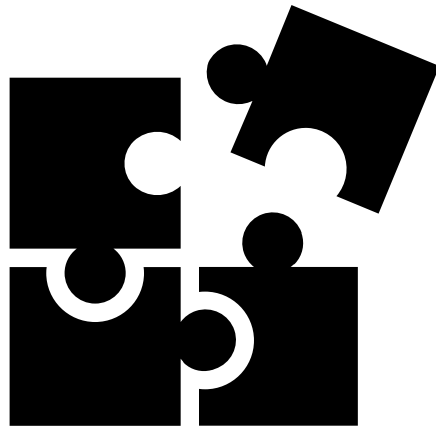


# Do I need to recuse myself?



## Answering Allegations of Conflicts of Interest for Land Use Board Members

Presented by:

Margaret Byrnes, NHMA  
Executive Director

Glenn Coppelman,  
Kingston Planning Board  
Chair, NHARPC Immediate  
Past Chair

October 31, 2020

# Attendee Participation



**Session Q&A:**  
Questions for  
presenters



**Chat:** General  
conversation and  
technical questions

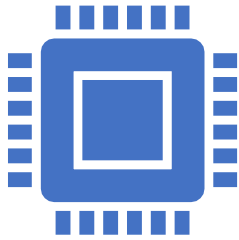


**Chat:** Hypothetical  
scenarios



# The Law

# Incompatibility of Offices



**RSA 669:7, I**

**RSA 673:7, I**

# Conflicts of Interest



RSA 673:14, I



RSA 500-A:12



Case Law

# What is a “conflict of interest”?



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Direct personal or financial interest in the outcome

---

Immediate, definite, and capable of demonstration; not remote, uncertain, contingent, or speculative

---

Personal/Financial interest conflicts with public's interest

---

“A man cannot serve two masters at the same time.”

---

Law presumes ethical conduct

# RSA 673:14, I



I. 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.

# The juror standard

## 500-A:12 Examination. -

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

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

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.



# What “type” of decision is it?



- ▶ Legislative/Administrative Decision-making
  - ▶ Policy decisions
  - ▶ Must be free from conflict
  - ▶ Don't need to be “indifferent”
  - ▶ Decision invalidated if conflict affects vote
  
- ▶ Quasi-Judicial Decision-making
  - ▶ Affect rights of petitioner/parties
  - ▶ Notify & hear parties
  - ▶ Weigh evidence
  - ▶ Must be free from conflict and be indifferent
  - ▶ Decision invalidated if person with conflict participates

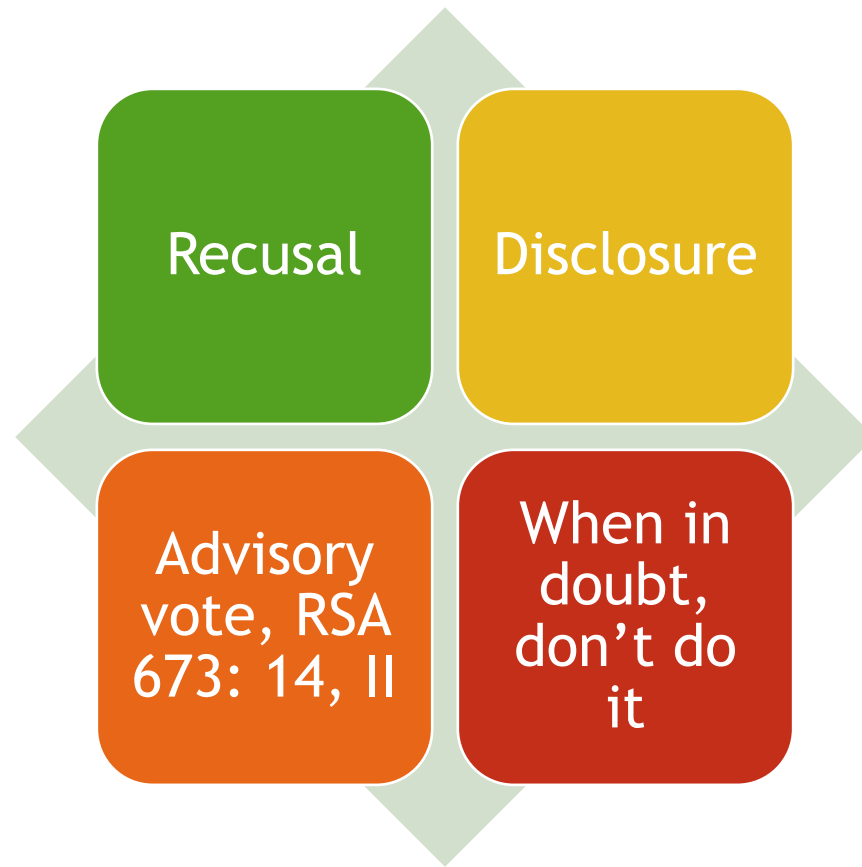


# Real Case Law Examples



- ▶ Michael v. Rochester, 119 N.H. 734 (1979): Financial interest in outcome, but decision not invalidated
- ▶ Merrimack v. McCray, 150 N.H. 811 (2004): Personal/financial interest in outcome, but decision not invalidated
- ▶ Quinlan v. Dover, 136 N.H. 226 (1992): Prejudgment, but decision not invalidated
- ▶ Atherton v. Concord, 109 N.H. 164 (1968): Prior participation “does not prove that he had an interest in the project other than that of any other citizen”; decision not invalidated
- ▶ Totty v. Grantham: Abutter is always disqualified

# How do you “cure” a conflict?





# The Appearance of Impropriety

# Transparency



Legal and ethical  
issue



Right-to-Know Law:  
access &  
accountability



Public body acts  
through a quorum  
(Noninterference)



What do you think: Is there a conflict? How would you handle this scenario?

# Neighborhood Watch



The chair of the planning board is an abutter to the property that is the subject of an application before the board.



Now, assume the chair recuses himself. Can she speak as an abutter at the hearing?

# Ripped from the headlines



An application is submitted for a major residential subdivision containing two hundred single family homes.



Prior to the planning board hearing, a local reporter calls a planning board member to comment on the proposal. In the article, the planning board member is quoted as saying, “There is a severe housing shortage in our community and this proposal will address that need. I’ll be interested to hear from abutters, but based on the plan that’s been submitted, I am strongly in favor.”

At the hearing, there are no comments made by abutters. However, a resident who lives a mile from the subject property voices an objection to the participation of the planning board member quoted in the article.

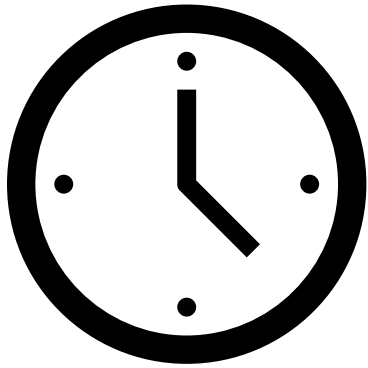


# Planning for a conflict?

In your town, a consultant planner reviews applications and holds initial meetings with the applicant in order to ensure the application is complete before forwarding it to the planning board. The new planning board chair is very enthusiastic about his new role, and requests that he be included in these initial communications between the consultant planner and applicants.

- Do you see issues with this request?
- How would you communicate with the planning board chair?

# It's all about timing



As the applicant's attorney is presenting her case, the planning board vice chair suddenly realizes why the applicant seemed familiar—the applicant is a former employee of the corner country store owned by the vice chair and his wife!

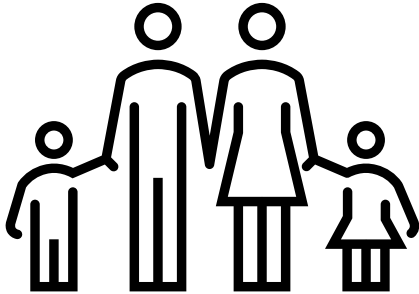
- ▶ Does the vice chair have a conflict?
- ▶ Should the vice chair say something or keep quiet?
- ▶ What can be done by the board to prevent this from happening in the future?

# Developing a Conflict?

An application for a variance is before the ZBA. One of the ZBA members is a contractor and has been hired by the developer seeking the variance many times in the past.



# Family Matters



The planning board is holding a public hearing on a proposed zoning ordinance that would rezone about 40 acres of low-density residential use to commercial use. The brother of one of the planning board members already has a business in the area to be rezoned (having obtained a variance).

# The Utility Player

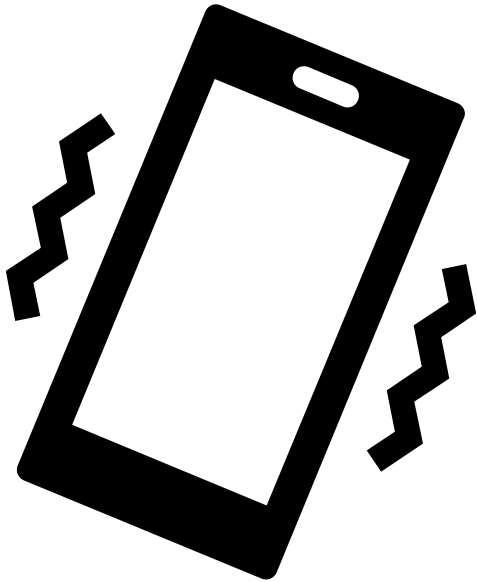
Brock Holt is the ZBA chair, code enforcement officer, and select board chair in town. The ZBA is about to hear an application for a variance. Previously, Holt met with the applicant in his capacity as code enforcement officer. He wants to know whether he must recuse himself from hearing the application.

# Duty to Serve/Assist the Public

- ▶ Dover v. Kimball, 136 N.H. 441 (1992)
- ▶ Carbonneau v. Town of Rye, 120 N.H. 96 (1980)
- ▶ Savage v. Town of Rye, 120 N.H. 409 (1980)
- ▶ Richmond v. City of Concord, 149 N.H. 312 (2003)



# Text me later!



- ▶ The planning board denies a project. After the vote to deny, and before the meeting is closed, one of the board members takes out his phone and sends a text to one of the city councilors: “*The project was denied.*” The councilor responds, “*Thank you—that’s great news!*”
- ▶ The next day, the city receives a Right-to-Know Law request for the text messages sent by the planning board member.

# Thank you for listening to our presentation!

During this time, we will provide  
written responses to outstanding  
questions in the Q&A tab!

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