

The Presenter



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ZBA Applications Part 2

Presented by:

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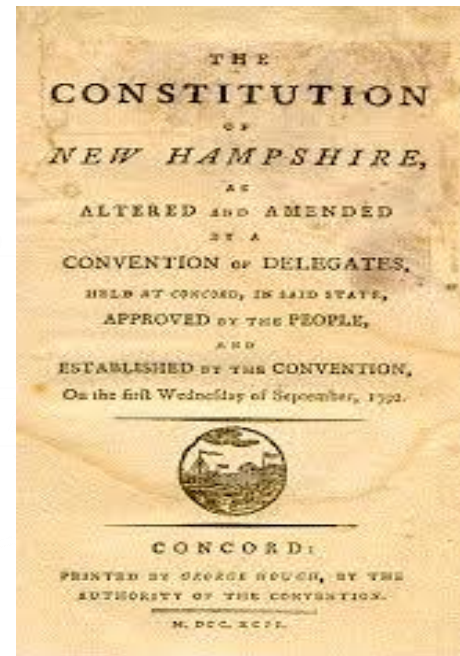
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The Right-to-Know Law RSA Chapter 91-A

PART I, ARTICLE 8 OF THE NH
Constitution: Government ...
should be open,

SECTION 1 OF RSA 91-A:

The purpose of this chapter is to ensure both the greatest possible public access to the **actions**, **discussions** and **records** of all public bodies, and their accountability to the people.



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

“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

“Convene”

- In person gathering
- Discussions via email, text chains, reply all
- Emails and text can be considered government records
- Communications outside of a meeting shall not be used to circumvent the spirit and intent of 91-A
- All discussions of a public body should take place at a public meeting



Discussing Board Business



- ▶ Chance encounters or social gatherings don't count
- ▶ Must be discussing matters the public body has some form of control over
- ▶ This can be simply advisory
- ▶ Multiple members of one public body serving on a different public body could get complicated

What are the requirements of a public meeting?



Public notice



Open to the public



Meeting minutes

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



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.

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.

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.

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

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.

“Legislative” decisions

- Court will only invalidate the action if the person with the conflict cast the deciding vote.

“Quasi-Judicial” decisions

- Court will automatically invalidate the decision and remand the decision to the board with instructions to begin again, without the disqualified person.



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

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!

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.

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

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.

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.



*For attending our
Workshop!*



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