# Chapter 12.
# Public Official Ethics
# and Conflicts of Interest

Citizens with a beef against a town-made decision often try any legal challenge they can. One tactic is to attack not the substance of the decision, but who made it. The popular name for this type of charge is "conflict of interest."

## I. CONFLICTS DISTINGUISHED FROM INCOMPATIBILITY.

The 'conflict of interest" issue — whether an official is disqualified to make a particular decision — is often confused with the issue of whether a person is disqualified from holding office at all. For example, someone might say, "I don't think it's proper for a real estate broker to be on the planning board." If a realtor represents a developer, he obviously can't vote on that developer's application. But he certainly isn't ineligible to be on the board. The conflict question focuses on specific decisions, whereas the incompatibility question focuses on the office a person holds.

### *A. STATUTORY INCOMPATIBILITY.*

RSA 669:7, I lists pairs of offices that cannot be held by a single person:

> RSA 669:7 Incompatibility of Offices.
> I. No person shall at the same time hold any 2 of the following offices: selectman, treasurer, moderator, trustee of trust finds, collector of taxes, auditor and highway agent. No person shall at the same time hold any 2 of the following offices: town treasurer, moderator, trustee of trust funds, selectman and head of any police department on full-time duty. No person shall at the same time hold the offices of town treasurer and town clerk. No full-time town employee shall at the same time hold the office of selectman. No official handling funds of a town shall at the same time hold the office of auditor. No selectman, moderator, town clerk or inspector of elections shall at the same time serve as a supervisor of the checklist. No selectman, town manager, school board member, full-time town, village district, school district or other associated agency employee or village district commissioner shall at the same time serve as a budget committee member-at-large under RSA 32.

**1. What Is Full-time?** RSA 669:7 says no "full-time employee" can be selectman. Also RSA 32:2 says no "full-time employee" of a municipality covered by the budget committee can be a member-at-large. This term is not defined. It clearly doesn't apply to someone who just gets a small annual stipend. But it is recommended that anyone whose decisions on budgets might be influenced by his/her personal pecuniary interest should not serve in these positions.

**2. What's A Town Employee?** A case from Littleton (*Town of Littleton v. Taylor*, 138 N.H. 419 [1994]) held that a full-time town librarian was not a "full-time town employee" and could therefore be legally elected selectman. The Court said that under RSA 202-A the library trustees have so much independence from the selectmen, that library employees weren't town employees.

### *B. COMMON LAW INCOMPATIBILITY.*

Two positions might be incompatible even though they are not listed in RSA 669:7 or any other 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. (See McQuillin *Municipal Corporations*, Sec. 12.67)

For example in the case of *Cotton v. Phillips*, 56 N.H. 220 (1875), the Court said one person couldn't be both school committee member and auditor, because he would, in effect, be sitting in judgment over his own acts. That's "incompatibility," not a "conflict of interest."

## II. LEGISLATIVE VERSUS JUDICIAL FUNCTIONS.

Not every type of decision made by an official is subject to challenge because of a conflict of interest. Courts from many states have said that even blatant bias or prejudice does not constitute grounds for disqualification when an official is acting in a legislative capacity. In those states, for example, a city council member would not be disqualified from voting on an ordinance which affected an entire city, even if he himself had a direct financial interest.

> "Members of a...governing body are not subject to judicial...standards, but rather (are) politicians. Any supposed errors in the substance of their views or the manner in which their opinions are expressed are therefore ordinarily subject only to relief at the polls, not in the courts... The basic doctrine of separation of powers precludes judicial interference with the vote even of a (governing body member) with an identifiable personal interest in the particular issue." *Izaak Walton League v. Monroe County*, 448 S.2d 1170 (Florida. 1984).

### *A. NEW HAMPSHJRE LAW.*

New Hampshire cases have not gone quite so far as the *Isaak Walton* case, to *exempt* legislative decisions from conflicts problems. But they have recognized a difference between legislative and quasi-judicial decisions. In *Michael v. City of Rochester*, 119 N.H. 734 (1979) the N.H. Supreme Court refused to invalidate a city council decision despite one member's conflict of interest because "no judicial function was involved."

In *Atherton v. Concord*, 109 N.H. 164 (1968), the Court implied that some less strict conflict of interest test would be applied to legislative actions. And in *dictum* in the case of *Appeal of Cheney*, 130 N.H. 589, 594 (1988), Justice Souter said that the rule for legislative functions is that a conflict invalidates a vote only if the vote improperly cast determined the outcome, i.e. if it's the deciding vote. Remember this was *dictum* (i.e. wasn't the actual holding of the case).

**1. Legislators Can Prejudge.** In *Quinlan v. City of Dover*, 136 N.H. 226 (1992), the Court held that in a *legislative* context, the mere fact that a city councilor has spoken out on one side of an issue in advance ("prejudgment") does *not* disqualify him/her from voting on that issue. The Court repeated its statement from the *Michael* case, however, that a *financial* conflict-of-interest would void the vote if it determined the outcome.

### *B. HOW TO TELL THE DIFFERENCE.*

Whether a decision is legislative or judicial depends, not on who makes the decision, but rather on its subject matter. Selectmen, for example, may be acting legislatively when they enact highway regulations, but judicially when they act on a petition to lay out a highway. The Court has said that a municipal body is acting judicially when it decides matters that affect the rights of a specific petitioner with respect to a specific parcel of land. *Ehrenherg v. City of Concord*, 120 N.H. 656 (1980). Also:

> "If (the municipal officials) are bound to notify, and hear the parties, and can only decide after weighing and considering such evidence and arguments as the parties choose to lay before them, their action is judicial." *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984).

Even under this standard, it may still be difficult to draw the line between legislative and judicial actions in some cases. For example, the Court in the *Winslow* case said that a decision on a petition to rezone a single parcel of land would be judicial. But in the *Quinlan* case (above), the Court said that the actions of the *legislative body* (city council) in review zoning amendments was *legislative*.

## III. STATUTES AFFECTING LEGISLATIVE ACTIONS.

### *A. A STRICTER STANDARD.*

Despite the vagueness of any *case law* conflict of interest test for legislative actions, statutes and ordinances may be more strict, and if so, the stricter standard must be followed.

> **1. Charters.** For example, former RSA 49-A:82, which formed the basis for many of the charters in effect in cities, says that no city official shall take part in a decision in which he has a financial interest "greater than any other citizen or taxpayer." If such a statute or

charter provision is in effect in your city, then this standard applies to legislative as well as judicial actions.

**2. Local Ordinances.** Furthermore RSA 31:39-a authorizes any municipality to enact a conflict of interest ordinance which is stricter than state law standards. If your community has enacted such an ordinance, it may (depending on its terms) apply to both legislative and judicial decision.

### *B. N.H. CASES INVOLVING QUASI-JUDICIAL DECISIONS.*

Part I Article 35 of the N.H. Constitution says "it is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit." The courts have applied this standard of impartiality to all judicial or quasi-judicial decisions. But such abstract language is very little help in deciding whether to step down in a case.

The only thing certain about the law of conflicts of interest is that very little is certain. The courts have said over and over that a determination of conflict of interest depends on the particular circumstances of each case. Often the most helpful way of deciding whether you are legally disqualified is to find the court decision most closely related to your dilemma. Here are the major rules found in N.H. Supreme Court cases:

**1. Prejudgment.** A former legislator who had vigorously supported a bill to eliminate the Milk Control Board's authority over price supports was found *not disqualified* to sit on the Milk Control Board and hear a petition to eliminate price supports. The court said the hearing was judicial in nature. *But* even though prejudgment or prejudice could sometimes be a conflict of interest, "a distinction must be made between a preconceived point of view about...the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case." *N.H. Milk Dealers' Assn. v. Milk Control Board*, 107 N.H. 335 (1966). In other words, the only "conflict" was with the person's *political* views — no different than the views any citizen might share.

In another case, a man who had voted in favor of a project as a member of the planning board was *not disqualified* from voting on the same project as a member of the city council. His participation as a planning board member "does not prove that he had an interest in the project other than that of any other citizen." *Atherton v. Concord*, (supra). Suppose, a ZBA member who voted on a variance request would *not* be disqualified from acting on a motion for rehearing. That's just process, not bias.

A man who had spoken in favor of a project at a public hearing before the planning board *was disqualified* from voting on the same project when he later became a hoard member because he had "prejudged the facts of the case before joining the board." *Winslow*, (supra).

A board chairman who had testified before the N.H. Bank Commission in favor of a bank in his town was *not disqualified* from sitting on an application for a variance which was

necessary to build a bank building. The Court said the issue of the desirability of a bank in town was different from the issue of a variance to put the bank on a particular location. *Levesque v. Town of Hudson*, 106 N.H. 470 (1965)

**2. Abutters.** Anyone owning land abutting a piece of property that is the subject of some type of application is *disqualified* from acting on that application. *Totty v. Grantham Planning Board*, 120 N.H. 390(1980).

**3. Financial Interest in the Outcome.** A public officer is disqualified if he has "a direct personal and pecuniary interest" *Preston v. Gillam*, 104 N.H. 261. However the interest must be "immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such that men of ordinary capacity and intelligence would not be influenced by it." *Atherton v. Concord*, (supra). (See the *McLaughlin* case (below) for an example of a pecuniary interest that is "remote and speculative.")

**4. Employment.** An employment relationship with an interested party *might* be grounds for disqualification, but the following cases indicate that the rule has exceptions, and that it is possible for an employment relationship to be so remote that the employee in reality has no interest different from that of the general public.

An attorney who had formerly been employed by the Concord Housing Authority, but who had been paid for those services, was no longer employed, and who stated, without anyone giving contradicting evidence, that he had no bias, was *not disqualified* from voting on an application by the Housing Authority. *Atherton*, (supra).

An employee of a Rockingham County food surplus program was *not disqualified* from sitting on the Board of Adjustment in a case in which the County was applicant for a nursing home expansion. He had testified that he was free of bias, and the court found he had no pecuniary interest in the outcome. *Sherman v. Town of Brentwood*, 112 N.H. 122 (1972).

A county commissioner, deciding on the necessity of an airport taking (a quasi-judicial function) was *disqualified* when it was discovered that his law partner had represented a party to the dispute in question. *Appeal of the City of Keene*, 141 N.H. 797 (1996). In this case, disqualification of the commissioner voided the decision because of the inherent difficulty in estimating the influence one member of the tribunal may have had on the others.

**5. Family Relationships.** There are no New Hampshire court cases on the extent to which a family relationship can constitute a conflict of interest on municipal boards. In other states this factor can be disqualifying, depending (once again) on the facts, and the degree of relationship. A person almost always has a direct interest in his or her spouse's affairs. See *Sokolinski v. Municipal Council of Township of Woodbridge*, 469 A.2d 96 (New Jersey 1983).

There is a New Hampshire case on *judges*, however. In *City of Rochester v. Blaisdell*, 135 N.H. 589 (1992), a taxpayer was in a dispute with the city. It turned out that one of the partners in the city's law firm (who hadn't actually participated in the case at all) was an uncle of the judge hearing the case, although they hadn't seen each other in 20 years. The Court held, based on the N.H Code of Judicial Conduct, that the judge at least had a duty to inform the parties, so that they could request him to step down.

**6. Other Relationships.** A member of a church that owned land abutting a project, who'd previously been a member of the church's building committee before taking public office was *not disqualified* to vote on the project. *Atherton*, (supra).

### *C. LAND USE BOARDS - THE STATUTE.*

Since 1988 all local land use boards have been subject to RSA 673:14, which prevents a member from sitting on a case:

> "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."

Equally important in RSA 673:14 is the procedure it sets up. Any person on the board (but not people in the audience) can ask for a vote on whether s/he herself *or any other member* is disqualified in a case. The vote must be taken prior to the public hearing in the case. The statute says the vote is non-binding, however, it should be taken as a serious message to a member that he or she has a problem that could jeopardize the outcome of a case.

### *D. OTHER OFFICERS.*

Other officials who are called upon to hear quasi-judicial matters are also subject to the "juror" standard by virtue of RSA 43:6, which says:

> "No selectman or other officer shall act, in the decision of any such case (a case "affecting the conflicting rights or claims of different persons" per RSA 43:1) who would be disqualified to sit as a juror for any cause, except exemption from service, in the trial of a civil action in which any of the parties interested in such case was a party."

## *E. THE JUROR STANDARD.*

RSA 673:14 and 43:6 both require officials to be as impartial as a juror. This juror standard was also cited in the *Winslow* case (supra), even before 673:14 applied to planning boards.

Some citizens' attorneys have cited this standard, and succeeded in intimidating board members, by implying that the juror standard is somehow much more strict and absolute than the standard in the *Atherton* case. For one thing it seems unlikely that the law would require "purer" jurors than judges. Furthermore, case law involving jurors and judges suggests that the juror standard is no more hard and fast than the "quasi-judicial" standard. Let's take a look:

Knowledge of facts concerning an application independently learned by a land use board member does not disqualify him. *City of Dover v. Kimball*, 136 N.H. 441 (1992). The Court here held that a planning board member's discovery of obvious inconsistencies in submitted documents and a subsequent statement to an applicant explaining why such inconsistencies would preclude approval of the application did not show that the application had been prejudged. "Municipal officials must be free to advise applicants of whether their applications conform to statutory requirements and make suggestions on how to bring the applications into compliance. If an application does not conform and will not be accepted, the officials should be able to communicate this information without being accused of prejudging the application." Id. at 447.

A person who had regularly run an ad in the Union-Leader was *not disqualified* from sitting as juror on a case in which the newspaper was a party:

> "It is not any and every business relation that disqualifies a juror, and if it did the newspaper subscriber, the telephone user, the electric and water consumer and those who engage in a host of other common everyday habits or ordinary commercial and domestic life would be eliminated from the average jury panel."
> *McLaughlin v. Union-Leader Corp*., 99 N.H. 492 (1955).

In a case involving a slip and fall on a sidewalk, the court refused to disqualify three people as jurors. One was employed by the company that had sanded the defendant's parking lot and driveway (which was not, however, a party to the case). A second was related to an employee of the defendant. A third had been a client of the defendant's attorney at some prior time. The Supreme Court said the trial judge had the authority, using the "voir dire" questioning procedure, to take these factors into account and still find these people were impartial. In other words, none of these relationships was disqualifying *per se*. *Matthews v. Jeans Pastry Shop, Inc*., 113 N.H. 546 (1973).

A *judge* in a probation violation case was not necessarily disqualified merely because he had formed an opinion prior to trial, so long as he was able to "set aside" his opinions and "decide the case on the evidence..." The Court said that a pecuniary interest in the outcome or a family

relationship to a party *would* constitute *per se* grounds for disqualification, but not a prior opinion. *State v. Aubert* 118 N.H. 739 (1978).

In the past in New Hampshire, jurors were not even necessarily disqualified for holding an opinion on the issue of guilt. The Court said the proper inquiry was whether they were capable of disregarding those opinions and deciding a case solely on the evidence. *State v. Labombarde*, 82 N.H. 493 (1927). The continuing validity of this rule is doubtful in the light of studies showing that large numbers of citizens do not understand the burden of proof in criminal cases. Recently the Court has said that a basic misunderstanding of the "presumed innocent" *is* grounds for disqualification. *State v. Cere*, 125 N.H. 421 (1984).

### *F. RECOMMENDATIONS ON DISQUALIFICATION.*

Officials exercising judicial or quasi-judicial authority, such as planning and zoning boards, must be impartial. Yet, though the above cases provide some guidance, there are very few black-and-white rules. What should you do when the answer is unclear?

**1. Reveal the Potential Conflict to the Parties.** That at least gets the issue out on the table, so nobody can claim surprise. It's also arguable that if nobody objects at that time, they have waived their right to object later.

Note that under RSA 673:14, citizens don't have a *right* to insist on a board vote on whether a member is disqualified. But it's still a *good idea* to listen to their concerns. If they object now, they may well object in court later.

**2. When In Doubt, Step Down.** Under the rule of the *Winslow* and *Keene* cases, a court will overturn a board's decision if a disqualified person participated, whether or not he influenced the outcome. It's silly for a board to risk being overturned because of a conflict of interest. Conflicts usually have nothing to do with the merits of a decision, and the board's hard work should not be put to waste. Furthermore you *can* step down if you don't feel right about sitting on the case, even if your "conflict" doesn't fit any of the court-created rules.

**3. Enact A Conflict Of Interest Ordinance.** As was suggested in Part I (above), a non-binding "ethics code" might be easier to enact, and more helpful, than a binding one enacted under RSA 31:39-a.

Even if your town does not want to establish hard and fast conflict rules, it might be helpful to establish some *procedural* rules. For example, it often frustrates everyone when someone with a blatant conflict refuses to step down. The town could adopt an ordinance that *required* someone to step down if a stated number of other board members determined that there was a conflict of interest.

## *G. REPLACING A DISQUALIFIED MEMBER.*

**1. Land Use Boards.** For land use boards, the law allows alternate members of the board to fill the shoes of a disqualified regular member, RSA 673:11 says that whenever a member is disqualified, the chair shall designate an alternate.

It's obviously in everybody's interest to identify conflicts as early as possible, so that alternates can be notified before the meeting.

A planning board does not lose any jurisdiction if the full membership is not present (as when a disqualified person steps down), so long as a *quorum* is still present, a simple majority of that quorum is sufficient to pass any vote over which the board has authority.

In the case of a zoning board of adjustment, RSA 674:33, III requires a vote of 3 members to decide in favor of an applicant. Because a less-than-full board can reduce the chances of favorable action, it is recommended that when there is an unexpected disqualification, the applicant should be given the chance to delay the hearing until a full board can be present (e.g. through contacting alternates.)

**2. Selectmen and Other Officers.** There's no such thing as an alternate selectman. But in RSA Chapter 43, which covers hearings held by the selectmen and other officials "for the purpose of deciding any question affecting the conflicting rights or claims of different persons" (i.e. "quasi-judicial" matters, as discussed above), there is a provision for appointing an alternate. This statute is widely overlooked. RSA 43:7 says that if any of the selectmen or other officials is disqualified, the remaining members of the board should appoint a replacement to hear the particular matter. The replacement should be "a qualified person *who has theretofore holden the same office in the town*, or, in the case of committees, by a new appointment." The word "committees" refers to committees appointed by the selectmen.

## *H. REMOVAL OF BOARD MEMBERS.*

**1. Appointing Authority.** It should be emphasized that the power to appoint an official does not necessarily include the power to remove that official. In fact, there is no such power unless it exists by statute. Such statutes include RSA 105:2-a (police chief); RSA 154:5 (fire chief); and RSA 41:40 (removal of tax collector by Department of Revenue Administration), among several others.

**2. Land Use Boards.** Land use board members can be removed under RSA 673:13 for "inefficiency, neglect of duty, or malfeasance in office."

In *Williams v. Dover*, 130 N.H. 527 (1988), Craig Williams, a member of the Dover Planning Board, had allegedly violated city land use ordinances in his private capacity as his employer's representative. The city council removed him.

The N.H. Supreme Court held that the removal was improper, noting that he had not, at any time, referred to, or attempted to take advantage of his position on the board:

> "Malfeasance sufficient under our law to warrant removal from office must have direct relation to and be connected with the performance of official duties... It does not include acts and conduct which, though amounting to a violation of the criminal laws of the state, have no connection with the discharge of official duties."

**3. Selectmen.** There is no law allowing the removal of selectmen, although we get a lot of questions on this. The only possible candidate for such a statute is RSA 42:1, which says:

> "Every town officer shall make and subscribe the oath or declaration as prescribed by part 2, article 84 of the constitution of New Hampshire and *any such person who violates said oath after taking the same shall be forthwith dismissed from the office involved*." (emphasis added)

Notice that RSA 42:1-a says that removal is by a petition to the superior court. However, there have never been any cases on this, to my knowledge. Any town or group of citizens who attempted to remove an official for violating the oath would have an uphill row to hoe.

## *I. PERSONAL FINANCIAL DEALINGS WITH COMMUNITY.*

Under RSA 95:1, public officials are prohibited from making a contract with the municipality they serve, if the value of the contract is more than $200 in goods or services, unless the contract was subject to open competitive bidding. This includes the selling of any real estate. Violation is a misdemeanor, and part of the penalty is removal from office. (RSA 95:2).

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