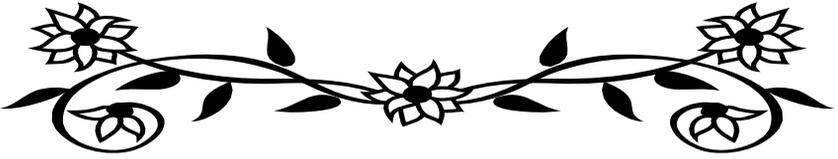


*Drawing  
Clear  
Lines:*

*Adopting  
Conflict of Interest  
Ordinances  
for  
Local Officials*



Office of the  
Vermont  
Secretary of State  
2008



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





In the spring of 2000, the legislature enacted a new law authorizing towns to adopt conflict of interest ordinances. This pamphlet is an introduction to the subject, for officials and voters alike.

At a time when we are seeing a declining interest in holding local office and an increase in public personal attacks on our officials, it is more important than ever to give communities the power to set ethical standards. Conflict of interest rules will protect our citizen officials from spurious criticism and will assure town residents of fair treatment - hopefully boosting volunteerism.

I want to thank Paul Gillies, the principal author of this pamphlet, for his hard work as chair of the Secretary of State's Ethics Task Force. As part of the task force, Gillies and 10 other Vermont local officials, municipal attorneys and citizens came up with a report on the need for ethical guidelines and provided legislative recommendations which became the basis of this new law. Thanks also to the Vermont League of Cities and Towns who worked with us on this important issue and who have crafted a model ethics ordinance which we have included as part of this booklet.

We can't legislate morals. They are personal, and reflect the nature and history of each of us. But we can draw clear lines about what can and can't be done in local office, as a way of defining the standards for behavior of those officials.

It is my hope that this booklet will be helpful to you as you begin to draft rules of conduct for your community. For additional assistance please feel free to call the Secretary of State's office at 802-828-2148.

A handwritten signature in black ink, which reads "Deborah Markowitz". The signature is fluid and cursive, with a large, stylized initial "D" and "M".

Deborah Markowitz  
Secretary of State

# **DRAWING CLEAR LINES:**

## Adopting Conflict of Interest Ordinances for Local Officials

*The affairs of government must be conducted openly, honestly and impartially so that the public's confidence in the integrity of its municipal affairs shall be maintained.*

**Town of Colchester- Code of Ethics**

## **Introduction**

The legislature enacted the Act Related to Conflicts of Interest because it was concerned with the vulnerability of local officials to charges of improper conduct. Sometimes that's the only argument people have to justify the outcome of a decision they find disagreeable. Anyone can accuse someone else of unethical conduct when there is no code; all they need is a voice to accuse, and often the damage that's done by such charges is severe. Sadly, some officials leave town office rather than having to deal with these accusations, even when they are unjust.

Voters also benefit from strong codes of ethical conduct for their elected and appointed officials. When something happens that offends us, involving a confusion of personal and public interests on the part of an official, we naturally want to do something about it. When there is no law clearly articulating a standard by which to judge whether it's wrong or not, we can begin to doubt our faith in government.

That the law allows us to do something about this problem is a refreshing difference. In spite of our long tradition of direct democracy in Vermont, there is really very little opportunity for voters to *propose* legislation at the local level. In the case of conflict of interest, however, the legislature has recognized the need for direct voter access to the ordinance-adoption process. No longer can we simply beef about government's irresponsibility. Now we can do something about it!

Clearly-written ordinances on conflict of interest are the answer. There, in writing, the community can establish a standard by which to measure the behavior of its officials. Accusations that depend upon the mere appearance of impropriety for their justification will necessarily fail when there is a formal law distinguishing between right and wrong for local officials.

The new law does not dictate what ordinances will contain, beyond some general categories. It speaks principally to the method of adopting the ordinances, leaving the content to the officials or voters who will draft them. That's why the experience of other communities with existing ethics policies is so valuable to this process. We can learn from what they have done, and improve on it with our own versions of the code.

*Accepting a position as a public official carries with it the acceptance of a public trust that the official will work in the public interest. Maintaining that public trust is critical to the continued operation of good government.*

**Village of Essex Junction Ethics Policy**

## **The Problem**

Consider these examples: a member of the planning commission wants to develop a commercial project. A selectboard member appeals her grand list. The town clerk wants to hire his daughter to work for him during the summer. The person who always gets the contract for gravel is underbid by an out-of-town competitor nobody really knows. A zoning administrator needs a zoning permit for her new garage.

In each of these situations local officials are thrown into a quandary. How should they act? The laws governing public officials concentrate mostly on what they have to do, not on how they are expected to do it. There are open meeting laws, of course, and access to public records laws, but rules of conduct are not part of the municipal code.

Although a handful of towns and villages have adopted ethics policies, most of Vermont gets by on a sense of what's right at the time, without any overriding direction on conduct. Poli-

cies, of course, are by their nature the softest of legislation, having little more enforcement authority than shame, although they do allow officials to have something to rely on as a reference.

The challenge of living a public life is remaining in balance with the law and reality. The law, whether in the form of statutes or local ordinances and bylaws, ought to recognize the special challenge of life in a small town no less than the needs of the largest municipalities. People used to say that our towns were too small for conflict of interest laws, but in fact the smallest places are the ones most in need of good rules of conduct. Well-written, well-thought out codes of conduct may make the difference in some communities between order and chaos.

*No elected or appointed official of the Town, whether or not s/he is compensated for his/her service by the Town, shall directly or indirectly...grant or influence the granting of any special consideration, advantage, or favor, which is distinct from that normally accorded to members of the public at large, to any person, group, firm or corporation.*

**Town of Williston Ethics Policy**

## **The Laws We Have**

State law provides some direction to local officials. School officials have the most comprehensive laws on conflict of interest. All purchases of goods over \$5,000 must be put out to public bid. No member of a board may vote on any issue involving a direct benefit to himself or herself. Towns have no similar statutes to guide them. School boards are also authorized to establish policies and procedures designed to avoid the appearance of board member conflict of interest.

Officials acting in a quasi-judicial capacity are also governed by a law on conflict of interest. No one with a direct or personal interest in the outcome of a decision may 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. This law applies to zoning boards, planning commissions, boards of civil authority, and selectboards when they act in a quasi-judicial capacity.

There are several laws limiting dual office holding. See 17 V.S.A. § 2647; 24 V.S.A. § 1622. The Municipal Administrative Procedure Act, which is available for use by Development Review Boards, contains a section on conflict of interest.

Of course, there are also laws that prohibit bribery, kickbacks, and embezzlement. 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.

Finally, a new law that became effective July 2008 permits the courts to temporarily remove from office (by suspending their duties) any local official who is charged with embezzlement 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.

The Vermont Constitution, of course, applies to every public office. It declares all local (as well as state) officials, the trustees and servants of the people, and holds them, at all times, in a legal way, accountable to the people. Vt. Const. c. 1, Art. 7.

The common law echoes this idea. In 1877, the Vermont Supreme Court ruled that selectboard members who acquire a “a pecuniary interest in any claim allowed, whereby they reaped a profit to themselves, the town would be entitled to the benefit of such profit, upon the familiar doctrine that applies to agents, trustees, administrators, and all other persons who stand in fiduciary relations to others, that such persons shall make no profit to themselves against those for whom they act.” *Davenport v. Town of Johnson*, 49 Vt. 403, 407 (1877).

From this wooden language in an old case there is a rule for conduct of all public officers. Any profit made while serving, which the town could earn, through the action of an officer, belongs to that town, and not the officer. This does not mean that no one may bid on a town contract, but if a benefit accrued to a public officer on account of his or her position, that benefit belongs to the town.

*At a meeting, no elective or appointive officer, acting in an official capacity, or employee of the town, while engaged in his or her duties, shall raise the issue of, place on the agenda, participate in a discussion of, or take part in a discussion concerning any business of the town relating to his/her business or personal financial interests, or those of a spouse, be they direct or indirect, to the degree that said interests exceed those of taxpayers generally.*

**Springfield Town Charter**

# **Adopting a Binding Conflict of Interest Ordinance for Your Town**

Title 24, Section 1984 permits a town, either through its selectboard or voters equal to five percent of the checklist, to propose a conflict of interest prohibition using the statutory process for enacting ordinances.

If the selectboard drafts an ordinance, the process begins with its adoption at a public meeting. Within 14 days the ordinance or a concise summary of it is published in a local newspaper and posted in five conspicuous places in town. That notice contains information about how voters can petition for a special meeting, by filing a petition signed by at least five percent of the checklist, to vote to disapprove the ordinance, if filed within 44 days of the date of adoption. 24 V.S.A. § 1971 and following. If no petition is filed, the ordinance takes effect on the 60<sup>th</sup> day following the vote to adopt.

Citizen-initiated ethics ordinances begin with a petition of five percent of the voters. The petition should set out the proposed ethics ordinance. Once submitted, the selectboard is required to submit the issue to the voters for vote at a special or annual meeting. The issue is voted in the manner that the town considers its public questions.

24 V.S.A. § 1984 provides guidance as to what a citizen-initiated ordinance must include. We believe these criteria are also appropriate for selectboards to consider as they draft their own ordinances.

Citizen initiated ordinances must contain the following parts:

- (1) A definition of "conflict of interest."
- (2) A list of the elected and appointed officials covered by such prohibition.
- (3) A method to determine whether a conflict of interest exists.
- (4) Actions that must be taken if a conflict of interest is determined to exist.
- (5) Method of enforcement against individuals violating such prohibition.

The law also provides a definition of "conflict of interest," which

will apply if the draft ordinance does not have its own. For this purpose, “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.

This definition is a good place for communities to start when drafting their own ordinance. But remember just how deferential the Legislature wanted to be to the needs of diverse communities. Some towns may want a different definition. The Town of Colchester defines “conflict of interest” as

. . . a significant pecuniary interest of an appointee or such an interest, known to an appointee, of a member of his or her immediate family or household or of a business associate or of a close personal friend in the outcome of any particular matter pending before the appointee or his or her public body. “Conflict of interest” does not include a pecuniary interest which is no greater than that of other persons generally affected by the outcome of the matter.

The difference is subtle, but Colchester’s use of “significant” changes the application of the policies that town has adopted through a motion and vote of its selectboard. The best part is, each community gets to choose what it wants — how deep the definition will cut, how much leeway the town will allow its officers. We advise towns to think seriously whether the strictures of a code of conduct would unduly restrict the free exer-

cise of authority by those officials. Also think about the experiences your town has had with officials whose conduct you've found objectionable, and try to contour the ordinance to avoid that problem in the future.

*Direct conflict of interest shall mean a situation in which the city officer has a direct and immediate financial interest in a matter which is officially before such officer or before a board of which such officer is a member. Such financial interest shall be regarded as present if the city officer is either the self-proprietor of the organization seeking to do business with the city or an officer, partner, professional associate, shareholder holding at least five (5) percent of the outstanding shares of any particular class of shares, director or managerial employee of such organization. It shall also be regarded as present if the city officer serves as legal counsel, accountant, architect or consulting engineer, or has another such professional relationship with such organization.*

### **Burlington City Charter**

**Choosing which officials should be governed by the ordinance is the next step.** It may make sense to start with a core group, and grow out from there. There may be a value in thinking through whether the town wants only persons who serve on boards to be governed by the code or at least how the rules would apply differently to single officers such as clerks and treasurers compared to those who serve as members of boards. Like much of this law, the option is yours, and there is no reason why you need to take your code of conduct to the purest waters right at the beginning; think of it as an evolutionary process that may be reworked as experience teaches you what works and what doesn't.

**The next category is to define “a method to determine whether a conflict of interest exists.”** This is a simple matter of implementation. Should the selectboard make such judgments? Is there a reason for an appeal directly to the voters? If the selectboard is the body to decide close questions, what happens if the board itself is accused of violating the ordinance? Clearly there needs to be a system of alternates ready to step in, since deciding whether there is a conflict of interest is a conflict of interest for the person accused. The ideal system encourages impartiality. Maybe the selectboard should appoint a body of citizens to make this decision on a case-by-case basis. Every ordinance ought to require an officer to disclose all possible conflicts at the beginning of any consid-

eration of a question, and to step down if a conflict exists. Let the ordinance be as self-executing as possible.

**“Actions that must be taken if a conflict of interest is determined to exist”** means addressing what kind of due process should be accorded the official who decides there is no conflict. Ideally, the officer steps down from the board or office for that one decision or type of decision, and then climbs back up into the official chair after it’s over, but some officials will object to the conclusion there is a conflict. To what body does the officer appeal? If a body of citizens is involved in making the initial determination, perhaps the selectboard should hear the appeal (unless the board itself is accused). Perhaps when the official is a member of the board the remaining members might decide whether a conflict is involved, and vote to require the official to step down. How this works in practice may necessarily vary, depending on the confidence of voters in the ability of the remaining board to act impartially in dealing with one of its members.

*If there is a specific written complaint of conflict of interest, the selectboard shall conduct an investigation in accordance with the ordinance that states the procedure and arrive at a decision.*

**Windsor Town Charter**

One of the difficulties of the new law is understanding precisely how much power an ordinance can give those who will decide questions of conflict of interest. Of all of the provisions of a town’s ethics ordinance this is the provision that most warrants a review by your town attorney.

The statute authorizes including in the ordinance “a method of enforcement against individuals violating such prohibition,” but be careful with this. As important as conflict of interest really is, we do not know whether a court would find that removal from public office could be justified by ordinance or statute. Imposing fines or penalties is equally an open question or holding an official disqualified from reelection or reappointment — but what then is left?

In the most common case, an officer objects to a decision that he or she has a conflict and continues to sit and participate in the decision. Perhaps the ordinance might declare this action invalid, and order that the decision or act not have the force

and effect of law. But what if the official has not disclosed a conflict and then it's later shown this was a knowing violation of the ordinance? One option is to, if possible, void the official action (if the decision is made by a single official) or invalidate the vote of a board member after the fact. This method of condemning the offense rather than the offender makes the most sense for purposes of the goals of enforcement. Perhaps the sanction of having offended the code will lead directly to voter dissatisfaction with the accused, as a secondary impact of the ordinance. Another option is to turn to the court to enjoin a violation.

*Any village officer or employee who has a substantial financial interest or business relationship, direct or indirect or by reason of ownership of stock in any corporation, in any contract with the Village or in the sale of any land, supplies or services to the Village, to a contractor supplying the Village or to an applicant or other party who appears before the board or commission of which the officer is a member, shall make known that interest or relationship and shall refrain from voting upon or otherwise participating in his capacity as a Village officer or employee in the making of such sale, decision, or in the making or performance of such contract...Violation of this section shall render the involved contract, sale or decision of a Board or Commission voidable by the Village Trustees.*

#### **Village of Essex Junction Charter**

Once an ordinance is drafted it makes sense to hold a public hearing on the proposal. Making sure every member of the community has access to a copy (perhaps on the town's webpage, or inviting the public to come to the town office for a copy) will help ensure the word gets out that this is what the people require of their officials.

The process set out in the ordinance should not be crafted with an eye toward punishing officials. Our officials need our support if they are to do the public business. Anyone serving in local government knows that the laws often leave too much room for discretion and encourage care and restraint in making tough decisions because of the risks involved. A well-written code of conduct makes good sense for everyone, voters and officials alike.

If you would like us to review your draft ordinance before it's adopted, we'll do that too. We'd like to help. Please give us a call at 802-828-2148.

# **Conflict Of Interest Model Policy**

Town of \_\_\_\_\_

[for adoption by legislative body as an ordinance]

**\*ARTICLE 1. Authority.** Under the authority granted in 24 V.S.A. Chapter 59 and 24 V.S.A. § 2291(20), the selectboard/city council/board of trustees of \_\_\_\_\_ hereby adopts the following civil ordinance concerning conflict of interest.

**ARTICLE 2. Purpose.** The purpose of this ordinance is to ensure that the business of this municipality will be conducted in such a way that no public official of the municipality will gain a personal or pecuniary advantage from his or her work for the municipality and so that the public trust in municipal officials will be preserved.

**ARTICLE 3. Definitions.** For the purposes of this ordinance, the following definitions shall apply:

- a. "Conflict of interest" means a direct personal or pecuniary interest of a public officer, his or her spouse, household member, business associate, employer or employee, in the outcome of a cause, proceeding, application or any other matter pending before the officer or before the public body in which he or she holds office or is employed. "Conflict of interest" does not arise in the case of votes or decisions on matters in which the public officer has a personal or pecuniary interest in the outcome no greater than that of other persons generally affected by the decision, such as adopting a bylaw or setting a tax rate.
- b. "Emergency" means an imminent threat or peril to the public health, safety or welfare.
- c. "Official act or action" means any discretionary legislative, administrative or judicial act performed by any elected or appointed officer or employee while acting on behalf of the municipality.
- d. "Public body" means a municipality and its departments, boards, councils, commissions, committees or other instrumentality's.
- e. "Public interest" means an interest of the community as a whole, conferred generally upon all residents of the municipality.
- f. "Public officer" or "public official" means a person elected or appointed to perform executive, administrative, legislative or quasi-judicial functions for a public body.

**ARTICLE 4. Disqualification.**

- a. A public officer shall not participate in any official action if he or she has a conflict of interest in the matter under consideration.
  
- b. A public officer shall not personally or through any member of his or her household, business associate, employer or employee represent, appear for, or negotiate in a private capacity on behalf of any person or organization in any cause, proceeding, application or other matter pending before the public body in which the officer holds office or is employed.
  
- c. In the case of a public officer who is an appointee, the person or public body which appointed that public officer shall have the authority to order that officer to recuse him or herself from the matter.

**ARTICLE 5. Disclosure.**

- a. A public officer who has reason to believe that he or she has or may have a conflict of interest but believes that he or she is able to act fairly, objectively and in the public interest in spite of the conflict of interest shall, prior to participating in any official action on the matter, prepare a statement describing the matter under consideration, the nature of the potential conflict of interest and why he or she believes that he or she is able to act in the matter fairly, objectively and in the public interest.
  
- b. In the case of a public officer who is an elected member of a board, commission or other body, the remaining members of that body shall have the authority to inquire of the officer about a possible conflict of interest and to suggest or recommend that the member recuse him or herself from the matter. If the member believes that he or she does not have a conflict of interest or believes that he or she is able to act fairly, objectively and in the public interest in spite of an existing conflict of interest, the member shall, prior to participating in the matter, prepare a statement describing the matter under consideration, the nature of the potential conflict of interest and why he or she believes that he or she is able to act in the matter fairly, objectively and in the public interest.
  
- c. The statement required by subsections (a) and (b) above shall be signed by the officer and filed as part of the minutes of the meeting of the public body in which the officer holds office.

**ARTICLE 6. Creation of an Ethics Committee.**

- a. The selectboard/city council/board of trustees shall solicit volunteers from among the registered voters who are willing to serve on an ethics committee for a period of one year.

d. The members of the ethics committee shall serve without compensation for their services. The committee shall not incur any expenses in the performance of its duties without the approval of the legislative body.

e. The municipal clerk shall serve as clerk for the ethics committee but shall not be a voting member of the committee. If the matter under consideration involves a complaint against the clerk, the chair of the board of civil authority or his/her designee shall act as clerk for the committee in that matter.

f. The committee shall elect a chair and shall establish rules of procedure.

#### **ARTICLE 7. Hearing before the Ethics Committee.**

a. Any resident of the municipality who believes that an officer should recuse him or herself from a matter because of a conflict of interest or that the officer should provide a disclosure statement regarding his or her conflict of interest in the matter may file a complaint with the clerk of the ethics committee.

b. Upon receipt of the complaint, the clerk shall set a date for a hearing by the committee as soon as possible. Personal notice shall be given to each member of the committee, including each alternate, to the complainant and to the person complained about. Notice of the hearing shall be posted in at least three public places within the municipality and shall be published in the newspaper of record at least seven days prior to the hearing date.

c. The committee shall consider the matter at a public hearing. Oral testimony shall be taken under oath. The complainant and respondent shall have a right to present evidence personally or by other witnesses, to examine and cross-examine witnesses and to be represented by counsel. The hearing shall be recorded.

d. At the conclusion of the hearing, the committee shall go into deliberative session in order to consider all the evidence. The committee shall issue a written decision as to whether the official shall be required to recuse him or herself from the matter and state the reasons for that decision.

#### **ARTICLE 8. Enforcement.**

a. Refusal to comply with the decision of the ethics committee shall be considered a violation of this ordinance. The legislative body or the ethics committee, acting on behalf of the municipality, may seek injunctive relief in superior court which may include, but not be limited to, an order to negate any vote or other action taken by the officer in the matter.

b. In addition to any other remedies provided by law, a public officer who violates this ordinance may be publicly censured by the ethics committee.

**ARTICLE 9. Exception.** The provisions of section 4 shall not apply if the legislative body of the municipality determines that an emergency exists and that actions of the public body otherwise could not take place. In such cases, a public officer who has reason to believe he or she has a conflict of interest shall disclose such conflict as provided in Article 5.

**ARTICLE 10. Severability.** If any section of this ordinance is held by a court of competent jurisdiction to be invalid, such finding shall not invalidate any other part of this ordinance.

**\*ARTICLE 11. Effective Date.** This ordinance shall become effective 60 days after its adoption by the \_\_\_\_\_ selectboard/city council/trustees. If a petition is filed under 24 V.S.A. § 1973, that statute shall govern the effective date of this ordinance.

Signatures: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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

\*\*\*\*\*



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