OPINION NO. 99-004

Syllabus:

Under R.C. 5709.73, if two members of a board of township trustees abstain from voting on issues of tax abatement for a particular company on the grounds that they have conflicts of interest, then the board lacks a sufficient number of voting members to act on those issues, and the vote of the remaining trustee is not effective to adopt township resolutions regarding those issues.

To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio
By: Betty D. Montgomery, Attorney General, February 1, 1999

We have received your request for an opinion concerning the ability of a township to grant a tax abatement to a company conducting business within the unincorporated area of the township if two of the three township trustees abstain from voting on the grounds that they have conflicts of interest. Your questions are these:

1. If two out of three township trustees abstain from voting on issues of tax abatements for a particular company, declaring themselves as having a conflict of interest, does the sole remaining trustee constitute a quorum for purposes of voting on township resolutions involving those issues?

2. Is the single vote of the remaining trustee valid to adopt or decline to adopt township resolutions regarding issues of tax abatements for the company?

Your representative has informed us that the township in question is considering granting tax exemptions pursuant to R.C. 5709.73. That statute states that "[a] board of township trustees may, by unanimous vote, adopt a resolution" that declares it a public purpose to make public improvements that are necessary for the development of certain parcels of land located in the unincorporated area of the township. R.C. 5709.73(B)(1). The resolution may exempt from real property taxation a percentage of improvements to land that directly benefits from the public improvements. *Id.* "The board of township trustees may, by majority vote, adopt a resolution" permitting the township to enter into agreements that are necessary or appropriate for the construction of the public improvements. R.C. 5709.73(C).

If the exemption lasts more than ten years or exceeds seventy-five percent, it is necessary to obtain the approval of the board of education of the city, local, or exempted village school district in the territory where the improvements will be located. R.C. 5709.73(B)(2). Approval of the board of education must be made by resolution adopted by a majority of the board. *Id.*

The statute thus provides that, in order to grant a tax abatement, the board of township trustees must adopt the resolution authorizing the tax abatement "by unanimous vote." R.C. 5709.73(A)(1). The board may then adopt resolutions authorizing particular agreements relating to the abatement "by majority vote." R.C. 5709.73(C). The statute does not address the question whether the board may act if two of its three members decline to vote on a particular matter because of conflicts of interest. *See generally* R.C. 505.01 (a board of township trustees consists of three members).[1]

In order to answer your questions, let us first consider the general principles governing the actions of a board of township trustees.[2] A board of township trustees is a public body, which must take official action and conduct deliberations upon official business at open meetings, except as otherwise provided by law. R.C. 121.22. It has been found, under Ohio law, that all members of a board of township trustees must be notified of a meeting of the board, but that a majority of the board - that is, two of the three members - constitutes a quorum[3] that is qualified to take action on behalf of the board. *See State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d 47, 212 N.E.2d 604 (1965); *In re Slavens*, 166 Ohio St. 285, 141 N.E.2d 887 (1957); 1965 Op. Att'y Gen. No. 65-70; 1934 Op. Att'y Gen. No. 2292, vol. I, p. 164. Therefore, if two or three trustees are present at a meeting, there is a quorum.

In general, the majority of a quorum may act for a board, provided that all members had notice and an opportunity to be present. *See In re Slavens*; *State ex rel. Green v. Edmond-*

---

[1] For ethical reasons, a public official, such as a member of a board of township trustees, may be required to refrain from voting on matters in which that official has an interest. *See* 1998 Op. Att'y Gen. No. 98-007, at 2-39; *see also* R.C. 102.03; R.C. 2921.42; R.C. 2921.43; 1997 Op. Att'y Gen. No. 97-061.

[2] Your questions pertain to a township that has not adopted the limited self-government form of township government pursuant to R.C. Chapter 504, and this opinion considers only townships that have not so acted. Specific provisions of R.C. Chapter 504 govern quorums and voting procedures, and this opinion does not address those provisions. *See* R.C. 504.09-.11.

[3] The term "quorum" has been defined as "such a *number* of the members of a body as is competent to transact business in the *absence* of the other members." *State ex rel. Cline v. Trustees of Wilkesville Township*, 20 Ohio St. 288, 294 (1870).

son, 12 Ohio N.P. (n.s.) 577 (C.P. Hamilton County 1912) (on seven-member building commission, four members could act by majority vote if three members refused to attend or to vote, except when statute required affirmative vote of five members); 1998 Op. Att'y Gen. No. 98-007; 1965 Op. Att'y Gen. No. 65-70. With respect to a three-member board, however, two members may be a quorum, but a single member does not constitute a majority (*i.e.*, *more than* half) of the quorum. Therefore, two members must act, whether two or three members are present. Under this rule, two or three of the township trustees must be present and voting in order for the board to take action under R.C. 5709.73. If only two members vote, they must concur in order for the board to act. *See, e.g., State ex rel. Saxon v. Kienzle*; 1976 Op. Att'y Gen. No. 76-022; *see also State ex rel. Dry Ridge Dev. Co. v. Hamilton County Bd. of Comm'rs*, 30 Ohio App. 3d 217, 507 N.E.2d 438 (Hamilton County 1986); 1934 Op. Att'y Gen. No. 2292, vol. I, p. 164. *See generally Federal Trade Comm'n v. Flotill Products, Inc.*, 389 U.S. 179 (1967); 1998 Op. Att'y Gen. No. 98-007; 1992 Op. Att'y Gen. No. 92-047; 1978 Op. Att'y Gen. No. 78-047.

It has also been concluded that, if one member of the board of township trustees abstains from acting on a particular matter because of a conflict of interest, the remaining two members may take action on behalf of the board and, if they agree, their action may be considered the unanimous vote of the board. *See* 1985 Op. Att'y Gen. No. 85-010; *see also State ex rel. Dry Ridge Dev. Co. v. Hamilton County Bd. of Comm'rs* (reaching same conclusion with respect to board of county commissioners). *But see* 1934 Op. Att'y Gen. No. 2292, vol. I, p. 164 (citing instances in which requirement of a unanimous vote meant that the votes of all three township trustees were required). This conclusion is based on the principle that a unanimity requirement does not necessarily mean that all members must vote for a proposition, but it may require only "that those who vote on the proposition vote in agreement and that no one dissents." 1985 Op. Att'y Gen. No. 85-010, at 2-38; *cf. Seyler v. Balsly*, 5 Ohio Misc. 210, 210 N.E.2d 747 (C.P. Hamilton County 1965) (finding that a vote by two members of a board of county commissioners satisfied the requirement of R.C. 303.12 that denial of a recommendation of the county rural zoning commission be by unanimous vote of the board when the third member was absent on leave and not voting). Under this principle, if one member of a board of township trustees abstains from voting and the other two concur, the vote is a unanimous vote (and, thus, also a majority vote) and is valid to adopt a resolution under R.C. 5709.73.

It might be argued that the vote of a single member of a board of township trustees may be considered the unanimous vote of the board if the other two members refrain from voting because of conflicts of interest, for in that situation all those voting agree and there is no dissent. This argument is supported by the general proposition that those who abstain from voting are deemed to have acquiesced in the action taken by the majority of those who do vote. *See* 1998 Op. Att'y Gen. No. 98-007.

The proposition that those who abstain from voting are deemed to have acquiesced in the action taken by the majority of those who do vote was applied initially to the election of officers and operated to permit an entity to provide for its own organization. *See State ex rel. Shinnich v. Green*, 37 Ohio St. 227 (1881) (finding that, in an election, those declining to vote are deemed to acquiesce in the choice of those who do vote, and action may be taken by a majority of legal voters who choose to vote, even though the number voting is less than a quorum and less than a majority of those present). This proposition has also been applied to other types of actions. *See, e.g., Gogate v. Ohio State Univ.*, 42 Ohio App. 3d 220, 537 N.E.2d 690 (Franklin County 1987) (vote on tenure by six-member board was three abstentions, two for tenure, and one against; court found abstentions to be acquiescence and stated that in any event there was no showing of substantial prejudice); *Babyak v. Alten*, 106 Ohio App.

191, 154 N.E.2d 14 (Lorain County 1958) (vote of village council was one abstention, two negative, and three affirmative; abstention was found to be acquiescence to meet statutory requirement of concurrence of a majority of all members elected to the legislative authority).

Other authorities have asserted, however, that a member who abstains does not vote either for or against the matter at issue, *State ex rel. Dry Ridge Dev. Co. v. Hamilton County Bd. of Comm'rs*: 1985 Op. Att'y Gen. No. 85-010, at 2-38, or that abstentions cannot be counted to fulfill a statutory requirement that a given percentage of the members concur, *Davis v. City of Willoughby*, 173 Ohio St. 338, 182 N.E.2d 552 (1962) (where statute required concurrence of three-fourths of the elected members of a city council, abstentions did not count as concurrence). *See also, e.g., State ex rel. Corrigan v. Tudhope*, 41 Ohio St. 2d 57, 60, 322 N.E.2d 675, 677 (1975) (refusal to vote was not considered acquiescence when those abstaining objected to allowing president of city council to vote in case of impasse); *Rajan v. State Medical Bd.*, 118 Ohio App. 3d 187, 692 N.E.2d 238 (Franklin County), *appeal not allowed*, 79 Ohio St. 3d 1449, 680 N.E.2d 1022 (1997) (statute calling for a vote of not fewer than six members required that there be six affirmative votes, not counting abstentions). In addition, it has been stated that those who abstain because they are disqualified due to conflicts of interest are not qualified to act and their offices must be treated as vacant. *See Gitlin v. City of Berea*, No. 58062 (Ct. App. Cuyahoga County Feb. 15, 1990); *see also State ex rel. Attorney Gen. v. Orr*, 61 Ohio St. 384, 56 N.E. 14 (1899). Thus, there is no single principle of law indicating how abstentions are to be treated in all circumstances.

An example of one manner of analyzing a vote when a number of members abstain appeared in a recent opinion of this office. That opinion concluded that the State Teachers Retirement Board could take action by a majority of the members who vote on a particular matter, excluding those who abstain, provided that a quorum is present. *See* 1998 Op. Att'y Gen. No. 98-007 (with all nine members present, a motion carries upon the affirmative vote of four members, with five abstentions). The Board, pursuant to its statutory authority, had adopted *Robert's Rules of Order*, which states that, unless otherwise specified, the set of members to which the proportion of votes required applies "is always the number of members *present and voting*." Gen. H. Robert, *Robert's Rules of Order, Newly Revised*, 397 (9th ed. 1990). This rule permits action to be taken when a number of members are required to refrain from voting because of conflicts of interest. *Id.* at 398; *see* 1998 Op. Att'y Gen. No. 98-007. *Robert's Rules* does not prescribe a minimum number of votes that must be cast for this rule to hold.

A board of township trustees is bound not by *Robert's Rules*, but by principles of statutory and common law.[4] No authority we have discovered has applied to a board of

[4] Although a board of township trustees may adopt reasonable rules governing its procedures, *see* 1992 Op. Att'y Gen. No. 92-032; 1988 Op. Att'y Gen. No. 88-087, the board is bound by principles of statutory and common law and there is no clear authority for the board to vary existing law governing the number of votes required for the board to act. *See, e.g.*, 1992 Op. Att'y Gen. No. 92-047 (general health district advisory council cannot fix its own quorum requirements); 1978 Op. Att'y Gen. No. 78-047, at 2-111 ("[t]he authority of a community mental health and retardation board to establish operating procedures and ...rules... does not clearly express a legislative intent to abrogate the common law standard for determining a quorum"); *cf. State ex rel. Corrigan v. Tudhope*, 41 Ohio St. 2d 57, 322 N.E.2d 675 (1975) (in the absence of constitutional, statutory, or charter provision, city council can determine whether election is by majority or plurality); *State ex rel. Reed v. DeMaioribus*, 131 Ohio St. 201, 2 N.E.2d 506 (1936) (same).

township trustees the principle that action may be taken by a single trustee if the other trustees decline to vote because of conflicts of interest. Rather, the principle that appears to be applicable in the instant case is that set forth in Ohio case law - namely, that "any action by a board requires that a quorum participate therein, and that a majority of the quorum concur." *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d at 48, 212 N.E. 2d at 605. As discussed above, a majority of a board of township trustees - or two members - may constitute a quorum. Regardless of the number of trustees present, however, at least two trustees must participate and concur in any action.

The Ohio Supreme Court has stated clearly that "[a] single member does not constitute a board [of township trustees] and, unless authorized by statute, cannot act as the board." *State ex rel. Saxon v. Kienzle*, 4 Ohio St. 2d at 48, 212 N.E.2d at 605-06. The *Kienzle* case involved a situation in which, because there were two vacancies, only a single member served as trustee in a particular township. Nonetheless, the principle is generally applicable: "if there was a board [of township trustees], [one trustee] acting alone could not act for such board." *Id.* at 48, 212 N.E.2d at 606; *see also State ex rel. Dry Ridge Dev. Co. v. Hamilton County Bd. of Comm'rs* (for board of county commissioners to act, a quorum must be present and voting); *Brophy v. Landman*, 28 Ohio St. 542, 545 (1876) (under the common law rule of quorum, one member of a three-member board "can do no official act"); *Goshen Township Trustees v. Heywood*, No. CA84-02-007 (Ct. App. Clermont County Apr. 8, 1985) (township trustee acting alone cannot authorize acquisition of and payment for medical insurance for township officers and employees); *cf. Fox v. Fox*, 24 Ohio St. 335 (1873) (upholding permit for cattle to run at large granted to township trustee who was one of two trustees who granted the permit and stating that trustee was not disqualified to act; dissenting opinion would require quorum without the interested trustee).

Hence, the principle that abstention does not interfere with unanimity applies only so long as there is a quorum of two township trustees who participate and concur in a particular matter. This result can occur if one trustee has a conflict of interest and must abstain; it cannot occur if two trustees are in that position. The vote of a single trustee cannot be either the unanimous vote of the board or a majority vote of the board.

It appears, accordingly, that if two members of a board of township trustees abstain from voting because of conflicts of interest, the board is unable to act. None of the authorities discussed above conclude that an abstention by a township trustee can be considered a vote for the purpose of having a minimum of two trustees present and voting on an issue. Even though abstentions might, for some purposes, be considered acquiescence, that principle does not appear to override the requirement that two trustees must vote in order for a board of township trustees to take action. Further, it seems inappropriate, if an individual is required to abstain because of a conflict of interest, to count that abstention as a vote either for or against the matter at issue. Therefore, under R.C. 5709.73, if two members of a board of township trustees abstain from voting on issues of tax abatement for a particular company on the grounds that they have conflicts of interest, then the board lacks a sufficient number of voting members to act on those issues, and the vote of the remaining trustee is not effective to adopt township resolutions regarding those issues.

A consequence of the conclusion reached in this opinion is that a township is unable to act on a proposal for a tax abatement under R.C. 5709.73 if two members of the board of trustees have interests in the matter that create conflicts with their duties as trustees. This may prevent the granting of abatements in some situations in which the abatements would be beneficial. Nonetheless, absent more direct guidance from the General Assembly, we are unable to conclude that a single trustee may act for the township under R.C. 5709.73 in the

circumstances you have described. *See generally, e.g., Frost v. City of Wilmington*, No. CA85-08-014 (Ct. App. Clinton County Jan. 31, 1986) (three-member civil service commission would lack quorum if more than one member found it necessary to recuse self from case; matter could be addressed by amendment of charter to allow for temporary substitution of commission members in cases involving possible conflicts of interest).

For the reasons set forth above, it is my opinion, and you are advised that, under R.C. 5709.73, if two members of a board of township trustees abstain from voting on issues of tax abatement for a particular company on the grounds that they have conflicts of interest, then the board lacks a sufficient number of voting members to act on those issues, and the vote of the remaining trustee is not effective to adopt township resolutions regarding those issues.