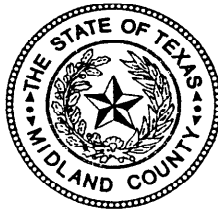


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OPEN RECORDS DIVISION



RQ-0559-JC

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OPINION COMMITTEE

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FILE # ML: 42637-02
I.D # 42637

May 28, 2002

Certified Mail # 7000 0520 0021 3203 7662, Return Receipt Requested

John Cornyn
Attorney General of the State of Texas
P.O. Box 12548
Capital Station
Austin, Texas 78711-2548

RE: Ex Officio Directors

Dear Attorney General Cornyn:

In my capacity as Midland County Attorney, and under the authority of *Tex. Gov't. Code §402.043*, I ask your opinion in regards to the following legal questions.

1. Does a non-voting director count toward a quorum at a meeting of the Board of Directors of an Appraisal District? If the answer is "yes," then what number of directors constitutes a quorum?

The Midland Central Appraisal District and the Midland County Tax Assessor have questions concerning the authority of the Tax Assessor as a member of the Board of Directors of the Appraisal District. Section 6.03 states that "If the county assessor-collector is not appointed to the board, the county assessor-collector serves as a nonvoting director." The Midland County Tax Assessor-Collector is not appointed to the board of the Midland Central Appraisal District, and, therefore, serves as a nonvoting director. Section 6.04 of the Texas Tax Code states that "A majority of the appraisal district Board of Directors constitutes a quorum."

The Open Meetings Act, which the Appraisal Board is subject to, defines a quorum as "a majority of a governmental body, unless defined differently by applicable law or rule or the charter of the government body." *Tex. Gov. Code Ann. § 551.001(6)* (West 2001); *Tex. Atty. Gen. Op. JC-0407* (2001). The Tax Code takes a similar approach when addressing the Appraisal District Board by providing, "A majority of the appraisal district Board of Directors constitutes a quorum." *Tex. Tax Code Ann. §6.04(a)*

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(West 2001). Neither the Tax Code, nor the Open Meetings Act, differentiates between a voting and nonvoting director.

The Texas Property Tax Appraisal District Director's Manual, published by the office of the Comptroller of Public Accounts, takes the position that legislative intent was to only distinguish voting and nonvoting directors by vote, and thus, the nonvoting directors could count towards a quorum. *Texas Comptroller of Public Accounts Publication #96-301- February 2002 at 7*. However, the manual also acknowledges that there is little statutory guidance and that the Attorney General's office has previously addressed ex-officio status by looking toward common law. *Id.*

The Attorney General Opinion mentioned in the Director's Manual addressed ex-officio status under the Nursing Home Administrators Licensure Act, *V.T.C.S. art. 4442d. Attorney General Opinion DM-160 (1992)*. In that case, the Texas Board of Licensure for Nursing Home Administrators had asked whether ex officio members count towards a quorum of the board. The opinion defined an "ex officio" board member as a person who has become a member of a board by virtue of an elected or appointed office that the person holds. *Id.* The opinion states, "By itself, ex officio membership status does not make an ex officio member inferior to an appointed member. Under this particular act, however, ex officio members of the board cannot vote." *Id.* at 2. This is similar to the fact scenario at hand. The Appraisal Board's one nonvoting director is a member of the board by virtue of the office of county assessor- collector. In the nursing home case, however, the opinion examined common law and determined that since members that could not vote were unqualified to transact business on behalf of the governmental body, they should not be included in determining the presence of quorum. *Id.*, examining *Ramirez v. Zapata County Indep. Sch. Dist.*, 273 S.W. 2d 903, 905 (Tex. Civ. Pp. -San Antonio 1954) and *Bedford County Hosp. Dist. v. County of Bedford*, 304 S.W. 2d 697, 704 (Tenn. Ct. App. 1957).

The Attorney General also addressed another case concerning nonvoting members, in the context of the Open Meetings Act. *Tex. Att'y Gen. Op. JC-0313 (2000)*. However, the statute involved in that case specifically delineated that a quorum consisted of eight members entitled to vote. The opinion concerned the Board of the Edwards Aquifer Authority, which was composed of seventeen directors. By statute, fifteen of the members were elected officials entitled to vote on matters before the board; the remaining two members were appointed officials who served as nonvoting members. *See Act of May 29, 1995, 74th leg., R.S., ch. 261, § 1 1995 Tex. Gen. Laws 2505, 2506 (amending Act of May 30, 1993, 73d Leg., R.S. ch. 626, § 1.09, 1993 Tex. Gen. Laws 2350, 2356)*. The legislature said that a quorum under this act shall be determined by the number of members eligible to vote. *Id.* The legislature enacted a similar provision in the Agriculture Code. *See Tex. Agric. Code Ann. § 58.014(b) (West 2001); also see Tex. Att'y Gen. Op. JC-0267 (2000)*. We do not have the luxury of direct statutory guidance in the case at hand. It would be a mistake to assume that the legislature inadvertently omitted this language from the Tax Code, when they so plainly added the language to other acts.

The Supreme Court visited a similar issue in *Meador-Brady v. Texas Motor Vehicle Comm'n*, 866 S.W.2d 593 (Tex. 1993). In *Meador-Brady*, four of six members were present at a meeting to consider an application for a license. Two members voted to issue the license, one member voted not to issue the license, and the Chairman abstained. The Commission issued the license and Meador-Brady challenged the order as not supported by an adequate number of votes. The Supreme Court addressed whether the vote was sufficient to sustain the order. The TMVC Code required a "majority vote of a quorum" to adopt a final decision. See TMVC Code § 3.08(g). A quorum is "a majority" of the Commission. TMVC Code § 2.08(a) (West Supp. 1997). The Commission had a quorum to transact business because four members were present at the meeting. The Supreme Court concluded the Chairman could not be counted to establish a quorum and then not vote. *Meador-Brady*, 866 S.W.2d at 596. Although in *Meador-Brady* the Chairman chose to abstain for voting, and in our case the county assessor-collector is not allowed to vote, the outcome would be the same should the nonvoting director be counted when determining whether a quorum is present under this second proposition.

The proposition that a nonvoting director counts in determining what constitutes a quorum and should be considered to determine if a quorum is present, is reasonable and supported by the plain language of the applicable statutes. The Tax Code provides that a quorum is a majority of the board. Tex. Tax Code Ann. § 6.04(a) (West 2001). There is no mention of voting distinctions when the statute discusses quorums. *Id.* There are six members of the board, one nonvoting and five voting. Thus a simple majority would be four directors. If one of the four is the nonvoting director, the board still has three voting directors, a majority of the voting directors. This proposition is also supported by traditional parliamentary procedure. Robert's Rules of Order refers to a quorum as the number of members present and not the number of members voting. H. Robert, *Robert's Rules of Order, Newly Revised* § 39 at 293 (S. Robert ed. 1981); A. Sturgis, *Standard Code of Parliamentary Procedure*, 104-105 (3rd ed. 1988). This proposition appears to be the most reasonable interpretation and is supported by the plain language of the statute.

3. Can a tax assessor-collector who serves on the Board of Directors of an Appraisal District as a non-voting member make or second motions?

Tax Code §6.04 addresses the officers and meetings of the appraisal district board and does not distinguish between voting and nonvoting directors. The Texas Property Tax Appraisal District Director's Manual does not address the ability of a non-voting director to make or second motions. Texas Comptroller of Public Accounts Publication #96-301- February 2002 at 7.

Robert's Rules of Order distinguishes between ex-officio members of a board who are under the control of the society and those who are not under the control of the society. The Rules provide that "if the ex-officio member is not under the authority of the society, he has all the privileges, including the right to vote, but none of the obligations of membership . . ."

I have not located any statutes, Texas Attorney General Opinions, or Texas cases addressing this issue. As there is no precedent on point, and legislative intent cannot be

determined, the only guidance is found in the plain language of the statute. There is nothing in the language of the statute that indicates an intent to prohibit the tax assessor-collector from making or seconding motions. If the legislature had intended to so limit the tax assessor-collector, they would have replaced the term "nonvoting" with "nonparticipating" or added other language to indicate this intent. Thus, it appears that a nonvoting, ex officio director, could initiate or second a motion. The only limitation on an ex-officio director, who by statute cannot vote, would be that of actually voting.

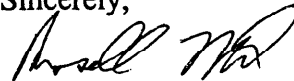
4. Can a tax assessor-collector who serves as a non-voting member on the Board of Directors of an Appraisal District serve as an officer?

I have not located any statutes, Texas Attorney General Opinions, or Texas cases addressing this issue. The Texas Property Tax Appraisal District Director's Manual, however, states that it is likely that the board may elect its nonvoting county assessor-collector as the board's chair or secretary because it is not necessary for a chair or secretary to have the right to vote. Texas Comptroller of Public Accounts Publication #96-301- February 2002 at 7.

I believe this question is subject to the same analysis as that used with regard to question #3. Therefore, it appears that a tax assessor-collector serving as a non-voting member of the Board of Directors of an Appraisal District can serve as an officer.

Thank you for your cooperation and assistance. Please do not hesitate to contact me should you have any questions concerning our request.

Sincerely,



Russell W. Malm
Midland County Attorney

cc: Kathy Reeves, Midland County Tax Assessor-Collector
Ron Stegall, Director, Midland Central Appraisal District