

CHAPTER 3 CONFLICTS OF INTEREST AND INCOMPATIBLE OFFICES

A. INTRODUCTION

The proper operation of democratic government requires that public officials be independent, impartial, and responsible to the people; that government decisions and policy be made in proper channels of government structure; that public office not be used for personal gain and that the public have confidence in the integrity of its government.

While the vast majority of Vermont's local officials have always taken due care to ensure that personal interests did not influence their public decisions, local officers have never been immune from conflict of interest allegations. Elected officials are rightfully seen as occupying a caretaker relationship to the town and worthy of the responsibility of keeping the town's best interests foremost. Yet the very structure of Vermont local government, the breadth of its responsibilities, and the oft-contentious nature of local issues all increase the likelihood that allegations will be leveled against even the most conscientious selectboard member.

Of all the issues facing Vermont towns, none has proven more difficult to address than the allegation that a local official has a conflict of interest. Such allegations touch the core of people's beliefs about local government and bring into question the personal motives of the official. However, it is often very difficult to determine if he or she has a genuine conflict. Concrete measures are few and far between and, for better or worse, the Legislature and Supreme Court have never provided much guidance for resolving local conflict of interest issues.

As a result, the resolution of conflicts of interest has often relied, for the most part, on the moral conscience of the persons involved. Unfortunately, it is both easy to make allegations of unethical conduct and difficult to defend against such accusations. A mere accusation can do significant damage to the reputation of the accused and, at times, an entire board.

Beyond damage to one's reputation, there are other, perhaps more direct reasons to avoid conflicts. For example, conflicts of interest may result in void contracts. Courts in several jurisdictions have held that where a public official enters into a contract, the execution of which may make it possible for the official's personal interest to come into conflict with his or her discharge of a public duty, the contract is void as against public policy, regardless of the good faith of the parties and the reasonableness of the deal. See McQuillan, *Municipal Corporations* § 29.97. As a further remedy for this self-dealing, a court may also require the official to surrender any profit realized as a result of the questionable deal. *Davenport v. Town of Johnson*, 49 Vt. 403 (1877). Conflicts can also result in void quasi-judicial decisions. The Vermont Environmental Court has stated unequivocally that if a development review board (DRB) member with a conflict of interest participates in a DRB decision, the Court can vacate the decision for that reason, and order the matter be reconsidered by the DRB without the participation of that member. *Appeal of Janet Cote*, 257-11-02 Vtec (2003).

Towns often fail to pay attention to conflicts of interest until an allegation is made or an outright crisis has developed. As the leaders of local government, it is incumbent upon the selectboard members to take the lead and develop strategies and tools for addressing conflicts of interest prospectively. They should take appropriate steps to minimize their own conflicts and

appropriately address them when they arise, not only for their own protection and protection of other local officials, but to uphold the public's faith in their local government.

B. IDENTIFYING CONFLICTS OF INTEREST

One of the most difficult aspects of conflicts is determining when they exist. Part of the problem is the breadth of local government's responsibilities. As explained in the Introduction, local government stretches across the three traditional functions of government: legislative, judicial and executive. Conflicts may be viewed in different ways, and different standards may apply, when a local official is acting in each of these various roles. Nonetheless, experience has shown that a local official is likely to have four types of interests that may result in a conflict: direct monetary interest, indirect monetary interest, direct personal interest, and indirect personal interest. In quasi-judicial proceedings, an official must also be conscious of bias and ex-parte communication. The following scenarios are examples of when conflicts of interest might arise in the selectboard's executive, legislative, and executive roles.

1. Direct monetary interest. A conflict of interest can be present when a local official acts on a matter affording the official a direct financial gain.

- **Executive function.** A selectboard is considering acceptance of a new public road. The road is located in a new subdivision proposed by one of the selectboard members. The town's acceptance of the road would relieve the selectboard member of the expense of maintaining it.
- **Legislative function.** A selectboard is considering adoption of an ordinance setting weight limits on the local highways and bridges. One selectboard member owns a local trucking company that might not be able to use several roads if lower weight limits are imposed.
- **Judicial function.** A selectboard is considering an application for a highway access permit. The applicant is proposing construction of a convenience store and deli. One selectboard member owns an existing convenience store and gas station on the same road.

Direct monetary interests are most easily identified and can present clear conflicts in all three of the selectboard's roles.

2. Indirect monetary interests. A conflict of interest can be present when a local official acts on a matter that financially benefits one closely tied to the official, such as an employer or family member.

- **Executive function.** A selectboard is considering bids for a new highway truck. The daughter-in-law of one of the selectboard members is the general manager of one of the two equipment dealerships that has submitted a bid.
- **Legislative function.** A selectboard is considering a revision to the town's zoning bylaw. The proposed revision would directly limit a selectboard member's brother's ability to expand his existing business.
- **Judicial function.** A selectboard is considering an application for a liquor license at a new restaurant. One of the selectboard members has been hired by the applicant to manage the new facility.

Indirect monetary interests can be difficult to identify, especially if the member at issue fails to disclose his or her relationship to the party that stands to benefit from the decision. At times, dealing with the family member or close associate of a selectboard member may be in the best interest of the town. However, when that relationship is the only reason, or a major reason for the decision, the arrangement may be detrimental to the town and may present a conflict. The failure to appropriately deal with an indirect monetary interest may lead to an allegation of nepotism or cronyism.

3. Direct personal interest. A conflict may be present when a local official acts on a matter that benefits the official in a non-financial way, but in a matter of significant importance.

- **Executive function.** The town's development review board has denied a permit for a large retail project. The selectboard is considering participation in an appeal to the environmental court as an interested party. One selectboard member has been a vocal proponent of the project and has written an op-ed piece about the project for the local newspaper.
- **Legislative function.** The selectboard is considering whether to allow snowmobiles on a town road that bisects property owned by a selectboard member.
- **Judicial function.** A resident has submitted a written complaint of a dog bite. A selectboard member owns the dog in question.

Direct personal interests can take many forms and, therefore, can be particularly difficult to identify. In the judicial role, a direct personal interest may rise to the level of a bias that prevents a local official from making decisions objectively. However, the same interest may be perfectly acceptable, or even desirable, when the official is acting in an executive or legislative role.

4. Indirect personal interest. A conflict may be present when a local official acts on a matter in which the member's judgment may be affected because of a family or personal relationship, or membership in some organization, and a desire to help that person or organization further its own interests.

- **Executive function.** The selectboard is preparing next year's proposed town budget. A member of the selectboard is also the chief of the town's volunteer fire department. The selectboard member would like the budget to include a line item for purchase of a piece of fire equipment.
- **Legislative function.** The selectboard is considering revisions to the town's zoning bylaw. Several members of a selectboard member's family have petitioned the proposed revision, which would restrict expansion of several industrial uses in a certain zone. The family members own homes in the zone.
- **Judicial function.** A selectboard member is sitting on the board of civil authority. The board member's sister is a town lister.

The concern presented by an indirect personal interest is embodied in the phrase "a person cannot serve two masters." Voters reasonably expect that when a local official is making a decision, he or she will give first consideration to the interest of the town. An official's close affiliation with, or membership in, another organization may result in a division of loyalties.

Failure to address the conflict may result in the perception that the official is using the office to further the interest of that other group.

- 5. Close calls.** The foregoing scenarios have been greatly simplified to provide examples of when conflicts of interest might be present. The reality is that conflicts, and potential conflicts, can be much more difficult to identify. Often times, the appearance of a conflict of interest can be more damaging than the conflict itself. Take, for example, a selectboard member who refuses to recuse himself, and votes to approve a roadside mowing contract between himself and the town. While the value of that conflict may be relatively small, the public's perception that the office has been used for private gain may be very costly, not only to the member, but to the entire selectboard. The best advice when trying to identify conflicts is to err on the side of caution, if only for the preservation and protection of the public's confidence in local government.

C. HANDLING CONFLICTS

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

– Chapter I, Article 7, Vermont Constitution

- 1. Transparency and disclosure.** Chapter I, Article 7 of the Vermont Constitution ensures that government be operated for the benefit of all the people and not for the advantage of a single person, family or group. It also reserves to the people the right to reform their government in a manner that is most conducive to the public good.

Violations of the public trust are most likely to occur when the transparency of local government is obscured. One of the best methods to effect transparency is to create an environment in which the full and frank disclosure of conflicts of interest is supported and encouraged. Selectboards can take the lead in promoting transparency by actively encouraging an environment where all local officials feel free to disclose facts that may lead to an actual or apparent conflict of interest.

Beyond transparency, disclosure can also be an effective tool for evaluating conflicts. When potential conflicts are disclosed, they can be discussed and evaluated with other local officials. Oftentimes, discussion of the facts surrounding a potential conflict may lead to the conclusion that no conflict actually exists or can be dealt with effectively.

- 2. Appropriate recusal.** When a conflict of interest is identified and disclosed, the proper course of action is recusal from participation in the matter, i.e. from discussing, questioning, commenting and voting. While some officials may feel it is sufficient to just refrain from voting, complete recusal acknowledges that the outcome of events and decisions often rests on more than the final vote. A conflicted official should not be allowed to use his or her position to influence others' decisions. Practically speaking, this can mean leaving the room, or at least the table, where the discussion is occurring.

A common mistake is to equate recusal for conflict of interest with a vote to *abstain*. They are entirely separate processes. To *recuse* means “to disqualify ... from participation in a decision on grounds such as prejudice or personal involvement.” *American Heritage Dictionary*, 1143 (3d ed., 1997). To *abstain* means “to refrain from something by one’s own choice.” *Id.* at 6. Abstention from voting is used by a board member when he or she has inadequate information on which to judge the merits. This may occur where the member has not had an opportunity to examine all of the evidence or to attend all of the hearings for reasons other than conflict of interest. Recusal, on the other hand, involves complete removal from participation in the discussion and the vote, where a conflict, or the appearance of a conflict, is present.

- 3. Remedies.** Can a selectboard force a conflicted local official to recuse himself when the member has a conflict of interest? Absent a local conflict of interest ordinance, the answer is probably not. Local government is not a private organization that can define its own membership and discipline its own members. Just as the Legislature has taken a limited role in defining conflicts, it has also been relatively silent on how to deal with conflicts once they are identified and disclosed. Absent a local conflict of interest ordinance (see below), the most a selectboard might be able to do is register its displeasure with a member’s conduct by passing a resolution censuring the member. Even this limited remedy can have its pitfalls. See *LaFlamme v. Essex School District*, 170 Vt. 475 (2000).

D. LOCAL TOOLS FOR PREVENTING AND ADDRESSING CONFLICTS

Many have argued that the best remedy for those officials who engage in conflicts is to vote the offender out of office. However, as explained in Chapter 2, there is no provision in Vermont law for recall of local officials, though some charters provide for it. It can be several years before the expiration of an office. Relying on political remedies is rarely sufficient. VLCT recommends that municipalities avail themselves of one or more of the local tools for addressing conflicts.

- 1. Conflict of Interest Ordinance.** In 2000, the Legislature authorized towns to adopt a conflict of interest prohibition for its elected and appointed officials. 24 V.S.A. § 1984. The process for adoption of the prohibition may be initiated by the selectboard or by application of five percent of the town’s voters. 17 V.S.A. §§ 2643(a), 2642(a). The prohibition must be adopted by the majority of those present and voting at an annual or special meeting warned for that purpose. 24 V.S.A. § 1984(a). Regardless of where the ordinance initiates, it must contain the following elements:

- A definition of conflict of interest.
- A list of the elected and appointed officials covered by such prohibition.
- A method to determine whether a conflict of interest exists.
- Actions that must be taken if a conflict of interest is determined to exist.
- A method of enforcement against individuals violating such prohibition. 24 V.S.A. § 1984(a).

The statute provides a default definition of a conflict of interest:

[A] direct personal or pecuniary interest of a public official, or the official’s spouse, household member, business associate, employer, or employee, in the outcome of a cause, proceeding, application, or any other matter pending before

the official or before the agency or public body in which the official holds office or is employed. 'Conflict of interest' does not arise in the case of votes or decisions on matters in which the public official has a personal or pecuniary interest in the outcome, such as in the establishment of a tax rate, that is no greater than that of other persons generally affected by the decision. 24 V.S.A. 1984(b).

While the statute provides a good starting point, towns should remember that they retain the authority to craft their own definitions. VLCT maintains a file of conflict of interest ordinances from around the state. If you are drafting a proposed conflict of interest prohibition and would like to review the work of other towns, please feel free to contact the League for assistance.

- 2. Conflict of Interest Policy.** The law also authorizes the selectboard to establish a conflict of interest policy. A policy and an ordinance have a small but significant difference: an ordinance has the force and effect of law. A policy is usually only advisory in nature and affords no direct legal remedy.

While selectboard policies typically have no bearing on the actions of the town's independently elected officials (e.g., town clerk, listers, auditors), the law expressly provides that a conflict of interest policy adopted by a selectboard will apply to "all elected officials of the town, city, or incorporated village." 24 V.S.A. § 2291(20).

Please see the Appendices for VLCT's model conflict of interest policy.

- 3. Purchasing and Bidding Policies.** Another effective tool available for avoiding conflicts of interest is the purchasing policy. Such policies typically provide procedures for competitive bidding and may prohibit local officials or employees from participating in the bidding process. A copy of VLCT's model bidding policy is located in the Appendices.
- 4. Municipal Administrative Procedures Act.** The Vermont Municipal Administrative Procedures Act (MAPA) requires towns that have adopted it to follow certain administrative procedures when conducting contested hearings. 24 V.S.A. § 1201. MAPA is an enabling statute and applies only in those towns where it has been adopted. The law creates procedural rights and duties, with an eye toward affording parties more formal hearings and additional due process protections. 24 V.S.A. § 1202. Though usually adopted and applied in conjunction with zoning hearings, towns may elect to apply MAPA to any other contested hearing held by a local board. 24 V.S.A. § 1201.

One of the features of MAPA is the conflict of interest provision, which requires local boards to comply with the requirements of the statute proscribing the circumstances under which a judge must be disqualified from hearing a case. 12 V.S.A. § 61(a). This statute prohibits persons from acting in a judicial capacity in which the person has an interest or is related to a party within the fourth degree of consanguinity. 12 V.S.A. § 61(a). Another feature of MAPA is the treatment of ex parte communications. The chair and all board members are expressly prohibited from communicating with any party or the party's representative, while the proceeding is pending. 24 V.S.A. § 1207(a), (b). Any ex parte communication received by the chair or a board member must be disclosed on the record. 12 V.S.A. § 1207(c).

E. STATUTORY REQUIREMENTS

- 1. Appropriate Municipal Panels (AMPs).** Under the 2004 revisions to Vermont's zoning statute, local land use panels (planning commissions conducting zoning review, zoning boards of adjustment, and development review boards) are required to adopt rules of ethics with respect to conflicts of interest. 24 V.S.A. § 4461(a).
- 2. Quasi-judicial Proceedings.** Where the Municipal Administrative Procedures Act applies, board members must recuse themselves as would members of the judiciary who are subject to 12 V.S.A. § 61. 24 V.S.A. § 1203. Indeed, as mentioned below, recusal is mandated for members of any body acting in a quasi-judicial proceeding, even in the absence of the Municipal Administrative Procedures Act, since 12 V.S.A. § 61 (a) states that no one shall "act in a judicial capacity ... as trier of a cause or matter in which he ... is interested..." 12 V.S.A. § 61(a).
- 3. Setting Compensation.** A town may vote at its annual meeting to compensate its local officials. 24 V.S.A. § 932. If the town does not set the compensation, the selectboard may. However, the selectboard may not set its own pay, which must be set by the auditors at the time of the annual town audit. 24 V.S.A. § 933.
- 4. Liquor Licenses.** There is a statutory conflict that prohibits the selectboard, acting as the local liquor control commissioners, from issuing a liquor license to "any enforcement officer or member of a local control board [or] to any person or corporation acting in his behalf." 7 V.S.A. § 223. In other words, a selectperson cannot receive a liquor license in his or her own town.
- 5. Election Officials.** No person may serve as an election official in an election where his or her name appears as a candidate for selectperson on the Australian ballot unless he or she is the only candidate for that office. 17 V.S.A. § 2456. These same prohibitions would apply to village officers as well. 1 V.S.A. § 139.

F. SIGNING ORDERS

Many small towns find themselves in the position of having to employ selectpersons to perform some extra services (e.g. road commissioner or board clerk). Even though there is no statutory prohibition on a selectperson being an employee of a town, selectpersons must be cautious when deciding to hire themselves and when setting compensation for these extra services.

A selectperson should not sign a paycheck or warrant for services that he or she renders. If the payment or salary amount is set by the voters or the auditors, then this conflict is not that critical. 24 V.S.A. § 931. But if the amount is not set by the voters or auditors, it is best to avoid any situation which would even remotely hint of conflict. It is simplest for the selectboard to avoid hiring individual selectpersons to perform services for the towns. However, if a town must hire a selectperson for a task, then a plan or system of bidding should be implemented to insure that unfair influence is not wielded by any selectperson.

G. INCOMPATIBLE OFFICES

No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that the accumulation of all power,

legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

– James Madison, *Federalist Papers*, No. 47

In recognition of the principle that the aggregation of political power may result in the diminishment of citizens' freedoms, the Legislature has prescribed a list of incompatible offices. The general statute concerning incompatible town offices is 17 V.S.A. § 2647. Under that statute, a selectboard member may not hold the offices of auditor, collector of current or delinquent taxes, first constable, lister, town agent, town manager or town treasurer. Likewise, the spouse of a selectboard member or "any person assisting [a selectboard member] in the discharge of their official duties" is not eligible to serve as auditor.

The incompatible offices statute does not apply in a town with 25 or fewer legal voters, but even in those towns "an auditor [or the auditor's spouse] shall not audit his own accounts kept and rendered in some other official capacity." 17 V.S.A. § 2648. It should also be noted that the statute does not prohibit one from running for two incompatible offices. For example, one person may simultaneously run for the office of treasurer and auditor, but if elected to both positions, must resign from one office before commencing duties in the other.

Finally, while the incompatible office statute does not mention romantic co-habitants or civil union partners, the intimacy of such relationships would necessarily imply that the same prohibitions apply to these relationships as well.

A Chart of Incompatible Offices is located in the Appendices.

H. NEPOTISM

A word about nepotism is also warranted. Nepotism may occur when town officers appoint their relatives to positions in town government. At times, the relative may be well qualified or even *the* most qualified person, and appointment is appropriate and in the best interest of the town. This is especially true in small towns. Nepotism, however, occurs when the relationship is the only reason or a major reason for the appointment. Such an appointment is not in the best interest of the town and may be detrimental to the town.

I. CRIMINAL OFFENSES

- 1. Kickbacks.** Under Vermont *criminal* law, public officials or employees who solicit or accept gifts, gratuities or promises of such with the understanding that the official or employee will be influenced in any matter within his or her official capacity (i.e., kickbacks) may be fined or imprisoned. Possible penalties include fines of up to \$10,000 and prison terms of up to five years, depending on the value of the gift or benefit. 13 V.S.A. §§ 1106, 1107.
- 2. False Claims.** State law makes it illegal for municipal officials to make any false claims to defraud a municipality. Guilt may result in a fine of up to \$10,000 and/or a prison term of up to five years. 13 V.S.A. § 3016.

J. CONCLUSION – CONFLICTS OF INTEREST IN A NUTSHELL

Many of Vermont's municipalities find it difficult to appoint and elect boards and commissions that do not include people with extensive business and family ties to their community. While conflicts cannot always be avoided, they can, and should, be managed. Here are some final tips to remember:

- Conflicts can have significant legal and personal consequences. Mere allegations of conflicts of interest can cause damage to reputations and undermine public confidence in local government.
- Disclosure of potential conflicts effectuates transparency and affords opportunities for discussion and evaluation of potential conflicts.
- When a conflict is identified and disclosed, the local official should recuse himself from participation in the matter under consideration.
- Municipalities should take a proactive approach to conflicts and avail themselves of all tools for dealing with conflicts, including conflict ordinances, conflict policies, nepotism policies and bidding policies.
- Remember to check State law. State statutes often have specific provisions to limit conflicts of interest or to prohibit one person from holding two offices simultaneously.
- In some extreme instances, conflicts of interest can rise to the level of criminal offenses.