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Second Bite at the Approvals Apple; New Jersey Appellate Court Rules Joint Land Use Board May Reconsider a Decision Before It Is Memorialized

The New Jersey Appellate Division has decided that the Joint Land Use Board of the Borough of Beach Haven is permitted to reconsider a decision to deny a site plan application within 45 days of the original vote and before a resolution has been adopted. However, the court found that in reconsidering the board's prior decision, the board was required to take a fresh vote of all voting members, rather than apply some members' original votes to the reconsidered decision.

The Borough of Beach Haven Council adopted a resolution in March 2018 designating a property as an area in need of rehabilitation, and it subsequently adopted an ordinance implementing a redevelopment plan for the property. Victoria Rose Condominium, LLC, was designated as the conditional redeveloper for the property, and it submitted a site plan application to the board. The site plan application fully conformed to the borough's zoning standards as modified by the redevelopment plan.

In August 2018, the board held two public hearings on Victoria's site plan application. The hearings resulted in a vote of four in favor of the application, four against and one abstention, constituting a denial of the application. Two board members who voted against the application acknowledged that the application fully conformed to the applicable zoning requirements. The board member who abstained, the mayor of the borough, commented that she was in favor of the project but abstained due to the animosity the project created in the community. Approximately three weeks after the vote, Victoria submitted a letter to the board requesting that the board reconsider its decision because the board's purview is constrained to determining whether the plan conformed to the borough's zoning ordinance as modified by the redevelopment plan, and Victoria's application was fully conforming.

A board member who had originally voted in favor of the application subsequently introduced a motion to reconsider Victoria's application. One member of the board who had originally voted in favor of the application was not in attendance to hear the request for reconsideration, and an alternate board member who was not in attendance for the original hearings was in attendance at the reconsideration hearing. Upon the board voting in favor of reconsidering the application (which vote included that of the alternate board member), the board attorney advised that the substantive vote on whether to grant Victoria's application should be limited to only the five board members who spoke against or declined to vote on the application, including the mayor.

The four members who had voted to deny the application did not change their votes. The mayor changed her abstention vote to grant the application. The other board members present for both the original hearing and the reconsideration hearing did not vote; rather, their original three affirmative votes, and the original affirmative vote of the board member not in attendance at the reconsideration hearing, were simply applied to the reconsideration vote, such that the application was approved by the board by a 5-to-4 vote. The board memorialized the approval in a November 5, 2018 resolution.

On November 28, 2019, 20 individuals (plaintiffs), members of the community, brought action in the Law Division against Victoria, the board and the borough (collectively, defendants) to compel the board to memorialize the original vote denying the application and to overturn the subsequent approval. Plaintiffs claimed, among other things, that the procedural reconsideration vote was the result of arbitrary and capricious ad hoc procedural rules; they further claimed that the substantive reconsideration vote was improper since only eight of the board members present were eligible to vote, because the alternate board member had not attended the original hearing on the application, and four of those eight board members

present and eligible for the reconsideration vote cast votes denying the application. The trial court entered judgment in favor of defendants and dismissed plaintiffs' complaint, noting that it was within the discretion of the board to reconsider its vote.

In *Lambert v. Borough of Beach Haven*, N.J. Super. Ct. (App. Div. 2020), the appellate division agreed with the trial court's rejection of plaintiffs' assertion that the board members who originally voted in favor of the application manipulated the procedural rules to reverse the outcome of the initial vote. The appellate court explained that the board had good reason to reconsider the vote to determine the reasoning of the board members who voted against the application, given that the application was consistent with the zoning ordinance and redevelopment plan. However, the appellate division agreed with the plaintiffs that it was improper for the board to approve the application without having all board members explicitly vote at the reconsideration hearing, citing N.J.S.A. 40:55D-9(a), which requires that all actions of a board must be taken by "*a majority of the members of the municipal agency present at the meeting.*" Further, the board erred by assuming that the board members who had previously voted in favor of the application would vote in favor of the application again, including the one board member who was not present for the reconsideration hearing.

The appellate court concluded that the board's actions did not warrant compelling the board to memorialize its original vote denying Victoria's application. However, the court remanded the matter to the board for further proceedings to deliberate and revote on the application. The appellate division further noted that it is good practice for land use boards to adopt formal rules of procedure for applications for reconsideration, which the board had not done.

This case has not been approved for publication; thus, its use in other suits is limited. This appellate decision demonstrates that a land use board has discretion to reconsider its decisions if there is good reason to do so. The reconsideration hearing should be held promptly to minimize prejudice to interested parties and must be publicly noticed. This decision also instructs that each board member must cast a fresh vote in order for that board member's vote to be counted on any reconsideration question.

Should you have any questions concerning this decision or land use issues in general, please contact any of the authors of this alert.

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