

1988-1991 Ky. Op. Atty. Gen. 2-49, Ky. OAG 88-35, 1988 WL 409903 (Ky.A.G.)

*1 Office of the Attorney General

Commonwealth of Kentucky

OAG

88

-

35

May 23, 1988

Mr. J. Stephen Kirby
Kentucky School Boards Association
Englewood Office Park
Route 3, Box 96A
Frankfort, KY 40601

Dear Mr. Kirby:

As staff attorney for the Kentucky School Boards Association, you have requested that the Attorney General reconsider OAG 82-374. Particularly, you have asked a review of this opinion in light of the decision of the Kentucky Court of Appeals in [Pierce v. Board of Adjustments, Ky.App., 616 S.W.2d 800 \(1981\)](#). As reasons for your request you have cited various attorneys have differed with the opinion, resulting in confusion among boards as to how to treat abstentions.

Assistant Deputy Attorney General Robert Chenoweth in OAG 82-374 opined that an abstaining vote by a member of a local school board is a vote concurring with the majority of those voting and may be used to establish the majority required under [KRS 160.270\(1\)](#). That section reads:

A majority of the board shall constitute a quorum for the transaction of business, but a concurring vote by a majority of the board, the number of board members in the quorum notwithstanding, shall be necessary to take any particular action unless otherwise specified by statute.

This office determined in OAG 82-374 that the general rule espoused in [Pierson-Trapp Co. v. Knippenberg, Ky., 387 S.W.2d 587 \(1965\)](#) is controlling in the school board setting. The rule is that whenever a quorum of a governing body is present and those members who are present do not vote, those members' votes are considered as acquiescing with the majority.

Similar to the issue in Pierson-Trapp was the question before the Court of Appeals in Pierce. Basically, the case involved the statutory interpretation of the requirement of five "affirmative" votes from the County Board of Zoning Adjustment to permit a special exception. In discussing whether an abstention would transform into the fifth statutorily required affirmative vote for a zoning variance, the court in Pierce, distinguishing the rule of Pierson-Trapp Co., said:

It has long been the law of this Commonwealth that when a quorum of a governing body is present those

members who are present and do not vote will be considered as acquiescing with the majority. [Pierson-Trapp Company v. Knippenberg, Ky., 387 S.W.2d 587 \(1965\)](#); [Payne v. Petrie, Ky., 419 S.W.2d 761 \(1967\)](#) and [Board of Education of McCreary County v. Nevels, Ky.App., 551 S.W.2d 15 \(1977\)](#).

The above cited cases dealt with the majority of those present and the constitution of a quorum and the application of a 'pass' or 'not voting' vote. The ordinance before us does not deal with majorities or quorum but states very clearly that 'the concurring vote of five (5) members shall be necessary to grant a Special Exception.' ... (U)nder the local ordinance an absolute requirement of five (5) affirmative votes is mandated. At 800-801, emphasis added.

*2 [KRS 160.270\(1\)](#) is distinguishable from the ordinance in Pierce, because the statute deals with majorities and quorum. The zoning statute which required five affirmative votes to grant a special exception to a zoning ordinance did not deal with either of these or with the application of an abstention from voting.

Although [KRS 160.270\(1\)](#) requires a concurring vote and the court in Pierce stated, "the concurring vote of five (5) members shall be necessary to grant a Special Exception," that statement cannot be considered an interpretation of [KRS 160.270\(1\)](#). The intention of the Pierce court as to the limitation of the scope of the court's interpretation of the particular terms contained in the zoning statute is evidenced by its conclusion that, "... under the local ordinance an absolute requirement of five (5) votes is mandated," at 801.

In conclusion, it is the continued opinion of the Attorney General that the rule of [Pierson-Trapp Co. v. Knippenberg, Ky., 387 S.W.2d 587, \(1965\)](#), and its progeny, still governs the effect of a board member's abstention from voting. However, as distinguished in Pierce, the Pierson-Trapp rule applies in instances where a required affirmative number of votes is not mandated by the controlling statute or ordinance.

Your second question regarded the impact of a board member abstaining from voting for a board action in which he or she has a conflict of interest. As is evident from Pierce, the rule is that a member who passes, or does not vote, acquiesces with the majority. Thus, the possibility exists when the member with the conflict abstains or refuses to vote, that abstention results in the third vote required for board action. [KRS 160.270\(1\)](#). In that instance, the effect of the abstention is no different than an affirmative vote. Therefore, in order to prevent the problematic circumstance, the member with the conflict should be absent either from the entire meeting or from the discussion and the vote on the issue in which he or she has the conflict.

Sincerely yours,
Frederic J. Cowan
Attorney General

By: Patricia Todd Thomas
Assistant Attorney General

1988-1991 Ky. Op. Atty. Gen. 2-49, Ky. OAG 88-35, 1988 WL 409903 (Ky.A.G.)
END OF DOCUMENT