

OPINION NO. 85-095**Syllabus:**

1. Pursuant to R.C. 122.72, at least four members of the Minority Development Financing Commission must be present to conduct any business of the Commission, and the Commission may not take any action except upon the affirmative vote of at least four members.
2. Pursuant to R.C. 122.72 and [1984-1985 Monthly Record] Ohio Admin. Code 127-1-13(I) at 1005, the Minority Development Financing Commission may change maximum or minimum loan amounts only upon

the affirmative vote of the greater of: (a) two-thirds of the members present; or (b) four members. Thus, when four, five, or six members are present, four votes are needed; when seven members are present, five votes are needed.

**To: Shirley Bishop, Chairperson, Minority Development Financing Commission,
Columbus, Ohio**
By: Anthony J. Celebrezze, Jr., Attorney General, December 27, 1985

I have before me your request for an opinion concerning the operation of the Minority Development Financing Commission. Your question concerns the number of Commission members who must be present to conduct the business of the Commission, including, specifically, the number of votes needed to change maximum or minimum loan amounts.

R.C. 122.72, which creates the Commission, states in part:

Four members of the commission constitute a quorum and the affirmative vote of four members is necessary for any action taken by the commission. No vacancy in the membership of the commission impairs the power of a quorum to exercise all the rights and perform all of the duties of the commission.

It is clear that, pursuant to this provision, at least four members of the Commission must be present to conduct any business of the Commission, and the Commission may not take any action except upon the affirmative vote of at least four members.¹

R.C. 122.74(B) provides that the Commission shall, under R.C. Chapter 119, adopt rules "establishing procedures for applications for loans from the fund established by [R.C. 122.82] and for review and approval of applications." Pursuant to this authority, the Commission has adopted [1984-1985 Monthly Record] Ohio Admin. Code 127-1-13(I) at 1005, which states: "The minimum loan amount will be ten thousand dollars and the maximum loan amount shall be two hundred thousand dollars, except where the commission, by a two-thirds majority, votes to remove the minimum or maximum loan amount."

Your question concerns the interaction of rule 127-1-13(I) and R.C. 122.72. You propose the following analysis:

Given the statutory provisions regarding the number needed for a quorum and the powers of a quorum, it is our belief that a four person quorum could deviate from the stated loan limits but would have to do so

¹ You have informed me that bylaws adopted by the Commission state, in art. III, §5:

Four (4) members shall constitute a quorum for all meetings and the affirmative vote of four (4) members is necessary for any action taken by the Board, except and provided that less than a quorum may adjourn or recess a meeting.

This provision essentially restates the rule set forth in R.C. 122.72.

unanimously. For various sized quorums, the votes to take that action would be as follows:

<u>Voting Members Present</u>	<u>Votes Needed</u>
4	4
5	4
6	4
7	5

In each case, the action would have been approved by 2/3 or more of the voting members and in no case fewer than four. This would seem to satisfy both the statute and the regulation.

You have, however, asked whether rule 127-1-13(I) should, instead, be read as requiring that "a vote to change the loan limit must always be approved by 2/3 of the seven voting members." (Emphasis in original.)

Rule 127-1-13(I) does not state whether, when it requires a vote by a two-thirds majority, it means two-thirds of the Commission members present when the vote is taken, two-thirds of the members serving on the Commission at the time of the vote, two-thirds of the positions authorized on the Commission, or two-thirds of some other grouping of Commission members. Compare [1984-1985 Monthly Record] Ohio Admin. Code 127-1-13(I) at 1005 with, e.g., R.C. 4117.14(C)(6) (providing that a legislative body may reject recommendations on collective bargaining "by a three-fifths vote of its total membership"). As your letter indicates, however, the four votes required by R.C. 122.72 constitute a two-thirds majority of a group of four, five, or six members. A fifth vote would be needed only if the group of which a two-thirds majority is required consists of seven members.

It is a firmly-established principle of Ohio law that a rule validly adopted by an administrative body "has the force and effect of law unless it is unreasonable or is in clear conflict with statutory enactments governing the same subject matter." Kroger Grocery & Baking Co. v. Glander, 149 Ohio St. 120, 125, 77 N.E.2d 921, 924 (1948) (citations omitted). It has also been stated that, since administrative rules have the effect of legislative enactments, they are subject to the ordinary rules of statutory construction. State ex rel. Miller Plumbing Co. v. Industrial Commission, 149 Ohio St. 493, 79 N.E.2d 553 (1948). One such rule is that provisions which deal with the same subject matter should be construed together and harmonized if possible. See State ex rel. Admond v. Board of Education, 135 Ohio St. 383, 21 N.E.2d 94 (1939). See generally Smith v. Haney, 61 Ohio St. 2d 46, 48, 398 N.E.2d 797, 799 (1980) ("[r]egulations. . . should not be read in a vacuum but must be read with reference to the enabling statute under which they were enacted" (citations omitted)); American Wine & Beverage Co. v. Board of Liquor Control, 66 Ohio L. Abs. 161, 116 N.E.2d 220 (App. Franklin County 1951). Thus, rule 127-1-13(I) should be construed, if possible, in a manner which is consistent with R.C. 122.72. I believe that the interpretation which you have proposed provides such a construction. See generally R.C. 1.47; R.C. 1.49; United States v. City of Painesville, Ohio, 644 F.2d 1186, 1190 (6th Cir. 1981), cert. denied, 454 U.S. 894 (1981) ("[a]n agency's interpretation of its own regulations is controlling unless plainly erroneous" (citations omitted)).

The portion of R.C. 122.72 which is quoted above expressly requires that at least four members must vote affirmatively in order for the Commission to take any action. It does not, however, preclude the Commission from requiring the votes of additional members in order to take certain types of action. If rule 127-1-13(I) is construed as requiring an affirmative vote of two-thirds of the Commission members present when the vote is taken in order to change maximum or minimum loan amounts, it imposes the requirement of five votes, rather than four, only when seven Commission members are actually present, and permits the Commission to act by the affirmative vote of four members whenever fewer than seven Commission members are present.

This interpretation finds support in the portion of R.C. 122.72 which states: "No vacancy in the membership of the commission impairs the power of a quorum to exercise all the rights and perform all of the duties of the commission." While this statement directly addresses only the impact of vacancies in membership upon the operation of the Commission, it clearly implies that a quorum of the Commission is to have power to exercise all the rights and perform all the duties of the Commission. See generally State ex rel. Cline v. Trustees of Wilkesville Township, 20 Ohio St. 288, 294 (1870) ("[a] quorum is such a number of the members of a body as is competent to transact business in the absence of the other members" (emphasis in original)); State ex rel. Youngs v. Board of Elections, 81 Ohio App. 209, 214-15, 78 N.E.2d 761, 764 (Lucas County 1947) (considering a statute which provided that two of three township trustees constituted a quorum and quoting Slicer v. Elder, 2 W.L.M., 90, 2 Dec. Rep., 218 (C.P. Logan County 1859), to the effect that the object of the statute was to enable a majority to act if all did not attend). It is consistent with the concept of a quorum to interpret rule 127-1-13(I) as requiring an affirmative vote of two-thirds of the members who are present when the vote is taken in order to change maximum or minimum loan amounts. See generally In re Slavens, 166 Ohio St. 285, 141 N.E.2d 887 (1957) (setting forth the general rule that, in the absence of provisions to the contrary, an administrative board may act through the majority of a quorum); State ex rel. Shinnich v. Green, 37 Ohio St. 227, 234 (1881) (discussing the general rule that, where the question is the transaction of business (rather than an election), a majority of those present must vote for it). In light of the four-vote minimum imposed by R.C. 122.72, this interpretation requires four votes when a quorum of four, five, or six is present and five votes when a quorum of seven is present. But see generally Babyak v. Alten, 106 Ohio App. 191, 154 N.E.2d 14 (Lorain County 1958) (in connection with action by the legislative authority of a village, adopting the common law rule that the legal effect of refusing to vote is acquiescence in the action taken by the majority).

It is true, as your letter indicates, that different interpretations of rule 127-1-13(I) might be possible. It does not, however, appear that the existing provisions of R.C. 122.72 would permit an interpretation which would require that a vote to change the loan limit always be approved by five members of the Commission. For example, if a two-thirds vote of the seven positions on the Commission were required regardless of the number of members present at a particular meeting, a quorum of four would be unable to act on a proposal to change minimum or maximum loan amounts. Such a result would impede the operations of the Commission and conflict with the

intent of R.C. 122.72 that a quorum be able to carry out the functions of the Commission.

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Pursuant to R.C. 122.72, at least four members of the Minority Development Financing Commission must be present to conduct any business of the Commission, and the Commission may not take any action except upon the affirmative vote of at least four members.
2. Pursuant to R.C. 122.72 and [1984-1985 Monthly Record] Ohio Admin. Code 127-1-13(I) at 1005, the Minority Development Financing Commission may change maximum or minimum loan amounts only upon the affirmative vote of the greater of: (a) two-thirds of the members present; or (b) four members. Thus, when four, five, or six members are present, four votes are needed; when seven members are present, five votes are needed.