

Questions and Answers

By Kevin J. Best

Q: The Town has a Historic Preservation Commission. They are only an advisory group and their votes aren't binding. They meet once a month and are advertised as starting at 7:30 p.m. I recently found out that they often start at 7:00 p.m. for a "work session." Are they violating the Maryland Open Meetings Law?

A: Probably, yes. The main issue that you present evolves around whether the State Open Meetings Act would consider the Town's Historic Preservation Commission to be a "public body" under Section 10-502 of the State Government Article of Md. Code Ann. If in fact this Commission was either created by your town's charter, an ordinance or by an order of your town's chief executive officer, then this "advisory" body would indeed be subject to the Act as a "public body" and in accordance with the notice requirements of Section 10-506 would also probably be in violation thereof due to the incorrect meeting time notice you mentioned. The fact that a public body serves only in an advisory capacity does not exclude it from the requirements of the Open Meetings Act. Several municipal bodies subject to the Act often serve only in an advisory capacity (e.g. a municipality governed by Article 66B of the State Code having a Planning Commission). Furthermore, the Act does not distinguish between "work sessions," public hearings, or public meetings held by "public bodies."

Q: Our Town recently conducted an election that resulted in a three-way tie for two of the three council seats. The five vote-getters, including one that was by write-in vote, ended up with an actual vote tally of 52-33-33-33-32 for the five candidates for council. Should we conduct another election?

A: Not necessarily. Tie votes in Maryland municipal elections happen fairly often, relatively speaking, among the 157 municipal corporations. Tie votes are resolved in numerous ways – normally by charter if not by ordinance. Approximately 64 municipalities have charter provisions designed to resolve the eventuality of a tie vote in municipal elections. Maryland municipalities have found at least eight ways to resolve tie votes

(by lot, council vote, run-off election, new election, ad hoc decision of council, etc.). Unfortunately, your town has no such charter provision (or as you state no ordinances either) that addresses what to do in case of a tie vote. An Assistant Attorney General of Maryland has opined that although there is no case law in Maryland that directly addresses what to do in the situation of a tie vote in a municipality having no express law to provide guidance, there is an analogous state statute (inapplicable to municipalities) that nevertheless declares a tie in state office to be considered a vacancy. There is also authoritative language in at least one Maryland case that seems to broaden a rule, similar to the statute's, to include municipalities as well. Therefore, absent a timely change to your charter (which is difficult to do due to the 40-day statutory notice period) or a new ordinance, the proper remedy for the tie election is to declare a "non-election" or vacancy in the two offices and fill the vacancies in accordance with your Charter, which basically codifies the common law, whereby a majority of the remaining council is empowered to fill the vacancies.

Q: Do you have a list of the various municipal tax rates? We are looking at ours and want to see where we stand with the rest of our sister municipalities.

A: Yes, please go to <http://www.dat.state.md.us/sdatweb/taxrate.html> (State Department of Assessments and Taxation) to obtain a table of all Maryland municipal tax rates.

Q: If you live in a town that has the wife of the mayor as a town council member, is this against municipal bylaws? Please respond with a direct answer.

A: Not necessarily. Usually, municipal laws do not outright ban two close relatives from serving in an elected or appointed capacity in the same municipal corporation. In fact, there are several examples throughout this State where spouses serve together on town councils or as elected and appointed officials within the same town. It depends on whether there are "anti-nepotism provisions" in your town charter or ordinances. Only a handful of Maryland municipalities have nepotism provisions in their local laws. Furthermore, anti-nepotism ordinances or charter provisions usually apply only to appointed officials and

employees of the town and not to elected officials. To be certain as to whether your town regulates nepotism, you should consult the town's charter and code of ordinances, as well as your ethics ordinance. Despite the probable absence of any anti-nepotism law in your town's laws, your municipal ethics ordinance (assuming your town is required to have one as generally mandated by State law) may address certain situations that may arise which constitute a conflict of interest between two close relatives serving on the same public body.

Q: Many of our walkways are black top paths, which look a lot like driveways. Does the municipality maintain the sidewalk that sits between the driveway nearest the house and the driveway apron?

A: Ultimately yes, the maintenance responsibility for the public sidewalk, whether or not it is part of a driveway, would be the municipality's duty. However, a municipality can by ordinance require the adjacent landowner to shoulder the expense of maintaining the sidewalk, whether it is part of a private driveway or not. Both the municipality and the private landowner concurrently share certain property rights (i.e. an easement) as to that portion of the driveway that intersects the sidewalk. For more information, please see also *Municipal Maryland* magazine, Streets and Sidewalks: Liability Issues (October 2002).

Q: Does the law of Maryland or our own municipal charter prohibit the passage of municipal legislation, particularly a formal resolution by the governing body, to be passed at a "work session" of the mayor and council? It has been the custom of the council to avoid making any final or binding votes on any municipal matters unless done so at a special or regular town meeting.

A: No, your charter does not state otherwise and under other state law (the Open Meetings Act, Title 10, SG Art. of Md. Code Ann.), there is absolutely no distinction made between a public meeting that is called a "work session" versus a "special" or "regular meeting" of the town council. According to the Court of Appeals of Maryland, "the Act makes no distinction between formal and informal meetings of the public body; it simply covers all meetings at which a quorum of the constituent membership of the public body is convened 'for the purpose of considering or transacting public business.'" Therefore, any legislation (including a formal or simple resolution) that may be passed at a regular or special meeting may also be passed at a so-called

"work session." Furthermore, since the proposed resolution is not an ordinance, the procedural requirements of your charter pertaining to ordinances are not invoked.

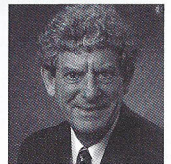
Q: If our mayor has the authority to break a tie vote of the council, does that include breaking tie votes in case of a charter amendment?

A: No, Article 23A, §13, Md. Code Ann. states that a charter resolution must be "passed as in the usual course of considering resolutions in the government of the municipal corporation by a majority of all the persons elected to the legislative body. (emphasis added) This means that a valid municipal charter resolution requires that at least a majority of all elected members of council must vote to affirmatively pass the resolution. In the case of *Mayor of the City of Hagerstown v. Lyon*, the Court of Appeals of Maryland held that the Mayor of Hagerstown was not a member of the legislative body of the City within the meaning of Article 23A, §13(a) and therefore was not permitted to vote on a charter resolution (nor could he exercise his veto power). In that case, the mayor by charter was declared the chief executive officer, wielded ordinance veto authority and served as the presiding officer of the council. The Court found that the mayor was deemed not to be a member of the governing body because the charter did not expressly state that the mayor was a member for all purposes. In sum, a municipal mayor may not vote to break a tie for a charter resolution unless he or she is expressly considered by charter to be a voting member of the legislative body. According to the Court, the legislative intent of the statute was to permit the citizens, not the mayor, to "veto" the charter resolution, if they chose to petition the measure to referendum.

The information above is not intended to serve as legal advice. Please consult your municipal attorney as necessary. Kevin J. Best wrote this column during his tenure as MML's Manager of Research & Information Management. Mr. Best is now an MML Business Associate and an attorney with the law firm of Linowes and Blocher LLP.

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