Municipal Lawyer

A joint publication of the
Municipal Law Section of the New York Bar Association
and the
Edwin G. Michaelian Municipal Law Resource Center of Pace University

Volume 16, Number 1 *January/February 2002*

Tall Trees Cast Uncertain Shadows

by Lester D. Steinman

Representing planning and zoning boards, conventional wisdom has always been that for those boards to act there must be, at a minimum, concurring votes equal to a majority of the whole number of their members. More simply stated, three concurring votes on a five-member board and four concurring votes on a seven-member board were required for valid action to be taken. The failure to obtain the necessary number of votes, including the occurrence of a tie vote, has been contradictorily referred to in the case law as either a "non action" or a denial. *Compare Matter of Walt Whitman Game Room, Inc. v. Zoning Board of Appeals of the Town of Huntington*, 54 A.D.2d 764 (2d Dept. 1976) *lv. denied* 40 N.Y.2d 809 (1977) and *Matter of Hoffis v. Zoning Board of Appeals of the City of Glens Falls*, 166 A.D.2d 850 (3d Dept. (1990) [non-actions] *with* *Matter of Monro-Muffler/Brake, Inc. v. Town Board of the Town of Perinton*, 222 A.D.2d 1069 (4th Dept. 1995) and *Matter of Zagoreos v. Conklin*, 109 A.D.2d 281, 296 (2d Dept. 1985) [denials]. However, in a recent decision, the New York Court of Appeals has resolved this question opining that, in the case of an application for a variance, where a quorum of the zoning board of appeals is present and voting, a failure to obtain a concurring vote of the majority of the whole number of that board in favor of the application constitutes a denial of the variance. *Matter of Tall Trees Construction Corp. v. Zoning Board of Appeals of the Town of Huntington,* 97 N.Y.2d 86 (2001).

Petitioner, Tall Trees Construction Corporation ("Tall Trees") sought minor area variances from the seven-member Town of Huntington Zoning Board of Appeals ("ZBA") to subdivide a 1.94 acre parcel into two building lots. On its initial vote, two members of the ZBA voted in favor of the variances, two members against, one member, who owned land abutting the subject property, abstained and two members were absent. The ZBA termed this vote as a "no action" decision.

When the ZBA refused Tall Trees' subsequent request to take another vote, the petitioner commenced an Article 78 proceeding to annul the ZBA's determination and to compel the issuance of the variances. The Supreme Court, citing *Matter of Walt Whitman Game Room, Inc. v. Zoning Board of Appeals, supra*, determined that the ZBA's tie vote constituted a "non-action" and remanded the matter to the ZBA for a new vote. The Appellate Division affirmed the Supreme Court's ruling.

Nevertheless, the ZBA refused repeated entreaties by Tall Trees to conduct a new vote. Tall Trees then commenced a contempt proceeding against the ZBA which compelled the ZBA to reconsider the matter. Once again, however, the ZBA filed a "non-action" determination based upon an identical two-two-one-two vote.

Declining the ZBA's invitation to return for a new hearing, Tall Trees instituted a second Article 78 proceeding to challenge this second "non-action". Ruling that under Town Law §267-a(4), a tie vote should be deemed a denial of the variance, the Supreme Court annulled the ZBA's determination and granted the variances. This time the Appellate Division reversed, concluding that the ZBA's vote could not constitute a denial because there was no majority vote either for or against the application. The appeals court remitted the matter back to the ZBA to conduct a new hearing within 30 days and to submit the matter to a vote when the full Board was present. The Court also voiced its disapproval that a zoning board member with a personal interest had participated in the first public hearing.

Granting Tall Trees' application for leave to appeal, the Court of Appeals reversed the Appellate Division's ruling. Reinstating the Supreme Court's judgment granting the variances, a unanimous Court of Appeals declared that "when a quorum of the Board is present and participates in a vote on an application, a vote of less than a majority of the Board is deemed a denial."

In reaching this result, the Court of Appeals explained that General Construction Law §41 and Town Law §267-a govern the procedures of a Town's zoning board of appeals. Under General Construction Law §41, a majority of the whole number of the members of a zoning board constitute a quorum and "not less than a majority of the whole number may perform and exercise such powers, authority and duty." According to the Court, however, this language does not specifically address the number of votes necessary for a zoning board or other administrative body to take formal action.

In the case of a zoning board, the Court declared, the voting requirements are set forth in Town Law §267-a(4). That statute provides "that the concurring vote of a majority of the members of the [zoning] board of appeals shall be necessary to *reverse* any ... determination of any ... administrative official [charged with the enforcement of any zoning ordinance or local law], or to *grant* a use variance or area variance (emphasis added)."

Harmonizing the two statutes, the Court of Appeals concluded:

"[A]lthough the participation of a majority of the Board is necessary for the Board to exercise its authority in considering a variance application, as long as a quorum is present and votes, a concurring vote of the majority is not required for that vote to constitute a denial of the application."

In other words, the Court opined, "General Construction Law §41 allows valid action by a body so long as there is *participation* by 'majority of the whole number' *Matter of Wolkoff v. Chassin*, 89 N.Y.2d 250, 254." Other than majority participation, however, the Court states that "that section imposes no specific voting requirement." By contrast, Town Law §267-a(4) "mandates a concurring majority vote of the Board in order to 'reverse' a determination of the appropriate administrative official ... or to 'grant' a variance application." Significantly, Town Law §267-a(4) fails to require the same majority vote concurrence for the denial of an application. Accordingly, if after participation and voting by a majority of the whole number of the board, no concurring vote of the majority exists to grant a variance application, the application is deemed denied.

In so ruling, the Court of Appeals declined to follow the decision in *Matter of Walt Whitman Game Room v. Zoning Board of Appeals, supra,*

(Continued on page 2)

Inside...

NYSBA Notes

James Coon Award

At its Annual Meeting in New York City in January, the Municipal Law Section of the New York State Bar Association honored Christopher Rizzo, a recent graduate of Pace University Law School, by bestowing upon him its 2001 James A. Coon Memorial Writing Competition Award for his article entitled "Environmental Law and Justice in New York City, Where a Park is Not Just a Park" published in the Pace Environmental Law Review.

The Section created this award to honor the memory of James Coon, a former member of the Executive Committee. At the time of his death, James Coon was the Deputy Counsel to the New York State Department of State. He was best known around the State as the ultimate resource on New York planning and zoning law. He traveled the State providing free technical assistance to local government on land use law issues. Also, he authored a number of publications for the Department of State and for the New York Planning Federation. This award is given annually to recognize outstanding writing in the field of land use and zoning.

New NYSBA President-Elect

The Municipal Law Section is proud to announce that one of its own, A. Thomas Levin, Esq., has been selected as the President-elect of the New York State Bar Association at the Association's January House of Delegates meeting. A dedicated member of the Section's Executive Committee for many years, Mr. Levin is a partner in the firm of Meyer, Suozzi, English & Klein, P.C. on Long Island.

As a result of his ascension, Mr. Levin has resigned from the Executive Committee. To fill the vacancy created by his resignation, Jennifer Siegel, vice-chair of the Section's Ethics Committee, was elected to complete Mr. Levin's unexpired term ending in May 31, 2003. Also reappointed to the Executive Committee for two year terms commencing June 1, 2002 and expiring May 31, 2004 were current members Barbara Samel, Patricia Salkin, Frederick Ahrens and Gregory Amoroso.

Published bi-monthly by the Edwin G. Michaelian Municipal Law Resource Center, Inc. of Pace University and the Municipal Law Section of the New York State Bar Association.

MLRC Director ..... *Lester D. Steinman*
Municipal Law Section Chair ..... *Linda S. Kingsley*
Co-Editors ..... *Lester D. Steinman*
Ralph Bandel
MLRC *914-422-4276*
Pace University
One Martine Avenue
White Plains, New York 10606
www.pace.edu/dyson/mlrc

Tall Trees

(Continued from page 1)

which concluded that a similar tie vote by the same board on a special permit application was the equivalent of a non-action. Writing for the Court, Justice Wesley opined that to construe, as that case did, that a tie vote constitutes a non-action "would be contrary to the plain language of the statute and would ... leave petitioner's application in 'zoning purgatory'-a place from which an applicant can escape only at the whim and pleasure of the Board."

Having determined that the tie votes were, in effect, a denial of the petitioner's variance applications, the Court proceeded to address the merits of the variance applications. Acknowledging the absence of factual findings "either supporting or opposing the requested variance" ... the Court observed that its powers of judicial review remained unimpaired:

"Courts have recognized that under circumstances where, as here, an application is rejected by a tie vote, 'there exists and can exist no formal statement of reasons for the rejection' and, thus, an examination of the entire record, including the transcript of the meeting at which the vote was taken along with affidavits submitted in the Article 78 proceeding can 'provide a sufficient basis for determining whether the denial was arbitrary and capricious' (citations omitted)."

Searching the record, the Court of Appeals concluded that the ZBA's denial of the variances was not supported by substantial evidence. Applying the statutory factors governing the adjudication of area variances, the Court concluded that the case involved nothing more than a minor variance application which, in prior similar circumstances, had been routinely granted by the ZBA. Because the benefit of granting the requested variances to the petitioner was great and clearly outweighed any *de minimius* detriment to the community and neighborhood, and because nearly identical variance applications had been approved in the past, the ZBA's failure to grant the requested variance in this case was held to be arbitrary and capricious.

In the few months since the Court of Appeals handed down this decision, numerous questions have arisen as to its application. Unlike the uniform statutes governing the operation of zoning boards of appeal in cities, towns and villages, the State enabling legislation governing decision making on special permits, site plans and subdivisions does not include specific provisions as to voting requirements. *See* e.g. Town Law §§274-a, 274-b and 276. Similarly, local legislation creating administrative bodies (e.g. wetlands boards, architectural review boards), may also be silent as to voting requirements. Under these circumstances, does a tie vote on these boards also constitute a denial. Based upon the Court of Appeals' refusal to follow the *Walt Whitman* case, and its citation with approval of *Matter of Monro-Muffler/ Brake, Inc. v. Town Board of the Town of Perinton, supra* and *Matter of Zagoreos v. Conklin, supra* involving a special permit and development permit respectively, it would appear that a tie vote in these other contexts would also constitute a denial and commence the running of the statute of limitations for an applicant to challenge that determination. Certainty on this issue is particularly significant in the case of subdivision approval where non-action by a planning board can result in default approval of an application.

Moreover, while a concurring vote of the majority of the whole number of a board is not required for the vote to be deemed a denial, is the converse true? Going beyond the narrow holding of *Tall Trees*, the language utilized by the Court suggests that in the absence of majority or super majority voting requirements, as long as a quorum of the board is present and participating in accordance with the provisions of the General Construction Law, a majority of that quorum, even though less than a majority of the whole number of the board, is empowered to take affirmative actions on applications. Simply stated, on a subdivision application, a five-member planning board could grant a subdivision approval as long as three members vote and two of those three members support the granting of the application. At least, in this case, unlike the zoning board of appeals in *Tall Trees*, the planning board is not prevented from making findings to support its determination and provide the basis for judicial review.

Indeed, this construction reflects the common law rule that "if there were a quorum, a vote of a majority of those present was sufficient for validation (e.g. *Morris v. Cashmore*, 253 App.Div. 657 *aff'd* 278 N.Y. 730; Ann., Municipal Council-Majority Vote, 43 ALR2d 698, 702." *Matter of the Town of Smithtown v. Howell*, 31 N.Y.2d 365, 376 (1972). According to the Court of Appeals in *Smithtown*, there was another common law rule requiring "that where a statute conferred power to act on several persons, all must be present before the power could be exercised." *Id.* It was this latter common law rule "that §41 of the General Construction Law was designed to abrogate." *Id.* at 377. *See also Wolkoff v. Chassin*, 89 N.Y.2d 250, 254 (1996).

Another unanswered question concerns the application of *Tall Trees* to legislative decision making. Town Law §63 expressly requires the affirmative vote of a majority of all members of a town board for the valid adoption of any act, motion or resolution. Local laws must also be adopted by the concurrence of a majority of the entire board. Municipal Home Rule Law §20(1). Thus, under *Tall Trees*, the inability to obtain such majority concurrence would constitute a defeat or denial of the proposed action. However, the Village Law provisions governing the powers and procedures of a village board do not contain a similar requirement. Under these circumstances, absent the village board's adoption of procedural rules filling this void, following *Tall Trees*, a tie vote would also constitute a denial or defeat of a motion, act or resolution before the board. Conversely,

(Continued on page 3)

Electronic Bulletin Boards on Municipal Websites: An Emerging Liability

by William E. Curtin

The Supreme Court recently noted that, "the Internet is an international network of interconnected computers, providing a unique and wholly new medium of world-wide human communication." *Reno v. American Civil Liberties Union*, 521 U.S. 844, 849-50 (1997). The benefits a municipality can derive from hosting an Internet website are virtually limitless. On a basic level, information regarding municipal services, meeting agendas and government accomplishments can be made far more accessible to the municipality's citizenry. If the website includes an electronic bulletin board, citizens can make their concerns and reactions to government policies instantly available to elected officials and municipal employees.

Due to the fact that local governments have just recently begun to utilize Internet websites, the applicable legal framework is in its early stages. While websites may subject their owners to liability the extent of that liability and its applicability to local government websites, in particular, are far from settled.

Major areas where a local government could forseeably be subject to liability based upon the content of its website are, 1) defamation claims based upon the content of postings on an electronic bulletin board and 2) constitutional violations in connection with regulating who can post and what can be posted on an electronic bulletin board on the website. Indeed, municipalities may be confronted with the dilemma that certain measures designed to protect the municipality from defamation claims may expose the municipality to claims of infringement of First Amendment rights.

When a municipality provides its citizens with an electronic bulletin board on the municipality's Internet website, it must consider that the bulletin board will not always be used for its intended purposes. While the intention of the bulletin board may have been for citizens to have open discussions and express viewpoints regarding current issues in local government, often the boards may be used to insult or belittle local officials, organizations, corporations and other citizens. When this occurs, the question becomes whether the municipality can be held liable in a defamation suit for the postings made on its Internet website bulletin board.

Recently, in New Jersey, two Emerson Borough Council members brought a defamation suit against the operator of a private website, "Eye on Emerson" (www.geocities.com/emersoneye). In addition to information regarding meetings, officials and special events, the Emerson website contains an electronic bulletin board that allows users to post messages. The original intent behind the bulletin board was to allow for free discussion of issues affecting the borough. The lawsuit alleges, however, that the bulletin board has become more of a "bathroom wall," containing false allegations about borough officials. *See* New York Times, August 7, 2001, Section B, Page 5, Col. 1.

The defendant website operator, who is a private resident of the borough, claims that he is protected by the 1996 Communications Decency Act, which some courts have said gives website operators immunity from responsibility for the statements of others. The Act prohibits, in relevant part, "utilizing a telecommunications device, whether or not conversation or communication ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person...who receives the communication." 47 U.S.C.A. § 223(a)(1)(C).

Although it seems as though the communication here fits within this definition, the Act goes on to state that, "No person shall be held to have violated subsection (a) or (d) of this section solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that does not include the creation of the content of the communication." *Id.* at § 223(e)(1). The scope of this safe harbor has not yet been judicially developed. However, in any event, the plaintiffs allege that the defendant, by editing some of the comments and instructing authors on how to write them without obscenities, was not a "passive observer in the free exchange of ideas," and therefore could not take advantage of this defense. *See Reno*, 521 U.S. at 844.

A recent posting on the municipal bulletin board reports that in the initial suit, summary judgment has been granted to the defendant and that the judge is currently hearing a request by the plaintiffs to amend their complaint.

This issue of defamation liability based on electronic bulletin boards has surfaced in the private sector as well. In 1999, the Supreme Court of New Jersey heard *Blakey v. Continental Airlines Inc.*, 322 N.J.Super. 187, 730 A.2d 854 (1999), where a Continental Airlines pilot attempted to hold the company liable for allegedly defamatory postings made about her on the Continental crew management system, a type of electronic bulletin board.

After discussing at some length the issues of personal jurisdiction involved in this case, the Court went on to hold that in this case, Continental Airlines could not be held vicariously liable for the bulletin board postings of its employees, even where the bulletin board was owned and operated by the company. *Id.* at 215. The court found that, "the [electronic bulletin board] is not a workplace for the purposes of a hostile work environment... Further, this Court finds that Continental cannot be held negligently liable for the [messages] that appeared on this [electronic bulletin board] as Continental had no duty to police the Internet to control its employees' activity in a non-workplace." *Id.* at 214.

A small number of other cases involving defamation claims based upon Internet websites have arisen, but have been decided on procedural grounds. *See Firth v. State*, 287 A.D.2d 244 771, 731 N.Y.S.2d 244 (3rd Dept. 2001)(Court granted summary judgment based upon statute of limitations); *Karl Storz Endoscopy-America Inc. v. Integrated Medical Systems, Inc.*, 2001 WL 755661 (Ala.) (Court enforced arbitration clause in settlement agreement).

Another issue in the area of defamation liability is the legal effect of a disclaimer on the website. Such a disclaimer would indicate, at a minimum, that the views and opinions expressed on the electronic bulletin board are those of the individual contributors and not the website owner or operator, that the user is responsible for checking the accuracy and reliability of the information on the website and that the website operator does not exert editorial control

(Continued on page 4)

Tall Trees

(Continued from page 2)

on a five member board, would a 2-1 vote in favor of adoption, except in the case of local laws, be sufficient to take action, effectively empowering a minority of the board to set policy for the village?

Certainly, these issues and others will sort themselves out over time, most likely through future litigation. In the meantime, an attorney advising an administrative board would be wise to avoid the tie vote scenario that existed in *Tall Trees*. Upon ascertaining the possibility of a split vote due to the absence of one or more board members, the attorney should request the board to advise the applicant that it might wish to defer its request for a formal vote on the application until the full complement of the board is present. Of course, if the applicant persists, the board may still reserve decision, consistent with statutory time periods governing decision-making and default approvals, to prevent a stalemate. Indeed, to do otherwise and allow the board to be divested of jurisdiction to decide the application would defeat the purpose for which the board was created and delegate to the courts the initial responsibility for protecting the public health, safety and welfare of the community.

Mr. Steinman is the Director of the Edwin G. Michaelian Municipal Law Resource Center of Pace University and co-editor of this publication. He also serves as Counsel to the White Plains law firm of Wormser, Kiely, Galef & Jacobs LLP where he concentrates his practice in municipal and land use law.

Electronic Bulletin Boards

(Continued from page 3)

over the information posted on the electronic bulletin board.

Although not yet addressed in a defamation context, the issue of website disclaimers was discussed in *Bihari v. Gross*, 119 F.Supp.2d 309 (S.D.N.Y. 2000). Here the court dealt with a situation where a third party used the plaintiff's copyrighted material on the defendant's website. The court, in analyzing the defendant's defense of fair use, held that, "Although a disclaimer cannot insulate [a defendant] from liability, it indicates good faith... and weighs in [the defendant's] favor." *Id.* at 324.

When attempting to reduce the risk of a defamation claim, a municipality operating a website must be aware of potential First Amendment violations. Although municipalities have long since been named as defendants in lawsuits claiming violations of free speech, the case law on First Amendment violations in the context of Internet websites is just developing.

The only appellate decision dealing with First Amendment violations in the context of local government-owned websites is *Putnam Pit, Inc. v. City of Cookeville, Tennessee*, 221 F.3d 834 (6th Cir. 2000). Here the Sixth Circuit considered whether a city's refusal to allow a publisher to establish a link from the city's website was based on impermissible viewpoint discrimination, and thus violated the publisher's First Amendment free speech rights. *Id.* at 834.

The Sixth Circuit opened the door for future litigation in this area by reversing the district court's grant of summary judgement to the city. The court held that, "the city's actions, some of which appear to be tied to the city's interests, and others which appear less clearly relevant to the purpose of the city's website, lead us to reverse the district court's grant of summary judgement because [plaintiff] has raised a material issue of fact regarding whether the city discriminated against him and his website based upon viewpoint." *Id. at 846.*

In its analysis of this issue, the court held that the crucial factor in its decision was whether the city website would be considered a traditional public forum, a designated public forum, or a nonpublic forum. *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983); *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 350 (6th Cir. 1998).

In traditional public fora, such as streets, sidewalks and parks, governmental restrictions of speech must withstand strict scrutiny, i.e., show that a content based prohibition serves a compelling state interest and is narrowly tailored. *Perry*, 460 U.S. at 45. Although the appeals court remanded the case to the district court for a determination of whether the website was a designated public forum or a nonpublic forum, the court does hold that this website was not a traditional public forum because it did "not allow for open communication or the free exchange of ideas between members of the public." *Putam Pit Inc.,* 221 F.3d at 843.

Based upon the rationale in *Putnam Pit, Inc.*, which involved only links to and from a municipal website, it would seem that a website with an electronic bulletin board would be a traditional public forum since it certainly allows for open communication and the free exchange of ideas between members of the public. If this were the case, any restrictions on the content of the bulletin board, including attempts to reduce the risk of defamation liability, would be subject to strict constitutional scrutiny.

As more municipalities embrace the Internet to provide services and information to their citizens, the electronic bulletin board may replace the town square as the preferred site for public debate and local protest. Given their potential exposure, governments should move cautiously until their rights and liabilities in this technology are more fully developed by the courts.

Mr. Curtin is a third-year student at Pace Law School and works as an intern at the Edwin G. Michaelian Municipal Law Resource Center of Pace University.

Edwin G. Michaelian
Municipal Law Resource Center
Pace University
One Martine Avenue
White Plains, N.Y. 10606