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# LEGAL Q&A: Mitigating Confusion over “Ex Officio”

*Jonathan Cowal, Municipal Services Counsel*

It is not uncommon for there to be a certain level of confusion concerning what it means to be an ex officio member of a public body. The position “ex officio” is explicitly provided for in statutes like RSA 673:2, where the statute refers to a member of the select board or an administrative official of a city serving as the ex officio member on the local Planning Board. There are other statutes that don’t use the term ex officio, however that designation is implied by the language of the statute. An example of this would be RSA 32:15 which requires one member of the governing body and one member of the school board to sit on an official budget committee. Several statutes include provisions for ex officio members to serve on public bodies and understanding their role is vital in ensuring that the public body is operating within the confines of the law.

What does it mean to be an “ex officio” member?

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For land use boards the term ex officio is defined in RSA 672:5. That statute provides that an "Ex Officio Member" means any member who holds office by virtue of an official position and who shall exercise all the powers of regular members of a local land use board. In this instance, the only difference between an ex officio member and any other member of a public body is that the ex officio member holds their position by virtue of holding some other official position. They are not simply a representative of the other public body, an advisor, or some other type of lesser member. They are equal in every respect to the other members of the public body except that they were chosen from a smaller pool of applicants due to their other official position. RSA 672:5 goes as far as to clarify that they shall exercise all the powers of regular members of a local land use board, however this sentiment is not limited to only land use boards. Any time an ex officio member sits on a public body, they shall have the same powers as other members, with a few very narrow exceptions.

It is important to note that while ex officio members may exercise the same authority as other members of the public body, they do not hold any more authority than any other member and they do not have a special status due to the fact that they serve on another board. The fact that there is a member of the select board who is statutorily appointed to the planning board does not mean that the select board member on the planning board gets to boss the other members around or wield the power of the select board over the planning board. They are an equal member just like everyone else

### What other boards have ex officio members?

There are several other statutes that specifically mention ex officio members. RSA 673:4-a states that if there is a historic district commission, one member of the commission shall be an ex officio member of the heritage commission. RSA 31:112 says, if a city or town has adopted RSA 36-A, a city or town forest may be managed by the city or town conservation commission, with the tree warden, if any, as an ex officio member. There are other statutes that don't explicitly use the term ex officio, but by the very language of the statute it is implied that the members are ex officio members. The most common example of this would be RSA 32:15 which requires an official budget committee to have one member of the governing body and one member of the school board serving on the committee. Even though the term ex officio isn't used, these members are appointed to the budget committee because they serve on another public body thus establishing their status as ex officio.

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While there are several statutes that explicitly call for an ex officio member, and others that imply the existence of ex officio members, it is also common for municipalities to mistakenly create ex officio members where none exist. A common example of this is when municipalities believe that there needs to be an ex officio member of the select board or planning board on the zoning board of adjustment. However, RSA 673:3 does not mention anything about an ex officio member, nor does it imply that there should be one. In fact, while not explicitly barred by statute, it can be problematic to put a select board member on the ZBA due to the potential for a conflict of interest to arise.

### **Are there any limits to the role of an ex officio member?**

There are a few statutes which narrowly limit the role of an ex officio member on certain boards. RSA 673:9 states that the ex officio member of planning board shall not serve as chairperson. RSA 673:11 states that whenever an ex-officio member of a land use board is absent or disqualifies herself, the chair may only designate the person appointed by the select board, town council or city council to serve as the alternate to the ex officio. The reason for this is because there cannot be more than one member of the select board serving on the planning board at the same time. Therefore, it stands to reason that you cannot appoint another member of the select board to be an alternate unless they are only serving as an alternate for the other select board member. Finally, RSA 32:15 states that the ex officio members of the budget committee who serve on the select board and school board cannot be elected or appointed to serve as at-large members.

### **To what extent can a public body choose to limit the power of ex officio members?**

This issue was addressed in a recent opinion by the Hillsborough Superior Court in the case of Town of Hudson and Hudson School District SAU 81 v. Hudson Budget Committee. In this case, the Hudson Budget Committee adopted a bylaw that barred the two ex officio members from voting. The provision read, "votes will be limited to the nine elected or duly appointed members-at-large". The Committee argued that RSA 32:15 is ambiguous and does not require the ex officio member to be permitted to vote. What is interesting about this argument is that RSA 32:15 does not actually use the term ex officio to describe the members at issue, nor does it include any provision like the one in RSA 672:5 which explicitly states that ex officio members have the same powers as other members.

Nevertheless, the court adopted the term "ex officio member" when talking about the two budget committee members and ruled that by the plain language of the statute they were considered a "member" just like the appointed or at-large members. RSA 32:15 limits these members ability to serve as at-large members and does not impose any further limitations. If the legislature wanted these members to be further limited, they would have included that in the statute. As a result, the court ruled that the actions of the budget committee were against the law, and they could not strip the ex officio members of their right to vote. All actions taken by the budget committee during the time that the ex officio members were barred from voting were deemed invalid and ordered to be redone.



*Jonathan Cowal is the Municipal Services Counsel with the New Hampshire Municipal Association. He may be contacted at 603.224.7447 or at [legalinquiries@nhmunicipal.org](mailto:legalinquiries@nhmunicipal.org).*

### ex officio members

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New Hampshire Municipal Association  
25 Triangle Park Dr.  
Concord, NH 03301  
603.224.7447  
[nhmainfo@nhmunicipal.org](mailto:nhmainfo@nhmunicipal.org)

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