

DISQUALIFICATION

Conflicts of interest and the "Juror Standard" RSA 500-A:12

- Disqualification is appropriate where a member has a direct personal or pecuniary interest in the outcome of a case that differs from the interest of other citizens or where the member would otherwise be disqualified as a juror. RSA 673:14
- The "Juror Standard" (RSA 500-A: 12) calls for disqualification where the member

- (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.

- Common sense should prevail, and the likelihood of a peripheral conflict is much higher with board members than it is with potential jurors. In *McLaughlin v. Union Leader Corp.*, 99 NH 492 (1955), the Supreme Court held that

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 of ordinary commercial and domestic life would be eliminated from the average jury panel.

- Unlike true jurors, disqualification of a board member is a voluntary act, except that members who are abutters are automatically disqualified. In *Totty v. Grantham*, 120 NH 388 (1980), the Supreme Court held

the fact of being an abutter is sufficient to disqualify a board member from voting without a showing of actual prejudice.

- A non-binding vote may be taken at the request of the member or any other board member, prior to any public hearing.
- If you think you may have a conflict, then you probably do.
- Ask yourself; "Can I be indifferent?" and respond honestly
- You are not required to divulge the reasons for which you are disqualifying yourself - that's your business, and no one else's!
- Don't let pride interfere with your judgment -- the alternate serving in your stead will do a good job, too. Remember that the reputation and credibility of the board are at stake.

"Ex Parte Contacts"

- Outside the board meeting, avoid discussing any case with other members, applicants, abutters, neighbors, friends, or relatives (but it's OK to talk with your dog about it).
- Decisions must be made upon personal knowledge and upon evidence presented during the public hearing.
- If someone buttonholes you and gives you information regarding an application, you are obliged to reveal that information to the entire board.
- If you should be disqualified yet participate in the board's decision, you may have tainted the entire decision of the board, and it can be invalidated. This is true even if your vote did not affect the outcome. In *Winslow v. Holderness*, 125 NH 262 (1984), the Supreme Court

determined a board's decision void where a newly-appointed member voted on an application after speaking in favor of it at a public hearing prior to his appointment. The Court said that it was impossible to weigh the influence of one member's opinion on that of the other members.

- "Though a judicial or quasi-judicial act of a municipal body may be voided because of a conflict of interest, [citations omitted] an administrative or legislative act by such a body need not be invalidated if the conflicting interest did not determine the outcome." *Michael v. City of Rochester*, 119 NH 734 (1979).
- The ZBA almost never engages in legislative or administrative functions, but the Planning Board faces the role annually, when zoning ordinance amendments are proposed.
- If you are disqualified, you **may** testify as a member of the public during the public hearing, but sit in the audience. It may even be better for you simply to leave the room while the board is deliberating the issue.

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