



MEMORANDUM

To: Vermont Municipal Officials
From: VLCT Municipal Assistance Center
Date: October 1, 2015
RE: VLCT Model Conflict of Interest Policy

What is a conflict of interest?

A conflict of interest is a “real or seeming incompatibility between one’s private interests and one’s public or fiduciary interest.” *Black’s Law Dictionary, 8th Ed.*

Conflicts may be either financial or personal, and they may be either direct or indirect:

- A direct financial conflict of interest occurs when a local official acts on a matter affording the official a direct financial gain.
- An indirect financial conflict of interest arises when a local official acts on a matter that financially benefits a person or group closely tied to the official.
- A direct personal conflict of interest is present when a local official acts on a matter that benefits the official in a non-financial way but is of significant importance to the official.
- An indirect personal conflict of interest arises when a local official acts on a matter in which the official’s judgment may be affected because of a familial or personal relationship or membership in some organization and a desire to help that person or organization further its own interests.

Within the context of local government, a perceived conflict of interest can be just as problematic as a real conflict.

Why are conflicts of interest important?

The structure of Vermont local government, the breadth of local government’s responsibilities, and the often-contentious nature of local issues increase the likelihood that allegations of conflicts of interest will be leveled against even the most conscientious municipal official.

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Failure to manage ethical dilemmas appropriately can significantly damage the reputation of a local official, an entire public body, or the municipality as a whole. Fortunately, the Vermont Legislature has provided broad enabling authority to create and adopt conflict of interest provisions for resolving local conflicts of interest. It is therefore up to every individual municipality to articulate standards for identifying and managing conflicts of interest.

A municipal conflict of interest policy can help guide elected and appointed officials through situations that present actual or perceived conflicts of interest. The adoption of a

conflict of interest policy sets shared expectations about how conflicts and perceived conflicts will be handled by municipal officials. This model policy has been drafted as a template which may be modified and adopted by the municipal legislative body.

How is a conflict of interest policy adopted and who does it apply to?

A conflict of interest policy is adopted by vote of the legislative body within the context of a duly-warned public meeting. A municipal policy is effective as soon as it is adopted or at any later date specified by the legislative body.

Twenty-four V.S.A. § 2291(20) gives the legislative body the authority to adopt a conflict of interest policy that will apply to all elected and appointed municipal officials. However, a conflict of interest policy is not meant to govern the behavior of employees which should be addressed separately in the context of a personnel policy and/or purchasing policy.

The adoption of a conflict of interest policy by the legislative body does not preclude any other public body in the municipality from adopting its own conflict of interest policy (especially an appropriate municipal panel such as a development review board, which is required by 24 V.S.A. § 4461 to adopt rules governing conflicts of interest). However, doing so will mean that the members of that public body will have to abide by both policies.

What should be done when a conflict is identified?

Conflicts of interest inevitably arise in the workings of small town government, and they should be avoided whenever possible. However, the presence of a conflict does not necessarily mean that a municipal official may not continue to act in a particular situation. The deciding factor should be whether the official is able to act *impartially* despite the presence of a conflict.

One important caveat to the above: A higher conflict of interest standard applies in the context of quasi-judicial decision-making. Quasi-judicial decisions are rendered in situations where the rights of a particular individual are at stake (e.g., tax appeals, vicious dog hearings, land use decisions). In those situations the affected individual has the right to receive constitutional due process, which includes the right to an impartial decision maker. If a municipal official with a conflict of interest participates in a quasi-judicial process, a court may determine that the official was not an impartial decision maker and may vacate the decision and order the matter be reconsidered without the participation of the conflicted member. See e.g. *Appeal of Janet Cote*, 257-11-02 Vtec (2003). Therefore, municipal officials should be more inclined to recuse themselves when they are participating in a quasi-judicial process.

When an actual or perceived conflict arises or is identified, VLCT recommends taking the following steps, which have been incorporated into this model policy:

1. The actual or perceived conflict should be *disclosed* at an open meeting or hearing.
2. The public body should *discuss* the situation at that meeting or hearing.
3. The individual with the actual or perceived conflict should *consider* recusal.
4. The individual with the actual or perceived conflict should *decide* whether to recuse him or herself and *explain* why.
5. The minutes of the meeting or the written decision from the hearing should *document* the above process.

Unless there is a local ordinance or charter provision that states otherwise, an elected official may not be forced to recuse himself or herself or to resign if requested, even if a clear conflict of interest has been identified. Other elected officials may express their opinions about the subject, and may privately or publicly admonish the elected official who fails to handle a conflict appropriately, but such is the extent of their power over the situation. Each elected official within a municipality is independent from the other elected officials and answers only to the voters. The situation is different for an appointed official who may be instructed to recuse himself or herself or may be removed from office by the official or public body that appointed him or her.¹

This model policy has been developed for illustrative purposes only. VLCT makes no express or implied endorsement or recommendation of any policy or any express or implied guarantee of legal enforceability or legal compliance. VLCT also does not represent that any policy is appropriate for any particular municipality. Please seek legal counsel to review any proposed policy before adoption.

If you have specific questions about this policy please contact us at (800) 649-7915 or info@vlct.org.

¹ Certain appointed officials such as a Zoning Administrator and a Town Manager may only be removed for cause and after being afforded with procedural due process protections including notice and a reasonable opportunity to be heard.

Conflict of Interest Policy [insert name of municipality]

Article 1. Authority. Under the authority granted in 24 V.S.A. § 2291(20), the [name of municipal legislative body] hereby adopts the following policy concerning conflicts of interest.

Article 2. Purpose. The purpose of this policy is to ensure that the business of this municipality will be conducted in such a way that no public officer of the municipality will gain a personal or financial advantage from his or her work for the municipality and so that the public trust in municipal officials will be preserved. It is also the intent of this policy to ensure that all decisions made by municipal officials are based on the best interest of the community at large.

Article 3. Application. This policy applies to all public officers as that term is defined below.

Article 4. Definitions. For the purposes of this policy, the following definitions shall apply:

A. **Conflict of interest** means any of the following:

1. A direct or indirect personal or financial interest of a public officer, his or her spouse, household member, child, stepchild, parent, grandparent, grandchild, sibling, aunt or uncle, brother- or sister-in-law, business associate, or employer or employee in the outcome of a cause, proceeding, application, or any other matter pending before the officer or before the public body in which he or she holds office or is employed.
2. A situation where a public officer has publicly displayed a prejudgment of the merits of a particular quasi-judicial proceeding. This shall not apply to a member's particular political views or general opinion on a given issue.
3. A situation where a public officer has not disclosed ex parte communications with a party in a quasi-judicial proceeding.

A "conflict of interest" does not arise in the case of votes or decisions on matters in which the public official has a personal or financial 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.

B. **Emergency** means an imminent threat or peril to the public health, safety, or welfare.

C. **Ex Parte Communication** means direct or indirect communication between a member of a public body and any party, party's representative, party's counsel or any person interested in the outcome of a quasi-judicial proceeding, that occurs outside the proceeding and concerns the substance or merits of the proceeding.

D. **Official act or action** means any legislative, administrative, or quasi-judicial act performed by any public officer while acting on behalf of the municipality.

E. **Public body** means any board, council, commission, or committee of the municipality.

Conflict of Interest Policy [insert name of municipality]

- F. **Public interest** means an interest of the community as a whole, conferred generally upon all residents of the municipality.
- G. **Public officer** means a person elected or statutorily-appointed to perform executive, administrative, legislative, or quasi-judicial functions for the municipality. This term does not include any municipal employee.
- H. **Quasi-judicial proceeding** means a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunities to present evidence and to cross-examine witnesses presented by other parties, and which results in a written decision, the result of which is appealable by a party to a higher authority.

Article 5. Prohibited Conduct.

- A. A public officer shall not participate in any official action if he or she has a conflict of interest in the matter under consideration.
- B. A public officer shall not personally – or through any member of his or her household, business associate, employer or employee – represent, appear for, or negotiate in a private capacity on behalf of any person or organization in a cause, proceeding, application, or other matter pending before the public body in which the public officer holds office.
- C. A public officer shall not accept gifts or other offerings for personal gain by virtue of his or her public office that are not available to the public in general.
- D. A public officer shall not use resources unavailable to the general public – including but not limited to municipal staff time, equipment, supplies, or facilities – for private gain or personal purposes.

Article 6. Disclosure. A public officer who has reason to believe that he or she has or may have a conflict of interest in a particular matter shall, prior to participating in any official action on the matter, publicly disclose at a public meeting or public hearing that he or she has an actual or perceived conflict of interest in the matter under consideration and disclose the nature of the actual or perceived conflict of interest. Alternatively, a public officer may request that another public officer recuse him or herself from a matter due to a conflict of interest.¹

Article 7. Consideration of Recusal. Once there has been a disclosure of an actual or perceived conflict of interest, other public officers may be afforded an opportunity to ask questions or make comments about the situation. If a previously unknown conflict is discovered during a meeting or hearing conducted by a public body of the municipality, the public body may take evidence pertaining to the conflict and, if appropriate, adjourn to an executive session to address the conflict.

¹ Such request shall not be considered an order for the officer to recuse him or herself.

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Article 8. Recusal.

- A. Recusal of Elected Officers.** After taking the actions listed in Articles 6 and 7, an elected public officer should declare whether he or she will recuse him or herself and explain the basis for that decision. If the public officer has an actual or perceived conflict of interest but believes that he or she is able to act fairly, objectively, and in the public interest, in spite of the conflict, he or she shall state why he or she believes that he or she is able to act in the matter fairly, objectively, and in the public interest.²
- B. Recusal of Appointed Officers.** The failure of an appointed public officer to recuse himself or herself in spite of a conflict of interest may be grounds for discipline or removal from office.³

Article 9. Post-Recusal Procedure.

- A. A public officer who has recused himself or herself from serving on a public body in a particular proceeding shall not sit with the public body, deliberate with the public body, or participate in that proceeding as a member of the public body in any capacity, though such member may still participate as a member of the public.
- B. The public body may adjourn the proceedings to a time certain if, after a recusal, it may not be possible to take action through the concurrence of a majority of the total membership of the public body. The public body may then resume the proceeding with sufficient members present.

Article 10. Enforcement.

- A. Enforcement Against Elected Officers; Progressive Consequences for Failure to Follow the Conflict of Interest Procedures.** In cases where an elected public officer has engaged in any of the prohibited conduct listed in Article 5, or has not followed the conflict of interest procedures in Articles 6 through 9, the [insert name of municipal legislative body] may take progressive action to discipline such elected officer as follows:
1. The chair of the [name of municipal legislative body] may meet informally with the public officer to discuss the possible conflict of interest violation. This shall not take place in situations where the chair and the public officer together constitute a quorum of a public body.
 2. The [name of municipal legislative body] may meet to discuss the conduct of the public officer. Executive session may be used for such discussion in accordance with 1 V.S.A. § 313(a)(4). The public officer may request that this meeting occur in public. If appropriate, the [name of municipal legislative body] may admonish the offending public officer in private.

² Each member of an elected public body is independently elected and answers only to the voters. Therefore, unless there is a local ordinance or charter provision that states otherwise, the remaining members of the body may not force recusal. They may only express their opinion about the subject and/or privately or publicly admonish a fellow member who fails to handle conflicts appropriately.

³ Certain appointed officials such as a Zoning Administrator and a Town Manager may only be removed for cause and after being afforded with procedural due process protections including notice and a reasonable opportunity to be heard.

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3. If the *[name of municipal legislative body]* decides that further action is warranted, the *[name of municipal legislative body]* may admonish the offending public officer at an open meeting and reflect this action in the minutes of the meeting. The public officer shall be given the opportunity to respond to the admonishment.
4. Upon majority vote in an open meeting, the *[name of municipal legislative body]* may request (but not order) that the offending public officer resign from his or her office.

B. Enforcement Against Appointed Officers. The *[name of municipal legislative body]* may choose to follow any of the steps articulated in Article 10A. In addition to or in lieu of any of those steps, the *[name of municipal legislative body]* may choose to remove an appointed officer from office, subject to state law.

Article 11. Exception. The recusal provisions of Article 8 shall not apply if the *[name of municipal legislative body]* determines that an emergency exists and that actions of the public body otherwise could not take place. In such a case, a public officer who has reason to believe he or she has a conflict of interest shall disclose such conflict as provided in Article 6.

Article 12. Effective Date. This policy shall become effective immediately upon its adoption by the *[name of municipal legislative body]*.

Signatures: _____

Date: _____