

# VLCT CONFLICTS OF INTEREST AND ETHICAL CONDUCT GUIDANCE AND MODEL POLICY

Every municipality in Vermont is required to adopt a conflict of interest prohibition by July 1, 2019. Such prohibition must contain at least the following elements, which are found in 24 V.S.A. § 1984:

- 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; and
- a method of enforcement against individuals violating such prohibition.

In general terms, a conflict of interest is an incompatibility between the private and public interests of a public official. It is up to each municipality to specifically articulate the types of conduct that constitute a conflict of interest. A municipality may also set certain behavioral standards for its public officials by broadening a conflict of interest prohibition to address ethical behavior. 24 V.S.A. § 2291(20).

This Model Policy Regarding Conflicts of Interest and Ethical Conduct was developed in 2018 by the VLCT Municipal Assistance Center (MAC) to help municipalities comply with the conflict of interest mandate in 24 V.S.A. § 1984 and take advantage of the authority granted in 24 V.S.A. § 2291 to regulate ethical conduct by public officials. It is up to each municipal legislative body to modify and adopt this model policy to suit local preferences. This model must be customized by replacing the italicized text.

## **Why is it important to address conflicts of interest?**

In addition to the statutory requirements mentioned above, there are also political, legal, and reputational interests at stake. 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. Within the context of local government, a perceived conflict of interest can be just as problematic as a real conflict. 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.

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. 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.

### **How is a conflict of interest policy adopted and to whom does it apply?**

A conflict of interest policy is adopted by vote of the legislative body within the context of a duly-warned public meeting and is effective as soon as it is adopted or at any later date specified by the legislative body. Such a policy will apply to all elected and appointed municipal officials. 24 V.S.A. § 2291(20). 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 protections, which include 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.

If an actual or perceived conflict arises or is identified, and the individual is a member of a public body (such as a board, committee, or commission) MAC recommends taking the following steps, which have been incorporated into this model policy:

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

**What if a municipal official has a conflict but does not recuse himself or herself?**

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 individuals 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.

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 the VLCT Municipal Assistance Center at (800) 649-7915 or [info@vlct.org](mailto:info@vlct.org).

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[Name of Municipality]

## Conflicts of Interest and Ethical Conduct Policy

**Article 1. Authority.** Under the authority granted in 24 V.S.A. § 2291(20), the [*name of municipality*] hereby adopts the following policy concerning conflicts of interest and ethical conduct.

**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 their work for the municipality and so that the public trust in its officers will be preserved. It is also the intent of this policy to ensure that all decisions made by public officers are based on the best interests of the municipality.

**Article 3. Application.** This policy applies to all individuals elected or statutorily appointed to perform executive, administrative, legislative, or quasi-judicial functions of the [*insert name of municipality*].

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

### A. Conflict of interest

A real or seeming incompatibility between a public officer's private interests and their public or fiduciary interests to the municipality they serve. A conflict of interest arises when there is a direct or indirect personal or financial interest of a public officer or a person or group closely tied with the officer including their 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 an official act or action, or any other matter pending before the officer or before the public body in which the public officer holds office.

A conflict of interest may take any of the following forms:

1. A direct financial conflict of interest arises when a public officer acts on a matter that has a direct financial impact on that officer.
2. An indirect financial conflict of interest arises when a public officer acts on a matter that has a financial impact on a person or group closely tied to the officer.

3. A direct personal conflict of interest arises when a public officer acts on a matter that has a direct impact on the officer in a non-financial way but is of significant importance to the officer.
4. An indirect personal conflict of interest arises when a public officer acts on a matter in which the officer'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.
5. 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.
6. A situation where a public officer has not disclosed ex parte communication(s) related to a quasi-judicial proceeding that is before the body to which that officer belongs.

A "conflict of interest" does not arise in the case of an official act or action in which the public officer 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. This term does not apply to ministerial acts or actions wherein no discretionary judgment is exercised.
- E. Public body** means any board, council, commission, or committee of the municipality.
- F. Public interest** means an interest of the municipality, 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 municipal employees.

**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 act or action if he or she has a conflict of interest, whether real or perceived, in the matter under consideration.
- B.** A public officer shall not personally – or through any member of their household, business associate, employer or employee – represent, appear for, or negotiate in a private capacity on behalf of any person or organization that has an interest in an official act or action 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 their public office that are not available to the public in general.
- D.** A public officer will not request or accept any reward, gift, or favor for taking an official act or action or advocating for or against an official act or action.
- E.** 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.
- F.** A public officer who is a member of a public body shall not give the impression that he or she has the authority to make decisions or take actions on behalf of that body.

**Article 6. Disclosure.** A public officer who, while serving on a public body, may have a conflict of interest, whether real or perceived, in a matter under consideration by that public body shall, prior to taking an official act or action or participating in any official act or 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, whether real or perceived.<sup>1</sup>

**Article 7. Consideration of Recusal.** Once there has been a disclosure of an actual or perceived conflict of interest, other public officers shall 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 shall take evidence pertaining to the conflict and, if appropriate, adjourn to an executive session to address the conflict.

**Article 8. Recusal.**

A. **Recusal of Appointed and Elected Officers.** After taking the actions listed in Articles 6 and 7, a public officer, whether appointed or elected, shall 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.<sup>2</sup> Otherwise, the public officer shall recuse him or herself from the matter under consideration. A public officer that recuses him or herself may, but not must, explain the basis for that decision.

B. **Recusal of Appointed Officers.** The failure of an appointed public officer to recuse himself or herself in spite of a conflict of interest, whether real or perceived, may be grounds for discipline or removal from office.<sup>3</sup>

**Article 9. Recording.** The minutes of the meeting or the written decision / minutes from the meeting / hearing shall document the actions taken in Articles 6 through 8.

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

<sup>2</sup> 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.

<sup>3</sup> Certain appointed public officers such as a Zoning Administrator and members of the Zoning Board of Adjustment or Development Review Board may only be removed for cause and after being afforded with procedural due process protections including notice and a reasonable opportunity to be heard.

#### **Article 10. Post-Recusal Procedure.**

- A. A public officer who has recused himself or herself from participating in an official act or action by a public body shall not sit with the public body, deliberate with the public body, or participate in the discussions about that official act or action in any manner in their capacity as a public officer, though such member may still participate as a member of the public or private party, if applicable.
- B. The public body may adjourn the proceedings to a time, date, and place 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 11. Enforcement.**

- A. **Enforcement Against Elected Officers; Consequences for Failure to Follow the Conflict of Interest Procedures.** In cases in which 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 10, the *[insert name of municipal legislative body]* may, in its discretion, take any of the following disciplinary actions against such elected officer as it deems appropriate:
  - 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.
  - 3. 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 their office.

**B. Enforcement Against Appointed Officers.** The *[name of municipal legislative body]* may choose to follow any of the steps articulated in Article 11A. 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 12. Exception.** The recusal provisions of Article 8 shall not apply if the *[name of municipal legislative body]* determines that an emergency exists or that actions of a quasi-judicial 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 only be required to disclose such conflict as provided in Article 6.

**Article 13. Effective Date.** This policy shall become effective immediately upon its adoption by the *[name of municipal legislative body]*.

Signatures:

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Date: \_\_\_\_\_