

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL
State of California

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OPINION	:	No. 10-901
	:	
of	:	December 28, 2011
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THE HONORABLE LEROY G. SHIPP, CHAIR OF THE CALIFORNIA STATE COUNCIL ON DEVELOPMENTAL DISABILITIES, has requested an opinion on the following questions:

1. If its enabling statutes do not specify a quorum, may California’s State Council on Developmental Disabilities establish its quorum through adoption of a bylaw?
2. If so, may the Council set its quorum at less than a majority of the Council’s full statutory membership, defining it instead as a majority of the council seats currently occupied by an incumbent?
3. When the Council convenes a meeting to consider and to vote on matters before it, what are the effects of member abstentions?

CONCLUSIONS

1. If its enabling statutes do not specify a quorum, California’s State Council on Developmental Disabilities may establish its quorum through adoption of a bylaw.
2. Although it may establish its quorum by bylaw, the Council may not define its quorum as less than a simple majority of the Council’s full statutory membership.
3. With respect to abstentions: (a) Council members who are disqualified by law from participating in a given matter may not be counted toward a quorum, and their abstentions may not be interpreted as support for, acquiescence in, or opposition to any actions taken by the Council; (b) members who are present and entitled to vote, but who abstain, are counted toward a quorum; (c) members who abstain by choice are deemed to “acquiesce” in the resolution reached by the Council—meaning that Council decisions will require majority support only from the members who actually cast votes, not from those who are entitled to vote—provided that the Council may not act without support from at least a majority of the Council’s quorum; and (d) a discretionary abstention may not be counted as a concurring or a dissenting vote absent a special rule to that effect.

ANALYSIS

California’s State Council on Developmental Disabilities (SCDD, or Council) is a state agency having a statutorily prescribed membership of 31 voting members appointed by the Governor,¹ each of whom “shall have demonstrated interest and leadership in human service activities, including interest in Californians who have developmental disabilities, their families, services, and supports.”² Its mission is to promote policies and practices that achieve self-determination, independence, and inclusion in community life for Californians with developmental disabilities, and for their families.³ The Council meets at least six times each year, holding additional meetings as often as necessary to fulfill its duties, and its meetings are open to the public.⁴

¹ Welf. & Inst. Code §§ 4520, 4521.

² *Id.* at § 4523.

³ *See* Welf. & Inst. Code § 4540; www.scdd.ca.gov.

⁴ Welf. & Inst. Code § 4535(a). We are informed that, in practice, the Council’s meetings occur once every two months on a regular basis, and that an executive committee consisting of nine Council members normally meets once in each of the intervening months to handle routine administrative matters.

Like many governmental councils, boards, and commissions, the SCDD experiences periods during which vacant seats remain unfilled for significant lengths of time. During those periods, the Council must operate with fewer than its statutorily designated number of members. Multiple vacancies make it more difficult to assemble a quorum, and harder to achieve the purposes for which the Council was created. Since its enabling statutes do not specify a quorum for the SCDD,⁵ the Council is considering whether it might ameliorate these problems by defining its quorum as a simple majority of *non-vacant* seats on the Council. Given the number and frequency of vacancies on the Council, such a quorum might amount to a significantly smaller number than half of the full statutory membership.

Taken together, the first two questions posed to us ask whether, in the absence of statutes to the contrary, the Council is authorized to establish such a reduced quorum through its bylaws. The third question posed to us arises when the Council has assembled a quorum and convened a meeting: We are asked how Council actions are affected when an attending member *abstains* from participating in and voting on a matter under consideration. How are such abstentions counted, if at all, and do they change the number of votes needed for Council approval of a motion or other proposal?

1. Bylaws

We first consider whether the Council has authority to establish its quorum through adoption of a bylaw. “Bylaws” are generally understood to be the rules adopted by an agency or organization to govern its administrative operations, including government of its members, and also to govern its external dealings.⁶ Rules and standards from other sources may be incorporated by reference into an organization’s

⁵ The Council’s enabling statutes do mention the term “quorum” once, in section 4521.5 of the Welfare and Institutions Code. However, that reference concerns only the authority of designee-members sitting in the place of various named directors, secretaries, and superintendents and does not establish a quorum number for the Council. Section 4521.5 provides, in pertinent part, that designees shall act as the member for all intents and purposes, “including the right of the designee to be counted in constituting a quorum to participate in the proceeding of the state council and to vote upon any and all matters.”

⁶ See *Black’s Law Dictionary* 228 (9th ed. 2009); *Webster’s Third New International Dictionary, Unabridged* 307 (3d ed., Merriam-Webster 2002); see also, e.g., Corp. Code §§ 211-213 (bylaws of general corporations); §§ 9150-9160 (bylaws of religious corporations).

bylaws, and may take precedence over contrary provisions in the organization's bylaws.⁷ Absent specific statutory prescriptions, the authority to adopt such rules is among the inherent powers of a public or private organization.⁸ An organization's bylaw authority is not unlimited, however. To be valid, a bylaw must address matters within the scope of the organization's enterprise, and may not conflict with any constitutional or statutory provisions.⁹

When enabling statutes are silent on the subject, we believe that it is well within an agency's powers to define its own quorum (or to establish different quorums for different kinds of transactions) through the adoption of bylaws.¹⁰ Accordingly, in response to the first question, we conclude that, where its enabling legislation does not specify a quorum, the SCDD may establish its quorum through adoption of a bylaw. As we explain further below, however, the Council's discretion in defining its quorum is restricted in certain respects by other statutes.

⁷ See, e.g., *Concord Christian Ctr. v. Open Bible Stand. Churches*, 132 Cal. App. 4th 1396, 1417 (2005) (local church bylaws expressly subordinate to bylaws of national church); *Guardian Angel Polish Nat. Catholic Church of Los Angeles, Inc. v. Grotnik*, 118 Cal. App. 4th 919, 924-925 (2004) (parish bylaws incorporate rules and standards of national church); *Korean United Presbyterian Church v. Presbytery of the Pacific*, 230 Cal. App. 3d 480, 504 (1991).

⁸ Cf. Corp. Code §§ 211-213 (prescribing form and content of bylaws of general corporations); §§ 9150-9160 (prescribing form and content of bylaws of religious corporations); *O'Byrne v. Santa Monica-UCLA Med. Ctr.*, 94 Cal. App. 4th 797, 806-808 (2001); Cal. Code Regs. tit. 22, §§ 70701, 70703 (requiring hospitals' governing boards and medical staffs to adopt written bylaws).

⁹ See, e.g., *Eldridge v. Sierra View Local Hosp. Dist.*, 224 Cal. App. 3d 311, 318-325 (1990). Bylaws of a corporation are also subordinate to the articles of incorporation and to any corporate charter or constitution; see also Corp. Code §§ 212(b), 9151(c); *Morris v. Richard Clark Missionary Baptist Church*, 78 Cal. App. 2d 490, 492-493 (1947); *Bornstein v. Dist. Grand Lodge No. 4*, 2 Cal. App. 624, 627-628 (1906).

¹⁰ See, e.g., *FTC v. Flotill Products, Inc.*, 389 U.S. 179, 181 and n. 3 (1967) (Federal Trade Commission quorum set by FTC rule); *Burke v. Ipsen*, 189 Cal. App. 4th 801, 817 (2010) (quorum set in labor union bylaws); *Classis of C. Calif. v. Miraloma Community Church*, 177 Cal. App. 4th 750, 757 (2009) (quorum set in church bylaws); *Iglesia Evangelica Latina, Inc. v. S. P. Latin Am. Dist. of the Assemblies of God*, 173 Cal. App. 4th 420, 441 (2009) (same).

2. Defining the Quorum: General Statutory Minimum

The second question asks whether the Council may define its quorum as a simple majority of the *non-vacant* seats. We conclude that the Council lacks authority to define its quorum in this manner.

A “quorum” is commonly understood to mean “[t]he minimum number of members (usually a majority of all the members) who must be present for a deliberative assembly to legally transact business.”¹¹ As the United States Supreme Court recently explained, “A quorum is the number of members of a larger body that must participate for the valid transaction of business.”¹² A deliberative body cannot transact business in the absence of a quorum, except to adjourn or to handle limited non-substantive matters.¹³ If a quorum is set as a simple majority (or more) of a body’s members and a quorum is achieved, then the majority of the quorum may act for the body, absent a contrary statutory provision.¹⁴

¹¹ *Black’s Law Dictionary* at 1370; *see also, e.g., Webster’s Third New International Dictionary* 1868; 78 Ops.Cal.Atty.Gen. 332, 340 (1995).

¹² *New Process Steel, L.P. v. Natl. Lab. Rel. Bd.*, 560 U.S. ___, ___, 130 S. Ct. 2635, 2642 (2010); *see generally id.* at 2639-2645 (discussing quorum principles).

¹³ *New Process Steel*, 130 S. Ct. at 2642 n. 4 (NLRB “may not, of course, itself take any action absent sufficient membership to muster a quorum”); 78 Ops.Cal.Atty.Gen. at 340, (quoting 62 Ops.Cal.Atty.Gen. 698, 699 (1979) (“[w]ithout the presence of a ‘quorum,’ a deliberative body cannot transact business other than to (1) fix the time to which to adjourn, (2) adjourn, (3) recess, or (4) take measures to obtain a quorum”)). We are also aware of instances in which, by rule or statute, a body is permitted to take action on a limited matter such as filling vacancies, when vacancies preclude attainment of a quorum. *See, e.g., Nesbitt v. Bolz*, 13 Cal. 2d 677 (1939); 49 Ops.Cal.Atty.Gen. 30 (1967); *cf. Price v. Tennant Community Svcs. Dist.*, 194 Cal. App. 3d 491, 497-498 (1987).

¹⁴ *See, e.g., FTC v. Flotill Products, Inc.*, 389 U.S. at 183-190; *People v. Harrington*, 63 Cal. 257, 259-260 (1883); *Co. of Sonoma v. Super. Ct.*, 173 Cal. App. 4th 322, 345-346 & n. 11 (2009); 75 Ops.Cal.Atty.Gen. 47, 49 (1992). We explained this general principle in the opening paragraph of our analysis in 66 Ops.Cal.Atty.Gen. 336 (1983):

The general parliamentary rule governing actions taken by a legislative body is that the body is empowered to act by a majority vote of those actually voting, where a majority of the existing membership is present. [Citations.] For example, a legislative body of five members adopts a

In some cases, the Legislature specifically defines a quorum for a particular body.¹⁵ Here, however, the SCDD’s establishing statutes say nothing about the number of members whose attendance is required for the Council to conduct its business.¹⁶ How, then, is that number to be ascertained? The answer lies elsewhere in the codes.

California’s codes include twin provisions that establish the general minimum quorum for most deliberative public bodies—that is, bodies consisting of three or more members to whom joint authority has been assigned by statute. Section 12 of the Civil Code and section 15 of the Code of Civil Procedure, each enacted in 1872 and containing identical language, provide the following rule:

Words giving a joint authority to three or more public officers or other persons are construed as giving such authority to a majority of them, unless it is otherwise expressed in the Act giving the authority.¹⁷

Although the term “quorum” does not appear in this language, courts have consistently interpreted these provisions as establishing a general rule for the minimum quorum (namely, a majority of the designated membership) for deliberative bodies consisting of three or more members.¹⁸ We too have construed these provisions to the same effect.¹⁹

motion if three members are present, two vote in favor, and one votes against the proposal.

¹⁵ See, e.g., Govt. Code §§ 8880.21 (for five-member State Lottery Commission, “quorum shall consist of three members of the Commission”); 25005 (for county boards of supervisors, “majority of the members of the board constitute a quorum for the transaction of business”); 36810 (for city councils, “majority of the council constitutes a quorum”); see also *Co. of Sonoma*, 173 Cal. App. 4th at 345-346 & n. 11 (specific statutory quorum and voting requirements override general principles of common law).

¹⁶ See Welf. & Inst. Code §§ 4520-4555.

¹⁷ Civ. Code § 12; Code Civ. Proc. § 15; see also Pen. Code § 7(17) (same, but with comma inserted after “persons”).

¹⁸ See, e.g., *Co. of Sonoma*, 173 Cal. App. 4th at 344-348; *Ursino v. Super. Ct.*, 39 Cal. App. 3d 611, 620 (1974) (“Thus, if a board is composed of five members three of such members constitute a majority capable and competent to exercise the authority of the whole board.”).

¹⁹ See, e.g., 90 Ops.Cal.Atty.Gen. 89, 97 (2007); 63 Ops.Cal.Atty.Gen. 240, 245 (1980).

This quorum rule “ensure[s] that a board’s or commission’s determinations reflect the considered judgment of at least a significant and representative number of the board’s or commission’s members.”²⁰ This policy is especially important when, as here, many of the body’s members are appointed not as at-large representatives of the general public, but as the voice of a particular constituency or interest group.²¹

We have found nothing in the SCDD’s enabling statutes to suggest that the Council is exempt from the general rule. Therefore we conclude that the Council’s quorum cannot be set at less than 16 members (*i.e.*, a majority of the 31-member body).²² We understand and sympathize with the Council’s concerns that adherence to a 16-member quorum in times of multiple prolonged vacancies may significantly hamper its ability to convene meetings, transact business, and advance its mission. But it is for the Legislature, not for us or the Council, to determine whether these concerns warrant a reduction in the Council’s minimum quorum requirement.²³ Here, because the Council’s enabling statutes contain no contrary expression, the Legislature’s grant of authority to the 31-member Council must, under general rules of statutory interpretation, be construed as “giving such authority to a majority of them.”²⁴ Accordingly, in response to the second question, we conclude that the Council may not define its quorum as less than 16 members, that is, a majority of the Council’s designated membership.²⁵

²⁰ 90 Ops.Cal.Atty.Gen. at 97.

²¹ 90 Ops.Cal.Atty.Gen. at 97-98; *see* Welf. & Inst. Code § 4521(b); *see also* *Robert’s Rules of Order* § 3, 20 (10th ed. 2001) (“The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.”) (quoted in *New Process Steel*, 130 S. Ct. at 2644).

²² Welf. & Inst. Code § 4523.

²³ *See New Process Steel*, 130 S. Ct. at 2644-2645.

²⁴ Civ. Code § 12; Code Civ. Proc. § 15; *see* Pen. Code § 7(17). In other cases, special statutes may produce a different result. We also take this opportunity to disapprove any suggestion in our previous opinions that vacancies on a public body may alter its quorum requirements when that effect is *not* produced by special statutes. *See* 62 Ops.Cal.Atty.Gen. at 700; 49 Ops.Cal.Atty.Gen. at 32-33.

²⁵ The Council may delegate appropriate functions to committees or to an executive officer in order to enhance efficiency during periods when a quorum may be difficult to muster. *See* 90 Ops.Cal.Atty.Gen. at 94-98. Of course, this would not be a complete solution to vacancy-related problems because delegations of authority are restricted to “powers and responsibilities that may be characterized as ‘routine’ or ‘preliminary’ or ‘ministerial in nature’ and that do not require application of [the public agency’s] special

3. Treatment of Abstentions

The final question asks how a Council member's abstention should be treated, particularly when the remaining members have insufficient votes to carry or defeat a motion. Included in this inquiry are questions about how abstentions affect the Council's ability to satisfy quorum requirements, and whether and how abstentions may change the number of votes required to carry a motion.

As a matter of public policy, abstentions are generally disfavored absent a conflict of interest. Members of a public body have a duty to vote on the issues before them in order to carry out the purposes for which the body was created. As the court observed in *Kunec v. Brea Redevelopment Agency*:

There is a strong public policy “that members of public legislative bodies take a position, and vote, on issues brought before them. This policy has been expressed as ‘the duty of members of a city council to vote and that they ought not “by inaction prevent action by the board.’”²⁶

The countervailing public interest in unbiased decision making, however, may from time to time require a member to abstain. Officials must avoid situations in which their allegiances may be divided between their personal interests and the public interests that they are duty-bound to promote.²⁷

expertise.” *Id.* at 94.

²⁶ *Kunec v. Brea Redevelopment Agency*, 55 Cal. App. 4th 511, 520 (1997). Put differently, “[t]he duty to vote is present if the member is present.” *Dry Creek Valley Assn., Inc. v. Bd. of Supervisors*, 67 Cal. App. 3d 839, 844 (1977) (quoting *Northwestern Bell T. Co. v. Board of Com’rs of Fargo*, 211 N.W.2d 399, 403 (N.D. 1973)).

²⁷ *See, e.g.*, Govt. Code § 1090 (barring city officers and employees from having financial interest in contracts made by them or by bodies on which they sit); *id.* at § 87100 (barring public official from making or influencing governmental decision in which official has financial interest); *Lexin v. Super. Ct.*, 47 Cal. 4th 1050, 1072-1093 (2010) (discussing both statutes); *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1171 (1996) (quoting 64 Ops.Cal.Atty.Gen. 795, 797 (1981)) (common law doctrine against conflicts of interest); 92 Ops.Cal.Atty.Gen. 19 (2009) (discussing all three); *cf.* Govt. Code § 1099 (deeming two offices incompatible, and barring one person’s holding of both simultaneously, where duties or interests of offices are likely to clash).

As with the quorum questions considered previously, the SCDD’s enabling statutes do not directly address the issues we have been asked to analyze—in this instance, the circumstances in which a member might abstain from voting and the effect that abstention would have on voting. Our analysis of these questions rests on general statutes and principles of law.

We have not always been crystal clear in our discussions of these issues, and neither have the courts. Accordingly, we take this opportunity to clarify our understanding of the rules governing abstention. In a 1978 opinion, we stated that members of a council who were present, but who abstained from voting, could be counted toward achieving the quorum required for taking up a measure, and that the affirmative votes of a bare majority of the body’s quorum would carry a measure or “sustain an action” even if those were the only votes cast:

Moreover, the votes of two members, being a majority of a quorum, are sufficient to sustain action of the agency regardless of whether the remainder of the members present to constitute a quorum fail to vote. In *Martin v. Ballinger* [(1938)] 25 Cal.App.2d 435, the court held that an appointment to fill a vacancy on a five member city council which was made by the votes of two members of the council was valid since it was the vote of a majority of a quorum despite the fact that the other two members present abstained from voting but expressed opposition to the appointment. (Cf. *Dry Creek Valley Assn., Inc. v. Board of Supervisors* (1977) 67 Cal.App.3d 839, 842-843.) Thus, the existence of a quorum is not destroyed when a member or members of a body, who are present and who are necessary to constitute a quorum, fail to vote.²⁸

In a 1983 opinion, we characterized the “general parliamentary rule” as holding that “abstentions are considered as ‘concurring’ in the action taken by the majority of those who vote”²⁹ We went on to explain that this rule, applied to a five-member board, would mean that “an act supported by two affirmative votes and one abstention *or one affirmative vote and two abstentions* would be valid . . . ,” citing the *Dry Creek Valley* decision as our principal authority.³⁰

²⁸ 61 Ops.Cal.Atty.Gen. 243, 252-253 (1978); see 62 Ops.Cal.Atty.Gen. at 700.

²⁹ 66 Ops.Cal.Atty.Gen. 336, 337 at n. 2 (1983) (emphasis added).

³⁰ *Id.* (emphasis added); see *Dry Creek Valley*, 67 Cal. App. 3d at 839.

Later, in a 1993 opinion, we again referred to the “usual rule of parliamentary procedure,” but characterized it differently, noting that the abstention of a councilmember “acts as an *acquiescence*” in the action taken by the majority of voting members, whether that majority vote was affirmative or negative.³¹

This latter characterization more accurately describes the language used in the oft-cited 1938 case of *Martin v. Ballinger*, which held that board members’ “refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members.”³² Thus, an abstaining member should not be said to acquiesce to a particular *outcome*, but only to acquiesce to the modified *decision-making process* by which that outcome will be determined. Such acquiescence cannot, of course, bestow a power on a body that is beyond its legal authority; hence, any action taken by a body must still be supported by the votes of at least a majority of the body’s quorum.³³

A discussion of the facts presented in our 1993 opinion should help to clarify our understanding of *Ballinger*. Our 1993 opinion addressed a city council’s vote of three to zero, with one abstention, to appoint a council member to the vacant mayor’s seat (the appointee having cast one of the affirmative votes). In evaluating a challenge to the validity of the appointment, based on the appointee’s voting for himself, we considered two different possibilities. On one hand, if such vacancies could be filled by a standard majority vote, the appointee’s vote for himself would be immaterial because the two *other* votes approving his appointment would still constitute a “majority of the quorum,” to use the words of the *Ballinger* court;³⁴ the fourth member, by abstaining, had acquiesced to having the matter decided by that quorum-majority vote.³⁵ On the other

³¹ 76 Ops.Cal.Atty.Gen. 254, 257 (1993) (emphasis added).

³² *Martin v. Ballinger*, 25 Cal. App. 2d 435, 439 (1938). Unfortunately, the *Ballinger* court went on to say that “the *grounds* assigned for [a member’s] refusal to vote [were not] material” (*id.*, emphasis added)—a statement which, in our view, is overbroad and therefore potentially misleading.

³³ Civ. Code § 12; Code Civ. Proc. § 15; see *Martin v. Ballinger*, 25 Cal. App. 2d at 439 (abstaining member consents that “*majority of the quorum* may act for the body”); (emphasis added). An abstaining member further consents that any views or protests he or she may voice will be given no effect; thus, “the previous declarations of the nonvoting members and their subsequent protest avail nothing.” (*Id.*)

³⁴ See *Martin v. Ballinger*, 25 Cal. App. 2d at 439.

³⁵ 76 Ops.Cal.Atty.Gen. at 257. Our opinion treated only the common law rule

hand, if the appointment were governed by a special rule requiring “the affirmative votes of at least three members,” as the challenging party contended,³⁶ then the self-appointment issue would not be moot because the abstention could *not* be counted as an additional affirmative vote.³⁷

It bears noting that there was a post-*Ballinger* judicial decision, *Dry Creek Valley Association, Inc. v. Board of Supervisors*,³⁸ in which the Court of Appeal appeared repeatedly to equate an “abstention” with a “concurring” vote. However, the focus of the issue in that case was a special local rule, promulgated by a county board of supervisors, which expressly directed that, under identified circumstances, “an ‘abstain’ vote shall constitute a concurrence.”³⁹ Under the circumstances, we think that the conflation of

against self-appointment and a statute, Government Code section 1752, that “essentially codifie[d] [that doctrine] with respect to the governing bodies of cities, counties, and districts.” *Id.* at 259. We did not address whether the appointee might have had a disqualifying interest under other rules, such as Government Code section 1090. *See also, e.g.*, 62 Ops.Cal.Atty.Gen. at 698 (with five-member city council, motion carried with two affirmative votes and two abstentions).

³⁶ *See* 76 Ops.Cal.Atty.Gen. at 257.

³⁷ *Id.* (citing 55 Ops.Cal.Atty.Gen. 26, 29 (1972) (discussing and distinguishing *Ballinger*)). Our 1972 opinion included the following reasoning:

The votes of the three abstaining members cannot be considered as votes in favor of the motion to elect the vice president since section 30525 requires the *affirmative* votes of at least a majority of the members of the board. [Citation.] Because of this statutory requirement of affirmative action by at least a majority of the members of the board, the case of *Martin v. Ballinger* . . . is distinguishable.

55 Ops.Cal.Atty.Gen. at 29.

³⁸ *Dry Creek Valley*, 67 Cal. App. 3d at 839.

³⁹ *Id.* at 841. In its entirety, that rule (Rule 12, as promulgated by the Board of Supervisors of Sonoma County) provided as follows:

RULE 12. In the event that one less than the necessary number of “aye” votes has been cast, then an “abstain” vote shall constitute concurrence and the Clerk shall set forth in his minutes that the matter was passed pursuant to this rule.

Id.

“abstention” with “concurrence” in the *Dry Creek Valley* opinion should be regarded as unique to the facts of that case, and should not be read as expanding the traditional rule of “acquiescence” as explained in *Ballinger*.

Moreover, depending on the circumstances, we think that the reason for a member’s abstention may be significant in determining whether a quorum has been reached.⁴⁰ If the member refrains from voting on a matter because he or she is *barred by law* from participating due to a personal interest in the outcome,⁴¹ then that member is plainly not entitled to vote on the matter. In our view, a disqualified member is, legally speaking, not “present” for the body’s deliberations on the disqualifying matter, and the disqualified member may not be counted toward attaining the quorum necessary to act on the matter.⁴² Neither could such a legally mandated abstention fairly be characterized as the member’s “concurrence” or “acquiescence” in the body’s action on the matter, since the member’s non-vote was required by law, and reflects no exercise of discretion whatsoever.⁴³

⁴⁰ We assume for purposes of our analysis that a Council member’s abstention would not be due to the member’s disqualifying financial interest in a proposed contract, because such an interest would preclude not only the interested member, but the Council itself, from making or participating in the making of that contract. Govt. Code § 1090.

⁴¹ See, e.g., Govt. Code §§ 1091, 87100.

⁴² We stated this principle in a 1979 opinion as well, emphasizing that “the quorum members must be *entitled* to vote,” and providing the following example:

A member who is not entitled to vote because of a conflict of interest, for example, is not counted for purposes of establishing a quorum on a particular question. (Robert’s [Rules of Order (Rev. 1970)], § 39, p. 293; cf. Mason’s [Legislative Manual (1975)], § 502, pp. 338-339; Sturgis [Standard Code of Parliamentary Procedure (2d ed. 1966)], p. 114.)

62 Ops.Cal.Atty.Gen. at 700 n. 2; see *Robert’s Rules of Order* § 3, 3; § 40, 334 (10th ed. 2000) (quorum is number of “voting members” who must be present— *i.e.*, members “having the right to full participation” in the proceedings); *Mason’s Legislative Manual* § 502, ¶ 2, 334 (2010 ed.) (“Every member entitled to vote should be counted in determining whether a quorum is present.”); see also Cal. Code Regs. tit. 2, § 18702.1(b) (official with disqualifying conflict of interest “shall not be counted toward achieving a quorum”); 86 Ops.Cal.Atty.Gen. 142, 143 (2003) (same).

⁴³ In the event that disqualifications are so numerous as to preclude attainment of a quorum, special rules may come into play—principally, the common law “rule of necessity” or its statutory embodiments—under which a legislative body would be

On the other hand, if a member is *not* disqualified by law from considering or voting on a matter before the body, but abstains for some other reason, such as an exercise of personal discretion, then (a) that member’s presence at a meeting may be counted toward the body’s quorum requirement (since she or he is “*entitled to vote*”),⁴⁴ and (b) the abstaining member may accurately be said to have “acquiesced in” or “consented to” any resolution reached by the body, as long as the number of members voting was at least a majority of the quorum.

It goes too far to call an abstaining member’s non-voting presence a “concurrence” or “concurring vote,” however, unless, as in *Dry Creek Valley*, there is a rule in place that expressly equates abstaining with concurring.⁴⁵ One’s choice not to participate—choosing instead to sit silently on the sidelines during deliberations, and refraining from participating in the body’s action—is manifestly not the same thing as voting on the measure oneself. Non-participation and non-voting cannot, in our view, be treated as an exercise of a member’s franchise in either direction.⁴⁶

permitted to act notwithstanding members’ conflicts of interest. As the California Supreme Court recently explained:

The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so, but it requires all conflicted members to refrain from any participation. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them.

Lexin, 47 Cal. 4th at 1097 (citations omitted); *see also id.* at 1097-1100; *Kunec*, 55 Cal. App. 4th at 520-523; Govt. Code § 87101.

⁴⁴ 62 Ops.Cal.Atty.Gen. at 700 n. 2.

⁴⁵ In practice, the rule analyzed in *Dry Creek Valley* operated to eliminate discretionary abstentions, requiring board members to cast either a “yes” or a “no” vote in every matter from which they were not legally disqualified. Members were clearly notified of this obligation in advance of voting. As the court observed:

Each member of the board is thus informed by the rule that he may *concur* in such a situation by either an “aye” vote or an “abstain” vote. Or if he shall so choose, he may vote against the measure by a “no” vote.

Dry Creek Valley, 67 Cal. App. 3d at 845 (original emphasis). The rule thus assures “that all of the board members who are present vote.” *Id.*

⁴⁶ As an example, we think it conceivable that a member might choose to abstain from

In accordance with the analysis and conclusions articulated here, we disapprove any suggestion in our previous opinions to the effect that a member’s discretionary abstention is equivalent to a “concurring vote”—or a vote of any kind—in the absence of a specific rule to that effect.⁴⁷ We likewise disapprove any suggestion that a body may validly take action without the support of concurring votes from at least a majority of that body’s quorum.

As for the Council, while members who choose to abstain may, by their presumed acquiescence, lower the number of votes needed to attain a majority (of those voting), such a reduced majority vote cannot result in action by the Council unless there are at least nine concurring votes—that is, a majority of the Council’s 16-person quorum.

Therefore, in response to the third question, we conclude that abstentions by Council members would have the following effects on the Council’s proceedings: (a) Council members who are disqualified by law from participating in a given matter may not be counted toward a quorum, and their abstentions may not be interpreted as support for, acquiescence in, or opposition to any actions taken by the Council; (b) members who are present and entitled to vote, but who abstain, are counted toward a quorum; (c) members who abstain by choice are deemed to “acquiesce” in the resolution reached by the Council—meaning that Council decisions will require majority support only from the members who actually cast votes, not from those who are entitled to vote—provided that the Council may not act without support from at least a majority of the Council’s quorum; and (d) a discretionary abstention may not be counted as a concurring or a dissenting vote absent a special rule to that effect.

voting when, due to illness or absence or other cause, the member has not yet fully reviewed the details of the proposal at issue or fully evaluated the merits of competing arguments, yet is unable to postpone the vote.

⁴⁷ Specifically, our use of the term “concurring” in footnote 2 of our 1983 opinion should be understood to apply only when, as in *Dry Creek Valley*, a special rule supports that construction. See 66 Ops.Cal.Atty.Gen. at 337 n. 2. Our hypothetical illustration there, that for a five-member board an act supported by “one affirmative vote and two abstentions would be valid,” should also be understood to apply only when a special rule supports that result. *Id.*