New Hampshire Town And City

Quorum Quandaries

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The concept of a quorum is fundamental to local government. A quorum must be present for a public body to take effective action, and when a quorum of a public body is convened to discuss or act upon matters within its jurisdiction, open-meeting requirements apply. *See* RSA 91-A:2.

Most people understand generally what a quorum is: "the number of members [of a public body] who must be present . . . before business may be transacted." *Appeal of Net Realty Holding Trust,* 127 N.H. 276, 278 (1985) (quoting Black's Law Dictionary 1130 (5th ed. 1979)). In New Hampshire, certain statutes define a quorum for specific public bodies. *See, e.g.,* RSA 49-C:12, I (majority of city council or board of aldermen constitutes a quorum for the transaction of business); RSA 41:8 (majority of selectmen "shall be competent in all cases"); RSA 673:10, III (majority of the membership of a land use board constitutes a quorum).

In some cases the governing law or rules set a quorum at more or less than a simple majority. For example, RSA 162-H:4-a states that a quorum of the state's nine-member Site Evaluation Committee is seven members. Similarly, section 3.7 of the Durham town charter states that a quorum of the town council shall be "two-thirds of the members currently in office." In the absence of such a provision, "a majority ordinarily constitutes a 'quorum' which can take effective action." *First Federal Savings & Loan Association v. State Board of Trust Company Incorporation,* 109 N.H. 467, 469 (1969).

That's easy enough. You need a quorum to transact business, and a quorum ordinarily (but not always) is a simple majority of the public body. If a quorum doesn't show up, the public body can't take any action.

But that is only the beginning of the questions. Is the number that constitutes a quorum affected by vacancies on the board? Can an alternate member be counted to make a quorum? What if a quorum is present but, because of abstentions or disqualifications, less than a quorum votes? If a quorum is not present, can the members present continue to meet? If a quorum is present at the beginning of a meeting, can it still take action after it loses a quorum?

Excellent questions! Read on.

Vacancies and quorums.

Assume a public body of nine members. Two members have resigned recently and have not been replaced, so there are seven active members. (It is not a land use board, so there are no alternates.) If four members show up for a meeting, is a quorum

present? Is a quorum a majority of the authorized nine-person membership (five), or a majority of the seven members currently serving (four)?

Unfortunately, there appears to be no clear answer to this question in New Hampshire. No statute addresses it, and the New Hampshire Supreme Court does not appear to have had occasion to address the question directly.

The court did make a passing comment on the issue in one case, but its statement is of questionable significance. In *Appeal of Net Realty Holding Trust,* 127 N.H. 276 (1985), an appeal from a decision of the Board of Tax and Land Appeals, the supreme court stated, "When there is a vacancy [in a public body], unless a special provision is applicable, a quorum will consist of the majority of the members remaining qualified." *See* 127 N.H. at 277 (quoting P. Mason, *Manual of Legislative Procedure* § 501, at 337 (1970)).

If that is the law, the answer to our hypothetical question is that four of the seven remaining members will constitute a quorum. However, the court's statement was a mere *dictum*—a statement by the court that was not necessary to its decision. A *dictum* ordinarily is not considered to establish any precedent, so the question may still be considered unsettled in New Hampshire.

Still, it never hurts to be able to quote the supreme court in support of one's position. Thus, if a public body has one or more vacancies, it is *probably* safe to take the position that a majority of the remaining members constitutes a quorum—at least until the court, or the legislature, decides otherwise.

However, an even better approach is to get those vacancies filled as soon as possible, so there is no need to worry about the question. For most public bodies, there is a clear method for filling vacancies, and there should be no reason for significant delay (unless no one can be found to fill the vacancy—an all-too-common situation, unfortunately). Further, because most public bodies consist of an odd number of members, the question will not arise unless there are at least two vacancies. (A majority of nine is five. If one resigns, leaving eight, a majority is still five. This works with any odd-numbered membership.)

The question might also be avoided by having clear definitions in the governing document. As noted above, the Durham town charter defines a quorum of the council as "two-thirds of the members *currently in office*." That is clear. There are nine seats on the council, so a quorum ordinarily is six; but if there are only six members currently in office, a quorum is four. If a different rule were preferred, the charter could define a quorum as "two-thirds of the authorized membership of the council."

Do you need a quorum to create a quorum?

Let's assume the court's statement in *Net Realty Trust* does not prevail, and in fact a quorum is deemed to be a majority of the total number of positions, not merely a majority of the members currently serving. Now assume a five-person board of selectmen. A quorum is three members, but three members have resigned, leaving only two. (Stranger things have happened.) If a quorum is still defined as three members, it is now impossible to assemble a quorum. Since vacancies on a board of selectmen are

filled (until the next election) by vote of the remaining selectmen, is it impossible for the two remaining selectmen to fill the vacancies, and therefore impossible for them to do anything?

No. The applicable statute, RSA 669:63, states that vacancies on the board of selectmen shall be filled “by appointment made by the remaining selectmen.” It does not say “by action of the board.” In this case, there are two remaining selectmen, and they are authorized to fill the vacancies, regardless of whether they are considered a quorum of the board.

The same applies to elected land use boards, which have a similar provision for filling vacancies. RSA 673:12, I, states that vacancies on an elected board shall be filled “by appointment by the remaining board members.” Thus, if an elected seven-person planning board finds itself with only three members left because of resignations or deaths (or because nobody wanted to run), the three remaining members may fill the vacancies, regardless of whether a quorum is three or four.

For most other boards, the question does not arise, because vacancies are filled either by election or by an appointing authority external to the board. For example, with an *appointed* land use board, the governing body is responsible for filling vacancies; and most (not all) city charters provide that vacancies on the council or board of aldermen are filled by special election.

Can alternate members be counted to make a quorum?

The use of alternate members depends on the particular statute that authorizes alternate members. The most frequent use of alternate members is on land use boards, so let’s consider a hypothetical situation involving a land use board.

On a seven-person planning board, only three regular members show up for a scheduled meeting. In addition, two alternate members are in attendance. Can they be counted to make a quorum?

Of course! RSA 673:11 states, “Whenever a regular member of a local land use board is absent . . . , the chairperson shall designate an alternate, if one is present, to act in the absent member's place.” If an alternate is going to act in place of a regular member, why shouldn’t he or she count toward a quorum? The alternate essentially assumes the status of a regular member.

Someone inclined to nit-pick might point out that the alternate member has no legal status (and therefore can’t count toward a quorum) until he is actually designated by the chairperson, which presumably happens at a meeting—and how can a meeting occur if there is no quorum? This chicken-and-egg conundrum has actually been presented to NHMA on at least one occasion, and it is a good example of over-thinking a problem. If there are enough regular and alternate members present to make a quorum, it would be absurd to say that a quorum of regular members must be present before alternate members can be designated to make a quorum.

Another path to the same answer is that the statute gives the power of designation to the chairperson—not to the board. Since it does not require board action, the

chairperson can make the designation before the meeting officially begins, and then declare a quorum.

However: Remember that on a land use board, the alternate for the selectmen's or council's representative is designated *only* as an alternate for that person. Assume, for example, on a seven-member planning board, three regular members show up, including the selectmen's representative. The only alternate present is the alternate for the selectmen's representative. That alternate may not participate as a regular member, because the selectmen's regular representative is present; thus, there is no one for the alternate to replace, and it is impossible to make a quorum.

What if a quorum is present, but less than a quorum votes?

Assume a board of aldermen with seven members. A quorum is four. At a meeting where six members are present, a motion is made and a vote is taken. Three members vote in the affirmative; the other three all abstain. Does the motion pass? A quorum was present, but less than a quorum voted.

Yes, the motion passes. The New Hampshire Supreme Court *has* addressed this issue on several occasions. In fact, it considered the exact situation just suggested in *Attorney General v. Shepard,* 62 N.H. 383, 384 (1882), and held that in the absence of an express rule to the contrary, if a quorum is *present*, a proposition is carried by a majority of the votes *cast*. It does not matter that the number of votes cast is less than a quorum. The court reaffirmed that rule more recently in *Town of Merrimack v. McCray,* 150 N.H. 811, 813 (2004) ("So long as a majority of the board is present, only a majority of the votes actually cast is necessary to support an action."); *see also Opinion of the Justices,* 98 N.H. 530, 531-32 (1953) ("[I]f [members] present should choose to remain silent, or otherwise abstain from voting, their action will not defeat the action of those who vote, but will be taken as acquiescence or concurrence in the action supported by the majority of the votes cast . . . ."). Thus, as long as a quorum is present, a question could even pass by a 1-0 vote. (There are some exceptions to this, perhaps the most notable being the provision in RSAS 674:33, III, that the affirmative vote of at least three zoning board of adjustment members is necessary to decide any matter in favor of an applicant.)

As an aside, why would someone abstain, anyway? Setting aside those situations (discussed below) when a member is disqualified or recused because of prejudice or a conflict of interest, there are few if any reasons for a member of a public body to decline to vote on a matter that is properly before the body. "I don't want to take a position" or "I'm undecided" is not a legitimate reason. Members are elected or appointed to a public body to make decisions, and they should be expected to do so, regardless of difficulty, except in unusual circumstances.

What about disqualified members?

Although a quorum is not defeated by abstentions, the disqualification (sometimes called recusal) of members because of prejudice or conflict of interest is a different matter. This arises primarily with land use boards, because they frequently sit in a judicial capacity, in which they are held to a high standard of impartiality. Under RSA 673:14, no member of a land use board may "participate in deciding or . . . sit upon the

hearing of any question which the board is to decide in a judicial capacity" if the member has a personal or pecuniary interest or would be disqualified from serving as a juror on the same matter in an action at law.

Although there is no statutory or case law in New Hampshire that directly addresses the effect of disqualification on a quorum, the structure and purpose of the law make it pretty clear that a disqualified member should *not* be counted for quorum purposes. Again, under RSA 673:14, the member is not permitted to "participate in deciding or . . . sit upon the hearing"; thus, the member is effectively rendered absent, even though he or she is physically present. This is quite different from being present and able to vote, but simply choosing not to.

The statute on designating alternates, RSA 673:11, reinforces that view. It states, "Whenever a regular member of a local land use board is absent or . . . disqualifies himself or herself, the chairperson shall designate an alternate, if one is present, to act in the absent member's place . . . ." This statement treats a disqualified member exactly the same as an absent member—even to the point of dropping the separate reference to disqualification in the second part of the sentence. If a disqualified member is deemed to be absent, surely the member cannot be counted toward a quorum—and of course, that is one of the reasons for having an alternate.

Further, as explained above, the alternate member *does* count toward a quorum, and it would make no sense to count *both* the alternate and the regular member whose place he is taking. But even if there is no alternate available, so that the double-counting issue does not arise, it is only sensible that if an alternate would (if present) count toward a quorum, then the disqualified regular member does not.

Can a public body still act if a quorum disappears?

Six members of the eleven-member council are present when the meeting begins. One of the six leaves before all business is finished. Can the remaining five members continue taking official action on remaining agenda items?

No. Almost all definitions of "quorum" refer to the number of members necessary to "take action" or to "transact business." The importance of a quorum doesn't end once the meeting convenes. Although there is no need to adjourn the meeting immediately (see discussion below), a quorum must be present for the body to take action.

Can a quorum be present for some purposes but not for others?

Sure. Imagine that five members (no alternates) show up for a meeting of a seven-person planning board. Of the several items on the agenda, one is a subdivision hearing, for which two members must disqualify themselves, leaving no quorum for that hearing. The hearing will need to be rescheduled, but a quorum is still present for the meeting, and the board may act on any other matters before it.

Must the meeting end if a quorum disappears?

Some people fear that something awful will happen if a board goes ahead with a meeting when a quorum fails to show up, or when a quorum is defeated because one or

more members leave during the meeting. It is not unusual to hear someone say, “We can’t meet—we don’t have a quorum.”

Of course you can meet—you just can’t do anything. There is no law against members discussing matters within the board’s jurisdiction when less than a quorum is present.

The legal issues surrounding meetings of public bodies arise primarily when a quorum *is* present. If a quorum is present and the board is discussing matters within its jurisdiction, it is a “meeting” under the Right-to-Know Law, and the requirements of that law apply (notice, public access, minutes).

If a board has posted proper notice of a public meeting and a quorum fails to show, there is nothing to stop the members present from discussing the items on the agenda. Because a quorum is not present, there is no “meeting” under the Right-to-Know Law, so the members could actually kick the public out and meet privately—but that is not a good idea for several reasons. Instead, if the members want to meet, they should continue to meet in public, just as if a quorum were present, but not take any action. Again, because it is not a “meeting” under the Right-to-Know Law, there is no requirement to keep minutes; but it is probably a good idea to keep very basic minutes (noting that a quorum was not present), to avoid questions later about why there are no minutes of that meeting.

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