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**BOARD MEMBER
DELIBERATIONS**

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Introduction and the Issue

It was with interest that I read the article in the December 2011 issue of New Jersey Planner (Volume 72, No. 6) titled “Due Deliberation – What it is and when it is done?” The article was a bit too theoretical for my tastes but it convinced me to convert a memo I had done for one of the boards I represent into a short article on the legal and practical requirements relating to deliberations and resolutions.

Discussion

Our courts have held that it is not necessary that Board members deliberate on an application at all before voting on a motion to grant or deny relief. Scully-Bozarth Post v. Planning Board, 362 N.J. Super. 296, 312 (App. Div. 2003), certif. denied, 178 N.J. 34 (2003). It is legally sufficient that the application be approved or denied by voice vote with no statement of reasons being placed on the record so long as a resolution is thereafter adopted setting forth a clear statement of reasons for the action taken. Id. Citing Scully-Bozarth, the Appellate Division recently explained, “where . . . board members voted on an application for development without a verbal discussion, we held that a verbal discussion in that circumstance is not mandatory, as long as the ultimate resolution, which will serve as the official statement of the . . . board’s findings and conclusions, is furnished to the board members in advance of the time they will vote, to provide them ample time to study it and, if they deem it appropriate, request clarification

or modification.” Jennings v. Borough of Highlands, 418 N.J. Super. 405, 424 (App. Div. 2011).¹

While there is no legal requirement for the Board to deliberate prior to entertaining a motion to grant or deny an application, it is my opinion that it is a better practice to deliberate prior to voting on a motion as the deliberative process gives the applicant and members of the public the sense that the Board acted for a reason and was not simply being arbitrary. Further, in the event the decision of the application is appealed to the courts, the absence of a deliberation will generally increase the chances that the Board’s decision will be reversed (although a detailed resolution containing findings and conclusions that fully explain the basis on which the board has acted, with ample reference to the record and the pertinent statutory standards, may serve to sustain the Board’s action even in the face of no deliberation).

I have heard arguments over the years that a deliberation can actually be used against the Board by the courts. I respectfully disagree. As to Board member statements made during deliberations, our courts have held that such statements, even if made in connection with directions to its attorney to prepare a draft resolution, do not constitute a vote on the application and merely indicate an “intention” to either grant or deny relief and that Board members are “not bound by preliminary deliberations.” Sansone Olds. – Cad., Inc. v. Shrewsbury Borough, 211 N.J. Super. 304, 309 (Law Div. 1986). Our courts have also held that it is immaterial that, prior to voting, Board members may have given reasons different from how they voted or discussed matters not brought forth or included in the resolution that is ultimately adopted. Hawrylo v. Board of Adjustment, 249 N.J.

Super. 568, 575 (App. Div. 1991). As explained in Cox and Koenig, New Jersey Zoning and Land Use Administration (Gann 2011), section 28-2.5, Board members may change their minds prior to an actual vote, which can result in the Board as a whole taking the opposite action from that initially contemplated or indicated in deliberations. See also, section 28-5.1.

Finally, our courts have held that the comments made by Board members in deliberations cannot be equated with Board findings supporting the grant of an application. As observed in New York SMSA v. Board of Adjustment, 370 N.J. Super. 319, 334 (App. Div. 2004), remarks of Board members “represent informal verbalization of the speakers transitory thoughts; they cannot be equated to deliberative findings of fact.” See also, Hawrylo v. Board of Adjustment, 249 N.J. Super. 568, 575 (App. Div. 1991), where the court rejected plaintiff’s contention that comments made by Board members revealed consideration of inappropriate criteria and vitiated the resolution adopted by the Board. As the New York SMSA court held, 370 N.J. Super. at 334: “It is the resolution, and not Board members deliberations, that provides the statutorily required findings of facts and conclusions.”² As such, “the memorializing

² In upholding a resolution against the claim that it failed to include the specific findings and conclusions as to the positive and negative criteria required by N.J.S.A. 40:55D-70, our Supreme Court commented that it had “no doubt that a resolution fully reflective of the statutory standards could have been adopted based on the record before the Board” and instructed that “local boards and their counsel should take pains to memorialize their decisions in resolutions that fully explain the basis on which the board has acted, with ample reference to the record and the pertinent statutory standards.” Commercial Realty v. First Atlantic, 122 N.J. 546, 566-567 (1991). As explained by Cox and Koenig, supra., section 28-5.1, whether a variance is granted or denied, the factual findings contained in the memorializing resolution must not merely recite “but instead must demonstrate with reference to facts and testimony” that the statutory requisites for the grant of a variance are either present or absent. See also, Randolph Town Ctr. v. Randolph Tp., 324 N.J. Super. 412, 417 (App. Div. 1999), holding that all administrative agencies “must articulate the standards and principles that govern their discretionary decisions in as much detail as possible,” approving of the board’s “detailed factual findings” in the resolution adopted in that case, and noting that the statutory requirement (N.J.S.A. 40:55D-10g) calling for

¹ The same applies to the adoption of the memorializing resolution. Rejecting plaintiff’s argument that a supplemental resolution was adopted without much debate, the court in Schmidhausler v. Borough of Lake Como Planning Board, 408 N.J. Super. 1, 15 (App. Div. 2009) held that “[t]here is no obligation for dialogue amount the members on voting for or against the resolution. The text of the supplemental resolution adequately speaks for itself.” Id.

resolution of the Board is the wellhead for the judiciary's consideration of the validity of municipal action." CBS Outdoor, Inc. v. Lebanon Plan. Board, 414 N.J. Super. 563, 580 (App. Div. 2010).

Conclusion

While there is no legal requirement for the Board to deliberate prior to entertaining a motion to grant or deny an application, it is a better practice to deliberate prior to voting on a motion as the deliberative process gives the applicant and members of the public the sense that the Board acted for a reason and was not simply being arbitrary. Further, in the event the decision of the application is appealed to the courts, the absence of a deliberation will generally increase the chances that the Board's decision will be reversed (although a detailed resolution containing findings and conclusions that fully explain the basis on which the board has acted, with ample reference to the record and the pertinent statutory standards, may serve to sustain the Board's action even in the face of no deliberation). 3

"specific findings was designed to insure that the exercise of discretion by boards of adjustment faithfully reflects the statutory standards ordained by the legislature." As explained by Cox and Koenig: "It is, of course, the attorney who prepares the resolution and he does so in such a way as to give the greatest possible support to the decision which has been made by the board. A copy of the proposed resolution should be circulated to all members of the board prior to the meeting at which the resolution is proposed to be adopted. Sometimes several drafts are required in order to give complete and accurate expression of the intent of the board. It may be that the factual findings and legal conclusions may differ from statements made by individual board members at the time of casting their deciding vote, nevertheless, once the resolution has been prepared and has been reviewed by each board member and voted on favorably by the members of the board, it becomes as much the board's resolution as if the board itself had prepared it." Id. at section 28-5.1. The importance of a well crafted resolution cannot be emphasized enough. "The board's decision in every case should be set forth in a carefully prepared resolution making appropriate findings of fact and conclusions of law, not only because the board may desire to refer back to the facts in that case, but also, in the event of an appeal, a well drawn resolution is of great aid to the reviewing body, and can also even be considered as a 'first brief' filed by the board of adjustment in any potential lawsuit." Id.

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in connection with the
NJ Association of County & City Health Officials,
NJ Department of Health & Senior Services,
and 12 other organizations presents :

Designing Healthy Communities: Your Role in Local Government.

April 21st at the Middlesex County Fire Academy
in Sayreville

April 28th at the Morris County Fire Academy in
Morris Plains

And

May 19th at the Cape May Technical High School
in Cape May.

Details can be found on www.NJPO.org

Did you know?

Union, New Jersey has the tallest water sphere in the world. The main tower is 212 feet tall and holds 250,000 gallons of water. In 2008, a red stroboscopic beacon was constructed atop the tower adding at least 6 feet to the tower making the overall structure 218 feet in height. The tower was built by Chicago Bridge and Iron Company in 1964.