Mike Stafford
Harris County Attorney

September 13, 2005

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OPINION COMMITTEE

RQ-0395-GA

The Honorable Greg Abbott
Attorney General of Texas
Supreme Court Building
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-44403-05
I.D. # 44403

Attention: Opinion Committee

Re: Approval of actions by the Board of Managers of the Harris County Hospital District and effect of any abstentions on those actions.

Dear General Abbott:

This office requests your opinion regarding the following questions:

1. Whether the board of managers of a hospital district created pursuant to Chapter 281 of the Health & Safety Code must approve an action based on a vote of (1) a majority of a quorum present and voting or (2) a majority of all of the members present?

2. Should the governing body consider abstentions, whether due to a conflict of interest or a refusal to participate, of its members in its determination of the final vote?

Our Memorandum Brief is attached.

Sincerely,
MIKE STAFFORD
County Attorney

By Rosalinda García
Sr. Assistant County Attorney

Enc.

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MEMORANDUM BRIEF

1. Whether the board of managers of a hospital district created pursuant to Chapter 281 of the Health & Safety Code must approve an action based on a vote of (1) a majority of a quorum present and voting or (2) a majority of all of the members present?

2. Should the governing body consider abstentions, whether due to a conflict of interest or a refusal to participate, of its members in its determination of the final vote?

Facts

On July 28, 2005, the Board of Managers of the Harris County Hospital District (the "Board") considered the award of a contract to recoup any overcharges for voice and data communication circuits and accounts. While seven board members were present at the commencement of the meeting, only six board members were present at the time of the vote. The vote to award the contract subject to drafting and execution of a final agreement was as follows:

For	DonCarlos, Lemond, Wortham
Against	Truesdell, Jackson
Abstention	Attwell
Absent	Louie, Franklin, Spinks

Clearly, more than a quorum was present. At issue, is the effect of the abstention and whether it should be considered in determining whether the motion passes. Based on a majority vote of those present and voting, the motion passes (3-2) if the abstention is not considered. Based on a majority vote of all members present, the motion fails (3-3) since counting the abstention results in a tie. The Board has abated the execution of an agreement pending an opinion from your office. Therefore, at issue are the effect of one or more abstentions on the final vote taken by the Board of Managers of the Harris County Hospital District and what constitutes a majority vote.

Analysis

Pursuant to Tex. Health & Safety Code Ann. §281.021(c) (Vernon 2001), the Commissioners Court of Harris County appoints nine members to serve as the Board to manage, control, and administer the District's hospitals or hospital system. Tex. Health & Safety Code Ann. §281.048 (Vernon 2001) authorizes the Board to adopt rules governing the operation of the hospital or hospital system. Tex. Health & Safety Code §281.023 (Vernon 2001) requires the Board to elect a chairman and vice-chairman and permits it to appoint a board member or the District's administrator as the secretary. Tex. Health & Safety Code Ann. §281.024 (Vernon 2001) requires the Board to maintain suitable records of its meetings. Based on Chapter 281, the Board adopted the current bylaws on December 4, 2003, which state, in part, as follows:

> Article VIII
> Meetings
> . . .
> (6) Quorum

The presence of the majority of the Board of Managers shall constitute a quorum for the transaction of business.

. . .

Article IX
Procedures for Meetings

. . .

3. Rules of Order

a. ***Roberts'[sic] Rules of Order shall govern the proceedings of the meetings of the Board of Managers in all matters not inconsistent with these Bylaws or the Constitution and laws of the State of Texas. Notwithstanding anything contained in such Rules to the contrary, the Chairman of the Board of Managers may vote on any matter before the Board.***

b. If any member or members in the minority on any question wishes to present a written minority opinion to the Secretary of the Board of Managers, such opinion shall be filed with the permanent records of the District.

. . .

Article XVII
Amendments and Alterations

(6) Suspension of Bylaws

The suspension of a Bylaw, not in conflict with applicable laws, ***shall require a majority vote of the Board of Managers present*** at an official meeting.

While these provisions indicate that a quorum is a majority of all members and that a suspension of the bylaws requires a majority vote of the members present, no other provision expressly addresses who must participate in a majority vote. A quorum merely states a minimum number and not a maximum number necessary for the transaction of business. This minimum requirement underlies the public policy of protection against totally unrepresentative action by an unduly small number of persons. *Robert's Rules of Order Newly Revised*, 10th ed., p. 20, l. 9 -11 (Cambridge, Mass.: Perseus Publishing 2000) ("*RONR*" or "Robert's Rules")

Assuming that the District's bylaws or *Robert's Rules* may determine how final votes taken by the Board or other governmental bodies may be calculated, *ROBERT'S RULES* (10th ed.), p. 390, l. 25 – 27 & footnote, state as follows:

- *A majority of the entire membership** is a majority of the total number of those who are members of the voting body at the time of the vote.

  *In the case of body having a legally fixed membership – for example, a permanent board – it is also possible to define a voting requirement as a majority of the fixed membership, which is greater than a majority of the entire membership if there are vacancies on the board. Thus, in a board whose membership is legally fixed at 12, if 2 members have died and their successors have not been named, a majority of the entire membership is 6, and a majority of the fixed membership is 7. Where a majority of

the fixed membership is required for the decision, the body cannot vote if half or more of the membership positions are vacant.

Accord Walker v. Walter, 241 S.W. 524 (Tex.Civ.App. – Fort Worth 1922, no writ). Further, *Robert's Rules of Order Newly Revised in Brief*, 1st ed. (Cambridge Mass.: Perseus Publishing 2004) provides some general guidance on ties and abstentions and states, in part, as follows:

> **CAUTION: THE ANSWERS GIVEN HERE TO THE QUESTIONS PRESENTED ARE BASED UPON THE RULES CONTAINED IN *ROBERT'S RULES OF ORDER NEWLY REVISED*. THESE RULES ARE, IN EFFECT, DEFAULT RULES; THAT IS TO SAY, THEY GOVERN ONLY IF THERE ARE NO CONTRARY PROVISIONS IN ANY FEDERAL, STATE OR OTHER LAW APPLICABLE TO THE SOCIETY, OR IN THE SOCIETY'S BYLAWS, OR IN ANY SPECIAL RULES OF ORDER THAT THE SOCIETY MAY HAVE ADOPTED. THIS FACT MUST ALWAYS BE KEPT IN MIND WHEN READING ANY OF THE ANSWERS GIVEN.**
>
> The questions in this chapter are based on queries repeatedly received on the Question and Answer Forum maintained by the Robert's Rules Association at www.robertsrules.com.
>
> ***Question 1: Is it true that the president can vote only to break a tie?***
> ***Answer:*** No, it is not true that the president can vote only to break a tie. If the president is a member of the assembly, he or she has exactly the same rights and privileges as all other members have, including the right to speak in debate and the right to vote on all questions. However, the impartiality required of the presiding officer of an assembly (especially a large one) precludes exercising the right to debate while presiding, and also requires refraining from voting except (i) when the vote is by ballot, or (ii) whenever his or her vote will affect the result.
>
> ***Question 6: Do abstention votes count?***
> ***Answer: The phrase "abstention votes" is an oxymoron, an abstention being a refusal to vote.*** *To abstain means to refrain from voting, and, as a consequence, there can be no such thing as an "abstention vote."*
> ***In the usual situation, where*** either ***a majority vote*** or a two-thirds vote ***is required, abstentions have absolutely no effect on the outcome of the vote since what is required is*** either ***a majority*** or two thirds ***of the votes cast. On the other hand, if the vote required is a majority*** or two thirds ***of the members present,*** or a majority or two thirds of the entire membership, ***an abstention will have the same effect as a "no" vote. Even in such a case, however, an abstention is not a vote.*** [*RONR* (10th ed.), p. 387, l. 7-13; p. 388, l. 3-6; p. 390, l. 13-24; see also p.66 of *RONR in Brief.*] (Emphasis added.)
>
> ***Question 9:*** **Isn't it true that a member who has a conflict of interest with respect to a motion cannot vote on the motion?**
> ***Answer:*** Under the rules in *RONR*, no member can be compelled to refrain from voting simply because it is perceived that he or she may have some "conflict of interest" with

respect to the motion under consideration. If a member has a direct personal or pecuniary (monetary) interest in a motion under consideration not common to other members, the rule in *RONR* is that he *should not* vote on such a motion, but even then he or she cannot be *compelled* to refrain from voting. [*RONR* (10th ed.), p. 394, l. 15-25.]

Question 10: **Should proxy votes be counted?**
Answer: A "proxy" is a means by which a member who expects to be absent from a meeting authorizes someone else to act in his or her place at the meeting. Proxy voting is not permitted in ordinary deliberative assemblies unless federal, state or other laws applicable to the society require it, or the bylaws of the organization authorize it, since proxy voting is incompatible with the essential characteristics of a deliberative assembly. As a consequence, the answers to any questions concerning the correct use of proxies, the extent of the power conferred by a proxy, the duration, revocability, or transferability of proxies, and so forth, must be found in the provisions of the law or bylaws which require or authorize their use. [*RONR* (10th ed.), p. 414-15.]

Question 17: **Can votes be taken in an executive session?**
Answer: Yes, votes can be taken in executive session. Proceedings in an executive session are secret, but are not restricted in any other way. [*RONR* (10th ed.), p. 92-93.]

Question 19: Can we hold our board meetings by conference telephone call?
Answer: You may hold board meetings by conference telephone call only if your bylaws specifically authorize you to do so. If they do, such meetings must be conducted in such a way that all members participating can hear each other at the same time, and special rules should be adopted to specify precisely how recognition is to be sought and the floor obtained during such meetings. [*RONR* (10th ed.), p. 482, l. 28, to p. 483, l. 5; *see also* p. 159 of *RONR In Brief.*]

It should be noted in this connection that the personal approval of a proposed action obtained from a majority of, or even all, board members separately is not valid board approval, since no meeting was held during which the proposed action could be properly debated. If action is taken by the board on the basis of individual approval, such action must be ratified by the board at its next regular meeting in order to become an official act. [*RONR* (10th ed.), p. 469, l. 24, to p. 470, l. 2.]

As you can see, a number of these provisions conflict with the Open Meetings Act, conflict of interest statutes (e.g. Ch. 171 of the Local Gov't Code, relating to disclosure and prohibition against participation in discussions regarding substantial interest and Ch. 573 of the Tex. Gov't Code, relating to nepotism), and other law applicable to public officers and entities. While *Robert's Rules* provide some guidance and an orderly mechanism for conducting a meeting, they do not apply to public meetings if they conflict with Texas law. Op. Tex. Att'y Gen. No. DM-95 (1992). *Robert's Rules* do not determine the validity or legal requirement for any particular action or vote. *RONR* (10th ed.), p. XXI. Further, no procedural or parliamentary rule may impinge on a public officer's statutory authority to participate in any public meeting. Op. Tex. Att'y Gen. No. DM-228 (1993).

This office has been unable to find a specific rule in *Robert's Rules* requiring the Board to adopt motions by a majority of the entire membership or by a majority of those present and voting.

In *Fielding v. Anderson*, 911 S.W.2d 858 (Tex.App. – Eastland 1996), the court considered the actions of members of the Dallas Area Rapid Transit Authority in connection with the termination of the Authority's executive director and opined,

> The guiding principles of law concerning the Texas Open Meetings Act are recited in *Webster v. Texas & Pacific Motor Transport Co.*, 140 Tex. 131, 166 S.W.2d 75 (Tex. 1942), and *Ferris v. Texas Board of Chiropractic Examiners, supra.*
>
> First, predating the Open Meetings Act is a mandate that decisions made by governmental bodies must be made by the body as a whole. In *Webster*, the court stated that the purpose of this principle:
>
> > [I]s to afford each member of the body an opportunity to be present and to impart to his associates the benefit of his experience, counsel, and judgment, and to bring to bear upon them the weight of his argument on the matter to be decided by the Board, in order that the decision, when finally promulgated, may be the composite judgment of the body as a whole.
>
> (*See also* Opinion No. DM-95 of the Attorney General, March 4, 1992). In *Ferris*, the court citing from *Cox Enterprises, Inc. v. Board of Trustees of the Austin Independent School District*, 706 S.W.2d 956 (Tex. 1986), observed that the second principle mandates that the decision-making process of a governmental body not be clothed in secrecy but rather be subject to public scrutiny:
>
> > The legislature's purpose in passing the Act was to ensure that every regular, special, or called meeting or session of every governmental body, with certain limited exceptions, would be open to the public ... As originally conceived, the Act was designed to ensure that "the public has the opportunity to be informed concerning the transaction of public business" ... The Act is therefore intended to safeguard the public's interest in knowing the workings of its governmental bodies.

Therefore, prior to the adoption of the Open Meetings Act in 1967, meetings of governmental entities were subject to common law rules mandating that decisions of governmental bodies be made by the body as a whole or as expressly authorized by statute. After adoption of the Open Meetings Act, the Board's authority may be exercised only at a duly posted meeting of a quorum of the Board as a whole or as expressly authorized by statute. Tex. Gov't Code Ann. §311.013 (Vernon 2005); *Texas Board of Dental Examiners v. Silagi,* 766 S.W.2d 280, 284 (Tex.App. – El Paso 1989, writ denied); *Walker v. Walter*, 241 S.W. 524, 528 (Tex.Civ.App. – Fort Worth 1922, no writ) (quorum defined in terms of the number of members provided for by law, not by the number actually sitting on a board at any one time); Op. Tex. Att'y Gen. No. O-761 (1939); Tex. Att'y Gen. LO-88-45 (1988) (Article 14, V.T.C.S. (*now* Tex. Gov't Code Ann. §311.013 (Vernon 2005) does not authorize a public entity to exercise any rule-making authority to define

a quorum of its members); *see Ramirez v. Zapata County Independent School Dist.*, 273 S.W.2d 903 (Tex.Civ.App. – San Antonio 1954, no writ); *Nalle v. City of Austin*, 93 S.W. 141 (Tex.Civ.App. – Austin 1906 writ denied) (city charter required majority of whole).

The Code Construction Act further defines the authority and quorum of a public body. Tex. Gov't Code Ann. §311.013 (Vernon 2005) states as follows:

(a) A grant of authority to three or more persons as a public body confers the authority on a majority of the number of members fixed by statute.
(b) A quorum of a public body is a majority of the number of members fixed by statute.

In *Tex. Bd. of Dental Exam'rs v. Silagi,* 766 S.W.2d 280, 284 (Tex.App. – El Paso 1989, writ denied), the court applied §311.013 to the actions of the 12-member board. While a vote of 4-3 was sufficient to uphold the determination made at the appellant's hearing, the subsequent vote of 5-5 with one abstention was insufficient to set aside the denial of the appellant's motion for rehearing. The court concluded that "[t]he affirmative action of granting a rehearing ***would have required a majority present*** to sanction." (Emphasis added.) *See also* Tex. Att'y Gen. LO-88-45. Chapter 281 of the Health & Safety Code which governs the Harris County Hospital District does not otherwise define a quorum of the Board of Managers or limit the ability of any member to vote. Further, a member's ability to participate in any discussion or vote on any matter is limited by law only in certain situations regarding conflicts of interest. In the absence of statutory limitation on discussion or voting, each member may deliberate and vote on all matters on the Board's agenda.

In Op. Tex. Att'y Gen. No. DM-228 (1993), the Attorney General concluded that the commissioners court may adopt *Robert's Rule of Order* to govern discussion and regulate the conduct of its meetings so long as the rules are consistent with law. The Board, like a commissioners court, is a creature of statute and has only those powers expressly granted by the legislature. *See Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948); *cf.* Op. Tex. Att'y Gen. No. DM-473 (1998) (home rule city may adopt rules of procedure regarding placement of items on agenda so long as they not inconsistent with the Open Meetings Act, constitution, other laws, or city charter provisions which expressly limit its authority.).

In Op. Tex. Att'y Gen. No. JC-580 (2002), the Attorney General considered the adoption of rules regarding the determination of a quorum by an appraisal district and held, in part, as follows:

> Section 6.03(a) of the Tax Code provides, in relevant part:
>
> > The appraisal district is governed by a board of directors. Five directors are appointed by the taxing units that participate in the district as provided by this section. If the county assessor-collector is not appointed to the board, the county assessor-collector serves as a nonvoting director.
>
> Tex. Tax Code Ann. §6.03(a) (Vernon 2001). Likewise, section 6.04(a) of the Tax Code declares:

> A majority of the appraisal district board of directors constitutes a quorum. At its first meeting each calendar year, the board shall elect from its members a chairman and a secretary.

. . .

When a statute is clear and unambiguous, its words are given their common meaning. *Ex parte Evans*, 964 S.W.2d 643, 646 (Tex. Crim. App. 1998); *Raines v. Sugg*, 930 S.W.2d 912, 913 (Tex. App.-Ft. Worth 1996, no writ). As the Texas Supreme Court has noted, "it is cardinal law in Texas that a court construes a statute, 'first, by looking to the plain and common meaning of the statute's words.' If the meaning of the statutory language is unambiguous, we adopt, with few exceptions, the interpretation supported by the plain meaning of the provision's words and terms." *Fitzgerald v. Advanced Spine Fixation Sys., Inc.*, 996 S.W.2d 864, 865 (Tex. 1999) (citing Liberty Mut. Ins. Co. vs. Garrison Contractors, Inc., 966 S.W.2d 482, 484 (Tex. 1998)).

Section 6.03(a) of the Tax Code states that "[t]he appraisal district is governed by a board of directors." Tex. Tax Code Ann. § 6.03(a) (Vernon 2001). Furthermore, a county assessor-collector who has not been appointed to the board "serves as a nonvoting director." Id.

. . .

Because a quorum is defined in Texas law to mean a "majority," it follows that the presence of four members of the Board is necessary to constitute a quorum. *See* Tex. Gov't Code Ann. § 311.013(b) (Vernon 1998) ("A quorum of a public body is a majority of the number of members fixed by statute.").

We must also address a prior opinion of this office that would appear to require a contrary result. In Attorney General Opinion DM-160 (1992), this office considered a request from the Board of Licensure for Nursing Home Administrators as to whether three ex officio, nonvoting members should be counted in determining the presence of a quorum. The opinion concluded that "the ex officio, nonvoting members on the board should not be counted in determining whether a quorum is present." Tex. Att'y Gen. Op. No. DM-160 (1992) at 3. The principal authority cited for this proposition is a 1957 middle-level appellate case from Tennessee, which in turn relies solely on a quotation from a legal encyclopedia. *See Bedford County Hosp. Dist. v. County of Bedford*, 304 S.W.2d 697, 704 (Tenn. Ct. App. 1957) ("Ordinarily, a quorum means a majority of all entitled to vote. 74 *C.J.S. Quorum* p. 171.").

A later and better reasoned case, in our opinion, supports the contrary view. *See Petition of Kinscherff*, 556 P.2d 355 (N.M. Ct. App. 1976), cert. denied, 558 P.2d 620 (N.M. 1976). A New Mexico statute provided for a "county valuation protests board" to be created in every county. Each board consisted of three appointed voting members and three county commissioners as ex officio nonvoting members. *Id.* at 357. The particular board at issue in *Kinscherff* argued that only the voting members could be counted in determining the presence of a quorum. The court disagreed:

> Had the legislature intended that the non-voting members of the Board be considered as mere supernumeraries they would have so stated. Or, had the legislature intended that the presence of two of the voting members would constitute a quorum they would have so specified. Absent any such statutory provisions the common-law rule applies, i.e., a majority of all of the members of a board or commission shall constitute a quorum.

Id. Although there is admittedly little in the jurisprudence of other jurisdictions to guide us, we believe that the *Kinscherff* case reliably states the common law rule - that a nonvoting member of a board or commission should be counted in determining the presence of a quorum. As a result, we overrule any statement to the contrary in Attorney General Opinion DM-160 (1992).

. . .

Finally, you ask whether the Assessor-Collector, as a nonvoting member, may make and second motions. In our opinion, whether an assessor-collector may do so is an internal matter of an appraisal board, and consequently, the Board may opt to allow or disallow the Assessor-Collector's authority to make and second motions. Although there appears to be no relevant law on this matter, we may infer an answer from several sources. In the first place, section 6.04(b) of the Tax Code states that "[t]he board may meet at any time at the call of the chairman or as provided by board rule." Tex. Tax Code Ann. § 6.04(b) (Vernon 2001) (emphasis added). This clause implies that a board is authorized to adopt rules governing its own internal procedures. In Attorney General Opinion DM-228 (1993), this office considered whether a commissioners court was permitted to use *Robert's Rules of Order* for the purpose of governing discussion in its meetings, and whether a treatise might be used to regulate the conduct of meetings. The opinion concluded that "[i]f the commissioners court wishes its meetings to be conducted according to Robert's Rules of Order or of those provisions of a treatise that are consistent with law, and to require compliance with those provisions from all members of the court, the court must formally vote to adopt the provisions." Tex. Att'y Gen. Op. No. DM-228 (1993) at 3. An appraisal district board, like a commissioners court, is a creature of statute, and, as such, may adopt only those rules that are consistent with statutory law. *See Canales v. Laughlin*, 214 S.W.2d 451 (Tex. 1948). Nevertheless, as in Attorney General Opinion DM-228, we see no impediment to an appraisal district board adopting a rule to determine whether its nonvoting member is entitled to make and second motions. *See also* Tex. Att'y Gen. Op. No. DM-473 (1998) (issue of agenda preparation is a matter of internal city council procedure). We conclude therefore that, although a nonvoting director of an appraisal district board is not entitled by statute to make and second motions, neither is he statutorily prohibited from doing so. An appraisal board may determine by rule whether to permit that member to make and second motions.

Assuming that the Board has authority, either expressly or by necessary implication in order to exercise expressly granted powers, to adopt a definition of quorum and majority vote, the Board may diminish or reduce the number that constitutes a voting majority and may include or exclude the "non-votes" of those who were present but abstained when determining whether a majority of affirmative votes were cast. *Cf. Walker v. Walter*, 241 S.W. 524, 528 (Tex.Civ.App. – Fort

Worth 1922, no writ) (in the absence of a removal action or other law, members may not be enjoined or prohibited from performing duties).

In *Meador-Brady Management Corp v. Texas Motor Vehicle Comm'n*, 866 S.W.2d 593 (Tex. 1993), the Supreme Court considered a 2-1 vote with one abstention taken during a meeting attended by four of the six members of the commission and held, in part, as follows:

> The three votes taken are summarized in the following table:
>
> | | License 1st Meeting | Rehearing | License 2d meeting |
> |---|---|---|---|
> | FOR | Collins
Horton | Chr. Burton
Collins
Cook
Jones | Collins
Horton |
> | AGAINST | Chr. Burton
Cook
Jones | Horton | Jones |
> | NOT VOTING | | | Chr. Burton |
> | NOT PRESENT | Eversole | Eversole | Cook (office vacant) |
>
> * * *
>
> Meador-Brady and Hubbard next contend that the Commission's second order was not approved by a "majority vote of a quorum of the Commissioners", as required by section 3.08(g) of the TMVCC. Gulf Coast has two arguments in response. First, Gulf Coast argues that the statute is satisfied when action is approved by a majority of commissioners voting when a quorum is present. Thus, when a quorum of four is present and the vote is 2-1, as in this case, the Commission may take action. Second, Gulf Coast argues that an abstention should be deemed an acquiescence in the majority vote, so that in this case the vote was in effect 3-1 to grant the application. We reject both these arguments.
>
> Gulf Coast's first argument is simply not a reasonable construction of the statute. ***We think that a "majority vote of a quorum" means a majority of the quorum itself, not a majority of those voting when a quorum is present.***
>
> ***Gulf Coast's second argument regarding the treatment of the chairman's abstention is more difficult. The argument is based upon an ancient common law rule, traced to Rex v. Foxcraft, also known as Oldknow v. Wainwright, 97 Eng. Rep. 683 (1760), which deems a member of a body who abstains from a vote to acquiesce in the action favored by a majority of the members voting.*** *See* J. R. Kemper, Annotation, *Abstention from Voting of Member of Municipal Council Present at Session as Affecting Requisite Voting Majority*, 63 A.L.R.3d 1072, 1078 n.6 (1975). ***The rule has been distinguished, rejected, or ignored about as often as it has been followed, n5 and we have never applied it in Texas.*** *Cf. State v. Etheridge*, 32 S.W.2d 828 (Tex. Comm'n App. 1930, judgm't adopted). n6 ***We need not determine whether to apply it in this case, however, because***

we believe the Legislature has foreclosed that decision by requiring a "majority vote of a quorum". An abstention, even if deemed to acquiesce in the action favored by the majority, is not a vote. The Commission tells us that by custom the chairman may vote in order to create a tie and thus defeat action, suggesting that his failure to do so in this case indicates acquiescence in the granting of Gulf Coast's application. However, the chairman voted against the application at the first meeting. It is possible, of course, that the chairman changed his mind between the two meetings, although none of the other commissioners did, but ***we are unwilling to presume*** [acquiescence] that he did when the Legislature has required a vote. *See Etheridge*, 32 S.W.2d at 831. We hold, therefore, that the vote of the commissioners at the second meeting did not authorize the action taken by the Commission.

Since we conclude that the order from which appeal has been taken is invalid, we need not consider whether there was substantial evidence to support it. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded to the Commission for further proceedings. (Emphasis added.)

In *Star Houston, Inc. v. Texas Department of Transportation*, 957 S.W.2d 102 (Tex.App. – Austin 1997), the court considered whether certain votes of the majority six members of Motor Vehicle Division (the "Commission") who were present and voting were sufficient and held, in part, as follows:

In points of error two and three, Star contends the September 7 order is void because (1) the Chairman had a duty to vote but did not, and (2) the order is not supported by the requisite number of affirmative votes. **All six commission members were present at the September 7 meeting but only five voted.** Three members voted to adopt the final order and two voted against it. **The Chairman apparently abstained, although he did not state the reason for his abstention. According to the Commission, the Chairman customarily abstains from voting except in the case of a tie or to create a tie to defeat a motion.**

Star cites several cases in support of its argument that the Chairman had a duty to vote. See, e.g., *Meador-Brady Management Corp. v. Texas Motor Vehicle Comm'n*, 866 S.W.2d 593, 596 (Tex.1993); *Wolff v. Travelers Ins. Co.*, 410 S.W.2d 36, 37 (Tex.Civ.App.--Austin 1966, writ ref'd n.r.e.); *State ex rel. Rea v. Etheridge*, 32 S.W.2d 828 (Tex. Comm'n App.1930, op. adopted); *State ex rel. Young v. Yates*, 19 Mont. 239, 47 P. 1004 (1897).

None of the cases Star cites imposes a general duty upon board members to participate in every vote. This Court in *Wolff* interpreted a workers' compensation statute requiring a "unanimous vote" to transact certain agency business. *See Wolff*, 410 S.W.2d at 37. The Court concluded the statute required an affirmative vote of all three agency members in order to transact that business. **The *Wolff* decision did not impose a common law duty to vote on members of all state agencies; the holding was specific to the statute at issue in that case.** The decision does not apply by analogy because the TMVC Code does not require the Commission to vote unanimously to affirm a proposal for decision.

Therefore, *Wolff* is not dispositive of this case. *See also Etheridge*, 32 S.W.2d at 829 (particular statute required two-thirds of entire city council, not two-thirds of those present and voting).

Neither does *Meador-Brady* support Star's argument, although it did involve the Commission and the TMVC Code. 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 then, as it does now, a "majority vote of a quorum" to adopt a final decision. See TMVC Code § 3.08(g). A quorum was and still 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, however, that the motion did not pass because the two affirmative votes did not constitute a majority of the quorum. Id. Under the facts of Meador-Brady, the minimum number of affirmative votes needed to pass the motion under the statute was a majority of the members that constituted the quorum--three of the four. See Meador-Brady, 866 S.W.2d at 596-97.**

Star emphasizes the supreme court's statement that "a 'majority vote of a quorum' means a majority of the quorum itself, not a majority of those voting when a quorum is present." Id. at 596. This statement, when read in the context of the *Meador-Brady* facts, does not impose a duty on the Chairman to participate in every vote. **The statement simply means a vote of two-to-one is not enough to pass a motion under the TMVC Code, and possibly that the Chairman may not be counted to establish a quorum and then refuse to vote.** [FN2] In the present case, the Chairman's presence was not necessary to establish a quorum and a majority of the voting members voted to adopt the order. **The number of affirmative votes was three; the vote, therefore, satisfied the minimum requirements of the TMVC Code as interpreted in *Meador-Brady*.**

In summary, we find no authority for the proposition that the common law requires board members to participate in every vote. Furthermore, the applicable statute does not prohibit the Chairman from abstaining unless the Chairman is necessary to establish a quorum. See Meador-Brady, 866 S.W.2d at 596. This case does not present that situation. We, therefore, overrule point of error two.

Our interpretation of *Meador-Brady* also disposes of point of error three. Star argues the TMVC Code requires a majority vote of the members present at the meeting, rather than a majority vote of the members voting at the meeting. Star cites Meador-Brady for this proposition. [FN3] **We have already interpreted *Meador-Brady* as discussing the limited circumstance of a vote taken when the minimum number of members are present to establish a quorum. *Meador-Brady* does not concern situations in which more than four members, i.e., more than a quorum, are present at a meeting. We**

> **hold under such circumstances, the TMVC Code does not require a majority vote of all members present at the meeting. It requires a majority vote of the members voting (assuming of course, that at least four are voting).** Accordingly, we overrule point of error three.

Of particular note is Footnote 3 which states as follows:

> FN3. Star also cites the Code Construction Act and the construction rules for civil statutes to support its argument that a majority of the members present at a meeting is required to pass a motion. See Tex. Gov't Code Ann. §§ 311.013(a), 312.004 (West 1988). ***Because the TMVC Code specifically defines the word "majority" in describing the number of votes required for Commission business, we do not rely upon the default provisions of the code and statutory construction statutes.*** See id. §§ 311.011(b), 312.004 (West 1988); TMVC Code §§ 2.08(a), 3.08(g). (Emphasis added.)

Therefore, based upon this court's holding, *Meador-Brady* construed a "majority vote of a quorum" and only applies if a bare quorum is present. The court also holds that (1) an officer of a state agency has a common law duty to vote only if the state agency is expressly required to adopt a measure "unanimously;" and (2) for purposes of calculating majority votes of the Commission, a majority vote does not require all members to vote but at least a quorum must vote. If a bare quorum of this Commission exists and the "abstention" is necessary for determining the members who actually voted, the abstention is not treated as acquiescence or an affirmative vote.

For purposes of this brief, neither *Star* nor *Meador-Brady* construes §311.011, the default statute, in determining whether the actions of any other public entity are determined by a majority of governing body or a majority of those present and voting. This determination requires case-by-case analysis. Further, neither court expressly rejects the "ancient common law rule" which deems silence or abstention as acquiescence and a vote in the action favored by a majority of the members voting. However, in *Meador-Brady*, the court recognizes that this rule has been distinguished, rejected, and never applied in Texas:

> ***n5*** *See, e.g., Prosser v. Village of Fox Lake,* 91 Ill. 2d 389, 438 N.E.2d 134, 136, 63 Ill. Dec. 396 (Ill. 1982) (when a statute required "'the concurrence' of a majority of either the quorum or of all members then holding office", and, of a six-member board, three voted in favor, one voted against, one was absent, and the acting president did not vote, the enactment was upheld on the theory that the acting president acquiesced with the majority*). See also Rushville Gas Co. v. City of Rushville,* 121 Ind. 206, 23 N.E.72 (Ind. 1889) (three of six refused to vote on resolution; the court reasoned that if the members present desired to defeat a measure, they had to vote against it, their inaction would not serve such purpose and their silence was acquiescence rather than opposition); *Payne v. Petrie,* 419 S.W.2d 761 (Ky. Ct. App. 1967) (statute required that ordinance be "voted for by a majority of the members of [the] board"; of a twelve-member board, six voted for, five voted against, and one passed; court applied the rule of acquiescence to validate the ordinance); *Northwestern Bell Tel. Co. v. Board of Comm'rs,* 211 N.W.2d 399, 404 (N.D. 1973) (statute provided that "a majority of all of the members of the governing body must

concur in the passage"; of a five-member body, two voted in favor, one voted against, and two abstained because of a financial interest; court upheld enactment); *Babyak v. Alten*, 106 Ohio App. 191, 154 N.E.2d 14, 16-19 (Ohio Ct. App. 1958) (statute required "concurrence of a majority of all members elected to the legislative authority"; of a six-member council, three voted in favor, two against, and one abstained; court upheld enactment) (dictum). *In contrast, see Davis v. Willoughby*, 173 Ohio St. 338, 182 N.E.2d 552 (Ohio 1962) (statute requiring "concurrence" of three-fourths of legislative body meant affirmative vote, not mere acquiescence or silent submission); *State v. Gruber*, 231 Ore. 494, 373 P.2d 657, 660 (Or. 1962) (statute required "appointment [by] a majority of the entire membership of the council"; of six qualified councilmen, three voted in favor, one abstained, and two were absent; court held that the measure failed to get the requisite four votes, calling the rule of acquiescence an "unwarranted extension" of *Rex v. Foxcraft*). Courts have also construed statutes requiring an "affirmative vote" of a majority as foreclosing application of the rule of acquiescence. *See, e.g., Prosser*, 438 N.E.2d at 136 (theory of acquiescence does not apply when statute requires affirmative vote of majority of either quorum or of all members holding office); *see also, e.g., Streep v. Sample*, 84 So. 2d 586, 587 (Fla. 1956) (statute required "affirmative vote of three-fourths of the governing body"); *City of Haven v. Gregg*, 244 Kan. 117, 766 P.2d 143, 147 (Kan. 1988) (statute required that "majority of all the members-elect of the council of council cities . . . vote in favor thereof"); *Ezell v. City of Pascagoula*, 240 So. 2d 700, 703 (Miss. 1970) (statute provided that an "affirmative vote of a majority of all of the members of the council shall be necessary"); *Braddy v. Zych*, 702 S.W.2d 491, 495 (Mo. Ct. App. 1986) (statute stated that "no bill shall become an ordinance unless a majority of all the members vote in favor of its adoption").

Meador-Brady, at 596.

At issue is whether the default provision regarding "majority of the number of members fixed by statute" applies to the Board and if so, should votes be based on the majority of those present or a majority of those voting. If not, does chapter 281 authorize the Board to adopt rules establishing a majority vote by a quorum of those present and voting? Based upon the current bylaws, the Board has not unequivocally adopted either standard for all actions.

In summary, based upon the facts and arguments presented, please provide your opinion regarding the effect of abstention(s) on a final vote of the Board of Managers of the Harris County Hospital District and what constitutes a majority vote.