

**15th ANNUAL SPRING PLANNING AND ZONING  
CONFERENCE**

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**OFFICE OF ENERGY AND PLANNING**



***BASICS FOR THE PLANNING BOARD***

***PRESENTED BY:***

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## **NOTE ON MATERIALS**

The materials used in this presentation were developed by Attorneys Bernard Waugh of Gardner, Fulton & Waugh in Lebanon, NH and Michael Donovan of Concord, N.H. These materials have been utilized at previous OEP Planning and Zoning Conferences and were provided to me by OEP to facilitate this presentation.

In some instances, I have supplemented and combined the prior presentations, especially as to the right-to-know statute. But Attorneys Waugh and Donovan rightfully deserve the credit for developing these presentations. It is my hope that I may faithfully present them in the same excellent manner in which they were prepared.

Jeffrey A. Meyers

## RIGHT-TO-KNOW

### Access to Public Records and Meetings (RSA Chapter 91-A)

#### 1. Purpose of the Right-to-Know Law

Part I, Article 8 of the N.H. Constitution reads:

“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 time 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.”

Section 1 of RSA Ch. 91-A reflects this purpose when it says:

“The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.”

#### 2. The General Rule

A *meeting* of a *public body* must have proper *notice* and be *open to the public*.

#### 3. What Is A "Meeting"?

It is the convening of a *quorum* to discuss or act upon any public business. RSA 91A:2, I. *This includes work sessions and deliberations. A meeting does not include:*

- \* *chance or social gathering*
- \* *collective bargaining*
- \* *consultation with legal counsel*
- \* *caucus of members of a body of the same political party elected on partisan basis*

Note: Plan review sessions and site walks could be included (depending on whether a quorum of the planning board attends).

**Question:** What is a **quorum**? **Answer:** A **majority** of any board or committee constitutes a quorum, unless there is a statute, applicable to some specific board, which says otherwise. (See: *First Federal Savings & Loan v. State Board of Trust Co.*, 109 N.H. 467 (1969).) A majority of a quorum is all that is needed to take action, unless there is a statute which says otherwise (e.g. RSA 674:33, which in the case of a ZBA requires a concurring vote of 3 members).

**Question:** What is a "consultation with legal counsel" ? **Answer:** Where the members of a public body speak with the body's attorney either in person or over the telephone (in a conference call) in order for the attorney to provide the public body with legal advice on any matter that is pending or could come before the public body. A **consultation with legal counsel** is distinguished from a **non-public session** of the public body for the consideration or negotiation of pending claims or litigation under RSA 91-A:3,II(e).

#### 4. What Is A "Public Body"?

“Public bodies” include *all* committees, boards, subcommittees, agencies, etc., which perform a governmental function in the community *including all designated subcommittees or informal advisory committees*. RSA 91-A:1-a. *Bradbury v. Shaw*, 116 N.H. 388 (1976).

Also includes citizen advisory groups or a public information meeting where a quorum of the public body is present (AG Opinion 93-01).

#### 5. What "Notice" Is Required?

*All meetings must have at least 24-hour notice* (not counting Sundays and holidays) prior to the meeting. Notice must be *either* published in a newspaper *or* posted in 2 prominent public places. RSA 91-A:2, II. Local ordinances can be even stricter about notice.

This 24-hour notice is only a *minimum* under the Right-to-Know law. Other statutes can be more strict. For example: (1) Planning board public hearings require 10-day notice under RSA 676:4, I(d); (2) Zoning Board of Adjustment hearings require 5 days' notice under RSA 676:7.

#### ***EXCEPTIONS TO NOTICE REQUIREMENTS:***

- (a) ***Emergencies.*** If you have a meeting which is too urgent to give proper notice, the nature of the emergency must be stated in the minutes of the meeting. Notice should still be given to the extent possible (For example, post a notice even if less than 24 hours). RSA 91-A:2.
- (b) ***Adjourned (Recessed or Continued) Sessions*** do not require notice, *as long as* the time, date and place of the session was announced at a previous, properly noticed, session of the same meeting.

#### 6. What does "Open to the Public" Mean?

Anyone (not just local residents) can attend any public meeting. They can take notes, tape record, take pictures, and videotapes. But “open to the public” does *not* necessarily mean the right to speak at the meeting. *Nobody* has a right to disrupt a meeting or to speak without being invited. Chapter 91-A itself only gives a right to attend, not a right to participate. See *State v. Dominic*, 117 N.H. 573 (1977) (Selectman convicted of disorderly conduct for disrupting selectman's meeting).

Obviously there may be reasons to allow public input, at specifically-designated portions of the meeting – e.g. when a public hearing is required.

## 7. Minutes -- What Is Required ?

Minutes must be kept of *all* public meetings and must be available to the public within ***FIVE BUSINESS DAYS*** after the close of the meeting. (***This is a change effective August 1, 2007 – Prior law required minutes within “144 hours.”***)

***Minimum Content of Minutes:*** (a) members present, (b) other people *participating* (it’s not necessary to list everyone present), (c) a “***brief description***” of subject matter discussed, and (d) any final decisions reached or action taken.

***Note:*** Take that “brief description” wording seriously! You want good records, but you also don’t want to waste hours and hours trying to correct a near-verbatim transcription of what happened (“Hey, that isn’t what I said!”)

***Note also:*** The Right-to-Know law itself has *no* “minutes approval” requirement! It is obviously a good idea to approve minutes, to help keep them as accurate as possible. But approval need not occur within the 5-day limit (or indeed at all).

## 8. Non-Public Sessions.

### **What are Non-Public Sessions?**

***Nonpublic Sessions*** are meetings which the public does *not* have the right to attend. Nonpublic sessions are allowed *only* for the exemptions specified in the statute – RSA 91-A:3, II. Since 1991 a public body can no longer exclude the public for ***deliberations***; all deliberations must be done in a public session unless one of the exemptions applies.

### **When may a local land use board hold a non-public session?**

The statutory exemptions: These are listed in RSA 91-A:3, II. The ones that local land use boards might be interested in are:

- (a) The dismissal, promotion or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against the employee, unless the employee affected (1) ***has a right to a meeting*** and (2) requests that the meeting be open, ***in which case the request shall be granted.*** (91-A:3, II(a))
- (b) The hiring of a public employee (91-A:3, II(b)).
- (c) Matters which would affect someone’s reputation ***other than a member of the body itself*** if made public (if that person requests, the meeting must be public) (91-A:3, II(c)).
- (d) Consideration of lawsuits threatened in writing or filed against the body or one of its members (91-A:3, II(e)).

Except for litigation, these rarely apply to a local land use board.

### **How To Go Into Non-Public Session:**

**First:** The body must have a properly noticed public meeting (need not necessarily be the same day as the non-public session).

**Second:** A motion to have a nonpublic session must be made and seconded, stating which specific exemption is relied upon.

**Third:** A roll call vote must be taken, with a majority of those present voting yes. While the statute does not require you to keep minutes of the motion and vote, it is a good idea to do so. ***ONLY the matters specified in the motion can be discussed in the nonpublic session.***

## **9. Minutes of Non-Public Session**

The statute requires that minutes be kept of the proceedings and actions of nonpublic sessions. These minutes must be released to the public within **72 hours** (not 144 as with regular meetings), unless 2/3 of the members present in a **recorded vote** decide not to release the minutes because of (a) somebody's reputation (other than a board member), or (b) releasing them would make the action taken ineffectual.

**Caution:** Unless you take the 2/3 vote to not release the minutes of a nonpublic session, those minutes are public records and must be released (*Orford Teachers Assn. v. Watson*, 121 N.H. 118 (1981)). In other words ***the fact that the session itself was nonpublic does not automatically make the minutes nonpublic.***

## **10. What Is A Public Record?**

**Anything** with information concerning the town's or city's business is a public record, and must be made available to the public unless there is an exception (below). The following provisions apply, as a general rule:

**When?** The records must be available for inspection during regular business hours – unless a record is temporarily unavailable because it's actually being used. However, the Supreme Court has said that when the office is very busy, officials can ask the citizen to ***make an appointment*** to review the records. The maximum time anyone can be required to wait is 5 days. *Brent v. Paquette*, 132 N.H. 415 (1989).

**Copies.** Any citizen may make notes, tapes, photos, or photocopies. The municipality should not hand over the records for copying (see RSA 41:61), but should make its photocopy equipment available at **actual** cost. Several Superior Court cases have held that towns can include in the "actual cost" computation an amount for staff time needed to make the copies as well as the actual mechanical costs of copying.

**Form.** If the information exists in a more convenient **form**, that must also be made available. (For example in *Menge v. City of Manchester*, 113 N.H. 533 (1973), the court said the city had to make its **computerized** tax records available. For the City to offer Menge only photocopies of the paper assessment cards was not enough.) Also in *Hawkins v. N.H. Dept. of Health and Human Services*, 147 N.H. 376 (2001), the Court also said that it is the duty of public bodies to hold records in a **format** which makes them **actually** available to the public.

The **motives** of the person requesting the information are not relevant, and cannot even be asked about. *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996).

**Raw Materials.** Tapes, rough notes, etc., which are used to compile the official minutes **are** public records too. These materials can be destroyed after the official minutes are prepared, but they are public **until** destroyed. Note, however, that tapes or notes made by a board member for **personal** use are not public records (*Brent v. Paquette*, 132 N.H. 415 (1989), and this exclusion is explicitly (as of 2004) recognized by statute. [Hint: make sure you designate who is taking the official minutes.]

**Preliminary Drafts.** As of 2004 the Right-to-Know law exempts preliminary drafts of documents from release under RSA 91-A, **but** only to the extent that such drafts *are never disclosed circulated, or available to a quorum or majority of the public body involved.*” Thus if you are a board member working at home on a motion (proposed decision) to present to the board, your preliminary drafts are not public documents, **but** once one of those drafts is actually discussed by a quorum of the board, it **is** public (even if it isn’t “final”).

## 11. Exemptions

The following types of records are **not** available to the public (this is not a complete list, but the following may be relevant to local land use boards):

- (a) Records pertaining to internal personnel files or practices, including police internal investigation documents (91-A:5, IV). See: *Union Leader Corporation v. Fenniman*, 136 NH 624 (1993). (However, salaries, and lists of employees are **not** exempt. *Mans v. Lebanon School Board*, 112 NH 160 (1972).)
- (b) Confidential or commercial information, if its release would be an invasion of privacy (91-A:5, IV). (**Note: Balancing Test:** You can’t call something “confidential” or “private” just by marking it that way. Instead, with the confidential and privacy exemptions, you must apply a “balancing test” used by the Supreme Court to determine whether or not the record should be released. The test: If “the benefits to the public of disclosure outweigh the privacy benefits of non-disclosure,” then the record should be released. The *Brent* and *Union Leader v. Nashua* cases (above) say that the real underlying issue is whether release of the record would aid the citizen to understand any aspect of his/her government.)

(c) Written legal advice. (*SPNHF v. WSPCC*, 115 N.H. 192 (1975).)

**Note Applications:** Information submitted with local land use applications will in general *not* be confidential, because other parties have a Due Process right to respond. If an applicant offers information solely on a “confidential only” basis, you should in general not accept it. An applicant has the burden of proof in all applications, and that means adequate *non*-confidential information to enable the board to make a decision.

When does a document become a public record?

The Test: A balancing of benefits to public of disclosure vs. benefit to government of nondisclosure.

**12. Relief for violations.**

Attorney's fees, except if following attorneys advice.

Invalidation of action if circumstances justify it.

Bad faith can result in award against individuals.

**13. Relief for Violation of Confidentiality**

RSA 42:1-a makes it a breach of the oath of office under RSA Chapter 42, for any municipal officer to divulge to the public any information learned by virtue of his/her official position if either (a) the public body has voted to withhold that information from the public by a vote of 2/3 under the Right-to-Know law *or* (b) the official knew or reasonably should have known that the information was exempt from disclosure under the Right-to-Know law *and* that its divulgence would constitute an invasion of privacy, or would adversely affect the reputation of some person other than a member of the public body, or would render proposed municipal action ineffective. The method of removing someone under this statute is by petition to the superior court – it is *not* an automatic removal.

**14. Emerging Issues: Use of Email**

House Bill 1408

# Conflicts and Disqualification

RSA 673:14

## 1. 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 she certainly is *not* ineligible to be on the board at all. The *conflict* question focuses on specific decisions, whereas the *incompatibility* question focuses on the office a person holds. The only incompatibility rules applying to land use boards are the multiple membership rules (see above).

## 2. Legislative Versus Judicial Functions

Not all decisions made by land use board members are 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 (e.g. a planning board member recommending zoning amendments. 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.

*New Hampshire Law.* N.H. cases have not gone quite so far. 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.” And in *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.

*The Quinlan Case - 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 *at all*. 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.

## 3. 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. The Court has said that a municipal body is acting judicially when it decides matters which affect the rights of a specific petitioner with respect to a specific parcel of land. *Ehrenberg 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).

#### 4. N.H. Cases Involving Quasi-judicial Decisions

***The Standard Of Impartiality*** Part I Article 35 of the N.H. Constitution says that “*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 rule to all judicial or quasi-judicial decisions. ***This includes all land use board decisions on specific applications.***

##### ***a. Prejudgment.***

(a) 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). Thus a ZBA member, say, who voted on a variance request would ***not*** be disqualified from acting on a motion for rehearing. That’s just process, not bias.

(b) 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 board member because he had “prejudged the ***facts*** of the case before joining the board.” *Winslow*, (supra).

(c) 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.

***b. Abutters.*** Anyone owning land abutting a piece of property which 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).

***c. 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).

***d 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.

(i) 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).

(ii) 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).

(iii) A county commissioner, deciding on the necessity of taking land for an airport purposes was **disqualified** when it was discovered that his law partner had represented a party to the dispute in question. *Appeal of City of Keene*, 141 N.H. 797 (1996). The court held the entire decision void, because it was impossible to estimate the influence of the disqualified person.

**e. 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 N.H. case on **judges**, however. In *City of Rochester v. Blaisdell*, (May, 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 Supreme 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.

## 5. 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.”

Note that under RSA 500-A:12, a juror **may** be disqualified for any of the following reasons, namely that he or she:

- (a) *Expects to gain or lose upon the disposition of the case;*
- (b) *Is related to either party;*
- (c) *Has advised or assisted either party;*
- (d) *Has directly or indirectly given his opinion or has formed an opinion;*
- (e) *Is employed by or employs any party in the case;*
- (f) *Is prejudiced to any degree regarding the case; or*
- (g) *Employs any of the counsel appearing in the case in any action then pending in the court. ...’.*

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. But I'd hate to have to go to court with a case where the board voted that someone was disqualified, but s/he refused to step down.

- In *Bayson Props., Inc. v. City of Lebanon*, 150 N.H. 167 (2003) it was held that, even though only board members can ask for a **vote** on disqualification under RSA 673:14, nevertheless **any** party can **object** to a particular member, based on a conflict of interest.
- **IMPORTANT:** In fact, not only **may** a party object – the party **must** object at the earliest possible opportunity; otherwise the right to object is lost. (In *Bayson*, the planning board gave parties an explicit opportunity to object at the beginning of the hearing. Only 4 months and 11 hours' worth of hearings later did the applicant object (based on facts they'd known all along). The Court said that was too late.
- See also *Fox v. Town of Greenland*, 151 N.H. 600 (2004) – the issue was whether a ZBA member who'd missed 2 out of 4 hearing was disqualified from voting. The Court said the objection was raised too late: "*Had the petitioners raised their objections to Wilbur's participation at either of these meetings, the board could have corrected the problem by disqualifying Wilbur from voting or taking steps to ensure that he had familiarized himself with the record.*"

## 6. 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?

- **Reveal the potential conflict to the parties.** That at least gets the issue out on the table, so nobody can claim surprise. Under *Bayson*, if nobody objects at that time, the parties have waived their right to object later.
- **When in doubt (especially if challenged), step down.** Under the rule of the *Winslow* case, 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.
- 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.

\* \* \*

## RULES OF PROCEDURE

“**Every local land use board shall adopt rules of procedure concerning the method of conducting its business. Rules of procedure shall be adopted at a regular meeting of the board and shall be placed on file with city, town, village district clerk or clerk for the county commissioners for public inspection.**” (RSA 676:1)

- **Keep them simple.** Think about how you want your meetings conducted, then craft the bylaws to suit that desire. Include statutory requirements, such as notice and filing deadlines (bylaws are easy to change). For an example for the ZBA, see the OEP ZBA Handbook.
- **You DON'T need Roberts' Rules.** Parliamentary procedure for land use boards follows the general principle that the Chair is always right, unless overruled by a majority of the board. So these rules need not be in the By-laws. Remember, sometimes falling back on parliamentary procedure can be the only way to move beyond an impasse.
- **Follow your own rules...or else!...or else** you risk otherwise valid actions being declared invalid (*Appeal of Barbara Nolan*, 134 N.H. 723, (1991)) **Note:** If you want to retain the authority to **waive** the rules (example: time for ZBA administrative appeal), you should include a waiver provision in the rules themselves – see *Greene v. Town of Deering*, 151 N.H. 795 (2005).
- **Officers.** The board itself determines who its officers are (a chairman is required, and others as the board deems fit). Officers serve for a term of one year. RSA 673:8. Don't make it a popularity contest—think about who will do the best job. Appropriate officers are Chairman, Vice Chairman, and Secretary/Clerk. Officers' terms are for 1 year (673:9).
- **May the Chair Vote?** Yes, yes, yes! The chairman is not like the President of the Senate, who only votes to break ties.
- **Reconsideration.** Include a by-law provision for reconsideration of your decisions **on the Board's own motion.** (This has specifically been upheld by the NH Supreme Court in the recent case of *74 Cox St., LLC v. City of Nashua*, (Sept 21, '07) – the court holding that a ZBA (and the logic also applies to planning boards) has “inherent authority” to reconsider a decision at any time **before the appeals period elapses.**) Thus boards (by motion of person in the majority) should clearly have the ability to move to correct their mistakes – for example you discover that  
a decision was made on the basis of applicant fraud. There may be time limits beyond which no reconsideration is allowed (for example vested rights have attached). But this would depend on all the circumstances of a case.