STRATEGIC ABSTENTIONS AND ABSENCES IN THIRD AND FOURTH CLASS CITIES:

WHAT DO YOU DO NOW?

by Paul Martin

Your six-member board of aldermen is considering an ordinance to approve a controversial development. Half the board favors the development; half is opposed. Such splits pose no theoretical problem. If each member votes, the mayor breaks the tie. But what if the mayor favors the proposal? Can a project opponent prevent a tie, and preempt the mayor's vote, by abstaining? If it happens, what can you do?

A strategic abstention can stop the bill in its tracks. Walking out of a meeting before the critical vote, or not attending at all, can have the same effect. This article addresses whether "strategic inaction" is lawful, and if not, what can be done about it.

Is It A Problem?

Strategic inaction only happens when a significant controversy already exists, but it can put board and community members against each other. Opponents of the controversial bill may believe they are right to use every tool available—including abstentions or walking out of a meeting, while proponents view such tactics as cheating the process. At minimum, strategic inaction causes social and political strife.

It can also put a city at risk from third-party litigation. Consider the possibility of a conditional use permit ordinance. The applicant may be entitled to a decision from the city as to whether a project may be developed. If the city fails to decide because of strategic inaction, the city might be dragged into litigation, and perhaps may even be at risk for a takings claim.

So Is Strategic Inaction Legal? The Law Suggests It Is Not.

Missouri statutes establish the procedure by which third and fourth class cities legislate: "[N]o bill may become an ordinance unless on its final passage a majority of the members elected" vote for it "and the ayes and nays be entered on the journal." Missouri courts have interpreted this language as requiring yes votes from a majority of the full membership of the board, regardless of absences or abstentions. In the case of our six-member board, four ayes are needed to pass the bill. If, and only if, the board is deadlocked at three-three, the mayor, "in case of a tie . . . shall cast the deciding vote."

These statutes establish a straightforward legislative process that is determined by the act of voting, casting the "ayes" and "nays." Implicitly, the statutes impose on elected officials the duty to attend meetings and vote. They do not acknowledge or permit any other legislative response.

Missouri courts would probably agree. In two older cases, school board members had either failed or refused to vote on pending issues. In both cases, the courts held that each board member had a duty to vote for or against the question submitted. And in a more recent appellate decision, a board of adjustment denied a variance application because there was no motion made to grant the variance. The court held that the applicable statute required the board to make a final decision on the merits; denying the variance because of procedural failure was not a permissible legislative response.

These cases suggest that public office holders have a duty to vote on and decide the propositions coming before them for consideration. If this is true, it follows that the office holder has a corresponding duty to attend the meetings at which the public's business is considered.

There Is No Statutory Right To Strategic Inaction

If strategic absences and abstentions are lawful legislative responses, then the "right to do nothing" must be found in law. It isn't. Neither

the laws governing third- and fourth-class cities, nor those governing local governments generally acknowledge a right not to act when faced with a legislative choice.

If there is no statutory right, some may look to their city's parliamentary rules that may well acknowledge the abstention as a permissible response to an association's decision on an issue. The problem with this approach is that parliamentary rules can't contradict statutes. A rule that permits the defeat of legislation through inaction cannot take precedence over a statutory decision-making process that is grounded in the act of voting.

One also may argue that a legislator has a constitutional right to abstain under the free speech clause of the First Amendment. Some courts have held so, but the United States Supreme Court appears to have settled that issue by holding that a legislator has no First Amendment right to vote on the policy decisions that he or she was elected to determine. If a legislator has no constitutional right to vote, by extension there can be no constitutional right to refuse to vote, whether by abstention or absence.

In the absence of such a right, refusing to vote or to attend meetings, would violate Missouri's statutory legislative scheme. It follows that strategic inaction cannot be a lawful response to a legislative choice.

The Abstention Solution

Case law from Missouri and other jurisdictions suggest a procedural solution to the problem of strategic abstentions. Missouri courts have held that under common law principles, an abstention is counted with the prevailing majority. A failure to vote has been deemed an acquiescence to the members who voted, and has been "regarded in law as voting with the majority."

But while these cases invoked the common law rule, its application was deemed improper in a later case. Because a statute required the affirmative votes of a majority of the full membership of the governing body, the court reasoned that an abstention could not be counted as a "yes" vote. Since Missouri statutes require a fixed affirmative majority in third- and fourth-class cities, a strategic abstention cannot be counted as a "yes" vote.

Courts from other jurisdictions have acknowledged the strategic abstention problem and have solved it by either counting the abstention with the majority or by doing the opposite—counting it as a "no" vote. If counted as a no, the abstention causes a constructive tie, and the mayor can then cast the deciding vote. The general theory expressed by these courts is that a legislative minority should not be allowed to defeat the legislative process and the will of the majority by abstaining.

Although these authorities suggest that a strategic abstention can be resolved by counting the abstention as a no vote, the question remains, how do you get there? Also left unresolved is the strategic absence. There appear to be three options; litigation, self-help or legislation, whether state or local.

The Litigation Option

Theoretically, suit could be filed against an abstaining or absent board member. A "mandamus" action would assert the member's duty to attend meetings and to vote either yes or no on the controversial bill, and it would ask the court to order the member to perform these duties. While simple in theory, mandamus presents many hurdles.

Initially, the city will have a practical problem in authorizing a lawsuit. Remember that the abstaining or absent member has support on the board at least among the minority who oppose the controversial ordinance and you will not be able to get a majority to approve a lawsuit. Your city attorney may also decline to represent the city because of a perceived conflict of interest with the recalcitrant board member. So initiating the litigation brings you back around to the same problem you had in the first place, gaining majority approval from a split board.

If the city can't sue, a citizen might. But, does the citizen have standing – a protectable interest in the recalcitrant legislator's attendance and vote? The mayor also might be a plaintiff, since the mayor is deprived of voting due to the board member's inaction. A councilmember might also have standing if his or her favorable vote is being nullified by the opposing member's inaction. These questions would have to be resolved before filing suit.

These difficulties are compounded by time and money factors. Contractual or statutory deadlines could run before litigation could be effective, and lawsuits require funding. If the city isn't footing the bill, is there someone else able and willing to do so?

If you clear these hurdles and get into court, you may need to prove that the recalcitrant member's motives are, in fact, strategic, and you will have to persuade the court that the law supports the relief that you seek an order directing the recalcitrant member to attend a meeting and vote. While

the weight of authority suggests this outcome, a court might still turn you down. The court might believe that as an elected official, the board member's inaction should be judged solely by the electorate.

Again, this brief article can't answer all the issues that might arise, but the litigation option, while viable in theory, may well fail in fact.

The Self-Help Option

Self-help also carries with it no small element of legal and political risk. First, it must be noted that this remedy can be used only when a member abstains from voting, giving the mayor the opportunity to declare and break a constructive tie.

Under the germane Missouri statutes, the mayor presides over the board, and he or she is further responsible for the care of the city, executing or vetoing legislation, and "enforcing all laws . . . for the [city's] government." Using this authority, the mayor might, after a final vote on the controversial ordinance, declare that the abstention is to be recast as a no vote. The mayor could then vote to break the resulting tie.

The mayor's authority to do so would be subject to legal challenge, either from a political opponent or from a party interested in having the ordinance declared lawful. And the mayor would face significant political pressure, and perhaps make some lasting political enemies.

But, if your mayor has the political fortitude, the "self help" option could result in the bill being enacted into an ordinance. The validity of the ordinance might then be subject to litigation, but the legislative process would have been completed, and based on the legal authorities already discussed, the ordinance would have a reasonable probability of being declared lawful.

The Legislative Option

The best option, of course, is to fix the problem before it happens. Consider adopting curative legislation. Third- and fourth-class cities have the power to enact ordinances deemed necessary to implement the city's powers. You could adopt an ordinance providing that if a member abstains from voting, the abstention is counted as a "no" vote. If the no vote creates a tie, the mayor gets to vote.

This might prove difficult at the local level. Board members who often find themselves in the minority, or who fear that possibility, may not want to foreclose a future opportunity to frustrate the majority's will. In fact, attempting such legislation might lead to the very problem you're trying to prevent!

And while this solution could apply to any abstention, regardless of the abstaining member's motive, it would have no effect on strategic absences. Perhaps local legislation could declare a board member's absence as a "nay" vote, but that question also is beyond the limits of this discussion.

State legislation, on the other hand, could avoid the local implementation challenge while conclusively solving the strategic inaction problem. The germane laws could be amended to require a mayoral vote if one-half of the board votes in favor of any legislation, regardless of absences or abstentions. If the mayor then votes in favor of the bill, it becomes law. If not, the measure fails. Such an amendment would circumvent strategic inaction difficulties while preserving each member's "right" to abstain.

Unfortunately, Missouri cities could not adopt similar legislation, because it would unlawfully contradict current state law that limits the mayor's role exclusively to a tie-breaking alone. The Missouri legislature, however, could solve the problem of strategic abstentions and absences.

Conclusion

Strategic absences and abstentions are unusual, but not unheard of, and they can cause political, social and legal turmoil. If it happens to you, think long and hard before heading to court. Consider adopting local legislation, if possible. If not, self-help might provide a viable remedy. The best option may be for the Missouri legislature to permit the mayor to vote, not in case of a tie, but whenever half the membership of the board has voted in favor of any given ordinance. Be sure to seek and heed the advice of your city attorney to help you through the thicket of the various legal issues.❑

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