, such that public safety is secured and substantial justice is achieved.

No change in permitted uses may be authorized by variance. Appropriate conditions may be imposed on any variance, provided that the conditions are reasonably related to the variance. Any other development regulation that regulates land use or development may provide for variances from the provisions of those ordinances consistent with the provisions of this subsection. (2019-111, s. 2.4; 2020-3, s. 4.33(a); 2020-25, ss. 17, 50(b), 51(a), (b), (d).)



Coates' Canons NC Local Government Law

Calculating the Majority Vote Required for Variances and Development Regulation Amendments

Published: 12/07/21

Author Name: David Owens

Note: A version of this post was originally published 9/30/2013. The post was updated and substantially revised on 12/7/21 to reflect repeal of the zoning protest petition statute, adoption of Ch. 160D, and amendment of the city voting statute.

When a governing board, board of adjustment, or planning board decides a matter, the general rule is that a simple majority of the board determines the outcome of the vote.

This general rule gets more complicated for variances and amendments of development regulations. A 4/5 majority is required to grant a development regulation variance. How is this 4/5 majority calculated when there are members absent or a member has a conflict of interest? Do those same rules regarding

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vacancies and those with conflicts apply to the governing board vote on a zoning map or text amendment? What if a governing board member is present but does not vote on a proposed development regulation amendment?

North Carolina statutes have specific rules that address calculation of the majority required to approve a variance or to amend a development regulation. The statutes specify how an absent member or a member with a conflict of interest affect the majority required. The statutes also have a special rule that applies to city council members who are present but do not vote on a development regulation amendment.

Variances

State law requires a four-fifths majority of the decision-making board to issue a variance. G.S. **160D-406(i)**. This 4/5 rule applies to any board making the variance decision.

This requirement for a supermajority for variances has been in the North Carolina zoning statute since its adoption in 1923. When strict application of the terms of the ordinance imposes an unnecessary hardship, variances allow a landowner to be granted relief short of having the ordinance amended or going to court. See this **post** for more on the standards for granting a variance. Since a variance

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authorizes an action contrary to the requirements that apply to everyone else, the requirement of a supermajority helps assure these are only granted when there is a strong consensus of the reviewing board that the rigorous standards for a variance have been met.

When all a board's members are present and voting, calculation of the required 4/5 majority is straightforward. Multiply the number of members of the board by 0.8 to get the number of votes required to issue a variance (80% being 4/5 of the board). So, with a typical five-member board, $5 \times 0.8 = 4$, so four affirmative votes are needed to issue a variance. For a seven-member board, $7 \times 0.8 = 5.6$, so five votes would be insufficient and six affirmative votes are needed to issue a variance.

The situation gets a bit more complicated if all the board members do not vote. Consider this situation:

Maggie Greene has applied for a variance to locate her new garage 5 feet into the required 20-foot side yard setback. The variance request is being considered by the Woodbury board of adjustment, which has nine members. Lorrie Grimes, a dedicated member of the board, is home taking care of a sick child so she does not attend the hearing or participate in the case at all. There are no alternate members available to take Lorrie's place for this case. After hearing all the testimony, the board votes 7-1 to grant the variance. Can Maggie celebrate and tell her contractor to start work?

This scenario raises the question of the impact a non-voting member has on calculation of the required supermajority. If the board has nine members and one member is absent, does the variance applicant need four-fifths of nine (the full membership of the board) or four-fifths of eight (the members present and voting)? In our case, if the computation requires four-fifths of all nine members, eight votes are

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required to grant a variance ($9 \times 0.8 = 7.2$). If the computation requires four-fifths of the eight members present, only seven votes are required to grant the variance ($8 \times 0.8 = 6.4$). So, was the variance granted?

The answer depends on why the member is not voting.

G.S. 160D-406(i) states that “the concurring votes of four-fifths of the board” are required to grant a variance. Therefore, generally the computation of the supermajority for a variance is based on the full complement of a board’s membership. However, this statute goes on to state that if a seat is vacant or the member cannot vote due to a conflict of interest, that seat is not counted in computing the required supermajority.

Lorrie is still a member of the board and she did not have a conflict of interest. Therefore, Lorrie’s seat is counted in the calculation. The vote was 7-1 in favor, so Maggie did not receive the necessary eight votes. The variance was denied. It does not matter whether the member’s absence is “excused” due to an illness. (See Frayda Bluestein’s [post](#) on excused and unexcused absences.) For this reason, many local governments set the quorum for boards making variance decisions at four-fifths of the membership. It is also a reason most of these boards have alternate members who can step in for absent members. Many boards, when faced with only having four of five members present, will offer a variance applicant the opportunity to continue the hearing to a future meeting to avoid having to get unanimous support of the four members present and voting.

There are two instances, however, where the legislature has determined that this usual calculation would be unfair. Suppose one of the seats on the board of adjustment was vacant. In that case there is no vote to be had from that seat one way or the other. Or suppose that one of the members had a conflict of interest and is ineligible to vote. Again, there is no vote to be had from that seat. The legislature has concluded that it is not fair to count a seat from which no vote is possible in the calculation of the required majority. G.S. 160D-406(i) provides that vacant seats and the seats of

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members who are disqualified from voting on a quasi-judicial matter under **G.S. 160D-109(d)** are not considered “members of the board” for purposes of the four-fifths vote computation if there are no qualified alternate members available to take the place of such members.

In our example, Lorrie did not vote because she was absent from the meeting tending to a sick child. But a vote was possible from her seat, so it is considered in the supermajority calculation. If she had been ineligible to vote due to a conflict of interest, however, her seat would not have been considered. In that case the variance applicant would have needed four-fifths of the eight potential votes, which is seven affirmative votes, and the variance would have been granted.

Amendments of Development Regulations

The statutes contain detailed procedures that must be followed whenever a city or county adopts and amends development regulations. See this **post** by Adam Lovelady for more details on the mandated process for these legislative decisions.

The city and county statutes regarding voting by governing boards to adopt ordinances, G.S. **160A-75(c)** and **153A-45** respectively, require a simple majority of “all of the members” of the board to adopt, amend, or repeal an ordinance. By referring to *all members* of the board, rather than all of those present and voting, this requires the majority calculation to be based on the total number of board members.

The supermajorities to adopt an ordinance on first reading do not apply to adoption or amendment of development regulations. The county statute requires a unanimous vote to adopt an ordinance on the date of introduction, but G.S. 153A-45 has long provided that this requirement does not apply to any ordinance that requires a public hearing prior to adoption (which includes all development regulations). G.S. 160A-75(c) requires a two-thirds majority to adopt an ordinance on first reading. However, as part of the enactment of Chapter 160D, that provision was amended to bring the city statute into alliance with the county statute. It now exempts ordinance enactments for development regulations from the first reading supermajority requirement.

As is the case for quasi-judicial decisions, a city or county elected official must not vote on adoption or amendment of a development regulation if the member has a conflict of interest under **G.S. 160D-109(a)**. G.S. 160A-75(c) specifically says the majority needed to adopt an ordinance must be of all

members not excused from voting, so the seat of a member with a conflict of interest is not counted in

This website uses cookies and similar technologies to understand visitor experiences. By calculating the voting majority. Prior to the repeal of the zoning protest petition in 2015 by S.L. 2015-160, G.S. 160A-385(a)(1) also explicitly provided that vacant seats, as well as those with a conflict of

interest, were not included when computing the supermajority to adopt a rezoning subject to a qualified

protest. That explicit provision is no longer in the statutes. But G.S. 160A-74(a) does provide that a vacant seat is not considered in computing the quorum for a governing board, so it is likely a vacant seat similarly is not counted in computing the required majority. See this [post](#) by Trey Allen regarding the impact of vacancies and members who do not vote on a quorum calculation. For counties, [G.S. 153A-44](#) provides that a member with a conflict of interest is prohibited from voting, so the rule of not counting those seats likely also applies to county boards of commissioners.

What about a member who is present but does not vote? The voting statutes for city councils (but not for county boards of commissioners) include a special provision regarding the required majority for adoption, amendment, or repeal of development regulations. The general rule for North Carolina cities is that a board member who is present must vote on all matters unless they are excused from voting by the rest of the governing board. If a member is present at the meeting but fails to vote without being excused from voting, that is automatically counted as an affirmative vote. [G.S. 160A-75\(a\)](#). But that statute has an exception to the general rule for development regulations (any ordinance subject to the adoption procedures in G.S. 160D-601). It provides that this rule about counting the non-vote as an affirmative vote does not apply to votes on development regulations.

Consider this scenario:

Daryl Dixon applied to have a four-acre parcel rezoned from single-family residential to multi-family residential to build a 180-unit apartment complex. The town staff and planning board recommended approval. Despite numerous informal meetings, the immediate neighbors remain adamantly opposed. The city council has seven members. Two council members are sympathetic to the neighbors' concerns, but also see some value in the project. Seeing merits in both sides of the question, both decide to abstain from voting. The council then votes 3-2 to approve the rezoning, with two members not voting one way or the other. Was the rezoning adopted?

In this scenario, there is a seven-member city council considering Daryl's rezoning request. With a seven-member board, four votes would normally be needed to approve a rezoning or other amendment

of a development regulation. Here there were only three affirmative votes. If this were not a zoning issue, the two members who were present but excused from voting but did not vote would be counted as affirmative votes. That would result in a 5-2 vote and adoption of the rezoning. But since it is a

zoning amendment, those two votes are not counted as affirmative votes, so the final vote stands at 3-2.

Since this is less than the four votes needed to be a majority of the “all of the board,” the rezoning failed.

As with variances, there is a likely different outcome if the two members who did not vote had done so because of a conflict of interest. In that situation, their seats would not have been counted in the calculation since you only need a majority of those not excused from voting. Thus, if there had been a conflict of interest for the non-voting members, a 3-2 vote would result in adoption of the rezoning.

Conclusion

In summary, the general rule is that since the statutes require the majority necessary to be calculated based on “all of the members” of a board, the calculation is based on the number of members of the board, not the number of members present and voting. But an exception to the general rule requires you to know why a member of the board did not vote. If no vote was cast because the seat was vacant or because the member was ineligible to vote due to a conflict of interest, that seat is not counted when making the required calculation. Also, when a city governing board is amending any development regulation (including a zoning map), the seat of a member who is present but does not vote (and who has not been excused from voting due to a conflict of interest) is not counted as an affirmative vote.

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