

NEW HAMPSHIRE MUNICIPAL ASSOCIATION

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New Hampshire Town And City

Local Officials Making Decisions: Understanding Conflicts of Interest and Disqualifying Bias

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By

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"A man cannot serve two masters at the same time, and the public interest must not be jeopardized by the acts of a public official who has a personal financial interest which is, or may be, in conflict with the public interest."

So reasoned the Court in *Atherton v. Concord* when ruling that no public official may vote on any matter in which he or she has a conflict of interest. The issue of conflict of interest is being raised frequently by citizens who don't want a particular official to act on a matter; by other board members who fear that participation by a particular board member may jeopardize the decision the board makes (or result in the town being sued!); and also by board members themselves who wonder if they should recuse themselves from participation on a matter.

Consideration of these issues before voting on a matter will be time well spent to avoid having a decision of the board overturned because of a disqualified member's participation.

Q. What exactly is a conflict of interest?

A. Precisely defining "conflict of interest" as it applies to municipal decision making is difficult because the existence of a conflict of interest depends in large part on the specific facts of each case. However, the general rule is that a conflict of interest requiring disqualification will be found when an official has a direct personal or pecuniary (financial) interest in the outcome. That interest must be "immediate, definite and capable of demonstration; not remote, uncertain or speculative." *Atherton v. Concord*, 109 N.H. 164 (1968). In short, would a person of "ordinary capacity and intelligence" be influenced by the financial interest? If yes, then the person has a conflict of interest and must not vote on the matter.

Q. So, does that mean if I don't have a conflict of interest I can vote on the matter?

A. Not necessarily. While no public official may vote on any matter in which he or she has a conflict of interest, there may be additional considerations of disqualifying bias or prejudice. When an official is acting in a "judicial" or "quasi-judicial" capacity, as opposed to a "legislative" capacity, a stricter standard of fairness will apply. This stricter standard is often referred to as the "juror standard."

Q. Why is there a stricter standard for judicial decisions?

A. The standard is rooted in the New Hampshire Constitution, Part 1, Article 35:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.

To accomplish this constitutional mandate, selectmen and other officers who are called upon to hear quasi-judicial matters in certain cases specified by statute are subject to the juror standard, as are certain land use boards under RSA 673:14.

Q. What is the juror standard?

A. The juror standard requires officials to be as impartial as a juror, that is, "indifferent." The inquiry to be made by the court in jury cases is set forth in RSA 500-A:12. Note that the statute calls for the court to inquire into situations provided in a list (such as financial interest, personal relationship, etc.) but, as with conflict of interest, all the circumstances must be considered. However, an allegation of bias is a serious matter and must be proven. Courts have held that "[a]dministrative officials who serve in an adjudicatory capacity are presumed to be of conscience and capable of reaching a just and fair result. The burden is upon the party alleging bias to present evidence to rebut this presumption." *Petition of Grimm*, 138 N.H. 42 (1993).

Q. When is a local official acting in a judicial, or quasi-judicial, capacity?

A. "An act is judicial in nature if officials are bound to notify and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties chose to lay before them." *Appeal of Keene*, 141 N.H. 797 (1997). Common examples of quasi-judicial functions in the municipal context include the selectmen conducting a hearing to lay out a road, and planning and zoning boards acting on applications under their jurisdiction.

Q. When is a local official acting in a legislative capacity?

A. All other types of decisions by public officials, whether commonly thought of as legislative, executive or administrative, are regarded as "legislative" for purposes of conflict of interest and disqualification. Examples include the board of selectmen changing the hours of the transfer station, the trustees of trust funds adopting investment policies or the planning board adopting subdivision regulations. When acting in a legislative capacity, there is no requirement of indifference because there is no expectation that officials will not have preconceived positions.

Q. Are there times when a local official can vote even when they are biased or have prejudged an issue?

A. Yes, but only when acting in a legislative capacity, not when acting in a judicial capacity. Consider this example: Suppose a citizen is well known in town for his comments at public meetings in favor of a supermarket that is rumored to be considering the town for its new store. This citizen is then elected as a selectman. Within minutes of being sworn in, the board votes to approve a building permit for the supermarket. The new selectman has prejudged this issue by making it known that he is in favor of allowing the supermarket to locate within the town. Since he is acting in a legislative, or administrative, capacity here, his bias and prejudice is irrelevant. But, if he also owns the land that the supermarket will build on, he has a conflict of interest (defined as a personal or pecuniary interest in the outcome) and should not vote on the building permit.

Now, suppose this same selectman is appointed to the planning board as the ex-officio member and, instead of a building permit, the supermarket needs site plan approval. This will be a judicial decision of the planning board, where the stricter standard of fairness applies, and the ex-officio member will be disqualified because of his earlier comments in favor of the supermarket (prejudgment).

Q. If an official votes when he or she was actually disqualified, will the decision be invalidated?

A. Maybe. If an official was acting in a legislative capacity and had a conflict of interest, the decision would only be invalidated if the conflicted member's vote was the deciding vote. If the measure would have passed even without the conflicted member's vote, the decision will stand. This is not true in the case of a judicial or quasi-judicial decision where the mere participation by a disqualified member invalidates the decision. In these decisions, where courts apply a stricter standard of fairness, "mere participation by one disqualified member [is] sufficient to invalidate the tribunal's decision because it [is] impossible to estimate the influence one member might have on his associates." *Winslow v. Holderness*, 125 N.H. 262 (1984).

Q. What procedure should a board follow when faced with a claim that a board member should be disqualified?

A. Take these issues seriously, but do not be intimidated merely because someone claims that a board member is disqualified. Even if no one has raised the issue, if a member realizes there could be a controversy, the member should raise the question in a public meeting and explain the facts to find out if anyone has an objection. When in doubt, step down, as it is not worth having a decision overturned because a disqualified member acted on the matter.