Town Of Chester

ETHICAL DILEMMAS

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Goals For This Session

- Create awareness of ethical dilemmas and their consequences.
- Introduce a framework to help you identify and analyze ethical dilemmas.



Give you some tools for managing ethical dilemmas.

Systemic Factors that Increase Likelihood of Ethical Dilemmas

 "That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community"

Chapter I, Article 7 of the Vermont Constitution



Systemic Factors that Increase Likelihood of Ethical Dilemmas

- The small size of our communities means that we often have more of the personal and financial relationships that can result in conflicts of interest.
- The community leaders that we select to fill roles in local government are the very people most likely to have the personal and financial relationships that can result in ethical dilemmas.

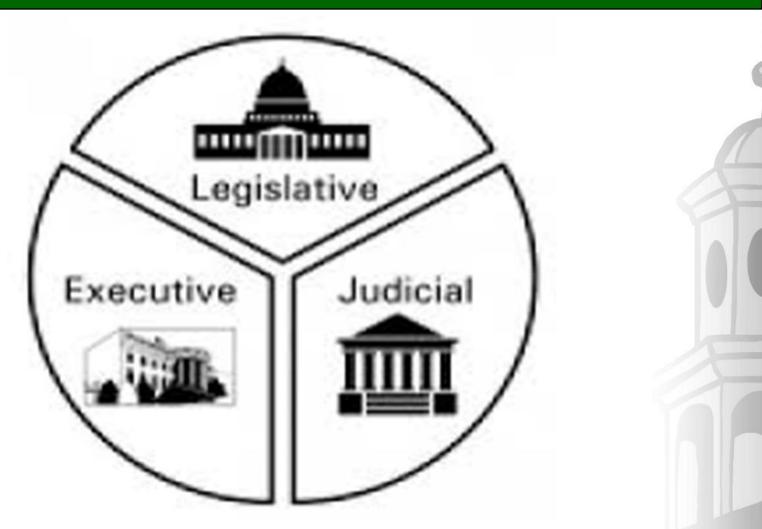


Systemic Factors that Increase Likelihood of Ethical Dilemmas

 The structure of Vermont local government, the breadth of local government's responsibilities stretching across the three traditionally separate branches of government, and the oftcontentious nature of local issues increase the likelihood that allegations will be leveled against even the most conscientious selectboard member.



The Three Roles of The Selectboard





The Three Roles of the Selectboard

- Executive: Responsible for effecting and enforcing ordinances/policies; supervise staff, manage the budget during the course of the year, appoint/remove officers; negotiate contracts.
- Legislative: Policy making activities that determine the direction of the community by adopting ordinances, setting the tax rate, enacting policies.



Quasi-Judicial: Vicious dog hearings, tax appeals (as members of the BCA), liquor licenses (acting as the Board of Liquor Control Commissioners), highway reclassification/discontinuance, employee dismissal hearings, etc.

Systemic Factors that Increase Likelihood of Ethical Dilemmas

- The Legislature and Supreme Court have not provided much in the way of guidance for resolving local conflict of interest issues.
- Lack of clear standards for identifying and evaluating ethical breaches which makes concrete measures few and far between.



 This makes it both easy to make allegations of unethical conduct and difficult to defend against such allegations.

- Ethical dilemmas typically elicit a very visceral/defensive reaction from people.
 - They touch upon our personal sense of what's right and wrong and our basic rights as Americans:



- Equal Protection and Due Process Clauses of the 14th Amendment to the U.S. Constitution.
 - Equality
 - Fairness

- Ethical dilemmas may result in void contracts.
- Where a public official enters into a contract, the execution of which may make it possible for the official's personal interest to come into conflict with his or her discharge of a public duty, the contract is void as against public policy, regardless of the good faith of the parties and reasonableness of the deal.



-Bergeron v. Jackson, 94 Vt. 91 (1920).

- Ethical dilemmas can result in void quasijudicial decisions.
- If a board member with a conflict of interest participates in a decision, the Court can vacate the decision for that reason and order the matter be reconsidered by the board without the participation of that member. Appeal of Janet Cote, 257-11-02 Vtec (2003).

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- Civil rights claim against the municipality.
- "(E)very person who, under color of any statute, ordinance, regulations, custom, or usage...subjects or causes to be subjected, any citizen of the United States...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..." 42 U.S.C. § 1983.



 Failure to manage ethical dilemmas appropriately can do significant damage to the reputation of a local official, an entire board, or the town as a whole.



Ethical Dilemmas

What are we talking about?

- Conflicts of interest;
- Bias/Prejudice; and
- Ex parte communications.



- What is a Conflict of Interest?
 - "A real or seeming incompatibility between one's private interests and one's public or fiduciary interest." Black's Law Dictionary, 8th Ed.



 Four types of interests that may result in a conflict:

Financial

- Direct financial interest
- Indirect financial interest

Personal

- Direct personal interest
- Indirect personal interest



Direct Financial Interest

A conflict of interest can be present when a local official acts on a <u>matter</u> <u>affording the official a direct financial</u> <u>gain</u>.





Conflicts of Interest (Direct Financial Interest)

- Executive function. A selectboard is considering acceptance of a new public road. The road is located in a new subdivision proposed by one of the selectboard members. The town's acceptance of the road would relieve the selectboard member of the expense of maintaining it.
- Legislative function. A selectboard is considering adoption of an ordinance setting weight limits on the local highways and bridges. One selectboard member owns a local trucking company that might not be able to use several roads if lower

Conflicts of Interest (Direct Financial Interest)

 Quasi-Judicial function. A selectboard is considering an application for a highway access permit. The applicant is proposing construction of a convenience store and deli. One selectboard member owns an existing convenience store and gas station on the same road.



Indirect Financial Interest

A conflict of interest may be present when a local official acts on a matter that <u>financially</u> <u>benefits a person or group closely tied to</u> <u>the official or employee.</u>





Conflicts of Interest (Indirect Financial Interest)

- Executive function. A selectboard is considering bids for a new highway truck. The daughter-in-law of one of the selectboard members is the general manager of one of the dealerships that has submitted a bid.
- Legislative function. A selectboard is considering a revision to the town's zoning bylaw. The proposed revision would directly limit a selectboard member's brother's ability to expand his existing business.



Conflicts of Interest (Indirect Financial Interest)

 Quasi-Judicial function. A selectboard is considering an application for a liquor license at a new restaurant. One of the selectboard members has been hired by the applicant to manage the new facility.



Direct Personal Interest

A conflict may be present when a local official acts on a matter that <u>benefits</u> the official in a <u>non-financial way</u> but in a <u>matter</u> of significant importance to the official.



Conflicts of Interest (Direct Personal Interest)

- Executive function. The DRB has denied a permit for a large retail project. The selectboard is considering participation in an appeal. One selectboard member has been a vocal proponent of the project and has written an op-ed piece about the project for the local newspaper.
- Legislative function. The selectboard is considering whether to allow snowmobiles to operate on a town road. The road crosses property owned by a selectboard member.



Conflicts of Interest (Direct Personal Interest)

 Quasi-Judicial function. A resident has submitted a written complaint of a dog bite. A selectboard members owns the dog in question.



Conflicts of Interest (Indirect Personal Interest)

Indirect Personal Interest

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



Conflicts of Interest (Indirect Personal Interest)

•Executive Function. The selectboard is preparing next year's proposed town budget. A member of the selectboard is also the chief of the town's volunteer fire department. The selectboard member would like the budget to include a line item in the budget for purchase of a piece of fire equipment.



Conflicts of Interest (Indirect Personal Interest)

- Legislative function. The selectboard is considering revisions to the town's zoning bylaw. Several members of a selectboard member's family have petitioned the proposed revision, which would restrict expansion of several industrial uses in a certain zone. The family members own homes in the zone.
- Quasi-Judicial function. A selectboard member is sitting on the board of civil authority. The board member's brother is a town lister.



Managing Conflicts of Interest

Four Step Process:

- 1. Disclose;
- 2. Discuss;
- 3. Consider Recusal; and
- 4. Record.



Managing Conflicts of Interest 1. Disclose

- Disclosure can be an effective tool for evaluating conflicts of interest and diffusing difficult situations.
- Violations of the public trust occur when the transparency of local government is obscured.
- The best method to achieve transparency and to refute allegations of a conflict of interest is to create an atmosphere of disclosure.



Managing Conflicts of Interest 2. Discuss

- Discussion of a potential conflicts of interest may lead to the conclusion that none actually exists or that it can be managed effectively.
- Focus: Would a reasonable, disinterested person believe that a conflict of interest exists?



Managing Conflicts of Interest 3. Consider Recusal

 "Notwithstanding the appearance of a conflict of interest, I believe that no actual conflict exists because..."

OR

 "Notwithstanding the appearance of a conflict of interest, I believe I can remain impartial and objective because..."



Managing Conflicts of Interest Consider Recusal

 When a conflict of interest is present or appears to be present, the cleanest course of action is complete recusal from discussion, comment, and voting on the matter under consideration.



Close Calls: Err on the side of caution when dealing with real or perceived conflicts.

Managing Conflicts of Interest 4. Record

- Make sure the record reflects what was disclosed as well as any ensuing discussion and action taken.
- Supports contention that decision was not only fair but also appeared to be fair.



Managing Conflicts of Interest Remedies

- Absent a local conflict of interest ordinance or charter provision, a selectboard probably cannot force a conflicted member into recusal.
- May be able to pass a resolution censuring the member, but this can have its pitfalls. *LaFlamme v. Essex School District*, 170 Vt. 475 (2000).



Managing Conflicts of Interest Remedies

- This leaves political remedies:
 - Some have argued that the best remedy for those officials who engage in conflicts is to vote the offender out of office.
 - The selectboard can help effectuate this by creating a record in its meeting minutes expressing its belief that a conflict of interest existed and dealt with improperly.
 - Relying on political remedies however is rarely sufficient:
 - Vermont has no general statutory recall provision (some municipal charters do);
 - Have to wait until the end of the offender's term of office (this could be several years);
 - Voters tend to have short or selective memories and the passage of time may diminish the urgency to cure the ethical breach.



Procedural Fairness

- Is the application of ethical considerations to quasi-judicial proceedings.
- What's a quasi-judicial proceeding?
 - "(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 to a higher authority."

1 V.S.A. § 310(5).

Procedural Fairness

- The 14th Amendment to the U.S. Constitution provides that no state may deprive a person of life, liberty or property without due process of law (Due Process Clause).
- It also states that no state may deprive a person of the equal protection of its laws (Equal Protection Clause).



The Due Process and Equal Protection Clauses define our relationship with government.



- Bias: A preference or an inclination that inhibits impartial judgment.
- An inescapable part of being human.
- We all have biases about people and ideas.





- Bias is a concern in quasi-judicial functions.
- A fair hearing before a decision maker who acts without bias is a fundamental part of due process.
- Bias is less of a concern in legislative functions, such as selectboard hearings on zoning bylaw amendments, deciding whether to adopt an ordinance, or preparing the town budget.

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- The law is fairly circumspect about assertions of bias by local board members.
- The Vermont Supreme Court start with a presumption that local quasi-judicial boards act with "honesty and integrity."



Bias

- Prior public statements by a board member on a topic of local concern do not alone demonstrate personal bias or prejudice requiring removal. In re: Judy Ann's Inc., 143 Vt. 228 (1983).
- Absent a showing that a board member is not capable of judging a particular controversy fairly and on the basis of its own circumstances, a court will not disqualify a member from participating.



 Ex Parte Communication: A direct or indirect communication between a board member and any party, party's representative, party's counsel or any person interested in the outcome of any quasi-judicial proceeding before the board that occurs outside the proceeding and concerns the substance or merits of the proceeding.



 Usually, a one-sided, off-the-record, or private communication between a board member and a party concerning a matter that is pending before the board.



- Generally, does not include staff or legal counsel.
- Could include other municipal officials.
- Communication may include face-to-face conversations, phone calls, written correspondence and e-mail.



- Ex parte communication:
 - Is a concern in quasi-judicial functions. In legislative functions (hearing on the town plan/zoning amendments) where public input is sought, it is not inappropriate, it may even be encouraged.



 Undermines the integrity of the local hearing process by contributing to the perception that decisions are based on access and influence rather than the facts and the rule of law.

- Ex parte communication:
 - Offends due process by allowing one party to influence the decision maker outside the presence of opposing parties and without opportunity for rebuttal or comment by other parties.



 Undermines transparency in the decisionmaking process.

 There is little published case law addressing ex parte communication by board members.



The key to managing *ex parte* communication is disclosure:

 All oral ex parte communication received by a board member should be disclosed through a memorandum or included in the minutes of the proceeding.



All written ex parte communications received by a board member should be included in the record and provided to all parties to the proceeding.

- Conflict of Interest Ordinance: In 2000, the Legislature authorized towns to adopt a conflict of interest prohibition to govern its elected and appointed officials. 24 V.S.A. § 1984.
- The process for adoption may be initiated by the selectboard or by application of 5% of the town's voters. 17 V.S.A. §§ 2642(a), 2643(a).



The ordinance must be adopted by the majority of those present and voting at an annual or special meeting warned for that purpose. 24 V.S.A. § 1984.

- Conflict of Interest Ordinance: Regardless of how it originates, it must contain the following components:
 - A definition of conflict of interests (otherwise the default statutory definition will apply);
 - A list of those elected and appointed officials covered by the ordinance;
 - A method to determine whether a conflict of interest exists;
 - Actions that must be taken if a conflict of interest is found to exist; and



 A method of enforcement against individuals found to be in violation. 24 V.S.A. § 1984(a).

- Conflict of Interest Policy: The law also authorizes the selectboard to establish a conflict of interest policy.
 - While selectboard policies ordinarily have no bearing on the actions of a town's independently elected officials, the law expressly provides that a conflict of interest policy adopted by the selectboard will apply to "all elected and appointed officials of the town, city, or incorporated village." 24 V.S.A. § 2291(20).



 Municipal Governance Charters: The following municipalities have conflict of interest provisions in their charters:

Burlington Springfield Windsor Barre Town Brattleboro Essex Junction ColchesterSt. AStoweHartBerlinMiltonJerichoManchester Village

St. Albans City Hartford

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A municipality can amend its municipal charter by following the provisions of 17 V.S.A. 2645.

- Purchasing and Bidding Policies:
 - These policies typically provide procedures for competitive bidding and may prohibit local officials or employees from participating in the process.



- Municipal Administrative Procedures Act (MAPA): This law requires towns that have adopted (either by the selectboard or the voters) it to follow certain administrative procedures when conducting contested hearings. 24 V.S.A. § 1201.
- The law creates minimum procedural rights and duties with the intent of affording parties more formal hearings and additional due process protections. 24 V.S.A. § 1202.



Though typically adopted and applied to zoning hearings, towns may elect to apply it to any other contested hearings held by a local board. 24 VERMONT LEAGUE V.S.A. § 1201.

- Municipal Administrative Procedures Act (MAPA): It's conflict of interest provision requires local quasi-judicial boards to comply with the requirements of the statue proscribing the circumstances under which a judge must be disqualified from hearing a case. 12 V.S.A. § 61(a).
- Prohibits persons from acting in quasi-judicial capacity in which the person has an interest or is related to a party within the fourth degree of consanguinity. 12 V.S.A. § 61(a).
- Board members are expressly prohibited from communicating with any party or the party's representative, while the proceeding is pending. 24 V.S.A. §§ 1207(a),(b).
- Any ex parte communication received by the chair or a member of the board must be disclosed on the record. 12 V.S.A. § 1207(c).



Conclusion

- Any further questions?
- Suggestions for next time or comments: Garrett Baxter at: gbaxter@vlct.org
- For more information: www.vlct.org

