

Opinion No. 90-02

January 4, 1990

OPINION OF: HAL STRATTON, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: Honorable Fernando R. Macias, New Mexico State Senator, P. O. Box 1155, Mesilla, NM 88046. Honorable J. Paul Taylor, New Mexico State Representative, Box 133, Mesilla, NM 88046

QUESTIONS

If a municipal ordinance requires the vote of three-fourths of the entire membership of the municipal board of trustees to decide a question, is the mayor's vote counted in the event of tie?

CONCLUSIONS

No.

ANALYSIS

We understand that this question arises from a dispute over how the mayor's vote should be counted for purposes of the Mesilla Zoning Ordinance, which provides:

The action of the Board of Trustees on the application for amendment, supplement or repeal shall be a three-fourths (3/4) vote of the entire membership of the Board of Trustees, and shall be final and conclusive.

We believe the correct interpretation of this ordinance precludes the mayor from voting in the event of a tie.

The town of Mesilla is governed by a Board of Trustees composed of the mayor and four trustees. By statute, questions before a municipal governing body are to be decided by a majority vote of the members present, unless otherwise provided by law. *Id.* § 3-12-2(C). The mayor of a municipality is authorized to vote only when there is a tie vote. NMSA 1978, § 3-11-3 (Repl. Pamp. 1985). This office has explained that, under these provisions,

where the mayor has no vote except in case of a tie vote of the councilmen and where the councilmen's vote is a tie, the mayor's vote is counted in determining the simple majority required in favor of the issue.

A "majority" of the governing body, therefore, is one more than half of the councilmen present at the vote....[A] mayor is counted for purposes of a quorum, but his vote is counted only if there is a tie vote of the councilmen present at a meeting. For example, if there are four councilmen present a least three would be required to constitute a "majority". If only two of the four councilmen present voted in favor of the issue, then the mayor's vote would be counted and included for purposes of constituting a "majority".

AG Op. No. 69-148 (1969). See also *Abeyta v. Town of Taos*, 599 F.2d 232, 328 (10th Cir. 1974) (where statute provided that a municipal employee could be discharged by a majority vote of governing body's members, a valid discharge by governing body composed of four councilmen and a mayor resulted only from "(1) three councilmen voting in favor thereof, or (2) a tie vote, broken by the mayor in favor of termination").

When an ordinance, like the Mesilla Zoning Ordinance, requires more than a simple majority vote, NMSA 1978, § 3-12-2(E)(Repl. Pamp. 1985) applies:

In those municipalities where a mayor has no vote except in case of a tie vote and there is a requirement that a certain fraction or percentage of the members of the entire governing body or of all the members of the governing body or **of the entire membership of the governing body** or other similar language other than the requirement of a simple majority vote for the measure, the mayor shall not be counted in determining the actual number of votes needed.

(emphasis added). The authority of the mayor to vote on questions raised under the Mesilla Zoning ordinance depends on how this provision is construed.

Under one interpretation of Section 13-12-2(E), the Mayor is not included in determining the necessary fraction of the members required to Vote, but still votes in case of a tie. Applying the three-fourths vote requirement under the Mesilla Zoning Ordinance, this would mean that three votes would be required to decide a question. If the trustees' votes were split 2 to 2, then the mayor could vote to break the tie and his vote would be counted to make up the required three votes.

The competing interpretation of Section 13-12-2(E) construes the phrase "the mayor shall not be counted in determining the actual number of votes needed" to mean the mayor's vote is not counted at all. Questions decided under the Mesilla Zoning Ordinance, therefore, would require the vote of three of the four trustees. The mayor would not vote in the event of a tie, and if the trustees split their vote, the measure would be defeated.

We believe that the second interpretation is correct because it gives effect to the supermajority requirements of measures like the Mesilla Zoning Ordinance. Our conclusion is supported by a previous opinion issued by this office, AG Op. No. 69-148 (1969), which discussed the status of the mayor on a municipality's governing body:

The mayor is the "presiding officer" of the governing body. On matters coming before the governing body, the mayor may vote only when there is a tie vote of the councilmen present at the meeting. **The possibility that his voting might be further limited is contemplated in Section 14-11-2(E), NMSA, 1953 Compilation [now NMSA 1978, 3-12-2(E)].**

(Citations omitted) (emphasis added). The opinion sets forth what is now codified at Section 3-12-2(C), providing that "[u]nless otherwise provided by law, a question before the governing body shall be decided by a majority vote of the members present," and what is now Section 3-12-2(E). It concludes "[t]he vote of a mayor is to be counted when only a simple majority vote is needed." This implies that when, by contrast, more than a simple majority is needed, the mayor's vote is not counted. The mayor's vote is "further limited" in these circumstances because he is not permitted to vote at all.

This conclusion makes sense as a practical matter. Rules of statutory construction require that legislation be interpreted so that all its provisions are given effect. See *T.W.I.W., Inc. v. Rhudy*, 96 N.M. 354, 357, 630 P.2d 753, 756 (1981) (statutes must be construed so that no part of the statute is rendered surplusage, if possible). Municipal ordinances are interpreted by using the same rules of construction that apply to statutes. *Burroughs v. Board of County Comm'rs*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1971); *Continental Oil Co. v. City of Santa Fe*, 25 N.M. 94, 101, 177 P. 742, 745 (1918). Assuming a three-fourths vote requirement, if Section 3-12-2(C) is interpreted to permit the mayor to vote when there is a tie, then in a town with four trustees, like Mesilla, the result is the same as if a simple majority of the entire board was required. For a question to be decided by a simple majority, it would need the vote of three or four trustees present or the vote of two trustees and the vote of the mayor. The same configuration also would decide a question requiring the vote of three fourths of the members if the mayor was not counted in determining the number of votes needed but was permitted to break a tie. This would render the requirement for a three-fourths vote of the entire board essentially superfluous and would defeat its purpose.

Accordingly, we conclude that the actions governed by Mesilla's Zoning Ordinance require the approval of three of the four trustees on the Board of Trustees. If only two of the trustees vote for a particular action, the mayor does not vote and the action is defeated.

ATTORNEY GENERAL

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