

Municipal

Law Basics



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Municipal Law Basics

Since taking office as Secretary of State in 1999 I have fielded many thousands of phone calls and emails from Vermonters with questions about the laws that apply to our cities and towns.



This handbook was written to be a resource for local officials and members of the public who want to better understand the legal context of municipal government. It does not cover all of the hundreds of specific statutes that govern the activities of Vermont municipalities but, rather, provides an overview of the laws that generally govern and limit municipal authority as well as those rules that govern the relationships of municipal officials to each other and which guarantee accountability to the public.

I hope *Municipal Law Basics* will be a resource that will make it easier for Vermont's local officials to effectively serve their communities.

Of course, we can't cover everything in a few pages. For specific advice about a particular legal problem please be sure to consult your legal counsel.

A handwritten signature in black ink that reads "Deb Markowitz". The signature is fluid and cursive, with the first name "Deb" and last name "Markowitz" clearly legible.

Deb Markowitz
Secretary of State
March 2009

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Municipal Law Basics

What every local official should know about the law

By Deb Markowitz, Vermont Secretary of State

Vermont local governments are governed by many different laws, policies, court cases and charters. This short publication seeks to clarify for local officials the basic principles that apply to our municipal governments.

A. What is a Municipality?

By definition, a municipality is “a political unit, such as a city, town, or village, incorporated (by the state) for local self-government or a body of officials appointed to manage the affairs of a local political unit.” According to Vermont law, “municipality” includes a city, town, town school district, incorporated school or fire district or incorporated village and all other governmental incorporated units.” 1 V.S.A. § 126. Most Vermont towns received their municipal incorporation (their land grant charter) from King George in the 1700s. Villages, counties, fire districts, solid waste districts, insect control districts, incorporated school districts, and other non-chartered municipalities are entities that were created (incorporated) by legislative act or by a process established by statute.

Although most of Vermont municipal law refers to towns, Vermont statutes provide that “the laws applicable to the inhabitants and officers of towns shall be applicable to the inhabitants and similar officers of all municipal corporations.” 1 V.S.A. § 139. This means that a statute that grants a particular authority to the selectboard will grant similar powers to the governing board of another kind of municipality, unless a more specific law applies to the particular municipal corporation.

Not every entity in our towns is a municipal corporation. For example, volunteer fire departments and incorporated public libraries are nonprofit corporations. Even though they receive public funds to operate they are not municipalities and the general rules that apply to municipalities, such as the open meeting law and the public records act, will not generally apply to them.

B. The Powers of Local Government.

- 1. Municipal authority to act is controlled by the state.** Vermont courts have consistently adhered to the so-called Dillon's Rule. Dillon's Rule is a set of principles related to municipal power formulated in 1872 by an acclaimed local government legal scholar, Judge John Forest Dillon.

As early as 1931, the Vermont Supreme Court, in its opinion *Valcour v. Village of Morrisville*, quoted Judge Dillon's publication Municipal Corporations (5th ed.): "It is a general and undisputed proposition of law that *a municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation---not simply convenient, but indispensable." The Vermont court held that Dillon's Rule calls for a strict construction of municipal function: "[I]f any fair, reasonable, substantial doubt exists concerning this question it must be resolved against the [grant of power]." *Valcour v. Village of Morrisville*, 104 Vt. 119, 131-32 (1932); see also *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977).

This means that the town and its voters or selectboard have no authority beyond that which is given by statute, or that which is necessarily implied by a statute. Accordingly, municipal officials must check all relevant statutes before acting to ensure that they will comply with the specific requirements of the enabling legislation. See e.g., *Robes v. Town of Hartford*, 161 Vt. 187 (1993); *Flanders Lumber and Building Supply Co. v. Town of Milton*, 128 Vt. 38, 45 (1969). In addition, whenever Vermont statutes set out the specific process that a municipality must follow in order to act, as when it adopts, amends or repeals its zoning and subdivision bylaws, there must be "substantial compliance" with these procedures or the action may later be challenged for legal insufficiency. *Town of Charlotte v. Richter*, 128 Vt. 270, 271 (1970).

The Vermont Supreme Court has also made it clear that, unless a statute clearly gives a municipality authority over a particular matter, it must yield to state control. In *Morse v. Vermont Division of State Buildings*, 136 Vt. 253 (1978), the court said "[a]s between the state and local units of government, the municipal bodies' power is derivative, based upon an allocation of authority from the state. Where conflict occurs, and no resolution is statutorily prescribed, the municipality must yield." See also, *City of South Burlington v. Vermont Electric Power Co.* 133 Vt. 438 (1975) ("local municipalities should play a secondary role where a clash of authority appears to exist between state control and local control . . .")

- 2. Municipal authority is governed by the Constitution, statutes and case law.** The United State Constitution is the highest law of the land. The Vermont Constitution is the highest law of Vermont, second only to the United States Constitution and federal law when it specifically pre-empts state law. A Vermont law is invalid if it violates either constitution, and actions of government officials, including local government officials, must follow the requirements of the constitution.

For example, the First Amendment to the United States Constitution includes a guarantee of free speech and association. The provision prevents a municipality from prohibiting certain individuals from speaking at a public meeting or posting notices on a public bulletin board solely because of the ideas that person was espousing. The municipality could prevent the speech or posting, however, because it was taking up too much time or space, or because it was threatening or libelous. The first amendment requirement that government not “abridge the free exercise of religion” requires municipalities to treat religious groups the same as other civic groups in its policies about use of public buildings or public spaces. This means that if the girl scouts can use the town hall for meetings, so can a prayer group. Or if civic groups use the park for public displays, a church may also use the park to display a crèche at Christmas.

- 3. Not all municipalities follow the same laws.** Some municipalities have special laws that apply only to them. This can be by special statute or by a governance charter adopted by the legislature for the municipality.

☞ **Almost everything in this publication may vary for municipalities with a charter – so before relying on any statement about the general law, you must check your governance charter – if you have one!** In most cases you can find your governance charter in Title 24A of the Vermont Statutes.

Any municipality can have a governance charter. Generally, the charter is first adopted by the voters of the municipality, and then it is sent to the legislature for its approval and adoption into law. 17 V.S.A. § 2645. Title 24A of the Vermont Statutes Annotated is a publication of all of the adopted municipal charters.

Governance charters contain provisions that differ from the general state law. When this happens the courts will usually find that the charter language takes precedence for that particular municipality. The Vermont Supreme Court has held that “whether the legislatively-adopted town charter or the statute is controlling is a matter of statutory construction,” and that “where two statutes deal with the same subject matter and one is general and the other specific, the more specific statute controls.” The charter will supersede state law since a charter is law that is more specific to a particular town. *Town of Brattleboro v. Garfield* (2006), citing, *Looker v. City of Rutland*, 144 Vt. 344, 346(1984).

The Vermont Supreme Court has also held that “[e]ven were it possible to find conflict between [a charter and the general law], all laws relating to [the same] subject should be construed together and in harmony if possible.” *Rutland Special Tax Challengers v. City of Rutland*, 159 Vt. 218 (1992). In *Rutland Special Tax Challengers*, the court considered whether a charter provision that permitted the city to set up a special tax district exempted the city from the provisions of general law that require voter approval to levy a special assessment or the consent of all of the property owners within the district. 24 V.S.A. § 3254. The court held that since the charter only grants the city the authority to establish a special tax district, but does not include procedures for how this is to occur, the provisions of general law that set out such procedures would apply.

4. **Within a municipality there is a separation of powers.** People who interact with Vermont's local officials often want to know who is in charge of a municipality. There is no easy answer to this question. Vermont law does not give any elected local official the general authority to tell another elected local official how to do his or her job. Consequently, within a municipality the elected officials are somewhat independent of one another and need to find ways to work out their differences as equals.

a) The selectboard is responsible for tasks not given to another official. The law provides that the selectboard is responsible for "the general supervision of the affairs of the town and shall cause to be performed all duties required of towns and town school districts not committed by law to the care of any particular officer." 24 V.S.A. § 872. This means that if something needs to be done, or a decision must be made that is necessary for a municipality to function, and no statute grants a specific local official the authority to perform that function, the particular duty will fall to the selectboard.

Example: As part of the selectboard's "general supervision of the affairs of the town" the selectboard has the authority to make decisions about town buildings (with the exception of the library). They get to decide things like who gets keys, who should be able to use the building, whether the roof needs to get fixed, and how much liability and casualty insurance should be purchased. This is true even if the office is used principally as the town clerk's office. The law requires the clerk to maintain the public records of the town and to make them available for public inspection during reasonable hours. 24 V.S.A. Ch. 35 (Town Clerks). Because of these specific statutory requirements, the clerk has control over the town vault, even though the vault is in a town building that is controlled by the selectboard, and the clerk may decide who gets a key to the vault. The clerk also gets to decide what his or her office hours will be and she can adopt policies related to making the town records accessible to the public.

b) Selectboard may not regulate how another official performs his/her duties. The Vermont Supreme Court has long held that, "there is no authority in the selectmen to prescribe the method by which [another elected official] performs his duties, nor any power to prevent his carrying out of his official responsibilities by the imposition by them of arbitrary restrictions." *Couture v. Selectmen of Berkshire*, 121 Vt. 359 (1960).

The *Couture* case was decided at a time when road commissioners were elected officials with express statutory authority to maintain the town highways (the law has changed so now a road commissioner has only that authority granted to him or her by the selectboard). In this case the selectboard believed the newly elected road commissioner was not competent to use the town highway equipment, so it denied him the use of all but the old horse-drawn grader. The court held,

the defendants contend that their insistence on a qualified operator was a reasonable requirement in view of the value of the equipment However worthy their motives, nevertheless, they were undertaking a supervision of the petitioner beyond the authority of their office. . . . The wrong is the attempted supervision of petitioner's use of the town's road repair equipment, because, in

so doing, the selectmen are presuming to direct the manner in which the road commissioner carries out the duties for which he is solely responsible under the law. . . Insofar as the [selectboard members] interject themselves into duties for which they have no responsibility and for whose performance the petitioner has full responsibility, their actions amount to an arbitrary abuse of their powers as selectmen.

Couture v. Selectmen of Berkshire, 121 Vt. 359, 363-64 (1960).

In an earlier case, *Bennington v. Booth*, the Vermont Supreme Court held that the selectboard could not force the clerk to change how he was recording documents (they were unhappy that the clerk was using a photostatic process of recording instruments and wanted him to copy by hand all records that had been recorded in this method.) The court said,

The clerk and the selectmen are all elected officers of the town. G. L. 3925. Each has certain duties to perform. Those of the clerk are not made subject to the approval of the selectmen. They have general supervision of the affairs of the town, to be sure, and are charged with seeing to it that duties required of towns and school directors, and not committed to the care of any particular officer, are performed and executed. G. L. 3969. The duty of keeping the records required to be kept in the town clerk's office is, however, committed to the care of the town clerk. G. L. Ch. 173. The selectmen have no express power to require the town clerk, who keeps his records in a lawful manner, to conform to their ideas as to what method he shall use.

Town of Bennington v. Booth, 101 Vt. 24, 29 (1927).

c) Statutes sometimes give officials potentially overlapping authority. There are a number of situations in which two or more officials have potentially conflicting authority. This can cause confusion, particularly when the officials are not communicating well with one another.

Example: There is often confusion about who is in charge of the zoning administrator. The administrator is appointed to a three-year term by the selectboard (after being nominated by the planning commission), and may be removed by the selectboard (“for cause” after consulting with the planning commission). 24 V.S.A. § 4448. However, the zoning administrator, as an official whose duties are set by statute, has independence in his or her exercise of authority. For example, that selectboard may not tell the zoning administrator whether to issue a permit in a particular case, or whether to enforce the zoning ordinance. The law obligates the zoning administrator to strictly apply and enforce the bylaws of the town. That being said, once a violation contest has gone to court, the selectboard represents the town in court, and the board can choose to settle the action, even over the objections of the zoning administrator. Further, the board must approve expenditures, and if it refuses to pay for an attorney or for court costs associated with enforcing violations of the bylaws, it will make it pretty difficult for the zoning administrator to perform his or her statutory functions.

Example: The town clerk has the authority to appoint one or more assistant town clerks who hold office during the clerk’s term or until the clerk revokes his or her appointment. 24 V.S.A. § 1170. At the same time the selectboard has the authority to adopt personnel rules that “may apply to any or all employees of a municipality.” 24 V.S.A. § 1121. In many cases, these rules include hours of employment and procedures that must be followed before an employee can be hired or fired. While it is likely that a court would find that the clerk may set the assistant clerk’s hours and make hiring and firing decisions according to his or her own policies, the only way to prevent legal confusion is to ensure that the personnel rules clearly state that they do not apply to the assistant clerk.

Example: Vermont law provides that trustees of municipal libraries have “full power to manage the public library, make bylaws, elect officers, establish a library policy and receive, control and manage property which shall come into the hands of the municipality by gift, purchase, devise or bequest for the use and benefit of the library.” 22 V.S.A. § 143. The statute goes on to say that “the board may appoint a director for the efficient administration and conduct of the library.” Vermont law also provides that the selectboard may establish personnel rules that apply to all town employees, 24 V.S.A. § 1121, and the town manager is “the administrative head of all departments of the town government and shall be responsible for the efficient administration thereof.” 24 V.S.A. § 1235.

In *Hartford Board of Library Trustees v. Town of Hartford*, 174 Vt. 598 (2002), the question arose as to who had the authority to set the salary, hours and vacation time of the town librarian. The Vermont Supreme Court held that “the overlapping duties of town managers and other municipal entities require a ‘spirit of cooperation’ for the efficient daily administration of the affairs of a town. . . . In this way, library trustees and town managers across the State of Vermont can agree to a wide variety of power-sharing schemes that best suit the needs of each particular town.” The court went on to say that

when that spirit of cooperation is lost, the Town cannot, in the name of administrative efficiency, infringe upon the Board's "full power to manage" the library. . . . The Board is directly accountable to the voters of the Town of Hartford. If the townspeople are unhappy with the performance of the library trustees, either because of a lack of administrative efficiency or for any other reason, they may vote the trustees out of office, or they may decide to undertake a system in which the trustees are appointed by town officials rather than elected.

Hartford Board of Library Trustees v. Town of Hartford, 174 Vt. 598, 602 (2002).

- 5. Board members may not act on their own.** Officials who are elected or appointed to serve on a local board have authority to take action only as part of the board. The law provides, “when joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise.” 1 V.S.A. § 172. This means, unless a board authorizes an individual board member to negotiate a contract or make a public

statement about the board's policy or position, an individual member of the board does not have power to negotiate or speak for the board. *Goslant v. Town of Calais*, 90 Vt. 114 (1916). (Statements by selectboard member acting independently did not legally obligate the town.) *St. George v. Tilley*, 87 Vt. 427 (1914) (action of one auditor working alone has no official force and effect.) The law provides some exceptions to this. For example, the selectboard may vote to authorize an individual selectboard member to examine the bills for town expenses and draw orders to pay them in between meetings. In such a situation each member of the board is provided with a record of the orders drawn so that they can be sure the individual selectboard member is acting appropriately. 24 V.S.A. § 1623.

- 6. The power of the electorate is limited by law.** The voters get to participate in running the town by voting at annual and special town meetings, and, in some cases, petitioning for articles to be considered at these meetings. Generally speaking, voters decide issues of governance, budget and spending. They can petition for a vote on a conflict of interest ordinance; they can vote to adopt land use regulations and they can vote to reject new ordinances or proposed sales of municipal property. They cannot direct officials in the exercise of their discretion. This means that if the law leaves a particular decision up to a particular local official, the voters cannot generally petition for a vote that will force the official to act in a particular manner. The Vermont Supreme Court has held that the statutory right of voters to petition an article for a municipal vote is "subject to the restriction that the business petitioners seek to conduct at that meeting is properly delegated to the voters' authority." *Town of Brattleboro v. Garfield*, 180 Vt. 90, 95 (2006).

The first case considering the rights of voters to petition was *Royalton Taxpayers' Protective Ass'n v. Wassmansdorf* 128 Vt. 153, 160 (1969). In this case the court held that the town is only compelled to warn a petitioned article when "the purpose stated in such petition set[s] forth a clear right which [i]s within the province of the town meeting to grant or refuse through its vote." A year later the court held that a petitioned article could be rejected if it did not constitute business that was "proper and appropriate for transaction by the meeting." *Whiteman v. Brown*, 128 Vt. 384, 387 (1970). These cases clarified the ability of a board to reject a petition for a vote to fire an employee or a vote that, if passed, would require the board to violate the conditions of a contract.

More recently the Vermont Supreme Court considered the authority of voters to petition for an advisory article for Town Meeting. The advisory article asked the selectboard to advise the legislature to adopt a law requiring parental notification when a minor seeks to get an abortion. In *Clift v. City of South Burlington*, 917 A.2d 483 (2007), the court held that the legislative body of the municipality has the discretion to warn or reject an advisory article submitted by petition. The court held that "[w]hile the City could have warned the advisory article and presented it to voters, it was under no obligation to do so. To decide otherwise would be to subject the town meeting - a forum primarily for conducting municipal business - to debate on every social issue of interest to voters. Allowing the City discretion to warn advisory articles, such as the one presented by petitioners, furthers the Council's ability to balance the efficient transaction of city business with the provision of a local forum for discussing state and national issues." *Id* at 485.

C. Administrative, legislative and quasi-judicial functions of municipal government

It is important to distinguish between the kinds of power municipal officials can exercise, because there are different kinds of legal, ethical and procedural obligations that will apply depending upon the kind of function.

1. Administrative functions are those related to the management of the town and the execution of the laws that apply to the town.

The selectboard performs administrative functions when it oversees the general affairs of the town by, for example, making sure town roads and buildings are safe and in good repair. The school board, town clerk, treasurer, library trustees, zoning administrator, auditors, listers, constables and others are administrative officials who must carry out the duties of his or her office according to the requirements of the applicable laws. A board makes administrative decisions by passing a resolution by motion and vote at its public meetings. 1 V.S.A. § 312(a). These resolutions are generally not law, but “merely a form in which the legislative body expresses an opinion . . . and ordinarily concerns matters that are ministerial and that relate to the administrative business of the municipality . . . [or] concerns matters that are special or temporary.” *Herbert v Town of Mendon*, 159 Vt 255, 259 (1992).

Some administrative functions are merely ministerial (mandatory) but the performance of some administrative duties are up to the discretion of the official. Generally, courts will force officials, through a court action called “mandamus,” to perform ministerial duties; but will not use mandamus to force the performance of discretionary duties. *Sagar v. Warren Selectboard*, 170 Vt. 167, 171, (1999) (mandamus is not generally available for discretionary decisions absent an arbitrary abuse of power). See also *Ahern v. Mackey*, 2007 Vt. 27 (April 2007). *Bryant v Town of Essex*, 152 Vt. 29 (1989) (a court will not “compel the performance of acts necessarily involving the exercise of judgment and discretion on the part of the officer or board from whom performance is sought”).

An activity may be ministerial even though an official or employee has some discretion in how to perform the job. *Morway v. Trombley*, 173 Vt. 266 (2001). A court will consider an activity to be discretionary only when the decision requires a weighing of public policy considerations, such as the availability of limited resources. *Id.* For example, the zoning administrator is required to enforce violations of the zoning ordinance; however, a decision to inspect a particular piece of property to ensure that there is no violation is a discretionary function. (See eg. *In re Fairchild*, 159 Vt. 125, 130 (1992) (zoning administrator required to enforce zoning violation because of statutory obligation.) *Libercent v. Aldrich*, 149 Vt. 76, 82 (1987).

2. Legislative functions are the power to make binding and enforceable rules, bylaws or ordinances. Officials who adopt rules that broadly apply to the citizens of a municipality act in a legislative capacity. This generally includes certain duties of such boards as the

selectboard, school board, planning commission, water and sewer commissioners, prudential committee of a fire district, solid waste district board and village trustees.

An individual's ability to do as he or she pleases can only be restricted by an act of the government if it is a proper exercise of police power. "Police power signifies the governmental power of conserving and safeguarding the public safety, health, morals and welfare." *Salvage Corp. v. Village of St. Johnsbury*, 113 Vt. 341 (1943). In *State v. Curley-Egan*, the Vermont Supreme Court reviewed the law related to police power. It said:

The police power has long been understood to encompass "the general power of the legislative branch to enact laws for the common good of all the people." *State v. Theriault*, 70 Vt. 617, 625,(1898). The 'proper function' of the police power is to balance "the possession and enjoyment by the individual of all his rights" with "such reasonable regulations and restraints as are essential to the preservation of the health, safety, and welfare of the community." *State v. Morse*, 84 Vt. 387, 393 (1911).

The legislative function of a municipality is an exercise of "police power" delegated by the state to the municipality. *Village of Waterbury v. Melendy*, 109 Vt. 441, 448 (1938). (legislature has authority to delegate police power to municipalities so long as they are "matters purely of local concern of which the parties immediately interested are supposed to be better judges than the legislature"). A municipality may exercise its legislative powers "for any purposes authorized by law." 24 V.S.A. § 1971. This means that the municipality only has the authority to regulate a particular activity when a statute or charter permits the municipality to do so. In addition, there are some activities that cannot be regulated because of constitutional protections – such as the right to free speech, the exercise of religion and assembly.

The legislative function is generally exercised by the adoption of an ordinance or bylaw. Indeed, in *Herbert v. Town of Mendon*, 159 Vt. 255, 259 (1996) the Vermont Supreme Court held, "An ordinance is a permanent rule of conduct or government that will remain in effect until the ordinance is repealed." The court went on to say that "all legislation that creates liability or that affects the people of a municipality in an important or material way should be enacted by ordinances [rather than by resolution of a board]. Similarly, if a municipal act applies generally and prescribes a new plan or policy, it is considered legislative and must be accomplished by ordinance." *Id.*

Municipal ordinances and bylaws may be designated by the board as either criminal or civil. 24 V.S.A. § 1971(b). A criminal ordinance is enforced by the district court and a civil ordinance is enforced by the judicial bureau.

Courts presume ordinances are valid under the law and constitution unless a person provides clear evidence that they are not. Ordinances cannot be arbitrary, oppressive or discriminatory. Indeed, our court has held that "municipal ordinances placing restrictions upon lawful conduct or the lawful use of property must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the privilege of all citizens alike who will comply with such rules and conditions; and must not admit of the

exercise, or of the opportunity for the exercise of any arbitrary discrimination by the municipal authorities between citizens who will so comply." *Village of St. Johnsbury v. Aron*, 103 Vt. 22, 27 (1930).

Generally speaking, an ordinance is simply adopted by the legislative body in an open meeting of the board, and then special notice of its adoption is posted and published in accordance with 24 V.S.A. § 1972. The ordinance will become effective 60 days after its adoption, unless, within 44 days following the adoption of the ordinance, five percent of the voters petition for a special vote to disapprove the ordinance. 24 V.S.A. § 1973. In order to adopt certain kinds of ordinances or bylaws, such as zoning and planning regulations, the legislative body must follow special procedures that are set out in the law. See 24 V.S.A § 4442 et seq.

Although voters have the right to petition for a vote to disapprove a newly adopted ordinance, with the exception of a conflict of interest ordinance and land use regulations, voters do not have the power to initiate the adoption or repeal of an ordinance or regulation. 24 V.S.A. §§ 1972, 1984. In all other cases it is up to the legislative body to decide whether or not to pass or repeal a particular ordinance.

The initial decision about whether or not to adopt a particular ordinance (with the exception of conflict of interest and land use regulations) is entirely discretionary on the part of the board that has legal authority to regulate a particular matter. However, once the board chooses to regulate a particular matter, it must strictly comply with all statutory requirements included by the legislature when it delegated its police power to the local government and it must strictly follow the statutory procedures for adopting the ordinance. See chapter 59 or chapter 117 of Title 24.

Note that when the legislature delegates to the towns the ability to regulate, state law creates specific standards that the local review board must consider when it administers and enforces the regulations. *Town of Westford v. Kilburn and Kilburn*, 131 Vt. 120, 124-5 (1973). These standards are designed to ensure that the board will not exercise its discretion in an arbitrary or discriminatory fashion. Courts differ on just how far an ordinance must go when it establishes standards for decisions by a quasi-judicial board. 2 A. Rathkopf, the Law of Zoning and Planning, ch. 54 § 3 (3d ed. 1972). "On one hand the standards governing the delegation of such authority should be general enough to avoid inflexible results, yet on the other hand they should not leave the door open to unbridled discrimination." *Town of Westford v. Kilburn and Kilburn* 131 Vt. 120, 124-5 (1973).

3. The quasi-judicial function is the power to act like a court to determine individual rights and obligations in specific cases. Some municipal officials have "quasi-judicial" responsibilities. According to Vermont law, a 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 opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable by a party to a higher authority." 1 V.S.A. § 310(5).

For example, the selectboard acts in a quasi-judicial capacity when it issues a curb cut permit or an entertainment permit, or when it determines that a particular animal is vicious. The selectboard also acts in a quasi-judicial capacity when it determines that an activity creates a public nuisance, and when it sits as the local board of liquor control and decides whether an applicant qualifies for a liquor license. Other boards, such as the local board of health, the zoning board of adjustment, development review board and planning commission (that have permit review functions) all have quasi-judicial responsibilities, as do the board of civil authority and board of tax abatement.

The United States Constitution requires boards that conduct quasi-judicial hearings to provide the applicant and interested parties with due process. Indeed, the constitution requires due process whenever an action of government might deprive a person of a protected property or liberty interest. *Herrera v. Union No. 39 School*, ___ VT ___, 917 A.2d 923 (2006); *LaFlamme v. Essex Junction Sch. Dist.*, 170 Vt. 475, 480 (2000). These include decisions that limit a person's ability to use land or conduct business, or decisions that could damage a person's good name or reputation.

Due process requires a fair hearing before an impartial decision maker. *Eno v. City of Burlington*, 125 Vt. 8, 14 (1965). It gives the parties involved the right to have reasonable notice of the hearing and an opportunity to be heard. See *Thompson v. Smith* 119 Vt. 488, 507-08 (1957) (Failure to afford notice and an opportunity to be heard violated the very essence of the meaning of "due process of law".) The right to due process also means that a board may not deny a person the right to be represented by counsel and to present relevant information or evidence at the hearing. That being said, the requirement of due process does not create a right to a particular outcome in the matter and the courts will give great deference to a decision by a quasi-judicial board. *Eno v. City of Burlington*, 125 Vt. 8, 14 (1965). ("The action of the board is presumed correct and valid and the court will indulge every presumption in support of its quasi-judicial determination of the facts, in the absence of evidence to the contrary").

Vermont statutes and case law establish procedural safeguards for people who come before quasi-judicial boards to ensure that they receive "due process." For example, 24 V.S.A. § 4464 sets out very specific procedures the municipality and applicant must follow to provide public notice of hearings when municipal development review applications are being considered or when a decision of the zoning administrator has been appealed. These procedures are designed to ensure that both the applicant and interested parties have adequate notice of the pending application and the hearing on the matter. On the other hand, even when the law is silent about the procedures to be used, whenever a board acts in a quasi-judicial capacity it must ensure that the interested parties receive adequate notice and the opportunity to be heard prior to making a final decision. (See, for example, 18 V.S.A. Chapter 11, on Local Health Officials.)

D. Delegation of Authority

As a general rule, municipalities and local officials may not delegate legislative or other governmental authority unless a statute specifically permits the entity or official to do so. See *Eno v. City of Burlington* 125 Vt. 8 (1965); 2A Eugene McQuillin, *Municipal Corporations* § 10.38, at 425 (3d ed. rev. 1996) § 10.39 (municipal government “cannot surrender, by contract or otherwise, any of its legislative and governmental functions and powers, including a partial surrender”). Courts that have considered this issue have distinguished between actions requiring an exercise of discretion, and those which are purely ministerial.

The general rule is that, absent a specific statute that provides otherwise, a municipal government or local official may not delegate the power to make decisions it has been empowered, by law, to make. It can, however, delegate ministerial or administrative duties. *In re: Buttolph*, 141 Vt. 601 (1982) (public body may delegate ministerial or administrative functions); see *Gabrilson v. Flynn*, 554 N.W.2d 267, 276 (Iowa 1996) (public boards generally cannot delegate discretionary power conferred by law.) These delegable acts typically involve functions that require little judgment or discretion.

This means that a board’s administrative functions may be delegated to others to perform so long as they include only ministerial functions, and not those that require a policy decision. Since all legislative acts and quasi-judicial decisions require the exercise of discretion, boards may not delegate their legislative or quasi-judicial powers. See e.g., *Lawton v. Town of Brattleboro*, 128 Vt. 525 (1970); *Vermont Agency of Natural Resources v. Henry*, 161 Vt. 556, 557-58 (1994) citing *In re Buttolph*, 141 Vt. 601, 604-05 (1982). (“The public trust requires that a state agency or department head may not delegate authority or duties that are “discretionary or quasi-judicial in character, or which require the exercise of judgment,” absent a statute expressly permitting such delegation.”)

For example, Vermont law permits the board of listers to delegate to an appraiser the reappraisal of property within the municipality. However, the listers may not delegate the exercise of their discretion in voting to accept the appraisals and lodge the grand list. 32 V.S.A. §§ 4041, 4111. The selectboard may delegate its day-to-day oversights of the town highways to a road commissioner, but it must approve all expenditures for highway maintenance.

Note that in towns that have adopted a town manager form of government, most of the administrative functions ordinarily performed by the selectboard are, by statute, the responsibility of the town manager. The manager is accountable to the selectboard who have general oversight over the manager’s performance, and the board retains its discretionary authority to determine the budget, sign the orders for payments, and to adopt policies for the town. 24 V.S.A. Ch 37. Similarly, the school board often delegates much of its day-to-day administrative authority to a school superintendent or principal. 16 V.S.A. § 563.

E. Municipal Liability and Sovereign Immunity

State statutes and Vermont case law provide protections to municipalities and their officers and employees from being sued for their official acts. In addition, case law provides some immunity to protect municipalities and their employees from the consequences of their wrongful acts: sovereign immunity and official immunity.

1. Official Immunity -- Protection for local officials and employees. The law offers general immunity from lawsuits that originate from actions taken by a local official in his or her official capacity. There is additional immunity for officials who act in a quasi-judicial or a legislative capacity for their judicial or legislative actions.

a) **Statutory protection.** Vermont statutes protect local officials and employees from being held personally liable for actions they have taken in their official capacities. 24 V.S.A. § 901 provides that when an official is sued for an official act the suit must be brought in the name of the town or town school district and not the official. This means that if a selectboard member is sued because of a decision he or she made while on the board, the selectboard member cannot be sued individually; rather, the lawsuit must be brought against the town. In addition, the law requires the municipality to pay “all reasonable legal fees incurred by an officer when the officer was acting in the performance of his duties and did not act with any malicious intent.” 24 V.S.A. § 901(b). This provision was added because there are costs associated with defending a lawsuit even when a court ultimately dismisses the case. It is not unusual for a person to sue both the individual and the town. The official (generally, through the town) will need to request that the court dismiss the case against him or her, citing the statute above.

A slightly different rule applies to village officers. However it should be noted that an action may be brought against “a duly appointed public or peace officer of [a] village,” and the village may choose whether or not to defend the official in that action. 24 V.S.A. § 1313 provides that “An incorporated village, by vote, may indemnify a duly appointed public or peace officer of the village against legal proceedings for injuries committed by him while in the lawful discharge of his official duties. If an action is commenced against such officer, upon vote of such village, the trustees may defend such action at its expense.”

Because this statute does not protect municipal employees, additional protections were added in 2003. 24 V.S.A. § 901a provides that “When the act or omission of a municipal employee acting within the scope of employment is alleged to have caused damage to property, injury to persons, or death, the exclusive right of action shall lie against the municipality that employed the employee at the time of the act or omission; and no such action may be maintained against the municipal employee or the estate of the municipal employee.” (Note that “municipal employee” is defined in the statute to include volunteers.) The law also requires the municipality to “defend and indemnify a municipal employee for any legal costs if a municipal employee is improperly named as a defendant in a proceeding.” The law makes it clear, however, that a municipal employee

won't be protected from acts that cause harm that were intentional or outside the scope of the employee's authority.

Note that the law will not protect officials who knowingly or recklessly engage in criminal activity, even if it is done in the course of their office or employment with the town. It is never considered within the scope of one's duties as an employee or official to violate a criminal law.

- b) **Legislative immunity.** A local official who acts in a legislative capacity may not generally be sued for the effects of the ordinance or regulation. The U.S. Supreme Court has held that local officials are immune from civil liability when they are performing a legislative function, just as state and federal legislators are. *Bogan & Roderick v. Scott-Harris*, 520 U.S. 1263 (1998). Selectboards perform legislative acts when they adopt policies, bylaws and ordinances. Therefore, a board member could not be sued for actions taken as the result of those regulations. This is not to say that a court might not find an ordinance or bylaw unconstitutional or that the enforcement could not be held improper due to arbitrary and capricious application. It merely immunizes the officials when they are adopting legislation.
- c) **Immunity for quasi-judicial acts.** Generally, officials are not liable for judgments or actions taken while acting in a quasi-judicial capacity so long as they are not negligent and they are acting in good faith. *First Universalist Soc. in Fletcher v. Leach*, 35 Vt. 108 (1862).
- d) **Case law.** In addition to the state statutes discussed above, there is a “common law” (court cases) doctrine of official immunity. The doctrine of official immunity began as a way to protect judges from civil suit, but over the years it has grown to offer protection to all public officials. *Banister v. Wakeman*, 64 Vt. 203 (1891); *Libercent v. Aldrich*, 149 Vt. 76 (1989). Under this doctrine judges, legislators and executive decision makers are held harmless for the consequences of their official actions but lower level officials and employees have less protection from suit. In *Libercent v. Aldrich*, 149 Vt. 76 (1989) and later in *Hudson v. Town of East Montpelier*, 161 Vt. 168, 171 (1993) the court held that lower level officials and employees are protected by a qualified immunity, “which extends to individuals (1) acting during their employment and acting, or reasonably believing they are acting, within the scope of their authority; (2) acting in good faith; and (3) performing discretionary, as opposed to ministerial acts.” This meant that employees and lower level officials were not held liable for policy decisions, but could be held liable for harm caused by the performance of (or failure to perform) routine administrative functions. In response to these court cases the Vermont legislature expanded official immunity to municipal employees.
- e) **Civil right suit exception.** Section 1983 of the Civil Rights Act permits an individual to sue a government official for the violation of his or her civil rights. 42 USC § 1983 provides, in part that “every person who under color of any statute, ordinance, regulation, custom or usage, of and State . . . subjects, or causes to be subjected any . . . person with the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured

by the Constitution and laws, shall be liable to the party injured in an action at law . . .” This means that if a local official purposefully discriminates against a person on the basis of race, religion, national origin or gender, or deprives a person of first amendment rights, or rights to property or liberty without due process of law a suit could be brought against the individual official for a civil rights violation.

Qualified immunity will protect officials who are performing discretionary activities unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Generally speaking a local official will be entitled to qualified immunity unless his or her behavior is clearly wrong so that only a person who was knowingly violating the law or someone who was clearly incompetent would have engaged in the offending behavior. Officials acting in a judicial or legislative capacity will be protected by absolute immunity.

2. Sovereign immunity. The doctrine of sovereign immunity protects the state and its subdivisions - including municipalities - from lawsuits except when the immunity has been expressly waived by statute. *Levinsky v. Diamond*, 151 Vt. 178,184 1989; 12 V.S.A. § 5603. State statutes waive sovereign immunity to the extent that a municipality or the state has purchased liability insurance. 24 V.S.A. §§ 901, 901a; 29 V.S.A. § 1403; and 12 V.S.A. § 5603. (Many Vermont local governments obtain coverage from the Vermont League of Cities and Towns’ Property and Casualty Inter-municipal Fund which is an inter-municipal risk pool that, by statute, does not create a waiver of sovereign immunity. 24 V.S.A. § 4941 et seq.) In addition, there are some specific statutory exemptions from immunity; for example:

- Towns may be liable for damages caused by the improper maintenance or repair of a bridge or culvert. 19 V.S.A. § 514.
- A town or town clerk can be sued for damages for neglect of duty in relation to a deed, execution or other instrument delivered to him or left at his office for record. 12 V.S.A. § 515.
- A town official who fails or neglects to perform a duty imposed on him or her by law can be fined up to \$100.00. 24 V.S.A. § 902.
- “Any town officer who willfully refuses or neglects to submit his or her books, accounts, vouchers or tax bills to the auditors or the public accountant upon request, or to furnish all necessary information in relation thereto, shall be ineligible to reelection for the year ensuing and be subject to the penalties otherwise prescribed by law.” 24 V.S.A. § 1686.
- If the tax collector fails after ten days of a request to submit his tax book and list to the treasurer for inspection and computation the collector shall be fined up to \$100. 24 V.S.A. § 1531.

The doctrine of sovereign immunity is generally seen as outdated – based on the feudal system where the king was the law and therefore could do no wrong. For that reason courts have worked to limit the application of sovereign immunity. In Vermont the court will apply sovereign immunity only to what it considers to be governmental functions performed by a municipality. The court has held that some of the things local governments do are

“proprietary” (like a private business), for example, trash collection and recycling or providing water and sewer services. A municipality is given no immunity for its proprietary activities. See *Hillerby v. Town of Colchester*, 167 Vt. 270 (1997).

As a practical matter it is not easy to determine what functions of municipal government are governmental and what function are proprietary; for this reason Vermont is one of the few states in which the court still recognizes a distinction. As recently as 2001 the Vermont Supreme Court applied the doctrine of sovereign immunity to protect the City of Rutland from liability for the death of a child who was hit by a car while crossing the street. In *O’Connor v. City of Rutland*, 172 Vt. 570 (2001) the court dismissed the suit because it held that designing and maintaining streets, lighting, and crosswalks are governmental functions.

3. “Good Samaritan” laws. Vermont law provides immunity for citizens, including local officials who are engaged in a variety of Good Samaritan acts. For example:

- Volunteer emergency service providers are immune from liability under certain circumstances. 12 V.S.A. § 519; 24 V.S.A. § 2687.
- Volunteers or employees of a library will be immune from suit for information contained in any library materials or library services provided to library patrons in the course of his or her duties. 12 V.S.A. § 5782.
- Good faith donors of food are immune from liability. 12 V.S.A. § 5761-5762.
- Certain people who respond to actual or threatened hazardous materials emergencies are immune from liability. 12 V.S.A. § 5783.
- Municipalities which acquire public water systems or sources are immune from liability. 18 V.S.A. § 122 (e).
- Fire personnel responding to a fire or accidental or natural emergency are immune from liability. 20 V.S.A. § 990.

F. Conducting meetings/quorums/rules of procedure

Meetings should be conducted in a way that maintains order while providing for the systematic and efficient performance of the business of the public body. It should allow all present to have their perspectives heard and considered by the body while permitting the work of the body to get done efficiently and effectively.

1. Quorum. For most boards a majority of the board must be present, and a majority must vote in favor of a motion in order for the board to take action. 1 V.S.A. § 172 (“When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise.”) Some exceptions to this rule exist in statute.

a) **School boards.** For example, 16 V.S.A. § 554 provides an exception for school boards. This statute provides that “a majority of the members of the board shall constitute a quorum. Notwithstanding 1 V.S.A. § 172, the concurrence of a majority of members present at a school board meeting shall be necessary and sufficient for board action.”

b) **Board of civil authority.** In acting on any matter related to elections, except actions taken on election day, those members of the board present and voting constitute a quorum. However, official action of the board may not be taken without the concurrence of at least three members of the board. 17 V.S.A. § 2103(5). On election day, any board members present may take action. This means that even if the clerk is the only member present at the election, he or she may take action for the board. When it comes to tax appeals, at least three members of the board are required for a quorum.

c) **Advisory boards.** Quorum rules will generally not apply to advisory boards appointed by the legislative body. This is because an advisory board has no authority to take official action; rather, it convenes for the purpose of collecting information or proposals to present to the decision-making body. See 1 V.S.A. § 172.

2. Rules of procedure. When a board has its organizational meeting after new members are appointed or elected to the board it must elect a chair, it should decide when it will hold its regular meetings, and it may establish rules of procedure. 24 V.S.A. § 871; 4464; 4323. Vermont law requires that Annual Meeting use Roberts Rules of Order unless the meeting adopts a different rule, and school boards are also required to use Roberts Rules of Order (we recommend that any board of seven or fewer members use Roberts Rules for small boards), but no statute requires boards (except the school board) to follow any particular procedure for conducting its meetings. 16 V.S.A. § 554(b).

As a practical matter, most boards follow rules and procedures set up by the chair, or rules that have evolved over time. Generally, the chair calls the meeting to order, introduces those present, and then works down the agenda in order. Technical issues about how many amendments may be offered to a motion, and in what order the amendments will be addressed, are generally decided by reference to past practice.

Unfortunately, since rules of practice are often not written down, members of the public who attend such meetings may go away feeling angry at what appears to them as a board making up rules as it goes along. For this reason we recommend that when a board creates its own procedures it should keep an up-to-date, written record of the adopted procedures for handy reference to ensure that all meetings are run consistently and participants feel as though they are being treated fairly.

3. Quasi-judicial proceedings. When a board conducts quasi-judicial hearings it must use a procedure that ensures that all interested parties receive “due process.” This is because the United States Constitution provides that an individual cannot be deprived of property or liberty without due process. The requirements of due process include adequate notice of the hearing and a reasonable opportunity to be heard, as well as an opportunity to hear and question the evidence that is being used to make the decision. Note that the guarantee of due process does not apply to every member of the public in every situation – but only to the person whose property or liberty is in question and any people designated by statute to have an interest in the matter.

Generally, when a public hearing is required the statute will set out public notice requirements that include posting and publishing notice of the hearing as well as actual notice (by mail) to all interested parties. At the hearing the chair will ensure that the parties have an opportunity to be heard and that the members of the board have an opportunity to question the parties so that they have all of the information they need to make a decision in the matter.

4. The power of the chair. Vermont law does not give the chair of a board particular authority except for that which is delegated to him or her by the rest of the board. This means that the chair has no special authority to control what is on the agenda, to spend money that is in the control of the board or to direct the employees that are overseen by the board. Generally the chair is responsible only for running the board meeting and for keeping order during the meetings and for making sure that the decisions of the board are carried out by the staff.

When boards follow Roberts Rules of Order, the chair has the powers granted by Roberts unless the board has voted otherwise. Roberts Rules provides that the duties of the chair are generally as follows: “to open the session at the time at which the assembly is to meet, by taking the chair and calling the members to order; to announce the business before the assembly in the order in which it is to be acted upon; to recognize members entitled to the floor; to state and to put to vote all questions which are regularly moved, or necessarily arise in the course of the proceedings, and to announce the result of the vote; to protect the assembly from annoyance from evidently frivolous or dilatory motions by refusing to recognize them; to assist in the expediting of business in every way compatible with the rights of the members, as by allowing brief remarks when non-debatable motions are pending, if he thinks it advisable; to restrain the members when engaged in debate, within the rules of order; to enforce on all occasions the observance of order and decorum among the members, deciding all questions of order (subject to an appeal to the assembly by any two members) unless when in doubt he prefers to submit the question for the decision of the

assembly; to inform the assembly, when necessary, or when referred to for the purpose, on a point of order or practice pertinent to pending business; to authenticate, by his signature, when necessary, all the acts, orders, and proceedings of the assembly declaring its will and in all things obeying its commands.” Roberts Rules of Order, § 46.

G. Open Government Laws

Unlike a board member who is operating in the private sector, local officials are bound by laws that guarantee public accountability. Vermont's "sunshine laws" are referred to as the "open meeting law" and the "access to public records act." The latter is sometimes referred to by the name of its federal counterpart - the Freedom of Information Act or "FOIA." These laws apply to all municipal boards, including committees appointed by a board.

1. The open meeting law. Vermont's open meeting law has three basic requirements. All public bodies that hold meetings must provide notice of the meeting, provide the public with an opportunity to participate in the meeting, and minutes of the meeting must be taken in order for a record of the business of the meeting and actions taken to be available at a later date. 1.V.S.A. § 312. Because the meetings are open to the public, board members, the press or members of the public have the right to record the meetings (audio, video or digital) so long as it is done in a way that does not unduly disrupt the proceedings. For more information about the requirements of the open meeting law look at "The Pocket Guide to Open Meetings."

- a) **Notice of public meetings.** The notice required for a public meeting varies depending upon whether the meeting is a regularly scheduled meeting, a special meeting or an emergency meeting. In addition, public hearings have their own statutory notice requirements.
- **Regularly scheduled meetings.** Regularly scheduled meetings do not require specific notice of each meeting. Rather, at the initial meeting of the board, the body may establish a regular meeting time, date and place by resolution, or such information may appear in the bylaw. Open meeting law only requires that this information be available to persons upon request. As a practical matter, most boards simply post this information in the town clerk's office. No other warning is necessary for regularly scheduled meetings. 1 V.S.A. § 312 (c)(1).
 - **Special meetings.** Special meetings must be warned 24 hours in advance of the meeting by posting notice of the time, place and purpose of the meeting in the town clerk's office and in two or more public places in the municipality. In addition, at least 24 hours before the meeting, notice of the meeting must be given, either orally or in writing, to all of the members of the board, unless the individual member gives a waiver. 1 V.S.A. § 312 (c) (2). Finally, notice must be given to a newspaper of general circulation in the area and to any member of the news media that has requested, in writing, notification of special meetings of the board. This request must be renewed every calendar year. 1 V.S.A. § (c)(5). Agendas must also be made available if requested.
 - **Emergency meetings.** Emergency meetings may be held without advance notice provided that some public notice is given as soon as possible before the meeting. Note that an emergency meeting may be held only when necessary to respond to an

unforeseen occurrence or condition requiring immediate attention by the public body. 1 V.S.A. § 312 (c)(3).

- **Adjourned meetings.** When a meeting is “adjourned,” or continued, to a new time and/or place, the meeting will be considered a new meeting unless the time and place of the new meeting is announced before the first meeting is closed. 1 V.S.A. § 312 (c)(4).

- b) **Agenda.** As part of the notice requirement an agenda of the meeting must be made available to individuals who so request. The agenda is an organizational tool to assist in the orderly conduct of the meeting, and is not intended to tie the hands of the board. (Unlike the warning for Town Meeting which binds the meeting.) However, insofar as matters not on the agenda are considered, the board runs the risk of challenge if a member of the public feels that he or she was denied an opportunity to participate in the discussion because he or she was not informed that the matter was to be brought up.

Matters that are decided but that were not on the agenda can be ratified at a later meeting at which the issue properly appears on the agenda.

- c) **Public participation in meetings.** Although the public must be given a “reasonable opportunity to express its opinion on matters considered by the public body,” the chair of the board may control how and when this participation occurs. 1 V.S.A. § 312 (h). The court will apply a “reasonableness” standard, requiring only that the public be given a reasonable opportunity to be heard before a decision is made on an issue.

Some board chairs allow the public to speak only at the beginning or end of a meeting, and greatly restrict the amount of time given for public input. Other chairs allow the public to provide input on every item on the agenda, as it is covered by the board. While this provides the greatest public participation it can also result in extremely lengthy and contentious meetings. The best practice is probably somewhere in between: allowing a limited time for public input at meetings, but holding public informational sessions to allow extended public discussion of issues that engender great community interest.

A special rule applies to school boards. A school board “shall afford a reasonable opportunity to any person in the school district to appear and express views in regard to any matter considered by the school board, and if requested to do so shall give reasons for its action in writing.” 16 V.S.A. §.554 (b).

Yet another rule applies when boards are acting as a quasi-judicial body. Only interested parties may speak, provide testimony or evidence at a quasi-judicial hearing. (Although the lawyers on either side may call anyone to testify as a witness – so long as the testimony given is relevant to the proceeding.) This is an exception to the public participation requirement that ordinarily applies. Although hearings are open to the public, the public does not have a general right to participate. 1 V.S.A. §312 (h). The rationale for this exception to the general rule is that a hearing is a quasi-judicial proceeding to determine the rights or obligations of a particular individual, and that such

determination should be devoid of political influence or public pressure. Thus, the law requires that only certain statutorily defined interested parties and the appellant should be able to submit evidence for the board to consider when making its determination.

- d) **Minutes.** The open meeting law requires that minutes be taken at all public meetings. The minutes must cover all topics and motions discussed at the meeting, but should not include in detail everything said at the meeting. In fact, by law, the minutes are only required to include the names of the board members present, all other active participants in the meeting, all topics discussed and motions made, and an indication of how the motions were resolved, and the results of any votes, with the record of the individual vote of each member, and whether members were absent or not voting. 1 V.S.A. § 312. Tape recordings will not replace required minutes of meetings.

Minutes are not taken in executive session (indeed, this would be unnecessary since the topic discussed is reflected by the motion and vote to go into the executive session, and any action taken as the result of the meeting occurs in the public session). In addition, no minutes should be taken in deliberative sessions. This is because meetings of board members to deliberate on a quasi-judicial matter are not subject to the open meeting law.

Minutes of meetings are matters of public record and must be kept by the clerk or secretary of the public body and must be available for inspection and copying within five days from the date of the meeting.

No law requires minutes to be “approved” at a subsequent meeting. Because minutes are legal evidence of board action, approval of the minutes makes them better evidence.

- e) **Inadvertent meetings.** According to the open meeting law, a meeting is a public gathering of a quorum of the members of a public body for the purpose of discussing the business of the public body or for the purpose of taking action. 1 V.S.A. § 310. This means that, for example, when a majority of a board find themselves at a social gathering together, it is important not to discuss the business of the public body.

f) **Exceptions to the Open Meeting Law.**

- **Quasi-judicial proceedings.** The open meeting law does not apply to the deliberations of a quasi-judicial body. 1 V.S.A. § 312(e). In addition, 1 V.S.A. § 312(f) provides that a quasi-judicial decision of the board does not have to be adopted in open session, so long as the decision is in writing, and so long as the written decision is a public record. This means that after the board has heard all of the evidence in a hearing it may adjourn, privately discuss and determine the merits of the issue, and then circulate drafts of an opinion for comment and approval.
- **Administrative matters.** Routine day-to-day administrative matters that do not require action by the public body may be conducted outside a duly warned meeting, provided that no money is appropriated, expended, or encumbered. The law also exempts “site inspections for the purpose of assessing damage or making tax

assessments or abatements, clerical work, or work assignments of staff or other personnel.” 1 V.S.A. § 312 (g).

g) Executive session. The law permits boards to exclude the public from a portion of an open meeting to discuss certain topics specifically provided for in the statute authorizing executive sessions. 1 V.S.A. § 313. That being said, no binding action may be taken in executive session (except those related to securing real estate options). All final votes must be taken in open session and recorded in the minutes of the meeting. 1 V.S.A. § 313(a). A board may not go into executive session simply because it wishes to proceed privately. Rather, it may only exclude the public if it can point to a specific exemption in the law. The statutory permissible reasons for going into executive session are listed below:

- Contracts, labor relations agreements with employees, arbitration, mediation, grievances, civil actions, or prosecutions by the state, where premature general public knowledge would clearly place the state, municipality, other public body, or person involved at a substantial disadvantage;
- The negotiating or securing of real estate purchase options;
- The appointment or employment or evaluation of a public officer or employee;
- A disciplinary or dismissal action against a public officer or employee; but nothing in this subsection shall be construed to impair the right of such officer or employee to a public hearing if formal charges are brought;
- A clear and imminent peril to the public safety;
- Discussion or considerations of records or documents that are not public documents under the access to public records act. However when the board discusses or considers the excepted record or document it may not also discuss the general subject to which the record or document pertains;
- The academic records or suspension or discipline of students.
- Testimony from a person in a parole proceeding conducted by the parole board if public disclosure of the identity of the person could result in physical or other harm to the person;
- Certain information relating to a pharmaceutical rebate

According to the Vermont Supreme Court, an action taken improperly in executive session will not be void so long as it is ratified in a later, properly noticed, open meeting at which the issue appears on the agenda. *Valley Realty & Development v. Town of Hartford*, 165 Vt. 463 (1996). Despite this recent case, if it looks like a board has used

executive session to circumvent the public process intentionally, it is likely that the court will determine its actions to be void.

In order to go into executive session the issue must be on the agenda and the board must vote to go into executive session to discuss the matter. A motion to go into executive session must indicate the nature of the business of the executive session, and this motion must be passed by an affirmative vote of a majority of the members present. In an executive session only the subject matter referenced in the motion to go into this session may be discussed.

Some boards indicate on the agenda that a particular item on the agenda will likely be taken up in executive session. This is fine to alert the public that an executive session is expected, but it will not substitute for a motion and vote to go into executive session.

Attendance in executive session may be limited to members of the public body, and, in the discretion of the public body, its staff, clerical assistants and legal counsel, and persons who are subjects of the discussion or whose information is needed.

2. Access to Public Records. The public records law establishes the general rule that all records created by a board member or local government official that relate to the business of the office must be available for public inspection and copying during all customary office hours. 1 V.S.A. § 316. That being said, there are a number of exceptions to the law that make certain records exempt from disclosure.

- a) **Application of the law.** The public records law applies to all records (paper or digital) created in the course of agency business. Public record or "public document" means all papers, documents, machine readable materials or any other written or recorded matters, regardless of their physical form or characteristics that are produced or acquired in the course of agency business. 1 V.S.A. § 317(b). Unless a statutory exemption applies these records must be made available to the public for inspection and copying upon request. As a practical matter this means that any record created by a local official that is related to his or her official duties – whether created at the town or on a home computer – is considered a public record. However, the public does not have the right to require a public official or employee to do research or create a document that does not exist
- b) **Timing.** Generally speaking when a public record is requested the custodian of the record (who may or may not be the town clerk, depending upon what the record is) must promptly produce the record for inspection. That being said, if the record does not exist in the format requested, or if it is in active use or is in storage and therefore not available for use at the time the person asks to examine it, the custodian must state this in writing and set a date and hour within one calendar week of the request when the record will be available for examination. 1 V.S.A. § 318.

In unusual circumstances the time limits may be extended by written notice to the person making the request stating the reasons for the extension and the date when a decision would be made, so long as it is not more than ten working days. The law provides that

the "unusual circumstances" relate to circumstances reasonably necessary for the proper processing of the particular request including the need to search for and collect the requested records; the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or to consult with another agency about the request, including the attorney general. 1 V.S.A. § 318.

- c) **Denying the request.** A public records request may be denied if the custodian considers the record to be exempt. The law requires the custodian to put the denial in writing within two business days of the request, unless there are unusual circumstances, as defined by the statute, in which case up to ten working days may be taken to respond. A denial may be appealed to the head of the agency. As a practical matter in town government this means that a decision of the clerk of a board (who is the custodian of the records of the board) can be appealed to the board, the decision of an employee of the town can be appealed to the selectboard, and a decision of the clerk is final when he or she is the custodian of the record. A denial after an appeal can be taken to court.

There are many statutory exemptions to the public records law, and additional exemptions to public disclosure found elsewhere in Vermont law. (You can visit <http://vermont-archives.org/records/access/index.htm> to see the complete list.) Before denying a request for public records the custodian must be sure an exemption applies. Examples of exemptions found in the public records law include:

- records which by law are designated confidential, records which by law may only be disclosed to specifically designated persons, and records which, if made public pursuant to this subchapter, would cause the custodian to violate duly adopted standards of ethics or conduct for any profession regulated by the state or would cause the custodian to violate any statutory or common law privilege other than the common law deliberative process privilege as it applies to the general assembly and the executive branch agencies of the state of Vermont;
- records dealing with the detection and investigation of crime, including those maintained on any individual or compiled in the course of a criminal or disciplinary investigation by any police or professional licensing agency; provided, however, records relating to management and direction of a law enforcement agency and records reflecting the initial arrest of a person and the charge shall be public;
- a tax return and related documents, correspondence and certain types of substantiating forms which include the same type of information as in the tax return itself filed with or maintained by the Vermont department of taxes or submitted by a person to any public agency in connection with agency business;
- personal documents relating to an individual, including information in any files maintained to hire, evaluate, promote or discipline any employee of a public agency, information in any files relating to personal finances, medical or

psychological facts concerning any individual or corporation; provided, however, that all information in personnel files of an individual employee of any public agency shall be made available to that individual employee or his or her designated representative;

- trade secrets, including, but not limited to, any formulae, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented, which is known only to certain individuals within a commercial concern, and which gives its user or owner an opportunity to obtain business advantage over competitors who do not know it or use it;
- lists of names compiled or obtained by a public agency when disclosure would violate a person's right to privacy or produce public or private gain; provided, however, that this section does not apply to lists which are by law made available to the public, or to lists of professional or occupational licensees;
- student records, including records of a home study student, at educational institutions or agencies funded wholly or in part by state revenue; provided, however, that such records shall be made available upon request under the provisions of the Federal Family Educational Rights and Privacy Act of 1974 (P.L. 93-380) and as amended;
- records concerning formulation of policy where such would constitute a clearly unwarranted invasion of personal privacy, if disclosed;
- information pertaining to the location of real or personal property for public agency purposes prior to public announcement of the project and information pertaining to appraisals or purchase price of real or personal property for public purposes prior to the formal award of contracts thereof;
- records which are relevant to litigation to which the public agency is a party of record, provided all such matters shall be available to the public after ruled discoverable by the court before which the litigation is pending, but in any event upon final termination of the litigation;
- records relating specifically to negotiation of contracts including but not limited to collective bargaining agreements with public employees;
- records of interdepartmental and intradepartmental communications in any county, city, town, village, town school district, incorporated school district, union school district, consolidated water district, fire district, or any other political subdivision of the state to the extent that they cover other than primarily factual materials and are preliminary to any determination of policy or action or precede the presentation of the budget at a meeting;

- records relating to the identity of library patrons or the identity of library patrons in regard to library patron registration records and patron transaction records in accordance with chapter 4 of Title 22;
 - records of, or internal materials prepared for, the deliberations of any public agency acting in a judicial or quasi-judicial capacity;
- d) Electronic records.** If an agency maintains public records in an electronic format, nonexempt public records shall be available for copying in either the standard electronic format or the standard paper format, as designated by the party requesting the records. An agency may, but is not required to, provide copies of public records in a nonstandard format, to create a public record or to convert paper public records to electronic format. 1 V.S.A. § 316 (i).
- e) Charging for records.** The law permits the municipality to charge fees (established by statute) for copies of particular records and to charge the actual cost of copying other public records. A municipality may determine its own actual cost, but if it doesn't it must use the state actual costs which can be found at <http://vermont-archives.org/research/fees/fees.htm>. An agency may also charge and collect the cost of staff time associated with complying with a request for a copy of a public record if the time directly involved in complying with the request exceeds 30 minutes; if the agency agrees to create a public record; or when the agency agrees to provide the public record in a nonstandard format and the time directly involved in complying with the request exceeds 30 minutes. The agency may require that requests subject to staff time charges under this subsection be made in writing and that all charges be paid, in whole or in part, prior to delivery of the copies. Upon request, the agency shall provide an estimate of the charge. 1 V.S.A. § 316 (c).

H. Ethics

Vermont law establishes a variety of rules of ethics that apply to local officials. There are rules about dual office holding, bidding (for school districts), graft, embezzlement and kickbacks. The law also permits the selectboard, or the voters, to adopt binding conflict of interest rules, but it does not require every municipality to do so.

1. Incompatible offices. Some offices in local government are related in ways that create a conflict of interest if one person serves in both official capacities. Vermont statutes prohibit dual office holding in many of these situations.

- **No official who expends or manages money for the town can be an auditor or the spouse of an auditor.** Specifically, 17 V.S.A. § 2647 provides that “an auditor shall not be town clerk, town treasurer, selectman, first constable, collector of current or delinquent taxes, trustee of public funds, town manager, road commissioner, water commissioner, sewage system commissioner, sewage disposal commissioner or town district school director; nor shall a spouse of or any person assisting any of these officers in the discharge of their official duties be eligible to hold office as auditor.”

The law creates an exception to this rule for towns having not more than 25 legal voters. In these towns “an auditor shall not audit his own accounts kept and rendered in some other official capacity, nor shall the husband or wife of any town official audit his or her spouse's official accounts.” 17 V.S.A. § 2648.

- **There are certain dual roles members of the legislative body may not play.** 17 V.S.A. § 2647 provides that “a selectman or school director shall not be first constable, collector of taxes, town treasurer, auditor or town agent. A selectman shall not be lister.” The likely reason that only the first constable, and not also the second constable, is prohibited from serving as a selectboard or school board member is because he or she serves as the tax collector in the event that the town fails to elect one.

Note that there are many dual roles that are not prohibited by statute which can nevertheless raise conflicts of interest. For example, nothing would prevent a selectboard member from serving on the road crew or as town clerk or as fire chief. However, it would be a conflict of interest for this board member to participate in decisions related to his or her pay or conditions of employment in the second office. Board members who hold these types of dual offices must take steps to avoid even an appearance of self-dealing by not participating in decisions that could be seen as a conflict of interest.

- **Town manager may not serve in elective office.** 17 V.S.A. § 2647 provides that “a town manager shall not hold any elective office in the town or town school district.” This may be because the town manager works for the selectboard who is responsible for the general oversight of the town. It would create unnecessary complications for the manager to hold an additional office wherein he or she was directly accountable to the voters.

- **School board member may not work for district.** Vermont law provides that “a member of a school board may not be regularly employed by the school district or by a school district within the same supervisory union or by the same supervisory union during the board member's term of office.” 16 V.S.A. § 558. In certain circumstances this rule may be waived by the commissioner of education.
- **Assistant clerk who records selectboard’s orders may not also be treasurer or related to treasurer.** The selectboard must keep a single record of all orders drawn by the board. If an assistant clerk assists the board in keeping this record, then this person may not also be the town treasurer, an assistant to the treasurer or a spouse of the treasurer. 24 V.S.A. § 1622.
- **Official whose name is on the ballot may not help run the election (with some exceptions).** A local official may not serve as an election official if the official’s name appears on the ballot of the Australian ballot system unless the official is the only candidate for that office (printed names only, not including write-ins) or unless the office is that of moderator, justice of the peace, constable, town clerk, clerk-treasurer, ward clerk, or inspector of elections. 17 V.S.A. § 2456. This incompatibility is based on a practical consideration. If the administration of elections is part of the office’s responsibilities, it would be irresponsible to prevent the person from serving and the election itself would suffer.

In an Australian ballot election, a person who runs for re-election as a town clerk and town treasurer (which are compatible positions) may not serve as the presiding officer of the election unless the treasurer position is not contested. 17 V.S.A. § 2456. Note that a write-in campaign won’t count to create a conflict since 17 V.S.A. § 2456 requires the official’s name to appear on the ballot for the incompatibility to exist.

A companion law, 17 V.S.A. § 2538(a), provides that no candidate or spouse, parent, or child of a candidate is eligible to deliver ballots to the ill or physically disabled at home “unless the candidate involved is not disqualified by section 2456 of this title from serving as an election officials.” No justice who is also a candidate for the office of justice is disqualified, and so may deliver these ballots at the general election. A candidate for the legislature in a contested race, however, who also happened to be a justice, could not deliver ballots to the ill and physically disabled, nor could the candidate’s spouse, child, or parent.

2. Bidding rules. No law requires the selectboard or board of trustees to bid out purchases of goods or services for the town or village. It is good practice to adopt a bidding policy and a board should always use a public bidding process when a board member or relative of a board member wishes to sell goods or services to the town. The law requires school districts to use a public bidding process for large projects. 16 V.S.A. § 559. The rules for school districts are as follows:

- **When the cost exceeds \$15,000.00.** A school board or supervisory union board shall publicly advertise or invite three or more bids from persons deemed capable of providing

items or services if costs are in excess of \$15,000.00 for the construction, purchase, lease, or improvement of any school building; the purchase or lease of any item or items required for supply, equipment, maintenance, repair, or transportation of students; or a contract for transportation, maintenance, or repair services.

- **When a school construction contract exceeds \$500,000.00.** When a construction contract will be larger than a half million dollars, the district must follow state rules for prequalification of bidders. In addition, the department of buildings and general services, upon notice by the commissioner of education, will provide suggestions and recommendations on bidders qualified to provide construction services to school boards undergoing construction projects. State law provides specific public notice requirements including publishing the request for proposals and timeframes for action.
- **Contract award.** The law creates a rule for who the board can award the contract to. For contracts for goods or services over \$15,000, the contract must be awarded to one of the three lowest responsible bidders conforming to the specifications. 16 V.S.A. § 559(c)(1). For large construction contracts, with some exceptions articulated in law, the contract must be awarded to the lowest responsible bid conforming to the specifications.
- **Emergency repairs and other exceptions.** The law provides a general exception for emergency repairs, school nutrition contracts (so long as federal rules are followed), purchases through the state and inter-municipal agreements for joint bidding procedures. The commissioner may also grant exceptions on a case by case basis so long as the school board has proposed “an alternative method of keeping costs down through a fair and public process.” 16 V.S.A. § 559.
- **Contract renewal may be permitted without a new bid.** The law permits contract renewal without bidding so long as the annual cost will not rise more than the New England CPI (cumulative price index), “the total amount of the contract does not exceed an increase of 30 percent more than the total amount of the original contract, and the contract for the renewal period allows termination by the board following an annual review of performance.” 16 V.S.A. § 559.

4. Graft, bribery, embezzlement and kickbacks. Criminal laws exist to prevent and punish officials who misappropriate public funds or who promise and improperly use their position for financial gain. 13 V.S.A. § 1102 provides that any official who solicits or accepts or agrees to receive a gift or payment with the understanding that “he or she will be influenced thereby in any finding, decision, report or opinion in any matter within his or her official capacity or employment,” or “for or because of any finding, decision, report or opinion in any matter within his or her official capacity or employment,” shall be subject to fine or imprisonment or both. The amount of the fine and length of possible imprisonment depends upon the amount of the bribe.

A public official or employee who grants a permit or license or who is authorized to procure materials or supplies, or who purchases by contract or who employs service or labor, and who accepts or receives a gift, benefit or payment from a person who has requested a permit

or license or who makes a contract, furnishes materials, supplies, or provides a service or labor under a public contract will be subject to fine or imprisonment. 13 V.S.A. §§ 1106, 1107. The amount of the fine and length of possible imprisonment depends upon the amount of the kickback.

A local official who “in his or her official capacity receives, collects, controls, or holds money, obligations, or securities belonging to [the municipality]..., who embezzles or fraudulently converts to his or her own use, money or other property belonging to the municipality...shall be guilty of larceny and shall be imprisoned not more than ten years or fined not more than \$1,000.00 or both.” 13 V.S.A. § 2537

A local official who is charged with embezzling may be temporarily removed from office (by suspending their duties) by the court as a condition of release from imprisonment pending trial. 13 V.S.A. § 7554. In the event that an official is suspended from office, the legislative body of the municipality may designate a person to perform the duties of the office. 24 V.S.A. § 963.

5. Conflict of interest. Whenever possible, local officials should take care to avoid even the appearance of conflict of interest. This will ensure that members of the public are confident that officials are using their authority for the benefit of the town and not for personal gain or advantage.

Vermont law provides a definition of conflict of interest. Conflict of interest means 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).

There are a variety of laws that address conflict of interest in local government. It is important to be aware that different rules may apply depending upon whether an official is operating in a legislative, executive or quasi-judicial capacity. The most stringent rules apply to quasi-judicial roles because the United States Constitution guarantees citizens the right to due process of law which, in part, requires unbiased decision makers. Officials who act in executive roles are limited by criminal laws described above, and may be limited by rules or ordinances adopted by a municipality. 24 V.S.A. § 1984. Few conflict of interest rules apply to legislators.

- **Legislative function.** In a democracy, a legislative body is made up of individuals with diverse viewpoints and interests – and those individuals debate issues and come to compromises reflected in legislation. For this reason, the fact that an individual has a particular interest or bias on an issue will not disqualify a person from participating in a legislative debate and vote – even though the same conflict might disqualify that person if they were acting in a quasi-judicial capacity. Courts

generally recognize that unless proposed legislation would provide a unique benefit to a legislator, the fact that legislation may provide some benefit to a legislator or his or her family will not create a conflict of interest that would disqualify the legislator from participating in a vote on the matter. For example, a selectboard member would not be disqualified from voting on an ordinance which would improve the value of his or her own property so long as it equally applies to all properties in the area.

- **Administrative functions.** Conflicts of interest can arise when an elected official is acting in an administrative capacity and makes decisions to spend government money or use government resources in a way that benefits the official or benefits his or her close family members. For example, it is inappropriate for the road commissioner to use town equipment to fix his own driveway, or a selectboard member to vote on a decision to purchase supplies from his brother's business.

The Vermont Supreme Court has held that local officials act in a fiduciary capacity to the people of the town – so that they may not make a profit from their office. *Davenport v. Town of Johnson*, 49 Vt. 403, 407 (1877). To more specifically address conflicts of interest a selectboard or a town (by vote) can adopt a conflict of interest policy or ordinance. 24 V.S.A. § 1984.

- **Quasi-judicial functions.** When local officials are making quasi-judicial decisions the same law that applies to judges will apply to ensure that those involved are heard by an unbiased decision maker. The law prohibits an official who has a direct or personal interest in the outcome of a decision to participate in that case. The law even proscribes hearing a case involving near relatives, by blood or marriage, and defines where to draw the line. 12 V.S.A. § 61. There are some specific laws that apply as well. For example, a member of the BCA is disqualified from participating in any tax appeals if the member has appealed his or her own property taxes and a lister may not sit on the board of civil authority since it is the listers' assessments that are under scrutiny in a tax appeal. 32 V.S.A. § 4404(d).
- **Personal agendas are not the same as conflicts of interest.** In many communities citizens confuse a board member having a "personal agenda" with a conflict of interest. While sometimes a personal agenda can rise to the level of a conflict of interest is not inappropriate for board members to have personal (or political) agendas. In fact, many of our board members join the board because of what they want to accomplish (lower the tax rate, improve the roads, improve the schools, etc.) It is only when a board member is acting in a quasi-judicial capacity (when an individual's rights are being determined by the board), that board member must be sure that his or her personal agenda will not get in the way of making a fair and unbiased determination based only on the facts of the situation and the law or ordinance that applies. Here, a person's agenda may rise to the level of a conflict of interest requiring recusal from the matter if he or she cannot separate his or her own feelings enough to be an unbiased decision maker, or if it would create an appearance of impropriety.

6. Special rules of ethics for school board members. School officials have the most comprehensive laws on conflict of interest.

- **Must adopt a conflict of interest policy.** Whereas a selectboard can decide whether or not to adopt a conflict of interest policy, Vermont school law requires school boards to do so. 16 V.S.A. § 563(20) provides that the school board “Shall establish policies and procedures designed to avoid the appearance of board member conflict of interest.”
- **Prohibits accepting gratuity or compensation.** The law prohibits and makes criminal soliciting or receiving “any gift or compensation for recommending or voting on any finding, ruling, decision or report, or voting to procure any service, thing or supply purchased with public funds” by a school board member or any person employed by the board. 16 V.S.A. § 557. With a few exceptions a board member may not receive any thing of value by contract or otherwise from the school district or supervisory union he or she serves. 16 V.S.A. § 557 (b).
- **Bidding rules.** School boards are required to put out to bid all purchases of goods over \$15,000. 16 V.S.A. § 559. See the section above for more complete discussion.
- **Dual office rules.** In addition to all of the incompatible office rules that apply to school district as well as to town officials, school board members may not be employed by the supervisory union or any school within the district. See the section above for more complete discussion.

I. Removal or Recall of Officials

Generally speaking there is no way for voters to remove an elected official from office. With the exception of a few towns with charter provisions to the contrary, no law permits unhappy voters to petition for a vote to remove or recall a local elected official. Likewise, a board cannot require a member to step down. If voters are unhappy with an official their only option is to encourage them to voluntarily resign or to wait until their term has expired and elect a new person to the office.

An exception to this general rule applies when a local official is charged with embezzling. When this occurs the official may be temporarily removed from office (by suspending their duties) by the court as a condition of release from imprisonment pending trial. 13 V.S.A. § 7554. In the event that an official is suspended from office, the legislative body of the municipality may designate a person to perform the duties of the office. 24 V.S.A. § 963.

Conclusion

Municipal law is constantly evolving. This booklet is a first step in providing local officials and those who interact with municipal government the tools to understand how common law, constitutional law and statutory law apply on the local level.

It is important to consult with an attorney when specific issues arise as the courts and the legislature may make changes that are not contemplated in this publication.



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