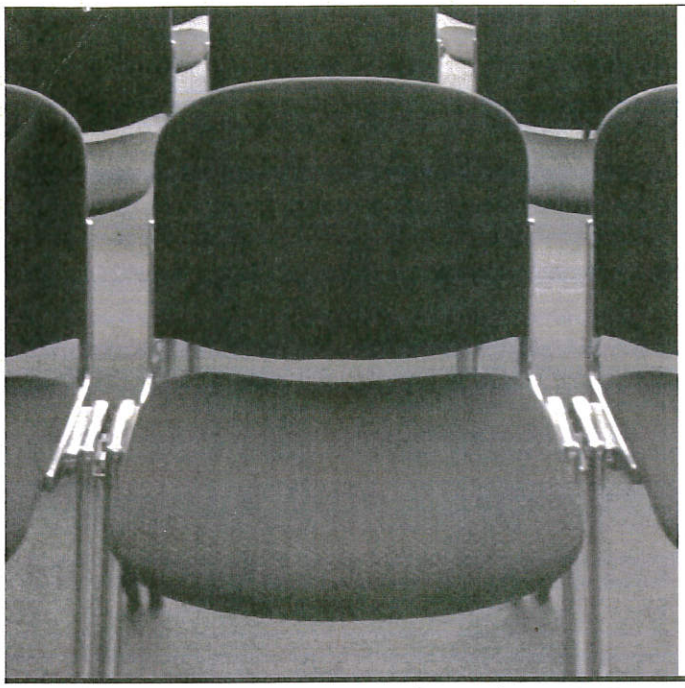

"I Recuse Myself"

By C. Christine Fillmore

It is generally understood that a municipal official who has a conflict of interest in a specific situation is not supposed to participate in that matter. What is less understood is how this process works and what is at stake in making that decision.

What is recusal?

What do you call it when an official decides not to participate in something when they have a conflict of interest? The word is "recuse." To recuse is to remove oneself as a participant for the purpose of avoiding a conflict of interest. You could use the word "excuse" instead, but it would not be as precise.

When is recusal appropriate?

In general, recusal is appropriate when an official has a conflict of interest with respect to a specific matter, or when the official is biased and cannot act impartially.

One of the most troubling situations to face as a municipal official is when an angry citizen claims that the official should not participate in a matter because of a conflict of interest. A charge of conflict of interest often implies unethical behavior, but it is not always easy to distinguish an actual conflict of interest from an unsubstantiated allegation. It is a charge that goes to the heart of the people's trust in their government and questions the personal motives of elected and appointed officials. After all, in this context, conflict of interest involves an official who has a conflict with the public interest. Consequently, it is something that all officials should be aware of and consider carefully.

Conflict of interest has proven difficult for courts and legislatures to define in a way that applies to all situations. The particular circumstances and facts of each case must be factored into the determination of whether an official is disqualified from acting on a matter. However, the basic rule is that a conflict of interest requiring recusal will be found when an official has a personal or pecuniary (financial) interest in the outcome of a matter. That interest must be "immediate, definite and capable of demonstration; not remote, uncertain, contingent or speculative." *Atherton v. Concord*, 109 N.H. 164 (1968). As the Court in *Atherton* explained, "the reasons for this rule are obvious. 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."

A conflict also exists when an official is actually biased in one direction or the other before the information is even presented to the board. 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." Local officials deciding matters of a quasi-judicial nature are held to the same standard of impartiality. Of course, unless an official says something in public indicating bias, the existence of a bias may not be known. However, an official who knows they are biased has a duty to the public to recuse him- or herself from the proceedings.

What is at stake?

If a person with a disqualifying conflict of interest or bias participates in a matter, the legal results will depend on the kind of matter at hand. (It is important to note here that if no one challenges the board's decision in court the only consequences are the political ramifications of eroded public

RECUSAL *from page 17*

trust in their government.) A court will look at whether the board was acting judicially or legislatively.

Briefly, a judicial action is one in which officials are bound to notify and hear parties, and can only decide after weighing and considering such evidence and arguments as the parties chose to lay before them. *In re Bethlehem*, 154 N.H. 314 (2006). Examples include a zoning board of adjustment's decision on a variance application or a board of selectmen's decision on whether or not to take private property by eminent domain. The other actions a board may take which are not judicial are generally referred to as legislative. Examples include the creation of proposed zoning amendments by a planning board or a town council's decision regarding whether or not to replace a yield sign with a stop sign or traffic light. (For more information on this topic, see Chapter 13 of NHMA's publication *Knowing the Territory* and the article "Local Officials making Decisions: Understanding Conflicts of Interest and Disqualifying Bias," which appeared in the January 2011 issue of NHMA's *Town and City Magazine*.)

When a board acts judicially, a court will invalidate the board's decision if a person with a disqualifying conflict participated in the matter. *See Totty v. Grantham Planning Board*, 120 N.H. 388 (1980) (a member who owns property abutting the property which is the subject of an application before the planning board is disqualified, and that member's participation requires the decision to be invalidated). In such a case, the board must begin all over again without the participation of the disqualified person. This is a tremendous waste of the municipality's money, time and effort, which can be avoided when a disqualified person recuses him- or herself.

When a board acts legislatively, the stakes are lower. A court will only invalidate the board's action if the person with the disqualifying conflict cast the deciding vote. *See Quinlan v. Dover*, 136 N.H. 226 (1992) (a city councilor expressed bias on one side of a rezoning issue before the Council in advance of the Council's discussion of the issue did not require the court to invalidate the Council's action because his was not the deciding vote and he had no financial interest in the matter.) This lower-stakes situation may play into an official's decision regarding recusal.

How does recusal work?

The crux of the difficulty with recusal is that the person with the potential conflict or bias must make his or her own decision about whether or not to step down. No one, except a court, has the legal ability to force a recusal.

Whether the issue of a conflict is raised by a party in a case, a member of the public, a member of the board or the official him- or herself, the ultimate decision is always in the hands of that member. Anyone may raise the issue. What happens next is up to the board and the member.

Members of all land use boards (planning board, ZBA, historic district commission, heritage commission, agricultural commission or housing commission) have a specific option under RSA 673:14 when a question about a disqualifying conflict of interest is raised. Any board member may request that the board take a vote to see whether they believe there really is a conflict. The board must take the vote if that motion is made, but the result is nonbinding. Again, the final decision is left to the member with the alleged conflict or bias. No similar statute exists for other municipal boards, but there is nothing preventing any board from taking a nonbinding vote regarding an alleged conflict of a board member.

Why take a vote at all if it is nonbinding? The answer is that the result of the vote may help the official make their decision. If the member does not believe a conflict exists and the board agrees, then perhaps recusal is not necessary. On the other hand, if the board believes a conflict exists and the official is uncertain, the result of the vote may make recusal seem appropriate. Of course, the member will not always agree with the board's vote. In those cases, there is nothing anyone can do to force that member to step down.

Something for all officials to consider is that if the potential existence of a conflict is disclosed to the public at the beginning of the matter, and if no one objects at that time, the parties are deemed to have waived their right to appeal on that issue later. *Taylor v. Wakefield*, 158 N.H. 35 (2008); *Fox v. Greenland*, 151 N.H. 600 (2004); *Bayson Properties, Inc. v. Lebanon*, 150 N.H. 167 (2003). That settles the matter and everyone can move along with the business of the board.

Another important idea is "when in doubt, step down." The New Hampshire Supreme Court has made it clear that it will overturn a board's judicial decision if a disqualified person participates. *Appeal of Keene*, 141 N.H. 797 (1997); *Winslow v. Holderness Planning Board*, 125 N.H. 262 (1984). It may not be worth taking the risk that the board's decision will be 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. A board member can always step down if they do not feel right about sitting on the case, even if the potential conflict does not fit any of the court-created rules about conflicts and bias.

On the other hand, there are times when an applicant or other party alleges a conflict of interest in an attempt to "bully" one or more members off the board because they are concerned that those members will vote against them. When it is clear that no conflict exists, the officials may not wish to step down. That is their choice. It all depends on the circumstances of the situation.

If an official does recuse him- or herself, how should they behave at that point? It is critical to note that simply saying "I recuse myself" is not enough. The official must take steps to make the recusal effective. Literally. The official should immediately leave their seat at the board table, and preferably, leave the room until the board moves on to the next subject. If the official remains in the meeting room, taking a seat with the general public is appropriate. These actions make it clear to all in attendance that the official is, for all purposes, no different from any member of the public in relation to this matter.

Of course, a person does not lose their status as a citizen when they become a local official, and a recused official may wish to be heard on the matter just like any other member of the public. In some cases, the official may be a party to the action if, for example, they are the applicant in a land use case or an abutting landowner. Parties to the case have a legal right to be heard on the application, so they may certainly participate in that capacity. In most cases, however, the official with the conflict is not a party to the case. In that situation, the better practice (both legally and for the sake of appearances, which matter in these situations) is for the official to remain quiet if they stay in the room. However, if they feel strongly about the matter, they have the right to speak during the time set aside for public comment or testimony. If a recused official does this, they should begin with a statement that they are speaking on their own behalf as a citizen and not as a member of the board. This helps solidify the understanding that the official is not participating in the board's consideration of the matter.

In any case, if the official remains in the room, they should not act in any way as a member of the board. It would be improper, for example, for the official to ask questions of the parties (other than at times when the general public is permitted to do so), engage in discussion that is occurring only among board members, or vote on the matter. This is just as risky as remaining at the table or failing to recuse oneself in the first place. "[M]ere 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 Planning Board*, 125 N.H. 262 (1984). It is also advisable to refrain from using body language to indicate an opinion or try to influence a decision of the board. Remember: appearances count in this situation. Officials should be concerned not only about the legal ramifications, but the political consequences of questionable behavior.

Recusal or Abstention?

There can be some confusion between recusal and abstention. Both mean that a board member does not vote, but the effect is quite different. When a person abstains from a vote, they remain "present" at the meeting for the purposes of a quorum and often participate in the discussion of an issue. When it is time to vote, they simply say "I abstain" and do not register a vote. Under New Hampshire law, a member who abstains is presumed to go along with whatever the majority of the rest of the board does in that matter. In contrast, when a person recuses him- or herself from a specific matter, that person steps off the board for the duration of that matter and does not count toward the quorum during that time. While the person remains a member of the board *in general*, they are treated as a member of the public whenever the board is addressing *that matter*.

Here is an example. Imagine a five-member board of selectmen. Three attend the meeting (that is enough for a quorum to conduct business). They discuss an item of business, but when the vote is taken, one member abstains. The other two vote "yes." What is the result? The vote is 2 yes, 0 no, 1 abstention. The person who abstained is presumed to go along with the majority vote of 2-0 in favor, and the fact that he abstained did not mean the board lost its quorum. The item is approved. The New Hampshire Supreme Court clarified these rules around abstention in *Merrimack v. McCray*, 150 N.H. 811 (2004).

Now imagine a five-member planning board. Three members attend the meeting, which again is enough for a quorum. A subdivision application is the next item on the agenda, and one of the three members present recuses himself because he has a conflict of interest. At that point, that person is no longer treated as a member of the board during any time when the board is addressing that application. The meeting has now lost its quorum because there are only two members sitting. On a land use board with alternates, the chair may designate an alternate to take the place of the recused member for that matter. RSA 673:11. This solves the quorum problem for those boards. However, on a board without alternates, recusal may prevent the board from acting until a future meeting at which more members are present.

RECUSAL *from page 19*

Conclusion

It is important for all local officials to understand what it means to recuse themselves, when it is appropriate, and what the consequences may be if a disqualified person participates in official action. Not only may it result in the invalidation of a board's actions, but defending a court challenge uses municipal resources that might be better spent elsewhere. In addition, retention of the public trust is a significant factor that should play into every official's decision when a potential conflict of interest is at stake.

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Recusal and Abstention from Voting: Guiding Principles

By Lester D. Steinman

Counsel to planning boards are often asked to address whether board members should recuse themselves from consideration and voting on an application or abstain from voting on an application. Set forth below are general principles which may be helpful in advising planning board members regarding the propriety of recusal or abstention in a particular case.

I. Abstention from Voting

Discharging the duties of a planning board member requires a member to vote on all applications that come before the board, assuming no conflict of interest or appearance of impropriety exists requiring recusal.[1] Indeed, a persistent refusal to vote on applications could constitute grounds for removal from office.

Applicants before the planning board have the burden of proof to support their applications. Thus, where a planning board member determines that the record contains insufficient information to satisfy the legislative criteria for granting a permit or approval, that member should vote to deny the application. Where a member has missed certain meetings on an application, the member should review the minutes and/or recordings of those meetings and discuss the issues with other board members at a public meeting to enable the board member to make an informed decision when voting on the application.[2]

In *Taub v. Pirnie*,[3] the board member in question had been a resident of the village for twenty-five years, a zoning board member for twelve years and a village trustee and was fully familiar with the neighborhood in question and its zoning problems. Before voting on the application, the member had thoroughly discussed the arguments presented at the public hearing with other members. The fact that the member in question neither attended the public hearing nor read the hearing minutes was not outcome determinative. Rather, it was sufficient that the member had the opportunity to make an informed decision by virtue of his knowledge of the neighborhood and familiarity with the issues raised at the public hearing.

Failure to vote is not a benign act of neutrality toward an application. Rather, abstention has significant consequences for the planning board's decision making. Every motion or resolution adopted by the planning board requires the affirmative vote of a majority of all the members of the board.[4] An abstention is not an affirmative vote in favor of the application,[5] and, to the extent that it cannot be counted as an affirmative vote, its effect is akin to a negative vote for purposes of compliance with statutory majority voting requirements.[6]

II. Recusal Based upon Conflicts of Interest

Where a member of the planning board has a conflict of interest affecting the consideration of an application, that member must recuse him or herself from participating in any discussion of the matter and from voting on that matter.[7] Conflicts of interest may be defined by statute,[8] local law [municipal code of ethics][9] or common law. Planning board members should familiarize themselves with the provisions of these rules.

Courts have held public officials to a high standard of conduct and have invalidated certain actions which, while not violative of the literal provisions of GML Article 18 or a local code of ethics, are tainted by the votes of members which "violate the spirit and intent of the statute, are inconsistent with public policy or suggest self interest, partiality or economic impropriety."[10] For example, in *Zagoreos v. Conklin*,[11] the court annulled the votes of two zoning board members, who were employees of the applicant, to grant variances on a controversial application to convert oil burning generating units into coal burning units. In *Tuxedo Conservation and Taxpayers Ass'n v. Town Board of the Town of Tuxedo*,[12] a town board member who was an officer of an advertising firm was disqualified from voting on a zoning application by a subsidiary of one of the firm's clients. Also, in *Conrad v. Hinman*,[13] the Court annulled a village board vote to grant a rezoning application where the deciding vote was cast by the co-owner of the property that was the subject of the rezoning petition.

Whether a member has a disqualifying conflict of interest "requires a case-by-case examination of the relevant facts and circumstances."[14] "Public officials must perform their duties solely in the public interest, and avoid circumstances which compromise their ability to make impartial judgments on any basis other than the public good."[15]

Indeed, where circumstances, viewed objectively, could reasonably be deemed to compromise a member's impartiality, avoidance of even the appearance of impropriety is essential to maintaining public confidence in the integrity of government.[16] Thus, the Attorney General has opined:

> 'It is critical that the public be assured that their officials are free to exercise their best judgment without any hint of self-interest or partiality, especially if a matter under consideration is particularly controversial.' *Matter of Byer v. Town of Poestenkill*, 232 A.D.2d 851, 852-53 (3d Dep't 1996). Thus, where a public official is uncertain about whether he should undertake a particular action due to an actual or potential conflict, he must recuse himself entirely from the matter in question unless he procures an advisory opinion from a local ethics board that concludes otherwise. *See* Op. Atty. Gen (Inf.) No. 98-38; *see also* Op. Atty. Gen. (Inf.) No. 99-21 (recusal requires the official in question to avoid 'taking any actions with respect to that matter.')[17]

Often, conflicts of interest arise out of familial relationships [recusal of planning board chairman required where his son had a pending employment application with the attorney for the applicant before the planning board];[18] prejudgment of the issues attendant to a specific application;[19] opposition to an application as a neighbor [often a neighbor acts out of their own self-interest and concerns about their own property values and families and may not be capable of measuring the merits of an application in light of the overall public interest];[20] or ongoing business relationships [where two board members were employed by the applicant, the board members must recuse themselves because "the likelihood that their employment . . . could have influenced their judgment is simply too great to ignore."].[21] However, not every private business relationship between an applicant and a board member is sufficient to require recusal. For example, in *Ahearn v. Zoning Board of Appeals of the Town of Shawangunk*,[22] the fact that one zoning board member had purchased insurance from an applicant and the spouse of another zoning board member had received a Christmas gift for teaching the applicant's daughter piano lessons was deemed to be so insubstantial that no common law conflict or appearance of impropriety was created when those members voted to grant the applicant a special use permit to construct a planned unit development.

Nor is recusal required where the interest of the member in the matter under review is not a personal or private one, but rather "an interest he has in common with all other citizens or owners of property" in the community.[23] Thus, where most of the property in a village met the acreage requirement for reclassification to a cluster residence floating zone under a proposed zoning amendment, village board members who owned qualifying property were not disqualified from voting on that zoning amendment.[24] Similarly, in *Segalla v. Planning Board of the Town of Amenia*,[25] the court refused to annul the vote of a planning board member to adopt a new master plan where the value of that member's property and the value of nearly every other property owner in the town would be similarly affected by the adoption.

Where recusal is required, the board member in question must refrain from deliberating and voting on the application or matter:

> We have stated that members with conflicts of interests must recuse themselves from participating in any deliberations or votes concerning the application creating the conflict. Op. Atty. Gen. (Inf.) No. 90-38. The board member's participation in deliberations has the potential to influence other board members who will exercise a vote with respect to the matter in question. Further, we believe that a board member with a conflict of interests should not sit with his or her fellow board members during the deliberations and action regarding the matter. The mere presence of the board member holds the potential of influencing fellow board members and additionally, having declared a conflict of interests, there would reasonably be an appearance of impropriety in the eyes of the public should the member sit on the board.[26]

Obviously, this article cannot address every potential situation in which recusal and/or abstention becomes an issue. However, by adhering to the general principles which guide those decisions, planning board members will be better able to discharge their responsibilities.

Endnotes

1. *See Cromarty v. Leonard*, 13 A.D.2d 275, 216 N.Y.S.2d 619 (2d Dep't 1961), *aff'd.* 10 N.Y.2d 915 (1961).
2. *See Taub v. Pirnie*, 3 N.Y.2d 188 (1957), holding that even where a board member has not attended the public hearing and not read the transcript, he may nevertheless vote on an application