

[Back](#)

## Ethics for Quasi-Judicial Boards

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A cell phone tower in Manchester. A revaluation in Kennebunk. A rock quarry in Windham. All these seemingly routine municipal matters have led to significant concerns about the ethics or biases of public officials in the recent past, and sometimes even to threats and lawsuits.

Attorneys who deal with quasi-judicial municipal boards say that volunteer service on boards is no longer an informal or routine matter, and can lead to significant time and expense – not to mention headaches – for local government and its officials, particularly when important precautionary steps are not taken.

The legal advice attorneys now provide to towns emphasizes that what worked in the past, and even meeting the minimum standards of state law, may no longer be enough to prevent long-running verbal and legal battles. They also say municipal board members need to avoid not only legal conflicts of interest, but also any strong appearance that they might be biased in deciding a particular case. Stating a possible interest in a case, or recusing oneself when a conflict may exist, is often the right move, and should not be seen as an admission that an official lacks fair-mindedness, they say.

The lawyers cite cases where towns and cities that took steps to head off controversy early came out ahead, and where those that didn't found themselves in the midst of prolonged battles that caused hard feelings and may have undermined public faith in the board.

Ken Cole, an attorney with Jensen Baird in Portland, has spent many long nights with planning boards, boards of assessment review (BAR), and other panels that are not supposed to make policy, but simply interpret and apply the rules as written. Even when boards follow all the procedures, it sometimes isn't easy, particularly when the stakes are high.

"One of the towns we're served for a long time is Cumberland," Cole said. "At one time, we might have gotten one or two calls a month from the town office. Now, we get calls every day."

### Legal Uncertainties

Curtis Webber, a partner with Linnell, Choate and Webber in Auburn, says that controversies over municipal procedures have certainly increased over the years, although the condition of Maine law may be responsible for some of the problems. For one thing, the relevant statutes are not very helpful in the kind of disputes that are likely to arise as land use and development rules become increasingly complex and affect larger numbers of abutters and, potentially, involve millions of dollars in investment.

While the statute books contain literally dozens of references to conflicts of interest, the definitions that govern municipal conflicts of interest are contained in Title 30-A, Section 2605, which was adopted in 1987. It covers "municipalities, counties and quasi-municipal corporations" and, in paragraph four, says, "In the absence of actual fraud" officials "deemed to have a direct or indirect pecuniary interest" in contracts must disclose that interest and abstain from voting on the proposed contract. It also specifies that 10 percent or greater stock ownership in a company creates a potential conflict.

As attorneys like Curtis Webber point out, the statute is clear but not very helpful. Most controversies over alleged bias in municipal officials do not involve contracts or direct financial gain. Instead, as in the hot-button cases occurring recently across the state, they revolve around suspicions about what being an abutter or neighbor might do to an official's judgment, whether a revaluation was performed correctly, or whether officials will bow to public sentiment rather than apply the law. Figuring out how to proceed in these instances is, well, tricky.

In addition to the statute's omissions, Webber said, there are few Maine Supreme Court cases dealing with conflict of interest and thus few precedents showing how the law should be applied. In fact, he had to go all the

way back to 1983 for a relevant citation, *Mutton Hill Estates v. Town of Oakland*. That case involved meetings between parties to a planning board application before it was formally considered – a mistake Webber believes few municipal officials would now make. Most controversies involving planning and zoning boards have raged and gone away without providing much help to future decision-makers.

Perhaps recognizing the inexact nature of many conflict charges, the municipal conflict of interest statute was amended in 1989, two years after its adoption. The next-to-last paragraph of Sec. 2605 now says, “Every municipal and county official shall attempt to avoid the *appearance* of a conflict of interest by disclosure or by abstention.” (Emphasis added.) And finally, it states, “In their discretion, the municipal officers may adopt an ethics policy governing the conduct of elected and appointed municipal officials.”

With the law expressly suggesting that conflicts of interest are as much a matter of perception as actual definition, the recent controversies may be as useful a guide to the subject as any.

### **Chairman as Abutter**

In Manchester, a cellular tower builder submitted an application in 2006 to the planning board, one of hundreds filed across the state in recent years. As it happened, the board chairman was an abutting landowner, and his role rapidly became the focus of contention between the parties – as well as front-page news in the local daily paper.

The attorney for the applicant requested that the chairman recuse himself because of potential bias, but the chairman refused and secured an opinion from town counsel backing his position. The controversy continued, however, with the applicant’s attorney charging, in essence, that her client had been forced to jump through far more hoops than necessary during the planning board’s preliminary review.

The board of selectmen then got involved, and, in an unusual move, asked the planning board chairman to step down from the case, which he did.

To Curt Webber, this was a relatively clear-cut instance where town officials should avoid the appearance of conflict. “An abutter can have a fairly direct financial interest in an application like this one,” he said. “A cell tower, depending on its location, could reduce the value of neighboring properties.” In Webber’s view, the chairman might indeed have had a financial stake in the outcome and, in any case, could certainly not avoid the appearance of conflict.

The trouble, he said, is that an official has only one opportunity to recuse him – or herself, which is before any hearings on an application take place. By the time a case becomes publicized, or featured in the newspapers, it’s too late to step down. This is why he advises his clients to declare an interest in any project due to come before a planning or zoning board “even if they think it’s minor or inconsequential.” That way, if questions are raised later, the official avoids any suspicion of improper dealing. “It’s not that big a thing to step down from a particular vote,” he said. “It doesn’t affect overall service on the board.” Most important, he said, such actions in advance of controversy maintain public confidence in the integrity of the board, which is probably its most important asset.

### **Perfect Storm for Revaluation**

When Dan Robinson became town assessor in Kennebunk in 1999 – succeeding Barry Tibbetts, who is now town manager – he knew there was a storm brewing on the horizon. The coastal town, like most of its neighbors the focus of a booming real estate market, had not had a full-scale revaluation since 1979. Property values had not only skyrocketed since then, but had also shifted sharply toward desirable shorefront lots. A shorefront property valued at \$300,000 back in 1979 might be worth \$2 million two decades later, and the town braced for a whole lot of taxpayers unhappy with their new assessments.

The revaluation was done in-house, and was completed in 2003. As Robinson expected, there were lots of phone calls. From 6,000 tax bills, there were 500 requests for abatements, and 80 appeals to the BAR. Of the appeals, Robinson said, “95 percent of them involved waterfront property.”

The revaluation also spawned a number of Superior Court filings by taxpayers unhappy with the town’s decision on their appeals, and Kennebunk was upheld on all matters relating to the actual value of

assessments. One case has just been adjudicated by the state Supreme Court where the plaintiff prevailed, though Robinson said it involved technical issues that won't affect the valuations of any properties.

What he did not expect was the sheer level of animosity created by the reassessment. "There were threats," Robinson said, "and since I live in town, the police were watching my house." One contract employee, who lived in Massachusetts, got a call from police there saying that "someone from Kennebunk is going through your garbage."

Although things have since settled down, Robinson still seems to be figuratively shaking his head: "None of this was necessary. No assessor gains anything through the value put on a particular property."

Nonetheless, the town weathered the legal challenges in good shape, according to Attorney Ken Cole, in part because it followed his advice to provide separate counsel for the assessor and the board of assessment review. Cole's firm represented the assessor, while the board worked with a different law firm. "You can't really claim to be neutral when you're representing both sides of the case," he said — in this instance an appeal to the assessment board of a valuation supplied by the assessor.

Cole notes that state law does not require towns to do this, and in smaller municipalities there may be resistance to the expense of hiring an additional law firm. "In the long run, you'll probably save money," Cole said. "Imagine what it would be like if we were trying to provide advice to both sides concerning all those disgruntled taxpayers in Kennebunk. It was like a perfect storm for appeals."

### **A Changing Landscape**

The rock quarry in Windham was a case in which Cole was personally involved. "I must have spent a dozen evenings between April and December (of 2006) attending many-hour meetings in Windham," he said.

The issues raised were in many respects like those brought up in Manchester. "One of the town councilors was an abutter, and several others lived nearby," he said. While the project, proposed by Peter Busque (doing business as Windham Properties LLC), was frequently described in the press as a "gravel pit," the application for a site off Route 302, the town's busiest road, involved rock crushers and the noise such operations necessarily produce, Cole said.

The application was turned down by both the planning board and the zoning board of appeals. Windham Properties is now suing in Cumberland County Superior Court.

As for the town councilor who is an abutter, he took Cole's advice and stepped down. "He was happy to do so," Cole said. "Why would you want all the grief that comes from having people suspect your judgment? Who needs it?"

The prevalence of controversial planning and zoning cases, particularly in the southern Maine area where Cole has most of his clients, can be attributed to one big factor: intense growth and the resulting pressure on neighborhoods and natural resources.

Referring to his own lengthy service on Portland's planning board, he said, "We had a lot of difficult decisions because a lot of the sites were marginal. The good land has already been built on. What you're dealing with lately are a lot of sites with problems."

### **An Ounce of Prevention**

Controversy concerning the role of volunteer, unpaid boards reviewing planning, zoning and assessment decisions seems certain to grow, not diminish. So what advice do the attorneys have for citizens dauntless enough to accept these appointments?

First, when in doubt, recuse, or at least declare an interest. Whether one feels a sense of bias or not, the official is always going to lose out when his or her conduct becomes the focus of discontent. "It's always going to come from the losing side," Webber said, "but you know it's going to be there, so you might as well anticipate it."

Second, hire separate counsel for boards performing separate functions. The attorney defending a code enforcement officer's decisions, Cole said, should not be the same one representing the zoning board's review of those decisions. The Kennebunk cases make it clear that assessors and review boards are in the same category.

Third, be aware of the ethics laws, and of the standards behind them. The Legislature is currently reviewing the definition of conflict of interest for legislators, based in part on a case that led to charges that a lawmaker was doing the bidding of his employer. The incident also led to the resignation of the then-commissioner of the Department of Environmental Protection.

No comparable review is apparently in the offing for the municipal conflict statute, so town and cities will have to make due with the current "unhelpful" definition and only a handful of legal precedents. In other words, they will have to strive to avoid not only conflicts of interest, but also the appearance of conflict – which in towns small or large can be very much in the eye of the beholder.