

ORIENTATION

DOVER CITY COUNCIL & DOVER SCHOOL BOARD

Topics for Discussion:

- 1. NH Law & Local Government**
 - 2. Oath of Office**
 - 3. Ethics and Conflicts of Interest**
 - 4. Right-To-Know Law (RSA 91-A)**
 - 5. Robert's Rules of Order**
 - 6. Public Meetings and Freedom of Speech**
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1. NH Law & Local Government

Legal Hierarchy

- a. **The Legislature is granted its authority by the people through the New Hampshire Constitution.**

"All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."
(Part I, Article 8 New Hampshire Constitution)

- b. **Towns and cities receive all their authority from the State Legislature. Dover is a city with a "Council/Manager" form of government. Pursuant to an act of the New Hampshire Legislature and the Dover City Charter, Dover is a single municipal corporation – the municipal side and school district side are one entity: the City of Dover. Compare this to other cities (e.g. Concord) where the City and School District are distinct, separate legal entities. The City Charter establishes both the City Council and the School Board – each entity with certain responsibilities under the Charter and State law.**

- c. **PRACTICE POINTER: New Hampshire is not a “home rule” state.** New Hampshire has a tradition of local control. The expression, “home rule”, is sometimes used to refer to the ability of towns and cities to choose their form of government. It would be a mistake to think we have the ability to add to our authority. We can change how we do things, but we cannot change the scope of our authority. We cannot add authority—we can only use what the State provides (e.g. has the State provided authority to enact an ordinance on a certain subject?).
- d. **PRACTICE POINTER: We must seek authority in State law for what we do.** State law is referred to as the Revised Statutes Annotated or “RSA’s”.
- e. The RSA’s for towns apply to cities (RSA 47:1). The reverse is not true.
- f. Most of the activities of city councilors are authorized by one of two state statutes: Appropriations (RSA 31:4 via RSA 47:1) and prudential affairs (RSA 31:39, I (1) and RSA 47:17, XV). The authority to govern the prudential affairs dates back to 1692 in a Massachusetts Colony law. These laws are in the nature of “filling in the details” of the way authority is exercised. Our form of government and provisions regarding our City Charter are set forth in RSA 49-B and RSA 49-C. Most of the state laws implicating school board members are set forth in RSA 186 through RSA 200, as well as the applicable administrative rules (Ed. Rules) of the State Board of Education. Federal school law is also implicated.
- g. **Preemption:** A legal term describing a level of government claiming regulation of a given field as its own. Preemption raises the question of what level of government has the paramount authority. The key is whether there is a comprehensive, detailed State regulatory scheme in place.
 - 1. **Indoor Smoking.** *JTR Colebrook, Inc d/b/a The Colebrook House v. Town of Colebrook*, 149 N.N. 767 (2003)(RSA 155:64-77 preempts local ordinance)
 - 2. **Liquor licenses.** *Casico , Inc. v. City of Manchester*, 142 N.H. 312 (1997)
 - 3. **Blasting ordinance.** *Whitcomb v. Town of Carroll*, 141, N.H. 402 (1996)
 - 4. **Exceptions:** RSA 483-B (Shoreland protection) and RSA 485-A (sewer systems) are comprehensive schemes, but provide for additional local regulation allowing more stringent regulations by municipalities.
- h. **Unconstitutional State Mandates:** Part I, Article 28-a of the State Constitution prohibits state mandates on municipalities. Narrowly interpreted in the case law and only applies to post-1984 mandates.
- i. The **hierarchy of legal authority** is:
 - 1. US Constitution
 - 2. Other sources of federal law (if federal law controls an issue)
 - 3. New Hampshire Constitution
 - 4. State Laws/regulations
 - 5. City Charter
 - 6. City ordinances/regulations
 - 7. “Common law” (Court decisions)

2. Oath of Office

- a. **Part 2, Article 84 of the New Hampshire Constitution and RSA 42:1** requires you to **pledge an oath** to uphold all the constitutions and laws pertaining to your role as city councilor/school board member. An oath of office is also required by Charter section C11-1.
 - b. **Liability**: RSA 508:17 provides immunity from liability for volunteers and RSA 31:104 provides immunity for individual officials acting in their official capacity and in good faith. RSA 31:108 does not allow attachment of an official's personal assets.
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3. Ethics and Conflicts of Interest

- a. **CHARTER ARTICLE X; ORDINANCE CHAPTER 21; SCHOOL BOARD MEMBER CODE OF ETHICS (NOVEMBER 14, 2005).**
 - b. **PRACTICE POINTER #1 (Deciding about a conflict): Take the position that you MAY have a conflict, investigate, seek advice, discuss and then decide and disclose.**
 - c. **PRACTICE POINTER #2 (Abstaining due to a conflict of interest): If you want to abstain due to a conflict of interest you should do so at the earliest possible moment, prior to participation in the discussion. You should physically remove yourself from your seat.**
 - d. **PRACTICE POINTER #3: (Abstaining for reasons not related to a conflict): You should vote on a matter before the Council/Board unless excused for good reason by the Chair.**
 - e. **PRACTICE POINTER #4: Decisions about conflicts of interest are made by the councilor/board member.**
 - f. **EXAMPLES: Possible ethical violations—(partial list)**
 - 1) Charter 10-2, Conflicts of Interest; City Code 21
 - 2) Charter 10-5, Acceptance of Gifts and Gratuities; City Code 21
 - 3) City Code 21-5, Required Disclosure by Officers and Employees
 - 4) City Code 21-8, Investments in Conflict with Official Duties
 - g. Ethics Commission. The City of Dover has an Ethics Commission, established pursuant to Charter section C11-4, consisting of 5 volunteers who investigate ethics complaints against elected and appointed officials. There are procedural protocols contained in Chapter 21 of the Dover Code of Ordinances.
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EXAMPLE #1:

➤ CHARTER 10-2: (CONFLICTS OF INTEREST)

“No elective or appointive officer or employee of this city shall knowingly take part in a decision concerning the business of this city in which they or a member of their immediate family directly or indirectly has a financial interest, aside from their salary as such officer or employee, greater than any other citizen or taxpayer. Any elective or appointive officer or employee of the city who has such financial interest in any such decision shall make full, public disclosure of such interest prior to the city's deliberating on such decision.”

Classic Examples of conflicts of interest—the vendor seeking the award of a city contract is the wife of a councilor

Example of a situation where there is no conflict—voting on the annual budget because the councilor owns property and pays property taxes

Elements:

1. Elective or appointive officer or employee of this city
 2. Take part in a decision concerning the business of this city
 3. They or a member of their family directly has a financial interest greater than any other citizen or taxpayer (not salary)
 4. If all of #1, #2, and #3, full public disclosure and abstention is required
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➤ CITY CODE 21-2 (CONFLICTS OF INTEREST)

“No elected or appointive officer or employee of the City shall take part in a decision concerning the business of this City or engage in any business or transaction in which he/she or a member of his/her family, directly or indirectly, has a financial interest, aside from his/her salary as such officer or employee, greater than any other citizen or taxpayer, nor shall he/she have any financial or other private interest, directly or indirectly, which is in conflict with the proper discharge of his/her official duties.”

Elements:

1. Elective or appointive officer or employee of this city
2. Take part in a decision concerning the business of this city, or engage in any business, or transaction
3. They or a member of their family directly or indirectly has a financial interest greater than any other citizen or taxpayer –OR-- They or a member of their family directly or indirectly has a financial interest or other private interest directly or indirectly
4. In conflict with the proper discharge of official duties

“Appointed Officer—Includes all positions appointed by the Mayor and Council or the City Manager, including appointment to the Housing Authority, but not employees.”

“Elected Officer—The Mayor, Deputy Mayor and all Councilors and the positions of ward election officials and charter commission members.”

“Family—Any person who is related to an elected or appointed officer or employee in one of the following ways: spouse, parent, grandparent, child, grandchild or sibling. The definition also includes all persons who are members of the same household as the elected or appointed officer or employee regardless of whether they are related by blood or marriage.”

EXAMPLE #2

CHARTER C10-5 (ACCEPTANCE OF GIFTS AND GRATUITIES)

“No elective or appointive officer or employee of the city shall solicit or accept any gift or gratuity which could, in any manner, be construed to affect or influence the performance of his/her official duties.”

Elements:

1. Elective or appointive officer or employee of the city
 2. Solicit or accept any gift or gratuity in any manner
 3. Construed to affect or influence performance of official duties
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➤ CODE 21-6 (GIFTS)

“No councilor, or appointed officer, or employee, shall accept any gift of twenty-five dollars (\$25.00) or more at one time, or one hundred dollars (\$100.00) in a calendar year from a single source, whether in the form of service, loan, thing or promise or any other form from any person, firm or corporation interested, directly or indirectly, in any manner whatsoever in business dealings with the city. Campaign contributions received during the official election period shall not be considered gifts.”

Elements:

1. Councilor, appointed officer or employee
 2. Accept gift of \$25.00 or more at one time or \$100.00 in a calendar year (not limited to cash; applies to any service, loan, thing or promise, or any other form)
 3. Single source
 4. From a person, firm or corporation interested directly or indirectly in any manner whatsoever in business dealings with the city
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EXAMPLE #3:

➤ CODE 21-5 (REQUIRED DISCLOSURE BY OFFICERS AND EMPLOYEES; RECUSAL)

“An appointed officer, or employee who, whether paid or unpaid, has a direct, or indirect financial interest or other private interest in any legislation or matter of official business in the City of Dover and who participates in discussion before or gives official opinion to the Council, or otherwise participates in the official business of the City of Dover, shall publicly disclose on the official record the nature and extent of such interest. Such disclosures shall be made orally prior to the legislation being discussed as part of a council meeting agenda, or the officer or employee may elect to file a written specific conflict of interest disclosure statement with the City Clerk. The statement shall be read aloud into the record at a public meeting.

Appointed officers and employees with a conflict of interest shall recuse themselves from further participation in the matter. Recusal means to immediately remove themselves from discussion and voting. Recusal shall also mean the officer or employee is required to physically vacate his or her seat. During a nonpublic session, the appointed officer or employee shall remove himself or herself

from the meeting room. In the case of a nonpublic session, the statement shall be read aloud at the next public meeting.”

Elements:

1. An appointed officer or employee, paid or unpaid
2. Direct or indirect financial or other private interest in any legislation or matter of official business in the City of Dover, or otherwise participates in the official business of the City of Dover
3. Publicly disclose on the official records the nature and extent of such interest
4. Oral OR written on supplied forms and filed with the City Clerk (NOTE: if written—read aloud at all public meetings)
5. Removal from discussion and voting

4. Right to Know Law (RSA 91-A)

- **The City of Dover makes every effort to comply with RSA 91-A, the Right-to-Know law, and seeks to be open and transparent, even beyond that required by applicable law. The City strives to abide by both the letter of the law and the spirit of the law.**
- a. **Paramount public records law is in State Constitution: “All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public’s right of access to governmental proceedings and records shall not be unreasonably restricted. . . .” (Part I, Article 8)**
 - b. **RSA 91-A is the statutory implementation of the constitutional mandate. RSA 91-A covers two core areas: meetings and documents. The presumption is the meeting is open to the public and the document is available for public inspection.**
 - c. **Meetings must generally be posted (two places, one of which can be the City website, at least 24 hours before the meeting) and open to the public unless a specific exception allows for a nonpublic session. Committees and subcommittees are included. The public can audio and/or video record a public meeting (but cannot be disruptive of the meeting in the process).**
 1. **Occasions not considered meetings under RSA 91-A are:**
 - i. **Social occasions where no matters of policy discussed**
 - ii. **Collective bargaining strategy or negotiating (informally called an executive session or non-meeting)**
 - iii. **Consultations with legal counsel (informally called an executive session or non-meeting)**
 - d. **Nonpublic sessions are allowed by RSA 91-A:3, II for certain specifically enumerated matters (the list below is by way of example and not comprehensive – you must refer to a specific exemption under RSA 91-A:3, II to enter into non-public session and may only take up that matter in non-public session):**
 1. **Personnel matters**
 2. **Matters adversely affecting reputation of someone not on the board**
 3. **Discussion of legal advice**
 4. **Potential sale or lease of property**
 5. **Others**
 - e. **Minutes for nonpublic meetings must be taken and can be sealed if warranted under**

RSA 91-A:3, III. Minutes that are not sealed per RSA 91-A:3, III become public within 72 hours of the non-public meeting. A specific protocol must be followed to seal minutes.

- f. **Documents:** Public inspection of documents is allowed unless a statutory exemption exists under RSA 91-A:5; there is no obligation to create documents that do not otherwise exist already. There are certain timelines applicable to responding to a request for documents.
1. **DISTINGUISH:** Documents provided to the city councilors/board members include both “created documents” and “confidential documents”.
 2. **NOTE:** All legal advice and counsel from the City Attorney should be treated as confidential and will generally be marked as such.

The City Council or School Board acting as a body and voting as a whole may disclose these confidential communications – individual councilors/board members may not.

g. **E-mails:**

1. The use of email by councilors/board members implicates both the meeting and documents aspects of RSA 91-A since the use of email on a particular matter by more than a quorum of councilors/board members potentially results in an unlawful “meeting”. While the use of emails in an appropriate fashion is not discouraged, officials must always be cautious not to run afoul of RSA 91-A by use of emails.
2. ***E-mails between and among less than a quorum of city councilors/school board members are generally not a meeting and likely are not subject to public disclosure.
3. ***E-mails from a constituent to a councilor/board member not distributed to a quorum of the Council/Board are generally not a meeting and not subject to disclosure.
4. However, the use of email by councilors/board members involves the “spoke theory”. The “spoke theory” involves the concept of sequential use of emails and results in the involvement of more than a quorum of councilors/board members in a single subject of emails. Such action could violate RSA 91-A.
5. When necessary, the use of City email for official business is recommended and preferred. This practice will assist in responding to RSA 91-A requests. Use of a personal email account has the potential of resulting in that account being subject to RSA 91-A and public disclosure.

5. Robert’s Rules of Order

Robert’s Rules of Order (12th edition) blend genuine debate with parliamentary rules to accomplish the business of deliberative bodies.

Henry Martyn Roberts (1837-1924) was a engineering officer in the US Army and rose to the rank of Brigadier General. The rules (61) revolve around the following:

- One subject at a time
- Alternating views

➤ **Decorum**

“The lesson of democracies to learn is for the majority to give to the minority a full, free opportunity to present their side of the case, and then for the minority, having failed to win a majority to their views, gracefully to submit and to recognize the action as that of the entire organization, and cheerfully to assist in carrying it out, until they can secure its repeal.”

SOME COMMON RULES

CHANGES: MOTION TO AMEND (RULE 12)

Motions to amend a resolution are permissible if germane. All amendments must be voted on separately and if the main motion is amended, the second vote is to adopt the motion as amended. There are no “friendly amendments” - all amendments must be debated and voted.

STOPPING DEBATE AND CONSIDERATION: MOTION TO LAY ON THE TABLE (RULE 17)

Motions to Table (Rule 17) are used to halt debate and to move on to other urgent business. There is no specific time for the matter to be raised again—the will of the majority determines the resumption of debate on the matter.

A Motion to Postpone (Rule 14) allows debate and selects a date or event to resume the debate and vote.

A Motion to Postpone Indefinitely (Rule 11) is debatable and adoption kills the matter.

Call the Previous Question (Rule 16) stops debate, requires a second and is not debatable.

CHANGING YOUR MIND ON A VOTE: MOTION TO RECONSIDER (RULE 37)

A Motion to Reconsider is designed to bring back a matter for another vote in the event to correct an error, or to allow a change of mind. Two significant limits on reconsideration. It may only be brought by a member who has voted in the prevailing side and in the same meeting.

A Motion to Rescind (Rule 35) permits another vote on a matter with notice if and only if there has been nothing done that cannot be undone.

6. Public Meetings and Freedom of Speech

The School Board is required by statute to have at least a 30-minute period for public comment at meetings, see RSA 189:74. The City Council is not required to provide for public comment (e.g. “Citizens’ Forum”) during their public meetings (regular, special, or workshop). Regardless, both the City Council and the School Board routinely allow a public forum at public meetings. In opening up a portion of meetings for public comment, a “limited public forum” or “public forum” is potentially created and issues of free speech are implicated. Toward that end, reasonable time, place, and manner restrictions that are content-neutral are generally permitted (e.g. a 5 minute time limitation on speakers). However, regulating speech based on content/disagreement with viewpoint offered, is not permitted. Additionally, attempts to ban speech that is thought to be libelous or slanderous may, in fact, ban speech that is opinion/viewpoint based and constitute discrimination. Regardless, true threats and/or disorderly conduct where a person “purposely causes a breach of the peace, public inconvenience, annoyance or alarm, or recklessly creates a risk thereof, by . . . [d]isrupting any lawful assembly or meeting of persons, without lawful authority,” can result in action to lawfully remove the speaker. RSA 644:2, III (c); see also State v. Dominic, 117 N.H. 573 (1977).

FINAL NOTES:

1. **The Office of City Attorney consists of the City Attorney, Deputy City Attorney, and Legal Assistant whose duties include those of a paralegal.**
2. **The Office of City Attorney is available to research and answer questions from the City Council and is available to provide drafting assistance for resolutions and ordinances. Access is accomplished through the City Manager; responses are provided to all the councilors and the City Manager.**
3. **Responses to City Council questions will generally be in writing with watermarks for each councilor. Only the Council as a whole can waive the attorney/client privilege.**
4. **The City Attorney also works with the School Board and represents the Dover School District when services are requested.**