Effect of Abstentions

Introduction

The complicated current law on the effect of an abstention by a member of a public body is found in case law. The basic common law rule is that if a member abstains from voting he is counted as voting "yes" unless he has expressed opposition, in which case he is counted as voting "no." *Aurentz v. Planning Board of Tp. of Little Egg Harbor*, 171 N.J.Super. 135,139 (L. Div. 1986); *Garner v. Mountainside Adj. Bd.*, 212 N.J. Super. 417, 426 (L. Div. 1986). We have found no case describing what kind of expression of opposition would suffice to make the abstention a "no" vote. These Law Division Cases have not been questioned directly. However, earlier Appellate Division cases suggested that the issue was undecided: *Sliwka v. Franklin Tp. Council*, 95 N.J. Super. 249, 250 (App. Div. 1967) and *Tp. Comm. of Freehold Tp. v. Gelber*, 26 N.J. Super. 388, 393 (App. Div. 1953) (Schettino, J). No Appellate Division has dealt with the issue since *Aurentz* and *Garner* were decided. See also, *Committee for a Rickel Alternative v. City of Linden*, 214 N.J. Super. 631 (App. Div. 1987) which treated an abstention as not a vote and failed to discuss the rule in a case where it might have been decisive.

Assuming, however, that an abstention should be treated as an affirmative vote, there are a number of important exceptions to this rule. Most important, if the member of the body is not entitled to vote, his vote is not counted and he is not counted as present to constitute a quorum. See, e.g. *Garner v. Mountainside Adj. Bd.*, *supra*, where two members had not attended prior hearings of the matter. In addition, if a member recuses himself and takes no part in the proceedings even if he is physically present and would not necessarily be barred from voting, his presence does not count toward a quorum, and logically his abstention can not be counted as an affirmative vote, see, *King v. New Jersey Racing Comm.*, 103 N.J. 412 (1986).

In addition, if a statute requires a particular number of affirmative votes for passage of a matter, abstentions do not count as affirmative votes. *Patterson v. Cooper*, 294 N.J. Super. 6, 18 (L. Div. 1994). *Garner v. Mountainside Adj. Bd.*, *supra*. The rule applies both where the statute specifies a particular number and where it requires a particular percentage of the membership of the public body. *Mann v. Housing Authority, Paterson*, 20 N.J. Super. 276, 279 (L. Div., 1952). It is often stated that in such circumstances, an abstention is a negative vote. Since a particular number of affirmative votes is required, there is no difference between no vote and a "no" vote.

As a result of these exceptions, the basic rule that an abstention is counted as an affirmative vote applies in a minority of cases: only where a member is entitled to vote, does not recuse himself and the statute does not provide that a particular number or percentage is necessary for approval of the matter. In addition, it may be particularly hard to determine whether a member fully recused himself or whether he merely abstained. In the first case, his vote would not count; in the second, he would be counted as affirmative.

While the complication of the rule is a serious defect, the greater problem is that the rule probably does not reflect the expectations of a person who chooses to abstain. A person who abstains does not intend to cast any vote, affirmative or negative. As a result, the Commission proposes a statute that would clarify the effect of abstentions and establish that an abstention is neither an affirmative nor negative vote.

Effect of Abstentions from Voting in Governmental Bodies

If a member of a governmental body is present but fails to vote on a matter before the body, the following provisions shall apply:

a. If the member is legally entitled to vote and has not recused himself from consideration of the matter, the member shall be present for the purpose of determining whether there is a quorum of the body;

b. If the member is not legally entitled to vote because of conflict of interest or otherwise or has recused himself from consideration of the matter, the member shall not be counted as present for the purpose of determining whether there is a quorum of the body.

c. The member shall not be counted as voting either yes or no on the matter;

d. If the approval of the matter voted on requires a majority of votes cast, it shall be approved if more members have voted yes than no.

e. If the approval of the matter voted on requires the affirmative vote of a percentage or a certain number of members of the body, it shall be approved if the required number of members have voted yes.

COMMENT

This section establishes the rule that when a member of a governmental body abstains from voting he neither votes, “yes” or “no.”