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How to Run An Effective Meeting (and Comply with the Right-to-Know Law)

Jonathan Cowal, NHMA
Will Phillips, NHSBA

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The Right-to-Know Law: Public Meetings & Nonpublic Sessions

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Overview of How RTK Governs Meetings Content

I. What is a "meeting"?
II. What is not a meeting, i.e., a "nonmeeting"?
III. Nonmeeting v. Non-Public Session
IV. What are the requirements for holding a proper "meeting"?
V. How to hold meetings virtually.

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What is a Public Meeting? RSA 91-A:2

- Quorum
- Public body
- Convenes so that they can communicate contemporaneously
- To discuss or act upon a something over which the public body has supervision, control, jurisdiction, or advisory power

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Quorum

- Majority of membership
- Can't define as more than majority to circumvent law
- Another statute may apply

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Meeting v. Hearing



Meeting

To conduct body's business

RSA 91-A

Open to public

No right to speak



Hearing

To hear public/certain people on issue

91-A "plus"

Open to public

Right to speak

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Public Body

RSA 91-A:1-a, VI:

- Any legislative body, governing body, board, commission, committee of any county, town, municipal corporation, school district, SAU or other political subdivision
- Any committee, subcommittee, advisory committee thereto
- New Case: But a committee created by and serving at the pleasure of the City Manager of city employees providing advice to planning board applicants and the planning board is not a public body Martin v. Rochester

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When Public Meetings – Purpose of Public Meetings



Convenes such that all participating members are able to communicate with each other contemporaneously

In-person
Email?
Phone?



To discuss or act upon matters which the Public Body has Supervision, Control, Jurisdiction, or Advisory Power

Any "business" the body deals with
Construe broadly

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Meetings Among Public Body Members Outside of Public Meetings

Meetings of public body members that are less than a quorum to discuss public business should not be undertaken – all public business should only be discussed at properly convened public meetings

91-A:2-a Communications Outside Meetings. –

I. Unless exempted from the definition of "meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III

II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1

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What is Not a "Meeting"? (i.e., "Non-meeting")

- Social or other encounter, no decisions
- Collective bargaining
- Consultation with legal counsel
- Circulation of draft documents
- *Different than nonpublic session!*

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What are the Requirements of a Public Meeting?

- Public notice
- Open to the public
- Meeting minutes

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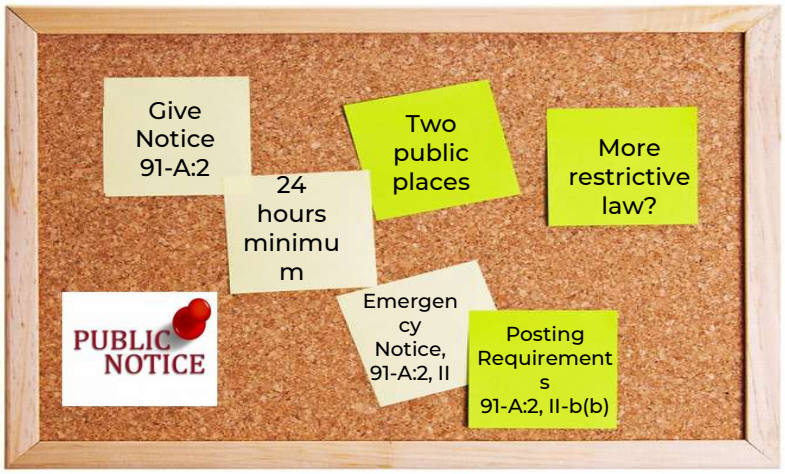
Posting Requirements



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Switching Back to In-Person Meetings

- Emergency Order #12, allowed virtual meetings during the State of Emergency
- Since State of Emergency expired on June 11, 2021, boards can still have partially remote meetings
  - There must be a physical location for the public to attend, and, in most cases,
  - A quorum of the board must be present at that location.
- Nothing prohibits boards from continuing to offer electronic access (telephonic, Zoom, etc.) to the public.

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Option 1: Remote Board Member Participation RSA 91-A:2, III(a)



- Public body may allow
- Personal attendance "not practical" (in minutes)
- Quorum present at physical location
- All board members can hear and be heard
- Identify board members in remote location
- All votes by roll call

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Option 2: "Emergency" RSA 91-A:2, III(b)

- Chair must declare that "emergency" exists sufficient to satisfy requirements of RSA 91-A:2, III.
- Still requires physical location.
- However, a quorum of the board need not be present at the physical location.
- Everyone can hear and be heard.
- Identify persons in remote location.
- All votes by roll call.



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Tips for Electronic Communications that Comply with 91-A

- ✓Use an administrative person to send an email.
- ✓Put the recipients' email addresses in the BCC line of the email to prevent the possibility of "Reply All."
- ✓Sending an email to a quorum of a public body could be deemed a violation of RSA 91-A where a recipient public body member could hit reply all and create an improper electronic conversation
- ✓Use official city/town email addresses.
- ✓Leave discussion and deliberation of official matters for a public meeting, a properly-held nonpublic session, or proper "non-meeting."

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Meetings "Open to the Public"

- "All meetings . . . shall be open to the public." RSA 91-A:2, II.
- "Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting."
- Public has right to record, etc.
- No secret ballot voting.
- Public Comment?

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Public Meeting Minutes RSA 91-A:2

- Minimum required contents:
  - (1) the names of members, (2) persons appearing before the public bodies, (3) a brief description of the subject matter discussed, (4) state final decisions made, and, (5) state the names of the members who made or seconded each motion shall be recorded in the minutes.
- Made available within 5 business days.
- Posting requirements–
  - RSA 91-A:2, II-b(a)
- If the software used to conduct a remote meeting allows for recording, use it to aid the minute taker, but remember that recordings <u>are not</u> a substitute for written minutes.

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Nonpublic Sessions - RSA 91-A:3

It's a nonpublic session, not a nonpublic meeting

A nonpublic session is different from a "non-meeting"

Nonpublic session is the exception, not the rule

Nonpublic sessions are permitted, not required – **except when the meeting is a "hearing" and a person has right to NP**

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When May a Public Body Enter Nonpublic Session?* RSA 91-A:3, II

- Public employee (specific employee)
- Hiring (specific employee)
- Reputation
- Real or personal property
- Lawsuits
- Emergency preparation
- Discuss legal advice
- Discuss student tuition contract

*Most common, but not complete list

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How To Enter Nonpublic Session RSA 91-A:3, I

Motion to enter nonpublic session must be made and seconded.

Motion must state on its face the specific exemption relied upon.

Vote must be by roll call; simple majority is sufficient. RSA 91-A:3, I(b).

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RSA 91-A:3, II (a) Dismissal, Promotion, Compensation, Discipline, Investigation of Charges Concerning a Public Employee

- Must concern a particular municipal employee – not a grouping of employees or a department
- This provision states that the meeting must be held in public if the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.
  - Thus, the "right to a meeting" refers to some written rule entitling the employee to a public airing of the matter under investigation.
  - By way of example, under RSA 41:48, an appointed police officer cannot be removed from office unless she is provided notice and a public hearing before the governing body.
  - Similarly, under RSA 202-A:17, no public employee of a public library can be removed from employment unless they are provided written notice and a public hearing on their removal if requested.

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RSA 91-A:3, II (c) Matters Which, if Discussed in Public, Would Likely Affect Adversely the Reputation of Any Person, Other than a Member of the Public Body Itself

- The harm to reputation must be severe and not trivial
- The claim of reputational harm cannot be asserted by a member of the public body that is convening the nonpublic session
- Person who might suffer the reputational harm can nevertheless request an open meeting
- This exemption extends to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant
- Notice of a nonpublic session based on harm to reputation need not be provided to the person whose reputation could be adversely affected. Sivalingam v. Newton, 174 N.H. 489 (2021)

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Minutes of Nonpublic Sessions

Minutes must be kept—same as for public session.

Must "record all actions in such a manner that the vote of each member is ascertained and recorded."

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Conducting the Nonpublic Session

May make decisions in nonpublic session

Member objecting to violations—note objection. If board persists, objecting member may continue to participate without being subject to penalties

RSA 91-A:2, II-a

Returning to public session

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Other Considerations

Include nonpublic session on posted agenda

Timing—beginning or end of meeting?

Attendance by non-members

- Legally, there is no limit on who may be permitted to attend a nonpublic session. However, it is best to exclude anyone whose presence is not essential. This may mean excusing the administrator and/or the recording secretary and instead having one of the board members take minutes. Whether to do this is a judgment call to be made by the board.

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Disclose or Seal?

Minutes must be publicly disclosed within 72 hours unless board determines, by 2/3 vote taken in public session, that:

- Disclosure would have adverse effect on reputation;
- Disclosure would "render the proposed action ineffective"; or
- Discussion in nonpublic session pertained to terrorism.

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New Law: HB 108
Maintain List of Nonpublic Meeting Minutes

Effective January 1, 2022

List of sealed nonpublic meeting minutes must:

- Identify the public body
- State the date & time of the nonpublic session
- State the exemption for the nonpublic session
- State the date of the decision to seal the minutes
- State the date of any subsequent decision to unseal minutes

➢ Minutes sealed under RSA 91-A:3, II (d) (sale or acquisition of real or personal property) "shall be made available to the public as soon as practicable after the transaction has closed or the public body has decided not to proceed with the transaction."

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Review of Previously Sealed Minutes

- RSA 91-A:3, IV - Effective October 3, 2023 (HB321)
  - New section imposes a statutory obligation to review all previously sealed nonpublic session minutes every 10 years to determine whether basis for sealing still present (i.e., divulgence would still cause hann to reputation, or render the proposed action discussed ineffective, or pertain to thwarting a terrorist attack).
  - For "archived" or minutes sealed prior to 10/3/23, statutory obligation to review the previously sealed nonpublic meeting minutes or unseal.
  - Failure to review "archived" minutes by October 3, 2033, or all minutes every 10 years, requires automatic disclosure regardless of reason of original sealing

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Meeting Goals, Meeting Planning, and Agenda Setting

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Meeting Goals

- Effective and productive meetings require forethought about:
  - Desired objectives and required actions – agenda items
    - "Agenda" = a list of matters which are to come before the meeting for consideration and/or decision
    - Distinct from "notice" as used in RSA 91-A:2, which only requires date, time and place of meeting
    - But published draft agenda is important to inform the public what the body "is up to"

      "Stay at home principle"

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Meeting Goals

- Meeting goals and agenda items should relate to the primary functions of the body
  - Adopt a policy?
  - Discuss the budget?
  - Have a hearing/make a finding & decision?
  - Ratify a CBA?
  - Vote on a committee's recommendation?
  - Review strategic plan or other long/short term goals?

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Agenda Setting & Policy

- Refer to the board's rules/policies relative to agenda setting process
- Common provisions in board agenda policies:
  - Superintendent/Town Manager – responsible for setting first draft of agenda
  - Chair as board's designee helps refine agenda
  - Individual board members might have "right" to have items placed on the agenda –
    - Doesn't mean the rest of the board needs to spend time on the item
    - Move to table indefinitely
  - Deadlines and method of requests

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Agenda Setting & Policy

Agenda policies continued...

- Information re where and when agendas will be available/posted
- Members of the public may request agenda items:
  - Through
    - communications to superintendent, chair, or members, or
    - through public comment
  - Distinct from public comment in that it is the board's item, not merely receiving input from member of public
  - Screening of such requests occurs as part of the ordinary agenda setting process (e.g., superintendent and chair)
    - From public comment, board could have set agenda item "board discussion of public input"

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Meeting Planning – Agenda Setting

- Planning a meeting agenda should involve consideration of:
  - reduction of transitional disruptions;
  - the audience and necessary or invited participants pertinent to specific items;
  - required space and technology;
  - anticipated non-public sessions;
  - issues warranting extra time or special placement;
  - appropriate amount of time for each item;
  - information board members need prior to the meeting; and
  - wording of anticipated motions or resolutions
- Some agenda policies have a standard order of business for regular meeting agendas – allow for flexibility by agenda setting personnel

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Agenda Setting – Individual Items

- Ask: What is the desired outcome for the agenda item?
  - Consent items addressing the routine matters, such as minutes and monthly expenses, which can be approved together in one motion without discussion
  - Action items on which the board is expected to reach a decision during the meeting
  - Discussion or presentation items that require comment but do not require action at that meeting; and
  - Information items that require no specific action or discussion, e.g.
    - Presentations from student/community groups
    - Presentations from potential vendors

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Agenda Setting – Individual Items

- When setting the agenda, identify agenda category
- Consider whether to include notations for each item – e.g.,
  - Finance Committee report. Discussion item. No action needed
  - Volunteer recruitment and philosophy: Anticipated Action: form committee of 3-4 board members
  - Policy Committee: Second reading of policies ABC & XYZ. Anticipated action: Review and adopt
  - Presentation by 5th grade social studies class. Information item. No action required
- Sketching out the anticipated time for items can be helpful planning tool
  - use only as guides or benchmarks

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Agenda Setting – Individual Items

- Items not included on the agenda -
  - Agendas are not "final" until the close of a meeting
  - Some items are identified between the original posting/"draft" agenda and meeting
  - Some items might be identified at the meeting from
    - reports
    - public comment
    - board discussion
  - Unless wholly inconsequential or there is a compelling reason for immediate action, items not on the agenda should not be acted upon, but merely discussed and framed for/as future meeting ("stay at home" principle)

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Sticking to the Agenda - Practice Tips

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Sticking to the Agenda Practice Tips

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- Start on time
- Stay organized and stay on task
  - Parliamentary procedure/rules of order can help as board members move through the agenda (rules of order discussed later)
  - But procedure should not be the focus
  - Points of order can be used to call attention to “issue creep”
- Stay focused on the desired outcomes
- If using a timed agenda, be mindful of how/when to stray

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Sticking to the Agenda - Practice Tips

- Have an endpoint
  - Establish an end time in advance - and
    - adjourn the meeting when you reach it, or
    - move to extend by increments (e.g., 20 min, etc.)
  - Not hard and fast, but a helpful goal to keep folks on task
- Don't ambush – no surprises
  - Effective meetings and good decision making depend on good information
  - Unplanned items - Recipe for contentious, unproductive meetings, ill informed, emotion driven actions

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Sticking to the Agenda Practice Tips

- Resolve unnecessary debate
  - Make a motion – "call the question"
  - "General consent" - The board chair asks if there is any objection to closing discussion on a particular topic. If no one objects, debate is closed, and action is final
  - "Consent agendas" - limit to non-controversial items
    - Items can be removed from consent agenda if one or more member requests (no second or vote required)

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Public Comment at Meetings of Public Bodies

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BOARD MEETINGS, PUBLIC COMMENT & THE 1ST AMENDMENT

- A board meeting is one that the public has a right to attend, rather than a meeting of the public
- Purpose of meetings of select and oool boards, or other public bodies, is to conduct the business of the body
- Supreme Court has recognized that nothing in the U.S. Constitution requires public bodies to allow public comment
- Neither the N.H. Constitution, nor RSA 91-A, create a public right to speak during or at board meetings
- **Historically**, "power" to create the opportunity for public comment is reserved to the board – **but RSA 189:74....**

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BOARD MEETINGS, PUBLIC COMMENT & THE 1ST AMENDMENT

- HIGHLY ENCOURAGED – Helps boards with the fundamental responsibility to make informed decisions and provide an avenue for constitutional (state) right to seek redress from government
- Whether legal mandate or board choice, opportunity for public comment creates a "forum" for speech, which in turn implicates First Amendment principles
- Improperly limiting speech constitutes a civil rights violation
- Public comment period is distinct from Annual or statutory "public hearings", e.g.,
  - Budget
  - Unanticipated revenue
  - Capital or Expendable Trust Funds

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First Amendment Principles

- 1st Amendment STRONGLY disfavors "prior restraint" and prohibits viewpoint bias or discrimination
- Time, place and manner restrictions are permitted provided (a) they are viewpoint neutral, and (b) applied fairly
  - Time: e.g.,
    - particular point(s) on the agenda
    - aggregate time limit
    - individual time limit
  - Place: e.g., stand at certain place or in line.
  - Manner: e.g.,
    - the mode of communication (spoken, distributing pamphlets, etc).
    - Viewpoint neutral method of selecting speakers
- **RSA 189:74** bends or sets parameters for some of these for **school boards**

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First Amendment Principles

- Some traditional meeting "norms" rejected by some lower courts and upheld by others
  - Vulgar language
  - As disruption
  - One person's vulgarity is another's idiolect
  - As political speech
  - Who is the "public" – residents, employees, parents, citizens
- HOWEVER, complaints &. accolades re individuals, MUST BE TREATED EQUALLY either allow or prohibit both categories
- May limit subject areas (e.g., agenda items only, action items only): **but RSA 189:74...**

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First Amendment – Unprotected Speech

Limited classes of unprotected speech – but ruling incorrectly can = $$$$

Don't allow

- speech threatening bodily harm or other "true" threats
- fighting words (very narrow)
- child pornography

Be careful

- speech intended and likely to incite imminent unlawful conduct
- obscenity - NOT MERE VULGARITY

Allow and rely on the clock

- defamatory speech (objectively false and harmful)
- speech that violates intellectual property
- false advertising or fraud (fire in the theater)

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RSA 189:74 – PUBLIC COMMENT AT SCHOOL BOARD MEETINGS

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RSA 189:74 – Public Comment at School Board Meetings

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- RSA 189:74 requires opportunity for **minimum of 30** minutes for **public** to comment on **school district matters** at every school board meeting – except
  - emergency meetings under RSA 91-A:2, II, or a
  - meetings called solely for addressing non-public issue (91-A:3)
- Under 189:74 a school board may adopt "**reasonable standards** for the public comment period, provided such standards are imposed equally for all speakers"
- **"Reasonable standards"** undefined, generally use rules permitted by 1st Amendment except where 189:74 provides greater right to the public

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Ambiguities Under RSA 189:74

- How is 30 minutes calculated?
- What happens if public does not exhaust the time?
- Who is the public?
- Can board define scope of "school district matters"?
- Apply to committees?
- Allow remote comment?
- Written comment vs. correspondence to board?
- What is personally-identifiable information?

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Public Comment: Policy and Practice Considerations

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Public Comment – Policy & Practice: General Considerations

- **Don't wait until you have a local controversy to create a policy**
- Implementation of policy/rules should be consistent, and must be equitable
- **Desired** standards of discourse - E.g., "All speakers are to conduct themselves in a civil manner" NOT ENFORCEABLE
- Time limits are the best cure for "undesirable" but protected speech
- Respectful reminders are the first response to both prohibited and undesirable speech
- Disruptive speech can be regulated as violative of TPM restrictions
- Extreme repetition can be deemed "disruptive";
  - ask to simply indicate support of prior speaker, or
  - state support or opposition of matter under consideration

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Public Comment – Policy/Practice Considerations

- Provide copies of public comment rules/policy at every meeting and/or with every agenda packet
- Other than school boards (and possibly land use), board can suspend or modify
- Provide opportunity for public to request agenda
  - Persons wishing to present longer than X minutes, should contact Superintendent to request agenda time
- Establish a NEUTRAL – method for speakers to participate (sign-up, first come first serve, line at mic, etc.)
  - School boards can't require sign-up under 189:74, but can use pre-registration to prioritize speakers who have done so

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Public Comment – Policy/Practice Considerations

- Need to determine how the board will calculate/run the aggregate clock
  - 189:74 - can be flexible so long as opportunity for 30 minutes is clearly provided in the agenda/notice, and reflected in the minutes
- Include language restricting comments with "personally identifiable information" ("PII") of students and staff. (See RSA 189:65, VII & VII-a, for possible definition.)
  - Include language indicating the channels for complaints about individuals
  - The chair should be prepared to try to deflect such complaints
  - Board is not violating privacy if public discloses, but continuation reduces the shield and may impact due process or reputation of individuals

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Public Forums – The Other Kind

- For important or emotional topics – where you are likely to draw many speakers - consider a separate or special "public forum"
  - Essentially a board meeting comprised solely of an extended public comment period
  - Can use the same basic rules as for your typical public comment period, with modifications to fit the purpose
    - Establish an agenda topic (e.g., a forum on a transgender policy, is not an opportunity to talk about the benefits of an artificial turf for the football field)
    - Expand the individual time limits
    - Set a total time for the forum
    - Determine how it will be moderated/facilitated

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Conflicts of Interest, Abstentions & Recusals

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Conflicts of Interest & Recusal vs. Abstention

It Begins with Ethics

- Disclose financial interests
- Respect confidentiality
- Do not abusing authority
- Treat people fairly and equally
- Practice honesty, integrity, and trustworthiness
- Avoid the appearance of impropriety
- Avoid conflicts of interest and the appearance of such conflicts

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Conflicts of Interest – "COI"

- An impermissible COI exists when a member has a "***direct personal or pecuniary interest***"
- A "**direct interest**" is one that is **"different from the interest held by the public generally"**
  - All board members have a financial (property tax) interest
  - Virtually all board members have a personal interest in their community
  - Conflicts are based upon facts and circumstances
- More tenuous or general the issue = less likely a COI, e.g. -
- **A perceived conflict widely held can have the same impact as a real one**
- **The more you think about whether you have a COI the more likely you do**

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Difference Between Legislative vs. Quasi-Judicial Functions

Legislative

- Establish local policies/ordinances
- Decisions apply generally
- Free from conflict of interests
- No need to be indifferent/impartial
- Can have pre-judged the issue and even campaigned on it

Quasi-Judicial

- Procedural due process required
- Affect rights of specific party(ies)
- Notify & hear parties
- Weigh evidence & decide facts
- Apply existing laws, ordinances and policies to those facts
- Free from conflicts of interest
- Must be indifferent (impartial)

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Recusal vs. Abstention

Recusal

- **REQUIRED** if member has an impermissible COI or, if quasi judicial, is not impartial
- Must withdraw entirely (discussion & voting)
- Personal decision, board can take a non-binding vote
- Disclose – (if no objection, the objection is waived)
- Court may vacate decision for failure to recuse
  - **Quasi judicial – automatic even if vote unanimous**
  - **Legislative** – only if deciding vote

Abstention

- Member participates in discussion, but not vote
- Counts toward quorum, and registers as null vote
- Appropriate when -
  - Not prepared to vote (e.g., missed meeting or not enough information) –
    - Vote no
    - Request delay
    - Abstain
  - Member does not have an actual conflict, but wishes to minimize perception of one

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Special Land Use Conflicts & Recusals Provisions

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Avoiding Conflicts

- Advisory Vote – RSA 673:14, II.
- Recuse (yes) vs. Abstain (no)
- Avoid Social Media Opinions on Pending Matters
- Disclose and Remove Yourself
- Err on the Side of Caution!

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Land Use Specific Statute

RSA 673:14, I Disqualification of Member.

No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, historic district commission, agricultural commission, or housing commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

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Modified Recusal Statute for ZBA and Planning Board Members

Amendments to the statutes now mandate that a zoning board of adjustment (ZBA) member or planning board member shall recuse himself or herself from voting on matters previously voted upon or that will be voted upon by the same member. Statute: RSA 673:3, V

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Juror Disqualification Standard: RSA 500-A:12

A juror is disqualified if the juror is "not indifferent" because he or she:

- Expects to gain or lose upon the disposition of the case;
- Is related to either party;
- Has advised or assisted either party;
- Has directly or indirectly given his opinion or has formed an opinion;
- Is employed by or employs any party in the case;
- Is prejudiced to any degree regarding the case; or
- Employs any of the counsel appearing in the case in any action then pending in the court.

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