

## COA Opinion: The concurring vote of a majority of the total members of the zoning board of appeals is necessary to reverse a city manager's decision, rather than the majority of those members present to vote.

20. July 2011 By Kristina Araya

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In *EDW C Levy Co v Marine City Board of Zoning Appeals*, No. 296023, the Court of Appeals affirmed the order of the circuit court, upholding a zoning board of appeals decision. The zoning board of appeals had upheld a city manager's certification that a proposed use for property was allowed permissible under zoning laws. This claim arose out of the proposed lease of a parcel owned by the St. Clair County Road Commission, which had used the parcel for storage. In 1999 the property was rezoned, but the parcel retained its industrial classification as a prior nonconforming use. In 2007, the Road Commission solicited proposals from several commercial operators that desired to lease the property. The Road Commission rejected plaintiffs' proposal, but accepted a proposal by Detroit Bulk Storage. Under the lease, Detroit Bulk Storage was required to obtain certification from the city manager that the proposed use of the property was permitted under the zoning laws. The city manager certified that the proposed use was allowed as a prior nonconforming use.

SCA appealed the city manager's decision to the zoning board of appeals. By a vote of 3-2, the five member panel approved the manager's decision. SCA appealed this decision to the circuit court, which vacated the decision and remanded the matter for a new vote because one of the members should have recused himself from voting. On remand, of the four members eligible to vote, only three members of the zoning board were present to vote on the matter. By a vote of 2-1, the present members voted to reverse the city manager's decision. SCA then amended its appeal in the circuit court in order to incorporate the new ruling of the zoning board of appeals. The circuit court ruled that the city manager's decision approving the proposed use of the parcel was still effective, because SCA was required to obtain a majority vote of the zoning board of appeals in order to reverse the city manager decision, and SCA only obtained 2 votes in favor of reversal. The circuit court also ruled that the zoning board of appeals' decision was supported by competent evidence.

SCA appealed this decision on two grounds. First it argues that MCL 125.3603(2) required only a concurring vote of the majority of the zoning board of appeals members present at a vote, rather than a majority of the total members, in order to reverse a decision by a city manager. The Court of Appeals rejected this argument, and held that MCL 125.3603(2) requires a concurring vote of the majority of the total board. MCL 125/3603(2) states that the "concurring vote of a majority of the members of the zoning board of appeals is necessary . . . ." The Court of Appeals found the statute was unambiguous, and if the legislature desired to allow for a majority vote of those present, it would have done so by adding such language to the statute.

Second, SCA appealed the circuit court's finding that the zoning board of appeals' decision to was supported by "substantial evidence." Under MCL 125.3606(1), the circuit court reviews whether a decision of the zoning board of appeals was supported by "substantial

evidence on the record.” The court of appeals affirmed the circuit court’s finding of substantial evidence to supporting the affirmation of the city manager’s decision. The Court of Appeals noted there was no competent evidence in the record that the proposed use would expand the use of the property outside of the prior nonconforming use.