

Ethics in Municipal Government

**A Workshop for the Town of
Shelburne**

September 14, 2016



Agenda

- Selectboard/Town Manager Roles – Town Charter
- Shelburne Ethics Ordinance
- Open Meeting Law Changes
- Scenarios

Open Meeting Law

- Generally requires boards to conduct meetings in the open
- Legislature made modest changes in 2016
- Electronic participation (conference call, Skype): any non-unanimous vote must be taken by roll call – simplifies voting, albeit slightly
- If a quorum participates electronically, the agenda must designate a physical location where a member of the public can attend and participate in the meeting

Open Meeting Law

- Posting minutes: must be available for inspection and posted to a website, if one exists, no later than five calendar days from the date of the meeting. 1 V.S.A. § 312(b)(2)
- Posted minutes must remain on town website at least one year, except for draft minutes
- Responding to a complaint of violation: must respond publicly within 10 calendar days to a complaint of violation 1 V.S.A. § 314(b)(2)
- Public body may either
 - (a) acknowledge an inadvertent violation of law and state intent to “cure” the violation within 14 calendar days; or
 - (b) state that the public body has determined that no violation occurred and that no “cure” is necessary. Failure to respond within 10 calendar days is treated as a denial of the allegation.

Open Meeting Law

- A public body can “cure” a violation by fixing the error that lead to that violation
- If violation was due to (i) a meeting that was not noticed in accordance with the law, (ii) a meeting from which a person or the public was wrongfully excluded, or (iii) an executive session not authorized by the law, public body must ratify or declare as void, any action taken at or resulting from that meeting. 1 V.S.A. § 312(b)(4).
- Must also adopt specific measures that prevent future violations of the law.
- Public body will not be liable for the complainant's attorney's fees and litigation costs if it cures a violation. 1 V.S.A. §314(b)(1).

What is the Role of Your Committee, Board, or Commission?

- Legislative?
- Executive/Administrative?
- Judicial?

Legislative Function

- Hearing requests for legislation from citizens
- Listening to debate on policy issues
 - Members of the Public
 - Interest groups/affected constituencies
- Debating public policy
- Making laws – ordinances, policies, etc.

Legislative Function

- Why do people serve on legislative bodies? (multiple choice)
 - A. To implement policy
 - B. To represent a constituency
 - C. To express a viewpoint
 - D. To stand up for what they believe in

Legislative Function

- Is it acceptable for legislators to take public position on an issue?
 - YES – they were elected or appointed to do exactly that

Legislative Function – Which Boards?

- Planning Commission
- Conservation Commission
- Selectboard
 - Subcommittees of those boards/commissions
- Library Trustees

Executive/Administrative Function

- Local government differs from federal/state government
- Local government: focused on providing municipal services, less on social policy and legislation
- Administer town programs and services:
- Police, fire, drinking water, wastewater, highway maintenance, recreation, etc.
- Manage town properties

Executive/Administrative Function

- No mayor in “town” form of government
- Town Manager – administers most local government functions
- Charter delegates Selectboard authority unto Town Manager
- Town Manager delegates to Department Heads

Judicial Function

- “Quasi-judicial” – defined:
- “a contested case under the Vermont Administrative Procedure Act”; or
- “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)

Judicial Function

- Which boards act in a quasi-judicial role?
 - Development Review Board (hearing applications for review, appeals of ZA decisions, etc.)
 - Selectboard (employee disciplinary proceeding, “vicious” dog complaints, highway alterations/discontinuances, liquor licensing, etc.)
 - Board of Civil Authority (hears tax appeals)

Judicial Function

- Members must hear only the evidence
- Must refrain from taking public positions
- Not a policy making function
- Adjudicatory function
- Rights of participants are protected by U.S. and Vermont constitutions

Conflicts of Interest – Four Categories

1. Familial Relationship (a relation to an applicant, interested person by blood or marriage)
2. Potential Financial Impact (a board member stands to gain or lose financially as the result of a decision)
3. Bias/Prejudgment (a board member has spoken out publicly in favor of or against a position)
4. *Ex Parte* Communications (a board member has had a conversation with a party to a proceeding about the subject of the proceeding)

Shelburne Ethics Ordinance

- Ordinance fills in the gaps left by Vermont law
- Dictates obligations of public officials, overall concepts on fairness/impartiality, no use of town property, and use of confidential information
- These apply to all elected and appointed officials, whether quasi-judicial or not

Shelburne Ethics Ordinance

- Articles 8 through 10
- Apply to Officials in Non-Quasi Judicial Proceedings
- Prohibits Gifts and favors for public officials (Article 8)
- Requires public official to disclose potential conflict of interest (Article 9(a))
- Declares “disqualification” where public official has a conflict of interest, or the appearance of a conflict of interest (Article 10(a))
- Prohibits a public official from representing or appearing on behalf of a person in a matter pending before that public official’s public body (Article 10(b))

Shelburne Ethics Ordinance

- Remedies:
- Ethics Commission created
- Can undertake a private investigation to determine if there has been an Ordinance violation
- If no probable cause to believe a violation has occurred, notice to public official and close file
- If probable cause found, Ethics Committee may hold a hearing to determine whether official violated Ordinance

Shelburne Ethics Ordinance

- Articles 11 through 14
- Apply to Officials in Quasi-Judicial Proceedings
- Requires that members disclose conflicts of interest (Article 11)
- Requires disclosure of ex parte communications (Article 12)

Shelburne Ethics Ordinance

- Add more from Article 13(b), (c), d, e, f, g, 14, and Ethics Committee/Enforcement

Shelburne Ethics Ordinance

- Public officials are obligated to disclose conflicts, or appearance of conflict
- Public officials are “disqualified” from participating in quasi-judicial proceedings
- “Any person” can request that a member recuse him or herself (Article 13(1))

Shelburne Ethics Ordinance

- What is the “appearance of a conflict of interest?”
 - “the impression that a reasonable person might have, after full disclosure of the facts, that a public official’s judgment might be significantly influenced by outside interests, even though there may be no actual conflict of interest....”

Shelburne Ethics Ordinance

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Shelburne Ethics Ordinance

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 - “the impression that a reasonable person might have, after full disclosure of the facts, that a public official’s judgment might be significantly influenced by outside interests, even though there may be no actual conflict of interest....”
- If you have disclosed your potential conflict of interest, you may make a written or verbal statement explaining why you can act fairly, objectively, and in the public interest (Article 13(b))

Shelburne Ethics Ordinance

- If you have recused yourself:
 - Make a simple statement of facts supporting recusal
 - Refrain from attempting to influence proceedings
 - Leave the table, leave the room

Shelburne Ethics Ordinance

- Ethics Committee:
 - Yes, there is one
 - Complaints must first go to Selectboard Chair (“informal” review)
 - Or, may submit direct complaint to Ethics Committee
 - Complaint must be signed, or in affidavit form
 - Ethics Committee may undertake confidential preliminary investigation
 - Upon finding of probable cause, may hold hearing

Potential Consequences

- 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)*.

Potential Consequences

- 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

Potential Consequences

- Failure of confidence by voters, taxpayers, and interested parties
- Board members may be removed for cause under Vermont law (standard varies for different boards)
- Selectboard may seek injunction to void board action
- Ethics Committee may publicly censure public official

Scenarios: # 1

- Burlington Planning Commission held public hearings on Sinex proposal to add tall office and residential towers to Burlington Square Mall.
- Planning Commission Chair works for commercial real estate brokerage and development firm.
- Chair is also former Chair of Burlington College Board
- Not involved in mall proposal, but some say he should recuse himself because: (a) he is too sympathetic to development proposals in general, and/or (b) he stands to benefit from increase commercial building activity if the mall proposal is successful.
- Chair did not recuse. How would you deal with this scenario under the Shelburne Ethics and Conflict of Interest Ordinance?

Scenarios: # 1

- Chair said he “will recuse himself from considering a planned zoning change to accommodate the redevelopment of the former college property on North Avenue” (due to former board presidency)
- Chair has in in the past recused himself when his own clients have had business before the Commission, including YMCA and City Market.

Scenarios: # 1

- Another Planning Commissioner recused herself from mall request for rezoning
- Then she resigned from Planning Commission the next day
- She worked for Champlain Housing Trust
- CHT had issued a public statement supporting mall rezoning
- Her employment contract prohibited her from taking a public position adverse to CHT
- CHT has public positions on mall and on Burlington College (CHT is a partner on Burlington College project)
- Reason for her recusal/resignation?

Scenarios: #2

- Selectboard sits as Liquor Control Commission
- Hears request for liquor license
- A local restaurant manager appears before LCC/Selectboard and opposes license request
- The local restaurant manager is the wife of a selectboard member, but does not make that clear when speaking

Scenarios: #2

- Does spouse have obligation to disclose this relationship?
- Does Selectboard member/husband have obligation to disclose this relationship?
- Do other members of the Selectboard or Town Manager have an obligation to make note of this relationship if not made by the spouse or SB member?
- Under what circumstances is it appropriate for relationships to be disclosed?

Scenarios: #2

- If no disclosure, and applicant/public later discovers relationship, can public have faith in board member's ability to hear a case?
- Does board member stand to gain financially from outcome?
- What about *ex parte* discussions?

Scenarios: #3

- The Selectboard initiates a lawsuit to prevent a trucking company from operating on Town highways because the trucking company is known to operate heavy trucks without overweight permits from the Town
- Selectboard initiates the lawsuit without any public discussion at a Selectboard meeting
- Selectboard discusses topic at executive session
- What are the Open Meeting Law implications?
- What are the implications under the Ethics and Conflict of Interest Ordinance?

Scenarios: #4

- You sit on the Development Review Board
- You are at a Little League game.
- Another parent speaks to you about a case pending before the DRB – she is adamantly opposed to the development (a six-unit subdivision that will adjoin her property)
- She tells you reasons why you should vote against it
- Compare and contrast a quasi-judicial body and one that is not quasi-judicial on the question of ex parte communications – what are they, how can they happen innocently, when should they be disclosed, when is recusal warranted? (Need Example)

Scenarios: #5

- You are on the Planning Commission
- You send out an email to all Planning Commissioners, listing the dates of upcoming regular meetings
- A fellow Commissioner replies, stating that he will be able to attend the meetings, and that he will not be voting in favor of the proposed Town Plan, because he does not agree with the proposed restrictions on renewable energy projects
- He also states in his email that he “will never vote to restrict renewable energy in our town, because we need to make a shift in our energy usage.”

Scenarios: #5

- Was his email reply appropriate?
- What are some legal issues with his reply?
- Open Meeting Law?
- Bias or prejudgment?

Scenarios: #6

- You are on the Development Review Board
- Soon after joining the Board, the local newspaper interviews you
- You are asked about your work and family background, and why you joined the DRB
- You discuss your work and personal life, and tell the reporter you believe Shelburne is “built out,” with “too many new subdivisions in town,” and “we really need to slow down the number of residential subdivisions coming into this town....”

Scenarios: #6

- Was that an appropriate statement?
- Why or why not?

#7A

- You are on the Planning Commission
- Prior to a meeting, board chair sends an all-board email asking for a “straw vote,” “just to know what people are thinking before we get into the meeting”
- All board members reply with how they will vote and their reasoning
- Open Meeting Law implications?
- Ethics and Conflict of Interest Ordinance implications?
- Public Records Act implications?

#7B

- You are on the DRB
- After hearing the evidence in a planned unit development application, the board chair sends an all-board email asking the board members to respond with
- a “straw vote” prior to a meeting, “just to know what people are thinking before we get into the meeting”
- All board members reply with how they will vote and their reasoning
- Open Meeting Law implications?

THE END

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