



MEMORANDUM

To: Virginia Conflict of Interest and Ethics Advisory Council

From: G. Stewart Petoe, Executive Director

Date: April 24, 2017

Re: Formal Advisory Opinion 2017-F-001 Savings clause for quorums § 2.2-3112

ISSUE PRESENTED

You ask about the quorum requirements of a public body under subsection C of § 2.2-3112 of the *Code of Virginia*, where five members of a seven-member public body are in attendance at the outset of a meeting, and a legal quorum is present. Two members of the public body are then disqualified. Your question is whether the three remaining members of the public body who are in attendance at the meeting would then constitute a quorum under all circumstances or only if the disqualifications were the sole cause of the quorum loss. As an example, you suggest a hypothetical where the two absent members of the public body would not have been disqualified if they had been present at the meeting, but were voluntarily absent.

DISCUSSION

Subsection C of § 2.2-3112 of the *Code of Virginia*, sometimes referred to as the “safe harbor” provision or the “savings clause,” provides a means by which an agency may carry out its official business, even in the absence of a quorum, if disqualifications of officers or employees under the State and Local Government Conflict of Interests Act (the “Act”) are the reason for the absence of the quorum.¹

Notwithstanding any other provision of law, if disqualifications of officers or employees in accordance with this section leave less than the number required by law to act, the remaining member or members shall constitute a quorum for the conduct of business and have authority to act for the agency by majority vote, unless a unanimous vote of all members is required by law, in which case authority to act shall require a unanimous vote of remaining members.²

¹ *Jakabcin v. Town of Front Royal*, 271 Va. 660, 665 (2006) (“safe harbor” provisions”); 2015 Op. Va. Att’y Gen. 76, 78 (“savings clause”).

² VA. CODE ANN. § 2.2-3112(C) (2016).

The Supreme Court of Virginia analyzed this statute in the case of *Jakabcin v. Town of Front Royal*, stating, “When a quorum is present, however, and members are disqualified from acting on a particular matter pursuant to the provisions of COIA [the State and Local Government Conflict of Interests Act], the remaining member or members may validly act on the matter by majority vote.”³ Since that decision, there have been no other cases in which the savings clause has been analyzed as it now exists.

No reading or interpretation of the savings clause, in any of its versions, has ever held that the savings clause is inoperative, even if a quorum is present, merely because other members are absent who could have participated in the vote if they had been present.⁴ If a quorum is present, and some of the members who are present are disqualified from voting due to a conflict under the Act, the remaining members shall constitute a quorum and may conduct business.⁵

CONCLUSION

Accordingly, if five members of a seven-member public body are in attendance at a meeting and constitute a quorum, and then two of those members are disqualified due to a conflict under the Act, the remaining three members constitute a quorum, pursuant to subsection C of § 2.2-3112. It is immaterial whether or not the absent members could have participated, or for what reasons they are absent.

³ 271 Va. 660, 668 (2006).

⁴ The savings clause was amended in 2007, by adding the introductory phrase “Notwithstanding any other provision of law.” 2007 Va. Acts ch. 613.

⁵ See Va. Op. Att’y Gen. 14-076, 2015 Va. AG LEXIS 6 (Feb. 6, 2015), 1988 Op. Va. Att’y Gen. 223 (analyzing previous version of the savings clause).