

Municipal & Governmental Law: How to Handle Conflicts of Interest on Municipal Boards

Bar News - June 15, 2016

By John Arnold

In many ways, municipal board members are a lot like judges. They are presented with a case (e.g. a land use application), tasked with applying the law (municipal regulations), and determining whether the applicant is entitled to relief (e.g. a development permit or approval).

The fate of a particular project rests in the hands of these board members. As with judges, board members are expected to be impartial and fair. However, given the small size of many New Hampshire towns, and the fact that municipal boards are typically composed of volunteer residents, it is not uncommon for board members to be familiar with a project, an applicant, or an abutter, even before the application is presented. This can either be advantageous or detrimental, depending on the circumstances.

Regardless, there are several considerations attorneys should be aware of when appearing before municipal boards, or serving as a board member, regarding conflicts of interest and disqualification.

Conflicts of Interest Defined

Conflicts of interest are defined by statute. RSA 673:14 prohibits participation by any board member who 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.” The so-called “juror standard” is a relatively low threshold. RSA 500-A:12 sets forth several circumstances warranting disqualification, including being related to any party, expecting to gain or lose upon the disposition of the case, or so much as appearing not to be indifferent.

Further, the New Hampshire Constitution expressly requires that all judges be “as impartial as the lot of humanity will admit.” Our Supreme Court has ruled that planning board actions are generally quasi-judicial, and therefore, the constitutional standard applicable to judges applies to planning board members. Identifying Conflicts

Some conflicts are readily apparent, while others may require a deeper understanding of the relationships between board members and the parties or properties involved. For example, if a board member is an abutter to the project, disqualification is mandated. Disqualification is likely warranted if a board member is a business competitor of the applicant.

Board members occasionally voice opposition or support for a particular project before the application has been heard, by speaking as a member of the public before other boards, writing letters to the local newspaper, or posting material on social media. Disqualification is warranted if such actions demonstrate prejudgment of the application.

It is worth the time well in advance of a hearing to identify the presiding board members and to consult with your client and any other parties involved, including the project engineers, architects and/or surveyors, to detect possible conflicts.

Addressing a Conflict

If you believe a conflict of interest exists, it is imperative to raise the issue at the earliest possible opportunity. Otherwise, you risk waiving the right to raise the issue later. It is generally advisable to submit a disqualification request in writing, so that your position is clearly part of the record, should the case be appealed.

Raising the issue in advance of the hearing, when possible, gives the board ample time to consider the issue. This is important given that many board members may be unfamiliar with the applicable procedures and legal standards. It also allows time for the board to consult with its legal counsel should it wish. An advance written submittal is also useful in that it allows the board to preemptively raise the issue at the public hearing, and relieves the applicant from the burden of making its oral argument in full detail, which can often be awkward.

That being said, only the board member has the authority to disqualify himself from a proceeding. Although the board may request a non-binding vote as to whether the member should be disqualified, the board cannot require a member to be recused. Thus, the applicant must be prepared for the board member to remain, and to participate in the remainder of the proceedings. This makes the nature and tone of the disqualification request critically important.

Potential Consequences

Applicants and attorneys may be reluctant to request disqualification of a board member, fearing that the board member will not recuse himself, and will hold a grudge over the request. As tempting as that may be, this approach is not free of risk. The participation by a board member who should have been disqualified is sufficient to invalidate the board's decision (favorable or not). Thus, even if the applicant chooses not to rock the boat, and the application is approved, an opponent who later discovers the conflict may be able to overturn the approval on appeal. In such cases, the consequences, both in terms of money and time, are substantial for the municipality and the applicant.

On the other hand, it is important to be prepared to proceed if the board member is recused. Most boards have rules of procedure setting forth important details such as quorum and participation by alternate board members. It will be important to be familiar with those rules, and to discuss with your client in advance the implications of proceeding with less than a full board, the identity of alternates who may be appointed to take the place of the recused board member, and continuing the hearing until a full board is present.

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