





# Conflicts of Interest

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## It All Begins with “Ethics”

“Ethics” are hard to pin down and mean different things to different people, but generally:

- Avoiding conflicts of interest
- Disclosing financial interests
- Avoiding criminal behavior, following state & local law
- Respecting confidentiality
- Not abusing authority
- Treating people fairly and equally
- Honesty, integrity, and trustworthiness
- Avoiding the appearance of impropriety

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## Few Statutory Rules

- ▶ Incompatibility statutes contain clear rules, but they're not the *only* ethical rules.
- ▶ Case law does provide a number of examples not contained in statute, but even that isn't complete.
- ▶ Ethical Golden Rule:
  - ▶ If you were to read about the same scenario occurring somewhere else in a newspaper, would you feel good about everyone who participated?
  - ▶ If the answer is “no,” then take steps to correct the problem.

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## Incompatibility

Whether the person can hold a particular office in the first place:

- ▶ 669:7 (general)
- ▶ 673:7 (land use boards)
- ▶ 32:15 (budget committee members)
- ▶ Other statutes
- ▶ Local ordinances (which we will talk more about later)
- ▶ Common law: positions may be incompatible even if not stated in a statute—whenever two positions bear a special relationship to each other, one being subordinate to and interfering with the other, with inconsistent loyalties or responsibilities, then one person cannot legally hold both positions. *Cotton v. Phillips*, 56 N.H. 220 (1875).

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## RSA 673:7 Land Use Incompatibility



- ▶ Any 2 appointed or elected members of the planning board in a city or town may also serve together on any other municipal board or commission, except that no more than one appointed or elected member of the planning board shall serve on the conservation commission, the local governing body, or a local land use board as defined in RSA 672:7.
- ▶ "Local land use board" means a planning board, historic district commission, inspector of buildings, building code board of appeals, zoning board of adjustment, or other board or commission authorized under RSA 673 established by a local legislative body.
- ▶ Other considerations: Select Board member on the ZBA?

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## Local Conflicts of Interest Ordinances - RSA 31:39-a



- ▶ Adopted by legislative body (town meeting/city council).
- ▶ Regulate conflicts of interest for officers (elected or appointed) & employees.
- ▶ May require financial disclosures by officers and employees.
- ▶ May enact more stringent incompatibility standards.
- ▶ May provide for conditions that warrant removal from office with the Superior Court having sole jurisdiction over the removal process.

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## When Do Conflicts of Interest Arise?

- ▶ A conflict of interest exists if “an official has a direct interest in the outcome of a proceeding, see *State ex rel. Thomson v. State Bd. of Parole*, 115 N.H. 414, 422, 342 A.2d 634, 639 (1975), or any “conne[ct]ion with the parties in interest, as would be likely, improperly, to influence [his or her] judgment,” *New Hampshire Milk Dealers’ Ass’n v. Milk Control Board*, 107 N.H. 335, 338, 222 A.2d 194, 198 (1966) (quotation omitted). *Appeal of City of Keene*, 141 N.H. 797, 801, 693 A.2d 412, 415 (1997).
- ▶ The direct interest is:
  - personal or financial.
  - immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative.
- ▶ The idea is that one person cannot serve two masters at the same time.
- ▶ RSA 95:1- Public Officials Barred From Certain Private Dealings  
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## Areas That Tend to Present Conflicts:

- ▶ Prejudgment. An abutter to land that is the subject of an application before a land use board.
- ▶ Employment relationship, which is connected to the financial interest in the outcome. Just like the financial interest, the employment relationship must create an immediate/definite conflict. The mere existence of the employment relationship is not going to be sufficient.
- ▶ Family relationships: Not necessarily a conflict. *Webster v. Candia*, 146 N.H. 430 (2001).

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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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## 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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## Difference Between Legislative vs. Quasi-Judicial

### Legislative

- ▶ Widely felt
- ▶ Policy decisions
- ▶ Must act in public's interest, but don't need to be "indifferent"

### Quasi-Judicial

- ▶ Affect rights of specific petitioner
- ▶ Notify & hear parties
- ▶ Weigh evidence
- ▶ Must be indifferent



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## What if the Official Participates Anyway?


Whether an official is disqualified, and what the consequences of a disqualified member's participation are depends on whether the decision was legislative or quasi-judicial.

<p><b>"Legislative" decisions</b></p> <ul style="list-style-type: none"> <li>• Court will only invalidate the action if the person with the conflict cast the deciding vote.</li> </ul>	<p><b>"Quasi-Judicial" decisions</b></p> <ul style="list-style-type: none"> <li>• Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.</li> </ul>
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Courts resolve "conflict of interest" disputes by examining the type of action taken + the facts.




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## Recusal vs. Abstaining




-  Recuse: Immediately remove from discussion and voting
-  Abstain: does not vote
-  Recusing is the remedy for avoiding conflict, not abstaining

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## Avoiding Conflicts



- ▶ 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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## Advisory Vote - RSA 673:14, II.



- ▶ Land use boards have a special procedure if uncertainty arises over a potential conflict
- ▶ When uncertainty arises as to the application of paragraph I (juror standard) to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified.
- ▶ Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1
- ▶ Local ordinance or rules of procedure could allow for someone else to call for such a vote

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## Ethical Violations and Conflicts of Interest



- ▶ Could be criminal
  - ▶ RSA 640- bribery, threatening harm to influence someone's actions
  - ▶ RSA 643- official oppression, failing to carry out a duty while purporting to be acting officially with the purpose of benefitting oneself or others. Misuse of information, insider trading.
- ▶ Could result in removal from office
  - ▶ Requires judicial intervention

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### Case Study: Winslow v. Holderness Planning Board (1984)

- ▶ Abutter appeal of a PB subdivision approval (with waivers granted)
- ▶ Resident (at the time) spoke in favor of the application and subsequently became a member of the board who voted in favor of the proposal (6-1 vote)
- ▶ Superior Court reversed PB decision & applicant appealed
- ▶ Supreme Court affirmed the lower court:
  - Proper to disqualify PB member as evidence showed he was not indifferent
  - Mere participation by a single DQ'd member can invalidate a board's decision
- ▶ Quasi-judicial vs. administrative / legislative discussion

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### Case Study: W. Robert Foley, Trustee v. Enfield (2017)

- ▶ ZBA chair e-mailed a "list serve" asking, "Should the board members consider precedents when deciding their position on a case?" The chair received replies from municipal employees and zoning board members in other communities.
- ▶ The ZBA denied the rehearing request the day after the chair's e-mail on the ground that granting the requested variance would violate the spirit of the ordinance by promoting overcrowding.
- ▶ Applicant learned of email after he appealed to superior court and argued that ex parte communications violated his right to a fair hearing and he might have asked for a recusal.
- ▶ The Court noted that plaintiff failed to appropriately preserve issue for appeal and concluded that the plaintiff failed to demonstrate prejudice as a result of the communications.

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## Case Study: Z-1 Express v. Manchester (2019)

- ▶ CUP application before planning board.
- ▶ After the public hearing portion, but before deliberations, two members voiced opposition to the project on a social media site established by residents opposing the project.
- ▶ One of the members who voiced opposition on social media was asked to recuse himself, he refused and he later voted to deny the application.
- ▶ Superior Court remanded the case after finding that the member's failure to enter into and participate in deliberations with an open mind "threaten[ed] the integrity of the deliberative process" undermining public trust in the overall function of the planning board.

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# Questions?



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## Thank you for attending today!



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