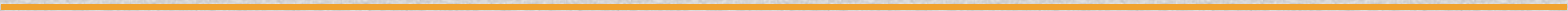




# TOPICS FOR BOARD MEMBERS



# Presentation Topics:

- Roles and Responsibilities
  - Board of Selectmen
  - Council
  - Planning Board
  - Board of Appeals
  - Incompatibility of Office
  - Conflict & Bias
  - FOAA/ Right to Know/ Ex parte communications
  - Due Process
  - Findings of Fact and decision-making
-

# Roles and Responsibilities

- **Code Officer** is responsible for enforcing ordinances and determining whether an application meets the requirements of the ordinances. S/he may also be preparing packets and agenda and providing review comments for the Planning Board and/or BOA. S/he must be certified in the areas of responsibility within one year of appointment.
  - **Town Manager** is usually the boss of the CEO and staff, and may have other roles like the Road Commissioner; brings issues from the selectmen/council to the planning board and other boards.
  - **Town Administrator** duties may be similar to a town manager, but may not be the boss of the CEO and staff.
  - **Selectmen/Council** appoints the board members and may adopt and amend ordinances.
  - **Town Meeting** adopts the comprehensive plan and may adopt/ amend ordinances.
  - **Board of Appeals** responsible for hearing administrative appeals and variance requests.
-

# Board of Selectmen/Selectboard

- Day to day running of the municipality
  - Budget/ expenditures
  - Entering into contracts
  - Hiring staff
  - Appoint committee/ board members (unless elected)
  - Approve town meeting warrants
  - Implementing policies established by town meeting
-

# Council

- Budget/ expenditures
  - Entering into contracts (varies)
  - Hiring staff
  - Appoint committee/ board members (unless elected)
  - Adopt ordinances
  - Establishing policies and implementation
  - May approve development applications
  - Approve economic development tools (TIF)
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# Planning Board

- Review/ approve subdivisions
  - Review/ approve some Shoreland zoning permits
  - Other duties as defined by the town meeting (ordinance or charter language) or municipal council
  - Short range and long range planning
-



# Board of Appeals (Board of Zoning Adjustment)

- **Title 30-A M.R.S.A Section 4353 Zoning Adjustment**
    - *“Any municipality which adopts a zoning ordinance shall establish a board of appeals subject to this section.”*
    - Hear appeals from any action or failure to act of the official or board responsible for enforcing the zoning ordinance.
    - Sometimes the appeal is taken directly to Superior Court instead, based on the ordinance language.
    - May interpret the provisions of an ordinance called into question, may approve issuance of special exception permit or conditional use permit, and may grant variances.
-



# Incompatibility of Office

- Two offices are “incompatible” if the duties of each are so inconsistent or conflicting that you could not hold both without undivided loyalty.
  - Planning Board and Board of Appeals (hearing appeal of decision you made on Planning Board)
  - Code Officer and Board of Appeals (hearing appeal of decision you made as Code Officer)
  - Appointed board member and Selectperson would be in cases where the Selectperson has the power to remove an appointed person (it depends on how the board was created).
  - LPI or CEO and Planning Board if board generally must pass judgment on a decision of the LPI or CEO regarding application or violation of the ordinance.
  - Avoid spouses ruling on a spouse’s decision.
-



# Conflict of Interest (financial)



- Statutory Test (*Title 30-A, Section 2605*)
  - “officer, director, partner, associate, employee or stockholder of a private corporation, business or other economic entity

AND

- “directly or indirectly the owner of at least 10% of the stock of the private corporation or owns at least a 10% interest in the business or other economic entity”
- Must be both.

*This is related to any situation where you could receive financial gain from approval of the project (real estate, financing, design, construction – not just the developer of the project)*

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# **Bias (relationship /state of mind)**

## **(Title 1 M.R.S.A. §71 (6))**

**If you are required to be disinterested or indifferent and make a quasi-judicial decision which involves a person:**

➤ **Blood or marriage 6<sup>th</sup> degree relation:**

(see a list- includes parents, grandparents, brother/sister, children, grandchildren, aunt/uncle, cousins, etc.)

➤ **Impartial decision:** (personal grudge, public position that you are opposed to a type of project and couldn't ever vote to support that type of development)

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# How does a board member handle potential conflict of interest or bias?

- ✓ Consult the bylaws or rules of procedure
  - ✓ If no written process:
    - Disclosure for the record
    - Abstain from further discussion and voting
    - Leave table to sit with audience
    - Participate as a member of the public
    - *Do this at the beginning of project review **before** any discussion has taken place!*
-

# What if it isn't clear . . .

- ✓ **Board member doesn't think they have a conflict or bias but other members disagree:**
  - Members of the board may vote on the issue
  - If the board finds there is conflict or bias based on the facts, then the board may order member not to participate.
  
- ✓ **Board member isn't sure if they have a conflict or bias:**
  - Ask the rest of the board to consider the facts and vote on it.

*Participation by a board member with a legal conflict of interest or bias may taint the board's decision and can cause an invalidation of the vote if it is taken to court.*

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# What if we don't have a quorum?

- **State law**
    - Majority of regular voting members
  - **Ordinance provisions may apply**
    - “a majority of those present and voting”
      - Legal
      - Supersedes statutory rule
      - Avoid controversy
    - “*Rule of Necessity*”
      - If there's trouble getting a quorum on a particular project
-



# Liability of Board Members

- **Nonperformance of Duty** (*Title 30-A section 2607*)
    - Municipal official neglects duty or commits civil violation
    - \$100 fine for each offense, when no other penalty provided
  - **Maine Tort Claims Act** (*Title 14 M.R.S.A. § 8101 -8118*)
    - Negligent acts or omissions in the normal scope of work as employee/ board member – \$10,000 personal liability limit(§ 8104-D).
    - Personal Immunity, town pays, for the following (§ 8111):
      - “*quasi-legislative*” (adoption of bylaws or procedures)
      - “*quasi-judicial*” (granting or denying a permit)
      - “*discretionary*” (where a board has a choice like whether to hold a site visit)
      - *Intentional* (if acted in good faith)
-



# Maine Tort Claims Act

- Municipal Liability and Immunity; Defense/Indemnification of Employee/Board Members
    - Provides up to \$10,000 in liability
  - Notice of Suit
    - Immediate notification (if you don't notify the municipality, you will be liable for the costs)
  - **Individual Liability \$10,000++ (municipality not liable)**
    - For Negligent Actions:
      - Not in good faith
      - Outside of authority
      - Criminally liable for acts or omissions
      - Or if the employee/member settles the claim without the consent of the municipality
-



# Maine Civil Rights Act (Title 5 M.R.S.A §4681-4683)

- Prohibits a person from “*intentionally interfer(ing) by threat, intimidation, or coercion*” with another person’s exercise or enjoyment of rights secured by the U.S. Constitution or the laws of the United States or rights secured by the Maine Constitution or laws of the State.
  - When you are sworn into office you are agreeing to uphold state and federal laws.
    - Board member could be sued whether or not they are acting in an official capacity at the time of the action.
-





# Federal Civil Rights Act of 1871

**Prohibits violation of an individual right under the U.S. Constitution or federal statute**

- Individual Liability
    - Immune from damage for acting in “good faith”
  - Municipal Liability
    - Liable if federal or constitutional right is deprived and decision was determined on town “policy, custom, or practice”
  - Defense/Indemnification
    - Municipality pays damages and defense costs
      - Exception: criminally liable or bad faith
  - Provide Immediate notice of suit to municipality
-



# **Maine Freedom of Access Act (FOAA)**

## **a.k.a. “Right to Know” (Title 1 M.R.S.A. §401-414)**

- Public right
    - Notice
    - Attend Meetings, and workshops
    - Access to records (normal business hours)
    - Record meetings/broadcast (non-disruptive)
  - Public Notice (timeframe varies by state statute/local law)
    - Non-emergency
      - Reach as many people as possible
      - Follow required timeframe, if none must be ample and reasonable
    - Emergency
      - Notify a media representative
-



# Right to Know Law (ex parte communications)

- **1. No board business (substantive) outside of advertised meetings**
  - The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter.
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# Right to Know Law

- *This subchapter does not prohibit communications outside of public proceedings between members of a public body unless those communications are used to defeat the purposes of this subchapter.*
  - This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.
-

# Right to Know Law

- **2. Record of public proceedings.** Unless otherwise provided by law, a record of each public proceeding for which notice is required under section 406 must be made within a reasonable period of time after the proceeding and must be open to public inspection. At a minimum, the record must include:
    - A. The date, time and place of the public proceeding;
    - B. The members of the body holding the public proceeding recorded as either present or absent; and
    - C. All motions and votes taken, by individual member, if there is a roll call.
-



# Right to Know Law – due process

## Participation/Attendance

- Board members must be physically present
- Must review record if absent at prior meeting before taking part/voting

## Public hearing

- Everyone must be given a chance to speak

## Applications reviewed on ordinance

- Private restrictions and disputes do not affect the decisions and action of the board
-



# Right to Know Law (§405)

## Executive Sessions

- Exception to public meeting
    - 3 rules to follow
    - Must make public vote to go into executive session during a public meeting which is preceded by public notice – agenda has to say “executive session”,
    - Follow the procedures in Section 405 for when executive session is allowed, how to make the motion, etc.
    - Do not make any final decisions in executive session.
-



# FOAA and Records Retention

- Incoming and outgoing email received or created in the course of business is an official public record.
  - Standardize your procedure with a designated records officer and records retention policy.
  - No official public records may be destroyed unless authorized, follow a retention schedule.
  - Records are treated differently based on content: non-archival (non-permanent) verses archival (permanent).
  - If it exists and was supposed to have been destroyed . . . you may be required to produce it (discovery). *Eliminate exposure by regular review and timely deletion.*
-



# FOAA Records Requests and Personal Records

- Municipal staff and board members may be required to provide personal files if they use private email or phones for municipal business.
  - *Best Practice: only use personal equipment to confirm date, time, and location of meetings.*
  - Use municipal equipment for all other communications: email, phone calls and text, taking site photos, etc.
  - Use of municipal email allows municipality to comply with state records retention requirements and to make the pulling of records to fulfill FOAA requests more efficient.
-

# FOAA Responding to Record Requests

- A written request is not required.
  - Must acknowledge receipt of request within 5 business days.
  - Must give a good faith, non-binding estimate of when the response will be complete, and an estimate of the cost to process the request.
  - Not required to create records that don't exist or convert files into requested formats.
-

# FOAA Responding to Record Requests

- Only provide public information, no confidential/private data.
  - You may charge reasonable fees associated with copying and mailing. You may charge up to \$15/hr. for staff time after the first hour.
  - You can ask for prepayment of associated fees before initiating work on the request for processing expected to be over \$100. You can ask for fee payment prior to delivery of the records regardless of fee amount.
-

# Findings of Fact and Conclusions of Law

- *“Findings of fact”*
  - Statements of facts
    - Applicant
    - Relationship to property
    - Key elements
  - Evidence
    - Applicant
    - Board
    - Interested parties
- *“Conclusions of law”*
  - Statements of facts regarding specific criteria in the ordinance or statute

**Required for  
permit decisions,  
variance  
decisions,  
subdivision and  
site plan review,  
and ordinance  
interpretation**

# Findings of Fact and Conclusions of Law

Title 30-A, M.R.S.A. Section 4403, requires that  
*“In issuing its decision, the reviewing authority shall make findings of fact establishing that the proposed subdivision does or does not meet the criteria described in subsection 5.”*

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# AVCOG Planning Technical Assistance

- Available to all member towns
  - Unlimited phone calls/email questions to town officials (elected, appointed, and staff)
  - We can always recommend you talk to MMA if we can't provide guidance/answer, so feel free to ask us first
  - We can also ask planners across the state what is happening in their municipalities
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- MMA's Local Planning Boards and Boards of Appeals – 12/5/19 in Augusta
- MMA's Managing Freedom of Access Requests – 12/12/19 in Freeport
- MMA's Elected Officials Workshop – 11/21/19 in Dover-Foxcroft and again on 12/19/19 in Augusta

## **MMA Upcoming Trainings**

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Questions?

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