

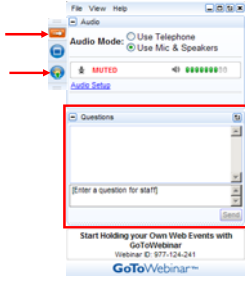
NHMA
NEW HAMPSHIRE MUNICIPAL ASSOCIATION

Conflicts of Interest

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March 18, 2014

How to Participate Today

- Open and close your Panel
- Submit text questions
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Focusing on Conflicts

- Often considered as part of a larger issue of "ethics"
- Today, just conflicts of interest
 - What they are
 - The effects that may be felt
 - Statutes and ordinances regulating it
 - What to do about them
- Incompatible Offices

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Focusing on Conflicts



- In any situation involving a conflict of interest (or a perceived conflict), consider:
 1. Whether there is a conflict or not, &
 2. How it looks. Appearances count!
- Municipal officers and employees are there to serve the **public interest**, not their own interests.



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Poll


Who decides when a board member has a conflict and must recuse himself or herself?



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Focusing on Conflicts

- Existence of a true conflict depends on the specific facts involved.
- Initial determination is up to the individual – but a court may disagree.



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Conflict of Interest Defined

- A conflict of interest arises when a local official has a direct personal or pecuniary (financial) interest in the outcome. The interest must be ‘immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.’

Atherton v. Concord, 109 N.H. 164 (1968)



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Court Review of Conflicts

- Courts judge conflicts differently depending upon the type of action taken:
 - Legislative Capacity – court will only invalidate the action if the person with the conflict cast the deciding vote.
 - Judicial Capacity – court may invalidate the action when a person with a conflict participated, whether or not there is proof that the conflicted person influenced the outcome.

Michael v. Rochester, 119 N.H. 734 (1979).



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The Practical Things


- Assume there is a conflict of interest, and the person is disqualified from participating. What to do next?
- Person “recuses” himself or herself
- Step away from the table
- Either sit with public or leave the room
- Don’t participate in either discussion or voting



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Court Review of Conflicts

- Legislative acts - setting policy, voting on procedural rules, other actions that do not directly affect the rights of a specific person.
- Examples:
 - Ordinances, Budget
 - Parking and traffic rules
 - Procedural Rules
 - Master Plan, CIP, subdivision regulations

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Court Review of Conflicts

- An act is judicial in nature if officials are required to:
 - Notify and hear the parties; and
 - Make a decision only after weighing and considering the evidence and arguments put forth by the parties.
 - A municipal body acts in a judicial capacity when it decides matters that affect the rights of a specific petitioner with respect to a specific parcel of land.
 - *Ehrenberg v. City of Concord*, 120 N.H. 656 (1980).

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Judicial Decisions

- Typically, potential conflicts arise in six situations:
 - Prejudgment
 - Abutters
 - Financial interest in the outcome
 - Employment
 - Family relations
 - Other relations

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Prejudgment

- *Atherton v. Concord*, 109 N.H. 164 (1968). The mere fact that the planning board member voted in favor of the project, did not disqualify him from voting on the same project as a member of the city council.
- *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984). A member was disqualified where, prior to his position on the planning board, he had spoken in favor of a project at a public hearing on a subdivision application in his private capacity.



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Abutters

- The owner of land abutting property that is the subject of an application before a municipal board is disqualified from acting on that application due to the unavoidable personal and pecuniary interest in the outcome.
– *Totty v. Grantham Planning Board*, 120 N.H. 390 (1980)



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Financial Interest in the Outcome


- A public officer is disqualified if he or she has 'a direct personal and pecuniary interest' in the decision. *Preston v. Gillam*, 104 N.H. 279 (1962).
- The interest must be 'immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such that men of ordinary capacity and intelligence would not be influenced by it'



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Employment

- *Atherton v. Concord*, 109 N.H. 264 (1968). Former employee of Concord Housing Authority not disqualified from voting on Authority's application where the person stated he had no bias
- *Sherman v. Brentwood*, 112 N.H. 122 (1972). A ZBA member/Rockingham Cty employee was not disqualified in case where the county was an applicant for a nursing home expansion
- *Taylor, Trustee v. Wakefield*, 158N.H. 35 (2008). Former employees only disqualified if they do not "appear indifferent"





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Poll

Which of the following people have a conflict of interest and should recuse themselves from the matter? (Check all that apply)


- A. Selectman is married to the appointed road agent and the board is discussing dismissing the road agent
- B. Budget committee member's son is a police officer and the committee is voting on the police budget
- C. Planning board member's brother is an applicant for site plan review

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Family Relations


- *Webster v. Candia*, 146 N.H. 430 (2001).
- Regarding an application before the planning board, there was no bias on the part of a board member when:
 - His spouse was leading opponent of project.
 - The member came to the board with a memorandum detailing the reasons to deny the application.



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Statutes Governing Conflicts


- Local conflicts of interest ordinances under RSA 31:39-a may:
 - Apply to elected and appointed officials as well as employees;
 - Require financial disclosures;
 - Establish incompatibility of offices stricter than state law; and
 - Require removal from office for certain violations through petition to the superior court.



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Statutes Governing Conflicts


- Local conflicts of interest ordinances under RSA 31:39-a may not:
 - Be adopted by the governing body – it requires a vote of the legislative body (town meeting in most towns).
 - Authorize a local ethics committee to remove elected officials for violations
 - Declare that the operations of a local ethics committee are exempt from RSA Chapter 91-A
- A more useful role may be education of officials, employees and public about conflicts of interest.



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Statutes Governing Conflicts


- Land Use Boards: under RSA 673:14, a member is prohibited from sitting on a case:
 - If that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law.
- Any board member can ask for a non-binding vote on whether he or she, or any other member, is disqualified in a case.



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Statutes Governing Conflicts


- ‘No Selectman or other officer shall act, in the decision of any such case . . . who would be disqualified to sit as a juror . . . in the trial . . . in which any of the parties . . . was a party.’ RSA 43:6.
- Does the official have:
 - Independent knowledge of the facts;
 - Dealings with an interested party as part of its ordinary business; or
 - Prior opinion regarding the facts of the case?
- Can he/she be impartial anyway? If not, disqualified.



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Statutes Governing Conflicts


- Independent Knowledge: A land use board member independently learned facts about an application. Did this knowledge disqualify him? *Dover v. Kimball*, 136 N.H. 441 (1992).
- Ordinary Business Relationships: A person regularly ran an ad in the Union-Leader. Could he sit as a juror on a case in which the newspaper was a party? *McLaughlin v. Union-Leader Corp.*, 99 N.H. 492 (1955).
- Prior Opinion: Judge formed an opinion prior to trial but said he could ‘set aside’ the opinion and ‘decide the case on the evidence.’ Was he disqualified? *State v. Aubert*, 118 N.H. 739 (1978).



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What to Do about Conflicts?


- Reveal any potential conflict to the parties:
 - Reveal at the first possible point. If nobody objects at that time, they have waived their right to object later.
- When in doubt, consider stepping down.
 - Is it worth going to court?
 - Alternatively, is a claim of conflict being used to “bully” someone off a board? Use common sense.



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Alternate Members

- Land Use Boards:
 - Alternate members may fill in for a disqualified member.
 - So long as a quorum present, planning board does not lose jurisdiction.
 - ZBA requires a vote of at least three members to decide in favor of an application.
- Library trustees, conservation commissions
- Other boards – No alternates.


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Removal of Members

- Land Use Board:
 - RSA 673:13 states that land use board members can be removed by selectmen for “inefficiency, neglect of duty, or malfeasance in office.”
 - The conduct must be related to member’s position on the board.
- Board of Selectmen and other elected officials
 - Generally, removal only for violation of oath of office under RSA 42:1.
 - By petition to the superior court.
 - Specific statutes provide for removal of a few other officials by Selectmen, but need statutory authority.


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Statutory Incompatibility

- Under RSA 669:7, I, no person shall concurrently hold any of the two following offices:
 - Selectman, treasurer, moderator, trustee of trust funds, tax collector, auditor and highway agent.
 - Town treasurer, moderator, trustee of trust funds, selectman and head of any police department on full-time duty.
 - Town treasurer and town clerk.
 - Full-time employee and selectman.
 - No official handling funds of a town shall at the same time hold the office of auditor.


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Common Law Incompatibility


- When two positions bear a “special relationship to each other”
 - One subordinate to and interfering with the other,
 - Inconsistent loyalties or responsibilities
 - Incompatibility would cause a loss of adequate internal financial controls or increase the chance of fraud



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Questions?

- Thank you for your time!
- New Hampshire Municipal Association
 - 603-224-7447 x3408
 - 1-800-852-3358 x3408
 - legalinquiries@nhmunicipal.org



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