

GENERAL CONSTRUCTION LAW §§ 41, 110.

The General Construction Law governs the provisions of the Oneonta City Charter regarding quorum and voting requirements. Non-voting absent council members are not considered as having cast votes against a provision so as to create a tie vote that would permit the mayor to break the tie.

December 21, 2001

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City Hall
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Informal Opinion
No. 2001-6

Dear Mr. Merzig:

You have requested an opinion whether the quorum and voting provisions set forth in General Construction Law § 41 apply with respect to the adoption of "non-tax resolutions" by the Oneonta Common Council. If the provisions of the General Construction Law apply, you have asked a further hypothetical question regarding tie-breaking procedures. We conclude that the provisions of the General Construction Law govern, requiring the affirmative vote of a majority of all Common Council members for the adoption of a non-tax resolution.

General Construction Law § 41 provides as follows:

Whenever three or more public officers are given any power or authority, or three or more persons are charged with any public duty to be performed or exercised by them jointly or as a board or similar body, a majority of the whole number of such persons or officers, gathered together in the presence of each other or through the use of videoconferencing... shall constitute a quorum and not less than a majority of the whole number may perform and exercise such power, authority or duty. For the purpose of this provision the words "whole number" shall be construed to mean the total number which the board, commission, body or other group of persons or officers would have were there no vacancies and were none of the persons or officers disqualified from acting.

The voting provisions of the City Charter are generally consistent with section 41. Under the City Charter, the Common Council of the City of Oneonta consists of eight aldermen and the Mayor, who votes only to break a tie. See City Charter § 2.1(A),(E). The Common Council can take action by ordinance, resolution, or local law. See City Charter § 2.1(F). You informed us that under the provisions of the City Charter, a quorum "for the transaction of business" is comprised of five members of the Common Council. See City Charter § 2.1(E) ("A majority of the members of the Common Council shall be a quorum for the transaction of business..."). No ordinance may be passed except by a majority vote of "the total voting power of the Common

Council." See City Charter § 2.2(A). No tax or assessment may be approved except by a majority of "all members of the Common Council." See City Charter § 2.1(E). Resolutions regarding special elections for approval of extraordinary expenses by the voters must also be approved by an affirmative vote of a majority of all the members of the Common Council. See City Charter § 2.8(A). Although the Charter defines a quorum as a majority of the members, it does not contain any provision expressly permitting action by the Council through less than a majority of all members.

The City Charter further provides, however, that "[t]he Common Council shall determine the rules applicable to its own proceedings" subject to the provisions thereof. See City Charter § 2.1(E). You have advised us that, pursuant to this provision, the Common Council has adopted Robert's Rules of Order for its proceedings, and has determined that under Robert's Rules, a majority of the Common Council quorum, thus as few as three, could enact resolutions that do not approve taxes and assessments or relate to special elections for approval of extraordinary expenses.

If section 41 of the General Construction Law were to govern resolutions, five members ("a majority of the whole number" of the Board) would be required to constitute the quorum, as well as the majority necessary to exercise the powers of the Common Council. See *Smithtown v. Howell*, 31 N.Y.2d 365, 377- 78 (1972); *Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington*, (Nov. 19, 2001) 2001 N.Y. LEXIS 3413. We conclude that the voting procedures of the Common Council with respect to resolutions that do not approve taxes or extraordinary expenses (these are specified in the charter) are subject to the provisions of the General Construction Law.

General Construction Law § 110 provides that this chapter "is applicable to every statute unless its general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by this chapter." The City Charter does not explicitly or in any other way define the majority vote necessary for the passage of these resolutions. Moreover, we note that a prior version of the City Charter contained a provision expressly permitting the adoption of ordinances and non-tax and non-spending resolutions by a majority of those present and voting at a meeting attended by a quorum. See L. 1908, ch. 454. Apparently, the Charter was subsequently amended to be more in conformity with General Construction Law § 41 regarding ordinances but voting requirements for these resolutions were not specified.

In our view, the general language contained in the City Charter that the Common Council "shall determine the rules applicable to its own proceedings" does not indicate that the provisions of the Charter are intended to override the General Construction Law, as required by section 110. "Rules of proceedings" could include a multitude of rules, for example, rules governing the place and scheduling of meetings; public notice of meetings; conduct of meetings such as the procedure for selection of a chair person, allocation of time for public comment, member debate, and the recording of meetings.

The case of *Morris v. Cashmore*, 253 App. Div. 657 (1st Dep't), *aff'd no opn.*, 278 N.Y. 730 (1938), is not inconsistent with this conclusion. In *Morris*, the court found that similar language in the New York City Charter permitting the City Council to determine the rules of its proceedings was sufficient to allow a majority of the quorum attending a meeting to take action with respect to intra-cameral matters, such as the election of council officers and adoption of

rules. See 253 App. Div. at 661. The Charter at issue in *Morris* defined "quorum" and specified that a majority vote of all council members was required for the enactment of local laws and resolutions. See *id.* at 659. Indeed, the court noted that with respect to the definition of quorum, "it is plain that section 41 has no application, for the reason that 'quorum' is defined in the Charter, and not left open to construction." *Id.* at 661 (emphasis supplied). The court, however, concluded that the actions at issue in *Morris* did not involve the enactment of local laws or resolutions, and that General Construction Law § 41 was not intended to apply to such actions of elected representatives acting in their individual capacities with respect to intra-cameral matters. See *id.* at 661-62 ("We doubt that [section 41] was intended to apply to elected representatives who act in their individual capacity [in selecting a vice-chair], and not as a body."); see also General Construction Law § 41 (referring to exercise of power or authority or performance of public duty by public officers acting jointly). Therefore, as to these intra-cameral matters, the charter could authorize voting requirements to be determined by parliamentary procedure. See *Morris v. Cashmore*, 253 App. Div. at 662. The implication of this holding is that, by contrast, voting requirements for other acts are subject to section 41 and could not be established under authority to establish general rules of procedure.

In the inquiry you pose, in comparison to the procedure upheld in *Morris*, the Council would, without authorization in the Charter, be using parliamentary rules of proceedings to alter the voting requirements of section 41 with respect to resolutions constituting legislative acts.

Accordingly, we conclude while the City Charter provides that the Common Council may determine the rules applicable to its own proceedings and permits the Common Council to adopt Robert's Rules to govern its procedures, these rules may not be used to establish quorum and/or voting requirements that are not in accordance with section 41. Therefore, in response to your related question, no modification of the City Charter is required to conform the Charter to the requirements of General Construction Law § 41.

You further inquire whether, in the event that General Construction Law § 41 applies to the above-referenced circumstances, and if only five council members are present and voting, a four to one vote is a "tie" vote by the Common Council that the mayor may vote to break pursuant to City Charter § 2.1(E). We note that the power of the mayor to vote to break a Common Council tie vote is not questioned. However, to reach the conclusion that the circumstances posed in the hypothetical constitute a tie vote would require that the three absent members be considered to have voted against the measure. As a general rule, absent council members may not be counted as casting negative votes to create a tie that would enable the mayor to cast a deciding vote. See *Application of Dudley*, 33 App. Div. 465 (1st Dep't 1898); *Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington*, (Nov. 19, 2001) 2001 N.Y. LEXIS 3413. Moreover, General Construction Law § 41 was recently amended to specifically define the quorum and voting requirements in terms of members "gathered together," either physically or through videoconferencing. See General Construction Law § 41, as amended by L. 2000, ch. 289, § 5. This indicates a strong legislative intent that official action by public bodies be taken by members who are present. We conclude, therefore, that in the circumstances posed by you, a tie vote would not exist. We note that if all eight aldermen were present at a meeting and voted four in favor and four against a measure, a tie-breaking vote by the mayor would be consistent with General Construction Law § 41's requirement that action be taken by a majority of all council members. See City Charter § 2.1(A) (Mayor and Aldermen constitute the City Council).

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Very truly yours,

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