

Appellate Division Rules on Voting Procedures

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The Appellate Division has decided two companion cases on the subject of abstentions which are of interest to governing bodies, authorities, boards and commissions. Although a rather arcane parliamentary topic, the interpretation of the effect of an abstention from voting recently became front page news in connection with the filling of vacancies on the Governing Bodies of Newark and Hoboken. In both cities, the proponents of the election of an individual to fill a vacancy on the Governing Body claimed that abstentions counted as no votes and thus, created a tie to be resolved in both instances by a mayoral vote breaking the tie.

How to deal with abstentions and whether they should be counted as being in favor, against or as no vote at all, arise more frequently than one would expect. What has been troubling is that there has been considerable confusion on the topic. Cases going back to 1867 have produced obscure interpretations that in some circumstances, an abstention should be counted as assenting to the prevailing votes but that an abstainer expressing a desire not to be counted in the affirmative should be recorded in the negative. In other cases it was held that if an abstention arose due to a conflict of interest, it should not be counted as an affirmative vote.

In both the Newark and Hoboken cases, the argument that a tie had been created by means of abstentions failed. In the Hoboken case, and relying on Robert's Rules of Order, in the absence of an explanation as to how an abstention was to be treated in the Hoboken Rules of Procedure, the Court ruled that "to abstain means not to vote at all" Robert's Rules Ch. III, Sec. 44. In the Newark case, the Court found that use of Newark's Rules of Procedure, which provided that an abstention should not be counted as a yes or a no vote, was dispositive of the issue. It was also consistent with a 2011 Report of the New Jersey Law Revision Commission that "a person who abstains does not intend to cast any vote, affirmative or negative".

In our experience, many local government entities have not developed rules of procedure. Many adopt Robert's Rules of Order, but this lengthy compendium of complex and sometimes obscure rules are really meant to govern the affairs of large parliamentary bodies which sit in permanent session and act through standing committees to process various measures.

As the Court observed with respect to abstentions, there is a need for legislative action on that topic to avoid the sort of litigation which these cases represent. In the meantime however, it would be well for local government entities to put into effect at least rudimentary rules which can guide their proceedings and produce certainty for the actions taken by them.