VERMONT LEAGUE OF CITIES AND TOWNS

HANDBOOK FOR VERMONT SELECTBOARDS

A Comprehensive Guide for
Vermont Selectboard Members

Serving and Strengthening Vermont Local Governments

The **Vermont League of Cities and Towns** (VLCT) was founded in 1967 as a nonprofit, nonpartisan organization dedicated to serving and strengthening Vermont local government. Today, VLCT supports its member municipalities by offering them a comprehensive insurance program, representation before the state and federal governments, and an extensive educational and technical assistance program.

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Founded in 2003, the **VLCT Municipal Assistance Center** (MAC) provides local officials with legal and technical assistance, consulting services, and educational workshops that increase the ability of local officials to serve their citizens. The Center also publishes handbooks for all major town officers and annual surveys on municipal salaries and benefits and current municipal practices. MAC staff have diverse backgrounds in public administration, municipal law, human resources, public finance, and planning and zoning.

A publication of the VLCT Municipal Assistance Center

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Front cover photo of the Stowe Selectboard by Allyson Barrieau.

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ABOUT THIS HANDBOOK

The Vermont League of Cities and Towns Municipal Assistance Center has prepared this *Handbook for Vermont Selectboards* as part of its series of publications to assist municipal officials.

It is not intended to be a substitute for the Vermont Statutes Annotated, but it should prove to be a valuable starting point. The office of selectperson covers a wide range of responsibilities, and we have made every effort here to cover them all. Additional sources of information are provided throughout the text, and, as always, you can call the Vermont League of Cities and Towns Municipal Assistance Center toll free at (800) 649-7915 with your questions.

This publication is designed to provide accurate and authoritative information with regard to the subject matter covered. Reasonable efforts have been made to insure that the information provided in this publication is accurate; however, Vermont League of Cities and Towns makes no warranty, express or implied, or representation that such information is suitable for any particular purpose or may be relied upon for any specific act, undertaking or course of conduct. In light of the ever-changing status of both statutory and case law, the Vermont League of Cities and Towns recommends that its members consult with an attorney before undertaking a specific course of action based on the material contained herein.

This April 2006 edition features a comprehensive re-write of chapters 1 through 4, and an update of the remaining chapters. Beginning in July of 2006, this manual will be available online at www.vlct.org. We plan to continue the comprehensive re-write of the remaining chapters and will publish them online as they become available.

Finally, please do not hesitate to contact us if you have suggestions for improvements or additional material you feel should be included in this handbook.

INTRODUCTION

A. WELCOME TO LOCAL GOVERNMENT

Congratulations, and welcome to the selectboard! You have been chosen for an office older than the state itself, but one that changes, in some respect or another, each time the Vermont Legislature convenes. During your term, it is likely that you will face issues as modern as the siting of a wireless telecommunication facility and as old as maintenance of the town's roads and bridges. It can be a tough job, with a lot of responsibility, but you are well qualified to get it done.

We are here to help. Founded in 1967, the Vermont League of Cities and Towns is a non-partisan, non-profit organization owned by Vermont's municipal governments. Today, all 246 of Vermont's cities and towns are members of the League. We provide services to these municipal members, as well as to over 135 associate member villages, counties, regional planning agencies and housing authorities. If you have any questions about this handbook or your role as a selectboard member, please call VLCT's Municipal Assistance Center at (800) 649-7915.

B. THE LEGAL AUTHORITY OF VERMONT SELECTBOARDS

Though Vermont has a strong tradition of local control and participatory democracy, Vermont's constitution does not actually grant any power or legal authority directly to the state's municipalities. Instead, towns and cities receive all of their legal authority from the Vermont Legislature. In Vermont, municipalities are truly political subdivisions of the state.

For better or worse, the Vermont Supreme Court has consistently held that Vermont municipalities only have those powers specifically delegated by the Legislature, and such additional functions as may be necessary to the exercise of those powers. The Court has said that any fair doubt concerning the existence of municipal power will be resolved against the municipality. *Petition of Ball Mountain Dam Hydroelectric Project*, 154 Vt. 189 (1990). When a question arises as to whether a municipality or local official has authority to act in a certain area, the municipality or official must identify the law that grants the authority to act; it is never enough to simply conclude that since there is no law prohibiting the contemplated action, the action is permissible.

C. THE MANY HATS OF SELECTBOARD MEMBERS

So, what are the responsibilities and authorities of a selectboard member? The Vermont Legislature and Supreme Court have stated:

> [Selectboard members] shall have 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.
>
> It is crucial at the start of our analysis to emphasize that, absent some specific limitation on their authority, the [selectboard members] have the general supervisory power over town matters. *Kirchner v. Giebink*, 150 Vt. 172 (1988).
>
> The clerk and [selectboard members] are all elected officers of the town…. Each has certain duties to perform. Those of the clerk are not made subject to the approval of the

> [selectboard members]. 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 districts, and not committed to the care of any particular officer, are performed and executed…. The duty of keeping required records in the town clerk's office is, however, committed to the care of the town clerk. The [selectboard members] have no express power to require the town clerk who keeps his or her records in a lawful manner to conform to their ideas as to what method he or she shall use. *Town of Bennington v. Booth*, 101 Vt. 24 (1927).

Through this one statute and two cases, the Legislature and Supreme Court have roughly framed the parameters of the selectboard's job: The selectboard must perform the duties directly assigned to it by the Legislature and the duties assigned to the town generally, but not to any other town officer, board, or municipal entity (e.g., fire district or library); the selectboard must not interfere with the duties granted specifically to other town officers, boards and entities, and it may not perform acts which the Legislature has not authorized it to perform.

As you read further in this Handbook about the number and variety of duties and responsibilities given to selectboards, you will soon realize that Vermont local government does not strictly adhere to the traditional notion of separation of powers. While the state and federal constitutions establish and maintain three separate and distinct branches of government (executive, legislative and judicial), at various times, selectboard members will fill all three of these roles. For example, at a single meeting, a selectboard might act as a legislature in adopting an ordinance or bylaw, as an executive in setting employee salaries, and as a judge in holding a hearing to determine the fate of a wayward dog.

D. COMMUNICATION AND COOPERATION

The administration of Vermont local government can be complex. Many of the laws outlining the responsibilities of municipal officers actually predate Vermont's statehood. Many more have not kept pace with modern practice. Even those laws that have been revised by the Legislature can be vague and confusing. The responsibilities of municipal officers frequently overlap and clear lines of authority can be hard to identify. Yet, while Vermont's arcane laws can be frustrating, they can also allow for great flexibility and creativity. Towns can often find, within the law, room for unique solutions to their unique local challenges.

The keys to effectively navigating the complexity are communication and cooperation. Vested with wide-ranging responsibilities and empowered with broad authority, the selectboard members are the leaders of local government. Conflict on any governing board is inevitable, but it is imperative that selectboard members take the lead in fostering communication and cooperation in town government, not only with each other, but also within and among the town's other officers and boards. Effective service to your town requires no less.

SOME OF THE SELECTBOARD'S RESPONSIBILITIES:

- Selectpersons are responsible for general supervision of the affairs of town and must cause to be performed all duties required of the town not committed by law to the care of any particular officer.
- The selectboard may enact ordinances and rules in many areas including traffic regulation, regulating nuisances, managing solid waste, dogs and recreation, and establishing bike paths. Many of these are listed in 24 V.S.A. § 2291, but others are scattered throughout the statutes.
- The selectboard warns all town meetings and specifies business to be conducted at the meeting, including proposing an annual budget. If the town does not set the tax rate, the selectboard must set a tax rate that will raise the specific amount voted at town meeting.
- The selectboard is responsible for hiring, directing, and firing almost all town employees *unless the town has a Town Manager form of government*; for setting salaries if voters do not do so at town meeting, and for establishing and enforcing personnel policies.
- The selectboard must authorize all town expenditures by signing orders for the treasurer to draw town funds.
- The selectboard supervises the expenditure of the highway fund and has charge of keeping town highways in repair. It also is responsible for laying out, classifying and discontinuing town roads.
- The selectboard is responsible for animal control.
- The selectboard may borrow money for periods of less than a year in anticipation of taxes.
- The selectboard must fill all town vacancies until an election is held.
- The selectboard may license many operations within the town (e.g., liquor sales, restaurants, junkyards and entertainment).
- The selectboard appoints several minor town offices (e.g., fence viewers, pound keepers, inspector of lumber and tree warden).
- The selectboard appoints and removes planning commissioners unless the town has voted to elect them. In "rural towns," selectpersons serve as ex officio planning commission members. A "rural town" is a town with a population of less than 2,500 or a town with a population of at least 2,500 but less than 5,000 which has voted by Australian ballot to be considered a rural town. The selectboard adopts the town plan unless the town votes to adopt it by Australian ballot. It also holds public hearings on proposed zoning bylaws and may, in some circumstances, adopt zoning bylaws.
- The selectboard appoints police officers and *municipal* fire department officers.
- The selectboard appoints and may remove a town manager when a town has voted to adopt such form of government.
- The selectboard purchases all insurance for the town.
- The selectboard requires certain town officers to obtain a bond and sets the amount necessary.
- The selectboard regulates and issues certificates for junkyards.
- The selectboard controls cemeteries if there is not a cemetery commission.
- Selectboard members serve as members of the Board of Civil Authority.

E. A WORD FOR SELECTBOARDS OPERATING UNDER TOWN CHARTERS

Please be aware that this Handbook is prepared from the laws and court decisions of general application in Vermont. Town charters may grant specific powers that differ from the general ones. *Where your charter differs from the general law and differs from the information in this Handbook, town officials should rely on the charter first.*

F. HISTORY OF THE SELECTBOARD

Finally, we thank attorney Paul Gillies, former Deputy Secretary of State, for this bit of selectboard history:

> To learn about the historical origins of the office of selectpersons, we look to the traditional sources, from Alexis de Tocqueville to Lord Bryce to Sidney and Beatrice Webb. Actually, Lord Bryce led us to the Webbs, by seeing the clear historical antecedent of the New England town meeting in the traditional rural English parish vestry.
>
> The vestry began, according to the Webbs, in the early fourteenth century, as a reaction against the poverty of the local church and its clergy. The people of the parish recognized the need to regulate and fund local church functions, and formalized the governance of their communities by establishing the Easter vestry, an annual meeting of the people at which decisions could be made respecting the maintenance of the church and its grounds and the funding of the clergy. In the middle of the sixteenth century, toward the end of the reign of Henry VIII, the parish was ordered by the king to supply harness and arms to his soldiers, and the parish for the first time in its history took on the duty of serving a civil function.
>
> To raise the money needed to fund these civil functions, the vestry levied a church tax, and established public offices to administer its business, which at times included the building and repair of highways and bridges, the maintenance of common pasturage, and supplying the community with local law enforcement. The direct antecedent of the office of selectpersons was churchwarden or select vestryman, and its incumbents were personally responsible for fulfilling the duties of his office and could be held personally liable for failing to do so.
>
> The office was unpaid. It was filled by rotation, as a compulsory duty of each member of the community in turn, according to the location of each homestead. Stiff penalties were levied for failure to serve. The office had its specific duties, and it was also responsible for carrying out the will of the community, as established by the Easter vestry meeting.
>
> The community had its obligations, including the duty to drop all work when hearing a general "hue and cry" and chase and apprehend robbers, as well as to pay the church tax. The parish, according to the Webbs, was the only popular assembly in England for many centuries other than the House of Commons having the right to impose compulsory taxation. The parish, they write, was less an organ of self-government than one of local obligation. (See Sidney and Beatrice Webb, *The Parish and the County* (1908).)
>
> When the new world opened up for settlement, the parish system became the model for the development of the New England town. Although the first experiments in governance

began with the creation of a weekly town meeting at which the critical decisions of managing the town would be made by the electorate as a whole, selectpersons were soon chosen to do the administrative work of the town, leaving the larger policy decisions to an annual town meeting.

"The selectpersons thus represented a culmination of leadership and publicity – they were (as they still remain) the 'first men' of the community, held to an exacting responsibility that only the public criticism of neighbors can compel. A recital of their powers rings with the broad finality of dictatorship in local matters, but the spirit of their service resembles the humblest agent. It is probable that since the Prytaneis of the ancient Athenian Boule there has been no such breadth of authority so confidently granted nor so thoroughly and publicly checked as in the executive services of the early New England town." John Fairfield Sly, *Town Government in Massachusetts (1620-1930)*, 382.

CHAPTER 1
FINDING THE LAW
BASIC LEGAL RESEARCH FOR THE SELECTBOARD MEMBER

A. SOURCES OF STATE AND FEDERAL LAW

As explained in the Introduction, your authority as a selectboard member is derived solely from State law. Therefore, it is not only important that you act within the law, but also know when you are authorized to act. While this handbook is a useful tool for learning about your authority and Vermont municipal law in general, it is not the final word. Often it may be necessary to consult with the original source.

Sources of state law include the written laws passed by the Legislature (statutes), case law (the set of legal principles developed and explained by the Vermont Supreme Court in its written opinions), and the Vermont Constitution. But this is not the end of the story. Other laws, both federal and state, often impact the operation of local government. Such laws include, for example, administrative regulations promulgated by federal or state agencies, federal statutes and case law, and the United States Constitution.

B. VERMONT STATUTES ANNOTATED

Most legal research on a municipal issue starts with Vermont Statutes Annotated. This hardbound compilation of state statutes is arranged by title and section. A citation to 24 V.S.A. § 2431, refers to section 2431 of title 24 of Vermont Statute Annotated. Bound copies of the statutes (the "green books") are typically maintained at the town clerk's office and in public libraries. An electronic version of the state statutes is also maintained by the Legislature at http://www.leg.state.vt.us/statutes/statutes2.htm.

To aid researchers, VLCT publishes a Municipal Index to Laws Affecting Local Government. The topical index is especially helpful for those using the Legislature's electronic version of the statutes, because the electronic version has no index or directory. To obtain a copy of the Index, call (800) 649-7915 or find it online at http://www.vlct.org.

C. SUPPLEMENTS TO VERMONT STATUTES ANNOTATED

When consulting the statutes, your research is not complete until the most current version of the law is found. In order to find the most current version of a statute, one should review the same section in the annual supplement, commonly called the "pocket part." The annual supplement is typically a paper pamphlet, located at the rear of the hardbound book. Sometimes supplements are printed in separate softbound booklets. The Legislature's electronic version of the statutes is updated regularly, obviating the need for a supplement. There is no electronic corollary to the published paper supplement to the hardbound versions.

D. RECENT LEGISLATION

If there is nothing in the supplement under the title and section number at issue, then the hardbound version is usually the most current version of the statute. However, from the close of the Legislature's annual session (usually late May or early June) to the publishing of the next

annual supplement (usually January), it is a good practice to check for any new legislation on the issue you are researching. This is true even when using the electronic version of the statutes. The easiest way to do this is to review the Vermont Legislative Bill Tracking System at http://www.leg.state.vt.us/docs/docs2.cfm.

Finding new legislation can be difficult. While the Legislative Bill Tracking System has a keyword search tool, finding a relevant bill may not be possible if one does not know the proper keywords to use. Therefore, we suggest that you also consult the VLCT Legislative Wrap-Up, published annually at the close of each legislative session. To obtain a copy, call the League at (800) 649-7915 or find it online at http://www.vlct.org.

Deciphering the Code: Understanding Legal Citation

The annotations in Vermont Statutes Annotated are written in the following format: *Town of Brookline v. Town of Newfane* (1966) 126 Vt. 179 224 A.2d 908. Here is the key to deciphering the code:

- *Town of Brookline v. Town of Newfane* is the title of the case. The first party listed (Town of Brookline) is the plaintiff - the party that first brought the suit. The second party listed (Town of Newfane) is the defendant – the party that was sued.
- (1966) indicates the year the Supreme Court issued its opinion in the case.
- 126 is the volume number of the series where the court's complete written opinion is published. Vt. stands for Vermont Reports (published by West Publishing), the reporter, or court case series, containing the opinion. 179 is the page number in volume 126, where the case begins.
- 224 is the volume number of another series where the court's complete written opinion is published. A.2d stands for Atlantic Reports Second (a regional compilation of state court cases also published by West Publishing). 908 is the page number in volume 224 of Atlantic Reports Second where the case begins.
- The party that appeals a case to the Supreme Court (the party dissatisfied with the prior decision) may be either the plaintiff or defendant, and, depending on the ultimate disposition of the case, may end up winning (a decision of "reversed" or "vacated and remanded") or losing ("affirmed").

E. STATE CASE LAW

Even when the applicable statute is found, the researcher's task is usually not complete. Below the text of each statute printed in Vermont Statutes Annotated, there often appear, in smaller print, one or more annotations. These annotations are brief summaries (but not quotes) of Vermont Supreme Court cases that interpret the statute. Not every statute has annotations because not every statute has been interpreted by the Supreme Court. The Legislature's electronic version of the statutes does not have any annotations.

Although annotations are helpful in understanding how the statute has been interpreted, a thorough legal researcher will not rely on them completely. The annotations are only case

summaries; they are not actual statements of law. To get the final word, one must review the actual case.

Finding published cases can be difficult. The Vermont Supreme Court publishes its written opinions at http://dol.state.vt.us/WWW_ROOT/000000/HTML/SUPCT.HTML, but the published cases only date back to 1994. For earlier cases, one must either look to a subscription-based online service (e.g., Lexis or Westlaw), Vermont Reports, or Atlantic Reports. We suggest that you first check your local public library. You can also check with the Superior and/or District Court in your county. Those in the Washington County area can visit the Vermont Supreme Court law library in Montpelier. You can also obtain copies of cases from the VLCT Municipal Assistance Center or by calling your municipal attorney.

F. STATE REGULATIONS

Other state laws binding on the town include the regulations passed by state administrative agencies (e.g., Agency of Natural Resources, Agency of Transportation, Agency of Agriculture, Food, and Markets). A complete list of Vermont's administrative agencies is available at http://www.vermont.gov/egovernment/agencylist.html. To get a copy of an agency's regulations, make a request to the agency itself, or visit the agency's website. Most Vermont agencies have published their regulations online.

G. SOURCES OF FEDERAL LAW

Federal law may also influence local action. Federal statutes are published in the United States Code (USC) and can be found at http://www.gpoaccess.gov/uscode/. Federal regulations are published in the Code of Federal Regulations (CFR), available at http://www.access.gpo.gov/nara/cfr/cfr-table-search.html - page1. Most federal agencies also maintain their own websites. Helpful resources for Vermont municipal officials include websites maintained by the Environmental Protection Agency (http://www.epa.gov/), IRS (http://www.irs.gov/), U.S. Forest Service (http://www.fs.fed.us/), and the Department of Labor (http://www.dol.gov/).

For Vermont federal district court opinions and rules, go to the United States District Court's website at http://www.vtd.uscourts.gov/. Opinions of the United States Court of Appeals for the Second Circuit (which covers Vermont, New York, and Connecticut) are available at http://www.ca2.uscourts.gov/.

CHAPTER 2
THE SELECTBOARD

A. QUALIFICATIONS

Being a selectboard member is undoubtedly one of more difficult jobs in the State of Vermont. Notwithstanding its challenges, the qualifications for the position are pretty simple: The law only requires that a member be a legally qualified voter of the town. 17 V.S.A. § 2646(4). That is, one must be eighteen years of age, have taken the voter's oath, be a citizen of the United States and a resident of the state of Vermont, and registered to vote. 17 V.S.A. § 2121. There is no test or civil service exam to get the job – just the voters' confidence in your ability to get the job done.

Once they have elected a selectboard member to office, the voters must abide by their decision until the next election. There is no provision in the law for removal or recall of a selectboard member. While the scrutiny may be unbearable and the criticism unavoidable, each member is given the opportunity to learn, leeway to make mistakes, and some time to gain experience. Once elected, a member generally must only maintain life, residency, and sanity to retain the office. 24 V.S.A. § 961.

The Penalty For Neglect of Duty

Notwithstanding that there is no provision for removing a local official from office, keep in mind that selectboard members who willfully neglect to perform the express or implied duties imposed upon them by law may be imprisoned for up to one year or fined up to $1,000 or both, 13 V.S.A. § 3006, and town officers who neglect their duties, whether willfully or not, may be fined up to $100. 24 V.S.A. § 902. Vermont courts have found a selectperson personally liable for "ordinary and simple neglect to perform his duties." *State v. Baldwin*, 116 Vt. 112, 70 A.2d 242 (1949).

B. NUMBER OF MEMBERS

How many members does a selectboard have? Like many other aspects of Vermont local government, the answer depends upon where the question is asked. The law provides that each town must have at least three selectboard members, but a town may elect up to two additional selectboard members, if the voters so chose. 17 V.S.A. §§ 2649, 2650(b). The reasons for expanding the selectboard vary, but as a practical matter, Vermont towns have either three- or five-member selectboards. Recognition of the likelihood of perpetual deadlock has made formation of a four-member selectboard rare, if not unknown.

C. ADDING SELECTBOARD MEMBERS

The process for adding selectboard members requires two steps: First, the voters must decide, at an annual or special town meeting, to add positions to the board. 17 V.S.A. § 2650(b). Then, if the voters have approved the additional positions, the newly created vacancies must be filled, either through appointment by the current selectboard members, or by election. 24 V.S.A. § 963. How these two steps are taken will depend, in part, on whether the process for addition has been

initiated by the voters or the selectboard. It will also depend upon the town's use of Australian ballot for public questions and elections.

After the town has voted to create new selectboard positions, the positions remain in effect until the town votes to eliminate them at an annual or special town meeting. 17 V.S.A. § 2650(c). If you are considering the addition of new members to your board, or have received a petition for a warning article on addition of new selectboard members, please feel free to contact VLCT for additional guidance.

D. SELECTBOARD POWERS AND LIABILITY – INDIVIDUALLY VERSUS AS A BOARD

As mentioned in the Introduction, a Vermont selectboard may serve, at various times, legislative, executive, and judicial functions. However, no individual selectboard member is given authority to serve any of these roles alone. Vermont law gives authority to selectboards and not to individual selectboard members. An individual selectperson has no more authority to take action on behalf of a town than any other resident. 1 V.S.A. § 172.

The only exception to this rule involves dogs causing damage to domestic animals. An individual selectboard member may determine the award of up to $20.00 in damage done to domestic animals by dogs. 20 V.S.A. § 3742. An individual selectboard member may also identify such dogs and issue a warrant for their destruction. 20 V.S.A. § 3745.

Likewise, when an action is brought against a selectperson or any appointed or elected municipal official, it is brought in the name of the town, not the individual. 24 V.S.A. § 901(a). The municipality also assumes all reasonable legal fees incurred by an official when the official was acting in the performance of his or her duties and was not acting with malicious intent. 24 V.S.A. § 901(b). The same is true if the selectperson or official brings an action *against* someone else. The town is the party in the suit.

E. TERM AND ELECTION

How long do selectboard members serve? In towns with a three-member selectboard, the answer is simple: each elected member holds a three-year term. 17 V.S.A. §§ 2646(4), 2649. In those towns with a five-member selectboard, the answer is more complicated. Three members of the selectboard will hold three-year terms, but the remaining two members hold two-year terms or one-year terms. 17 V.S.A. § 2650(b). The length of these remaining members' terms will depend on whether he or she has been elected to a two or one year seat.

Regardless of the number of selectboard members, the election of a selectboard member must be by ballot, either paper ballot, 17 V.S.A. § 2646(4), or Australian ballot if the town has voted to elect its officers by Australian ballot. 17 V.S.A. § 2680(b).

F. VACANCY ON THE SELECTBOARD

When a selectperson resigns, moves from town, dies or becomes insane, the remaining selectpersons must post notice of this vacancy in at least two public places in town and in and near the town clerk's office within 10 days of the creation of the vacancy. 24 V.S.A. § 961.

When such vacancy occurs, the remaining selectpersons may then call a special town meeting to fill the vacancy, either on their own initiative or by a valid petition, or they may appoint a

person, in writing, to the position until an election is held, either at a special or the next annual town meeting. This appointment is filed with the town clerk and recorded in the town records.

If there are vacancies in a majority of the board of selectpersons at the same time, the vacancies *must* be filled by election at a special town meeting called by the remaining selectpersons for that purpose, and *not* filled with appointments by the remaining selectpersons. 24 V.S.A. §§ 961, 963.

In the event there are no selectpersons in office, the Secretary of State is required to call a special election to fill the vacancies. 24 V.S.A. § 963. If there is a vacancy on the selectboard or in any other elective office because no candidate filed a petition and no one was otherwise elected, a majority of the selectboard may appoint a voter of the municipality to fill that office until the next town meeting. 17 V.S.A. § 2682.

See Chapter 5, *The Selectboard and Town Officials/Employees*, for a more comprehensive explanation of vacancies in regard to other officials.

Handling Resignations. While state law provides that a vacancy is created by resignation, it does not set out what an official must do to resign from office. The law's silence has led to numerous questions, such as whether an oral resignation is sufficient to create a vacancy and whether a resignation must be formally accepted by the selectboard before the vacancy exists.

In the absence of some further guidance from the Legislature, the best policy is to require written resignations from local officials. Verbal resignations are often made in haste, in the heat of the moment, leaving the recipients to ponder whether the resignation was sincere or merely a spontaneous act of immediate and overwhelming frustration. At the very least, written resignations afford a small moment of contemplation and reflection; the act of putting pen to paper may prompt the official to consider the problems before him or her in a different light. From the recipients' perspective, the written resignation will usually remove questions of the official's true intention. We recommend that a local official who is resigning from office do so in writing, stating the effective date of the resignation. The written resignation can then be recorded with the record of the official's oath of office. 24 V.S.A. § 831.

G. THE OATH OF OFFICE

All selectpersons are required to take an oath of office prior to assuming the office. The oath is:

> *You solemnly swear that you will faithfully execute the office of selectperson to the best of your judgment and abilities, according to law. So help you God.*

The oath is given and taken orally; no forms are involved. 12 V.S.A. § 5813. The swearing in must take place before each new term. Usually this is done immediately following the election, upon adjournment of the meeting or at the first meeting of the board. The town clerk must have record of the fact that the oath was taken and must notify the Secretary of State of the names and addresses of the newly elected selectpersons. 24 V.S.A. § 831; 17 V.S.A. § 2665.

H. OFFICIAL BOND

Selectpersons are not required to give a bond to perform their duties but they must require bonds of certain other town and school officials. 24 V.S.A. § 832. (See Chapter 5, *The Selectboard and Town Officials/Employees*, for the bonding of other officers.)

I. COMPENSATION AND BENEFITS

1. **Salary.** The town may vote at its annual meeting to compensate its officials and employees and it may also fix the amount of that compensation. 24 V.S.A. § 932. If the town does not fix the amounts of compensation, the selectboard shall do so, *except* for their own pay, which must be set by the auditors at the time of the annual town audit. If the office of auditor has been eliminated and if the voters do not set the amount of the selectboard members' compensation, the selectboard members must be compensated at the rate at which they were compensated during the immediate preceding year. 24 V.S.A. § 933.

Selectboard Compensation. VLCT's 2004-05 *Vermont Municipal Salaries and Benefits* indicates that there is no link between budget size and selectboard compensation. Annual compensation for selectpersons and trustees in municipalities with less than a $1,000,000 annual budget ranges from $100 to $2,700 per regular board member. In municipalities with more than $1,000,000 annual budget, compensation ranges from $300 to $3,750. Some municipalities provide more compensation to the board chair. Most compensation is in the form of a set annual stipend, but some towns pay on a per-meeting or an hourly basis.

2. **Income tax and Social Security withholding and reporting.** Quite a bit of folklore has developed around this topic. For some reason, a number of towns believe that elected officials are "self-employed" or "consultants" not subject to income tax withholding or Social Security (FICA). They therefore issue 1099 forms with the Internal Revenue Service for compensation paid to selectpersons. The rules show quite clearly that elected officials must be treated as employees and that they are subject to FICA. Section 263.14 of the Social Security rules covering state and local governments states:

   > An officer of a state or political subdivision is an employee by statutory definition. ... Indicative of such status are provisions that the individual has tenure in his position and that he takes an oath of office. Generally, a public officer exercises some part of the sovereign power of the state or political subdivision.

   In the original 1951 agreement by which the State of Vermont and Vermont cities and towns became eligible to be covered by Social Security, "employee" is defined to include "an officer of a political subdivision of the State." If your municipality is covered by Social Security – several small towns still are not – your selectpersons must also be covered. That means two things. First, selectpersons' paychecks must have the FICA tax withheld from their pay, and the town must match that as they do with all employees. Secondly, IRS instructions for preparing W-2 forms clearly indicate that a W-2 must be filed for anyone from whom you withhold income or social security tax.

3. **Workers' Compensation.** Selectpersons are specifically exempted from workers' compensation coverage *except* "while actually engaged in highway maintenance or construction." 21 V.S.A. §§ 601(12)(O)(i), 601(12)(F).

4. **Unemployment Compensation.** Selectpersons are specifically exempted from unemployment compensation coverage. 21 V.S.A. § 1301(6)(C)(vi)(II).

5. **Minimum Wage and Overtime.** Selectpersons are specifically exempted from the Federal Fair Labor Standards Act (FLSA) (Federal Register § 553.11 (a)) and from state overtime provisions. 21 V.S.A. § 384 (b)(6). Although the state statute is not clear on minimum wages, selectpersons probably fall under the exemption for "bona fide executive, administrative or professional capacity" or their relationship with the town is not deemed an "occupation" or "employment" according to the state Department of Labor. 21 V.S.A. § 383 (2)(E).

6. **Vermont Municipal Employee Retirement System (VMERS).** Although not specifically exempted from VMERS, selectpersons would have to work at least 1,040 hours in a year and at least 24 hours per week in order to qualify as an employee under this system. 24 V.S.A. § 5051(10). (See 24 V.S.A. Chapter 125 and Chapter 5 of this handbook for a discussion of VMERS as it applies to town employees generally.)

CHAPTER 3
CONFLICTS OF INTEREST AND INCOMPATIBLE OFFICES

A. INTRODUCTION

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

While the vast majority of Vermont's local officials have always taken due care to ensure that personal interests did not influence their public decisions, local officers have never been immune from conflict of interest allegations. Elected officials are rightfully seen as occupying a caretaker relationship to the town and worthy of the responsibility of keeping the town's best interests foremost. Yet the very structure of Vermont local government, the breadth of its responsibilities, and the oft-contentious nature of local issues all increase the likelihood that allegations will be leveled against even the most conscientious selectboard member.

Of all the issues facing Vermont towns, none has proven more difficult to address than the allegation that a local official has a conflict of interest. Such allegations touch the core of people's beliefs about local government and bring into question the personal motives of the official. However, it is often very difficult to determine if he or she has a genuine conflict. Concrete measures are few and far between and, for better or worse, the Legislature and Supreme Court have never provided much guidance for resolving local conflict of interest issues.

As a result, the resolution of conflicts of interest has often relied, for the most part, on the moral conscience of the persons involved. Unfortunately, it is both easy to make allegations of unethical conduct and difficult to defend against such accusations. A mere accusation can do significant damage to the reputation of the accused and, at times, an entire board.

Beyond damage to one's reputation, there are other, perhaps more direct reasons to avoid conflicts. For example, conflicts of interest may result in void contracts. Courts in several jurisdictions have held that 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 the reasonableness of the deal. See McQuillan, *Municipal Corporations* § 29.97. As a further remedy for this self-dealing, a court may also require the official to surrender any profit realized as a result of the questionable deal. *Davenport v. Town of Johnson*, 49 Vt. 403 (1877). Conflicts can also result in void quasi-judicial decisions. The Vermont Environmental Court has stated unequivocally that if a development review board (DRB) member with a conflict of interest participates in a DRB decision, the Court can vacate the decision for that reason, and order the matter be reconsidered by the DRB without the participation of that member. *Appeal of Janet Cote*, 257-11-02 Vtec (2003).

Towns often fail to pay attention to conflicts of interest until an allegation is made or an outright crisis has developed. As the leaders of local government, it is incumbent upon the selectboard members to take the lead and develop strategies and tools for addressing conflicts of interest prospectively. They should take appropriate steps to minimize their own conflicts and

appropriately address them when they arise, not only for their own protection and protection of other local officials, but to uphold the public's faith in their local government.

B. IDENTIFYING CONFLICTS OF INTEREST

One of the most difficult aspects of conflicts is determining when they exist. Part of the problem is the breadth of local government's responsibilities. As explained in the Introduction, local government stretches across the three traditional functions of government: legislative, judicial and executive. Conflicts may be viewed in different ways, and different standards may apply, when a local official is acting in each of these various roles. Nonetheless, experience has shown that a local official is likely to have four types of interests that may result in a conflict: direct monetary interest, indirect monetary interest, direct personal interest, and indirect personal interest. In quasi-judicial proceedings, an official must also be conscious of bias and ex-parte communication. The following scenarios are examples of when conflicts of interest might arise in the selectboard's executive, legislative, and executive roles.

1. **Direct monetary interest.** A conflict of interest can be present when a local official acts on a matter affording the official a direct financial gain.

   - **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 weight limits are imposed.
   - **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.

   Direct monetary interests are most easily identified and can present clear conflicts in all three of the selectboard's roles.

2. **Indirect monetary interests**. A conflict of interest can be present when a local official acts on a matter that financially benefits one closely tied to the official, such as an employer or family member.

   - **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 two equipment 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.
   - **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.

Indirect monetary interests can be difficult to identify, especially if the member at issue fails to disclose his or her relationship to the party that stands to benefit from the decision. At times, dealing with the family member or close associate of a selectboard member may be in the best interest of the town. However, when that relationship is the only reason, or a major reason for the decision, the arrangement may be detrimental to the town and may present a conflict. The failure to appropriately deal with an indirect monetary interest may lead to an allegation of nepotism or cronyism.

3. **Direct personal interest.** A conflict may be present when a local official acts on a matter that benefits the official in a non-financial way, but in a matter of significant importance.

   - **Executive function.** The town's development review board has denied a permit for a large retail project. The selectboard is considering participation in an appeal to the environmental court as an interested party. 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 on a town road that bisects property owned by a selectboard member.
   - **Judicial function.** A resident has submitted a written complaint of a dog bite. A selectboard member owns the dog in question.

   Direct personal interests can take many forms and, therefore, can be particularly difficult to identify. In the judicial role, a direct personal interest may rise to the level of a bias that prevents a local official from making decisions objectively. However, the same interest may be perfectly acceptable, or even desirable, when the official is acting in an executive or legislative role.

4. **Indirect personal interest.** A conflict may be present when a local official acts on a matter in which the member's judgment may be affected because of a family or personal relationship, or membership in some organization, and a desire to help that person or organization further its own interests.

   - **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 for purchase of a piece of fire equipment.
   - **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.
   - **Judicial function.** A selectboard member is sitting on the board of civil authority. The board member's sister is a town lister.

   The concern presented by an indirect personal interest is embodied in the phrase "a person cannot serve two masters." Voters reasonably expect that when a local official is making a decision, he or she will give first consideration to the interest of the town. An official's close affiliation with, or membership in, another organization may result in a division of loyalties.

Failure to address the conflict may result in the perception that the official is using the office to further the interest of that other group.

5. **Close calls.** The foregoing scenarios have been greatly simplified to provide examples of when conflicts of interest might be present. The reality is that conflicts, and potential conflicts, can be much more difficult to identify. Often times, the appearance of a conflict of interest can be more damaging than the conflict itself. Take, for example, a selectboard member who refuses to recuse himself, and votes to approve a roadside mowing contract between himself and the town. While the value of that conflict may be relatively small, the public's perception that the office has been used for private gain may be very costly, not only to the member, but to the entire selectboard. The best advice when trying to identify conflicts is to err on the side of caution, if only for the preservation and protection of the public's confidence in local government.

C. HANDLING CONFLICTS

> *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; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.*
> *– Chapter I, Article 7, Vermont Constitution*

1. **Transparency and disclosure.** Chapter I, Article 7 of the Vermont Constitution ensures that government be operated for the benefit of all the people and not for the advantage of a single person, family or group. It also reserves to the people the right to reform their government in a manner that is most conducive to the public good.

   Violations of the public trust are most likely to occur when the transparency of local government is obscured. One of the best methods to effect transparency is to create an environment in which the full and frank disclosure of conflicts of interest is supported and encouraged. Selectboards can take the lead in promoting transparency by actively encouraging an environment where all local officials feel free to disclose facts that may lead to an actual or apparent conflict of interest.

   Beyond transparency, disclosure can also be an effective tool for evaluating conflicts. When potential conflicts are disclosed, they can be discussed and evaluated with other local officials. Oftentimes, discussion of the facts surrounding a potential conflict may lead to the conclusion that no conflict actually exists or can be dealt with effectively.

2. **Appropriate recusal.** When a conflict of interest is identified and disclosed, the proper course of action is recusal from participation in the matter, i.e. from discussing, questioning, commenting and voting. While some officials may feel it is sufficient to just refrain from voting, complete recusal acknowledges that the outcome of events and decisions often rests on more than the final vote. A conflicted official should not be allowed to use his or her position to influence others' decisions. Practically speaking, this can mean leaving the room, or at least the table, where the discussion is occurring.

A common mistake is to equate recusal for conflict of interest with a vote to *abstain*. They are entirely separate processes. To *recuse* means "to disqualify … from participation in a decision on grounds such as prejudice or personal involvement." *American Heritage Dictionary*, 1143 (3d ed., 1997). To *abstain* means "to refrain from something by one's own choice." *Id*. at 6. Abstention from voting is used by a board member when he or she has inadequate information on which to judge the merits. This may occur where the member has not had an opportunity to examine all of the evidence or to attend all of the hearings for reasons other than conflict of interest. Recusal, on the other hand, involves complete removal from participation in the discussion and the vote, where a conflict, or the appearance of a conflict, is present.

3. **Remedies.** Can a selectboard force a conflicted local official to recuse himself when the member has a conflict of interest? Absent a local conflict of interest ordinance, the answer is probably not. Local government is not a private organization that can define its own membership and discipline its own members. Just as the Legislature has taken a limited role in defining conflicts, it has also been relatively silent on how to deal with conflicts once they are identified and disclosed. Absent a local conflict of interest ordinance (see below), the most a selectboard might be able to do is register its displeasure with a member's conduct by passing a resolution censuring the member. Even this limited remedy can have its pitfalls. See *LaFlamme v.Essex School District*, 170 Vt. 475 (2000).

D. LOCAL TOOLS FOR PREVENTING AND ADDRESSING CONFLICTS

Many have argued that the best remedy for those officials who engage in conflicts is to vote the offender out of office. However, as explained in Chapter 2, there is no provision in Vermont law for recall of local officials, though some charters provide for it. It can be several years before the expiration of an office. Relying on political remedies is rarely sufficient. VLCT recommends that municipalities avail themselves of one or more of the local tools for addressing conflicts.

1. **Conflict of Interest Ordinance**. In 2000, the Legislature authorized towns to adopt a conflict of interest prohibition for its elected and appointed officials. 24 V.S.A. § 1984. The process for adoption of the prohibition may be initiated by the selectboard or by application of five percent of the town's voters. 17 V.S.A. §§ 2643(a), 2642(a). The prohibition 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(a). Regardless of where the ordinance initiates, it must contain the following elements:

   - A definition of conflict of interest.
   - A list of the elected and appointed officials covered by such prohibition.
   - A method to determine whether a conflict of interest exists.
   - Actions that must be taken if a conflict of interest is determined to exist.
   - A method of enforcement against individuals violating such prohibition. 24 V.S.A. § 1984(a).

   The statute provides a default definition of a conflict of interest:

   > [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).

While the statute provides a good starting point, towns should remember that they retain the authority to craft their own definitions. VLCT maintains a file of conflict of interest ordinances from around the state. If you are drafting a proposed conflict of interest prohibition and would like to review the work of other towns, please feel free to contact the League for assistance.

2. **Conflict of Interest Policy.** The law also authorizes the selectboard to establish a conflict of interest policy. A policy and an ordinance have a small but significant difference: an ordinance has the force and effect of law. A policy is usually only advisory in nature and affords no direct legal remedy.

   While selectboard policies typically have no bearing on the actions of the town's independently elected officials (e.g., town clerk, listers, auditors), the law expressly provides that a conflict of interest policy adopted by a selectboard will apply to "all elected officials of the town, city, or incorporated village." 24 V.S.A. § 2291(20).

   Please see the Appendices for VLCT's model conflict of interest policy.

3. **Purchasing and Bidding Policies.** Another effective tool available for avoiding conflicts of interest is the purchasing policy. Such policies typically provide procedures for competitive bidding and may prohibit local officials or employees from participating in the bidding process. A copy of VLCT's model bidding policy is located in the Appendices.

4. **Municipal Administrative Procedures Act.** The Vermont Municipal Administrative Procedures Act (MAPA) requires towns that have adopted it to follow certain administrative procedures when conducting contested hearings. 24 V.S.A. § 1201. MAPA is an enabling statute and applies only in those towns where it has been adopted. The law creates procedural rights and duties, with an eye toward affording parties more formal hearings and additional due process protections. 24 V.S.A. § 1202. Though usually adopted and applied in conjunction with zoning hearings, towns may elect to apply MAPA to any other contested hearing held by a local board. 24 V.S.A. § 1201.

   One of the features of MAPA is the conflict of interest provision, which requires local boards to comply with the requirements of the statute proscribing the circumstances under which a judge must be disqualified from hearing a case. 12 V.S.A. § 61(a). This statute prohibits persons from acting in a 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). Another feature of MAPA is the treatment of ex parte communications. The chair and all 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 board member must be disclosed on the record. 12 V.S.A. § 1207(c).

E. STATUTORY REQUIREMENTS

1. **Appropriate Municipal Panels (AMPs)**. Under the 2004 revisions to Vermont's zoning statute, local land use panels (planning commissions conducting zoning review, zoning boards of adjustment, and development review boards) are required to adopt rules of ethics with respect to conflicts of interest. 24 V.S.A. § 4461(a).
2. **Quasi-judicial Proceedings.** Where the Municipal Administrative Procedures Act applies, board members must recuse themselves as would members of the judiciary who are subject to 12 V.S.A. § 61. 24 V.S.A. § 1203. Indeed, as mentioned below, recusal is mandated for members of any body acting in a quasi-judicial proceeding, even in the absence of the Municipal Administrative Procedures Act, since 12 V.S.A. § 61 (a) states that no one shall "act in a judicial capacity … as trier of a cause or matter in which he … is interested… ." 12 V.S.A. § 61(a).
3. **Setting Compensation.** A town may vote at its annual meeting to compensate its local officials. 24 V.S.A. § 932. If the town does not set the compensation, the selectboard may. However, the selectboard may not set its own pay, which must be set by the auditors at the time of the annual town audit. 24 V.S.A. § 933.
4. **Election Officials.** No person may serve as an election official in an election where his or her name appears as a candidate for selectperson on the Australian ballot unless he or she is the only candidate for that office. 17 V.S.A. § 2456. These same prohibitions would apply to village officers as well. 1 V.S.A. § 139.

F. SIGNING ORDERS

Many small towns find themselves in the position of having to employ selectpersons to perform some extra services (e.g. road commissioner or board clerk). Even though there is no statutory prohibition on a selectperson being an employee of a town, selectpersons must be cautious when deciding to hire themselves and when setting compensation for these extra services.

A selectperson should not sign a paycheck or warrant for services that he or she renders. If the payment or salary amount is set by the voters or the auditors, then this conflict is not that critical. 24 V.S.A. § 931. But if the amount is not set by the voters or auditors, it is best to avoid any situation which would even remotely hint of conflict. It is simplest for the selectboard to avoid hiring individual selectpersons to perform services for the towns. However, if a town must hire a selectperson for a task, then a plan or system of bidding should be implemented to insure that unfair influence is not wielded by any selectperson.

G. INCOMPATIBLE OFFICES

> *No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than that the accumulation of all power, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.*
>
> *– James Madison, Federalist Papers, No. 47*

In recognition of the principle that the aggregation of political power may result in the diminishment of citizens' freedoms, the Legislature has prescribed a list of incompatible offices. The general statute concerning incompatible town offices is 17 V.S.A. § 2647. Under that statute, a selectboard member may not hold the offices of auditor, collector of current or delinquent taxes, first constable, lister, town agent, town manager or town treasurer. Likewise, the spouse of a selectboard member or "any person assisting [a selectboard member] in the discharge of their official duties" is not eligible to serve as auditor.

The incompatible offices statute does not apply in a town with 25 or fewer legal voters, but even in those towns "an auditor [or the auditor's spouse] shall not audit his own accounts kept and rendered in some other official capacity." 17 V.S.A. § 2648. It should also be noted that the statute does not prohibit one from running for two incompatible offices. For example, one person may simultaneously run for the office of treasurer and auditor, but if elected to both positions, must resign from one office before commencing duties in the other.

Finally, while the incompatible office statute does not mention romantic co-habitants or civil union partners, the intimacy of such relationships would necessarily imply that the same prohibitions apply to these relationships as well.

A Chart of Incompatible Offices is located in the Appendices.

H. NEPOTISM

A word about nepotism is also warranted. Nepotism may occur when town officers appoint their relatives to positions in town government. At times, the relative may be well qualified or even *the* most qualified person, and appointment is appropriate and in the best interest of the town. This is especially true in small towns. Nepotism, however, occurs when the relationship is the only reason or a major reason for the appointment. Such an appointment is not in the best interest of the town and may be detrimental to the town.

I. CRIMINAL OFFENSES

1. **Kickbacks.** Under Vermont *criminal* law, public officials or employees who solicit or accept gifts, gratuities or promises of such with the understanding that the official or employee will be influenced in any matter within his or her official capacity (i.e., kickbacks) may be fined or imprisoned. Possible penalties include fines of up to $10,000 and prison terms of up to five years, depending on the value of the gift or benefit. 13 V.S.A. §§ 1106, 1107.
2. **False Claims.** State law makes it illegal for municipal officials to make any false claims to defraud a municipality. Guilt may result in a fine of up to $10,000 and/or a prison term of up to five years. 13 V.S.A. § 3016.

J. CONCLUSION – CONFLICTS OF INTEREST IN A NUTSHELL

Many of Vermont's municipalities find it difficult to appoint and elect boards and commissions that do not include people with extensive business and family ties to their community. While conflicts cannot always be avoided, they can, and should, be managed. Here are some final tips to remember:

- Conflicts can have significant legal and personal consequences. Mere allegations of conflicts of interest can cause damage to reputations and undermine public confidence in local government.
- Disclosure of potential conflicts effectuates transparency and affords opportunities for discussion and evaluation of potential conflicts.
- When a conflict is identified and disclosed, the local official should recuse himself from participation in the matter under consideration.
- Municipalities should take a proactive approach to conflicts and avail themselves of all tools for dealing with conflicts, including conflict ordinances, conflict policies, nepotism policies and bidding policies.
- Remember to check State law. State statutes often have specific provisions to limit conflicts of interest or to prohibit one person from holding two offices simultaneously.
- In some extreme instances, conflicts of interest can rise to the level of criminal offenses.

CHAPTER 4
SELECTBOARD MEETINGS

A. THE OPEN MEETING LAW

As discussed in Chapter 3, transparency is an essential element of democratic government. In Vermont, the foundation of this transparency is the state's open meeting law. 1 V.S.A. §§ 310-314. The open meeting law implements the command of Chapter I, Article 6 of the Vermont Constitution that officers of government are "trustees and servants" of the people and are "at all times, in a legal way, accountable to them."

All selectboard meetings, with some very limited exceptions discussed below, are subject to Vermont's open meeting law. 1 V.S.A. §§ 310(3), 312. In a nutshell, the open meeting law requires that all meetings of a public body be open to the public. No resolution, rule, regulation, appointment, or formal action undertaken by a selectboard will be binding unless made at an open meeting. 1 V.S.A. § 312(a). See the Appendices for a copy of the law.

1. Notice. The open meeting law recognizes three types of meetings and prescribes specific notice requirements for each.

a. Regular Meetings. Regularly scheduled selectboard meetings do not require a specific notice for each meeting. As explained below, a resolution adopted at the organizational meeting of the board setting the day, time and place of all regular meetings for the ensuing year will suffice as notification. 1 V.S.A. § 312(c)(1).

The First Selectboard Meeting.

Forthwith after the new selectboard members have been elected and taken the oath of office, they must meet to organize and elect a chairperson. If the newly organized board so chooses, it may also elect one of its members as its clerk. Certificates of the election of the chairperson and clerk must be filed with the town clerk. 24 V.S.A. § 871.

This meeting is also a good time to set the board's regular meeting time. The time and frequency of selectboard meetings vary from town to town. Some boards meet twice a month, others once a month. Usually the meetings are on a specific day, for example, the second Tuesday of each month. It is recommended that the board adopt a resolution establishing the date, time and place of all regular meetings for the year. The resolution should be permanently posted in the town office. This will suffice as notice of all regular board meetings under the open meeting law. 1 V.S.A. § 312(c)(1).

b. Special Meetings. Special meetings require specific notice. The time, place and purpose of a special meeting must be publicly announced, at least 24 hours before the meeting. The notices must be posted in or near the town clerk's office and in at least two other public places in town. Also, unless waived previously by the board members, notice must be given orally or in writing to each member of the board. 1 V.S.A. § 312(c)(2). Any editor, publisher or news director of any newspaper or radio or television station serving the area that requests notification of special meetings must be notified. 1 V.S.A. § 312(c)(5).

c. Emergency Meetings. Emergency meetings may be held by the selectboard without public announcement, meaning no notice posting or member notification is necessary. However, some sort of notice must be made as soon as possible before an emergency meeting. The law specifically provides that emergency meetings may be held *only* when it is necessary to respond to an unforeseen occurrence or condition that needs the immediate attention of the board. 1 V.S.A. § 312(c)(3).

2. Agendas. While there is no direct reference to meeting agendas in the open meeting law, there is a provision in the law that requires that the agenda for a special or regular meeting be made available to the news media or concerned persons prior to the meeting upon specific request. 1 V.S.A. § 312(d). The practical implication of this provision is that an agenda should be prepared for every regular and special selectboard meeting.

a. Content. While the open meeting law does not specify what must be contained in a meeting agenda, the Vermont Supreme Court has routinely interpreted the open meeting law with an eye toward making information available to the public. It can be inferred from the few cases that have explored the open meeting law that a vague or inaccurate agenda will not pass muster. An agenda should be crafted to give the public actual notice of the matters to be considered at the meeting.

b. Preparation. In most towns, one person (usually the board chair, the board assistant, town manager or the town clerk) will take on the responsibility for drafting the selectboard meeting agenda. While an informal approach works in most cases, problems may arise when there is a dispute regarding the content of the agenda and no one is sure who has the final authority to determine the agenda's content. The best way to avoid this conflict is for the selectboard to specify, as part of its adopted rules of procedure, who will craft the agenda, how the content will be determined and who will have final say over the content.

c. Posting. There is no legal requirement that a meeting agenda be posted or published, as the law merely states that the an agenda "shall be made available to the news media or concerned persons prior to the meeting upon specific request." 1 V.S.A. § 312(d). Notwithstanding the strictures of the law, most towns will post a copy of each selectboard meeting agenda in one or more public places in town.

d. Following the agenda. When considering a deviation from the agenda, the board must balance two competing interests: the public's right to notice and the board's ability to effectively deal with emerging issues in a timely manner. When a selectboard engages in extensive discussion of issues not included on the agenda or takes binding action on matters not included in the agenda, it does so with the risk that the public trust, if not the law, will be violated. Agenda items such as "other business" or "public comment," while necessary, should be used sparingly and not as cover to avoid public scrutiny on difficult or controversial issues. Often the person responsible for the agenda will present the agenda to the board as a draft at the beginning to the meeting. The members of the board can then suggest additions to the draft that will be approved by the entire board.

SELECTBOARD, TOWN OF _____

March 31, 2006

REGULAR MEETING AGENDA

	EVENT	TIME
1.	Call to order.	6:15
2.	Introduction of those present by chairperson.	6:16
3.	Reading (optional) and approval of minutes from previous meeting.	6:18
4.	Appearances by local citizens and visitors.	6:20
5.	Announcements (could include times and places of upcoming meetings and events)	6:30
6.	Reports	6:40
	• from commissions/boards (such as recreation commission).	
	• from selectpersons responsible for certain activities on an on-going basis.	
7.	Old or unfinished business.	6:50
	• list specific items left unfinished from previous meetings that will be addressed at this meeting.	
8.	New Business.	7:00
	• list specific items of business not previously considered at other meetings that will be addressed at this meeting.	
9.	Review of bills and signing of selectboard's orders.	7:15
10.	Adjourn.	7:30

3. Minutes. The open meeting law requires that minutes be taken at all public meetings. 1 V.S.A. § 312(b)(1). The minutes must cover all topics and motions discussed at the meeting and provide a true reflection of the business transacted. At a minimum, minutes must include the following information:

- The names of all board members present and all other active participants in the meeting.
- All motions, proposals and resolutions made, offered and considered, and the disposition of each.
- The results of any votes, with a record of the individual vote of each member if a roll call is taken.

Minutes are considered public records, and must be kept by the town clerk. 1 V.S.A. § 312(b)(2). The minutes must be available for inspection by anyone five days from the date of the meeting and may be purchased for the cost of copying. 1 V.S.A. § 312(b)(2).

A Practical Problem. While the law requires that selectboard meeting minutes be made available to the public within five days of the date of the meeting, the reality is that most selectboards meet only biweekly. In most circumstances, final selectboard minutes cannot be made available in time to meet the law's requirement. The solution is to prepare draft

minutes and make them available within the statutory timeframe. These draft minutes should be clearly marked "draft," "unapproved," "subject to approval" or with some similar appropriate term. At the next selectboard meeting, the minutes can be reviewed and approved, then made available for inspection and copying.

4. **Committees and Subcommittees.** Occasionally, a selectboard will appoint some of its members or a group of citizens to study and make recommendations on a particular issue. All such committees and subcommittees are subject to the open meeting law and must follow all of its notice and record keeping requirements. 1 V.S.A. § 310(3).

5. **Adjourned Meetings.** Normally, when a meeting is adjourned, the meeting is over and the board will meet at the next regularly scheduled time. However, a meeting can be adjourned "to a time and place certain" to attend to some unfinished business without being re-warned. Note that when a meeting is adjourned "to a time and place certain," only that business which is carried forward from the adjourned meeting may be dealt with. Any new business must be conducted at a new, properly warned meeting. 1 V.S.A. § 312(4).

6. **Cancellation of Meetings.** Nothing in the law provides a procedure for canceling a meeting. It would seem best to provide as much notice in as many places as possible, but what can be done in the midst of a January blizzard? In this electronic age, radio announcements, cell phones and e-mail may be very useful.

7. **Penalties.** The penalty for knowingly or intentionally violating any provision of the open meeting law is an individual fine of up to $500.00. 1 V.S.A.§ 314(a). Also, the attorney general or any person aggrieved by a violation of the open meeting law may apply to the superior court for relief. These cases take precedence on the court docket and will be heard "at the earliest practicable date." 1 V.S.A. § 314(b). In other words, it is wise to follow the law carefully and to assume that the court will interpret the law in favor of open meetings whenever possible.

Smile – You're on Candid Camera! Tape recording of selectboard meetings has been a source of tension between citizens and selectboards for years. Now, with the expansion of public access cable television, more selectboards find themselves smiling (if somewhat reluctantly) for the television camera. While Vermont law is silent on the issue, it is generally recognized that a selectboard has no authority to exclude tape recorders or video cameras from its meetings. The only exception would be when the board is conducting deliberations in the context of a quasi-judicial hearing. 1 V.S.A. § 312(e).

The best approach for the reluctant selectboard is to accept tape recorders and video cameras as part of public life, and develop reasonable rules to ensure that recording takes place in a manner that does not interrupt or disturb the meeting. A selectboard should also remember that if the board (or one of its members) records a meeting, the tape is a public record subject to disclosure under the state's public records law. 1 V.S.A. § 316.

B. OPEN MEETING LAW EXCEPTIONS

The Legislature has recognized that in certain circumstances private interests may outweigh the public's interest in open meetings. In recognition of these interests, the Legislature has crafted some limited exceptions to the open meeting law. Recognizing the opportunity for abuse that

they might provide, courts have traditionally interpreted these exceptions very narrowly. Selectboards are well advised to take the same approach.

1. **Executive Session.** Executive session is a limited statutory exception to the open meeting law. A selectboard may vote to enter into an executive session at any time during an open meeting when the topic to be discussed meets the criteria in 1 V.S.A. § 313(a). The motion must state the nature of the business to be discussed in executive session, it must pass by a majority of the members present, and the result of that vote must be entered into the minutes. No other matter may be discussed in the session and no binding votes or actions may be taken until the board comes out of the session and is again in open meeting. At the board's discretion, it may ask staff, clerical assistants, legal counsel and "persons who are subjects of the discussion or whose information is needed" to attend the executive session. 1 V.S.A. § 313(a).

   Executive session is not meant to be a way to get around public scrutiny or debate when controversy is brewing. Rather, it is a way to discuss sensitive subjects thoroughly before taking action. An executive session is considered an extreme measure and may only be done under statutorily prescribed circumstances. The Vermont Supreme Court leans very heavily in favor of conducting business in open meeting. *Trombley v. Bellows Falls Union H.S.*, 160 Vt. 101 (1993).

   The only binding action that may be taken in an executive session is related to the securing of real estate options. 1 V.S.A. § 313(a)(2). If a vote or resolution is required or desired on any other topic discussed in an executive session, it must be taken in an open meeting, not in the executive session. Minutes of an executive session are not required. However, if minutes are taken, they do not need to be made public as other minutes are. 1 V.S.A. § 313.

2. **Deliberative Session.** The deliberations of a selectboard, undertaken in conjunction with a quasi-judicial proceeding, are exempt from the open meeting law. 1 V.S.A. § 312(e). A quasi-judicial proceeding is a contested case or one in which the legal rights of one or more persons are adjudicated. Parties have the opportunity to present evidence and to cross-examine witnesses presented by other parties. The result is a written judgment that may be appealed by a party to a higher authority. 1 V.S.A. § 310(5).

   A common example of a quasi-judicial proceeding is the procedure for altering a highway. The selectboard inspects the site and takes testimony at a public hearing. At the end of the process, the selectboard issues a written finding. 19 V.S.A. § 709. Other examples are hearings about vicious dogs, tax appeal hearings, and appeals from health orders.

   Deliberations are defined as weighing, examining and discussing the reasons for and against an act or decision, but the definition expressly excludes the taking of evidence and the arguments of parties. 1 V.S.A. § 310(1). The rationale for this exception is that the board should be allowed to deliberate in an atmosphere that is free from influence by the parties and the public. The written decision issued by a public body in connection with quasi-judicial proceeding need not be adopted at an open meeting if the decision will be a public record. 1 V.S.A. § 312 (f).

3. **Other Exceptions.** There are other exceptions to the open meeting law worthy of discussion. Site inspections for the purpose of assessing damages or making tax assessments or

abatements are exempt from the open meeting law, as is clerical work and work assignments of staff. 1 V.S.A. § 312(g).

It should also be noted that the law provides that "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." 1 V.S.A. § 312(g). In some towns, this provision has been interpreted to exempt so-called "work sessions" from the open meeting law. Typically, these work sessions are meetings where issues and subjects are discussed, but no formal action or votes are taken, such as budget planning meetings. Work sessions are not explicitly recognized in the statutes. Accordingly, VLCT recommends that municipalities take a conservative approach to this interpretation. If matters are going to be discussed that might later be the subject of a vote by the board, then those discussions should take place in the context of a duly noticed open meeting. Labeling a meeting a work session in order to avoid the open meeting law requirements is not appropriate.

C. QUORUMS AND BINDING VOTES

Under Vermont law, a majority of the members of a board or commission must be present in order to hold a meeting. 1 V.S.A. § 172. This majority is called a quorum. In the case of a three-member selectboard, two members must be present and in the case of a five-member board, three members must be present in order to convene a meeting.

Quorum Confusion. In order for a board to take a binding vote or action, there must be "the concurrence of a majority of" the total number of members. For example, if there is a five-member board with four members present and they vote 3 to 1 to approve a contract, the contract is accepted and valid because three of the five members of the board concurred. Suppose only three members of the five-member board are present and they vote 2 to 1 to fire an employee. That is not a binding decision because only two members of a five-member board have concurred. 1 V.S.A. § 172.

1. **Use of technology.** In a different technological era, the Vermont Supreme Court held that actual physical presence was necessary in order for a person to be counted as "present" under the quorum statute. However, under subsequent amendments to the open meeting statute, "A meeting may be conducted by audio conference or other electronic means, as long as the [other] provisions of [the open meeting law] are met." 1 V.S.A. § 312(a).

   In order to meet the requirements that the meeting public be given reasonable opportunity to participate, as provided in subsection 312(h), electronic communication must be by something like a speaker phone. Contact by regular phone would probably not meet the statutory requirements.

E-mail and the Unintended Selectboard Meeting

No technology has done more in the last ten years to revolutionize the way we communicate than e-mail. Everyone uses it, including local officials. But there is a downside to e-mail that local officials should be aware of.

Consider, for example, the typical three-member selectboard. One board member has been doing some research about a family of beavers causing flooding of the town baseball field. The board member has found a solution to the problem that seems (at least on its face) to have some merit. Excited by her find, she sends an e-mail to her fellow board members. Thereafter, the three have a brief e-mail exchange on the merits of this solution and decide to give it a try.

So, what is the problem? By failing to give proper notice of this meeting, and failing to provide the public an opportunity to participate by expressing its opinion on the matter, the selectboard has potentially violated the open meeting law.

Recall that the open meeting law defines a meeting as "a 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(2). The law also provides that a gathering can be conducted "by audio conference *or other electronic means*." 1 V.S.A. § 312(a).

If a quorum of board members is conducting a group e-mail discussion about town business, it is very likely that they are violating the open meeting law. The same principle would apply if the board members were talking on the telephone or chatting at the local convenience store. While the result may seem harsh, the larger goal of maintaining the public trust far outweighs the minor inconvenience of saving the discussion for a properly warned meeting.

2. **Delegation of routine matters.** These quorum and open meeting requirements do not prevent a board from delegating authority to handle a particular task to one member of the board, so long as the decision to delegate authority is *properly made by a majority of the board at an open meeting*. For example, the board may vote to authorize one member to sign payroll orders on behalf of the board. 24 V.S.A. § 1623. This is commonly done in towns where payroll must be issued weekly and the board meets monthly.

D. CONDUCT OF THE MEETING

1. **Introduction.** As noted in Chapter 2, a selectboard must act as a body and has authority only when acting as a whole. 1 V.S.A. § 172. This means that a selectperson may not act alone unless the board as a whole (or majority) has voted on the issue. Selectpersons acting on their own without the concurrence of the other selectpersons have no authority. *Town of Wolcott v. Behrend*, 147 Vt. 453, 456-7 (1986) (Single selectman could not approve cutting of timber on town property.). The selectboard accomplishes its business through *meetings*. The most effective selectboards are those that make the best use of their meeting time and resources.
2. **Role of the Chair.** At its first organizational meeting, the selectboard must elect a chair. 24 V.S.A. § 871. Often times, the role of board chair is filled by the most senior board member. While experience is important, an effective board chair must be a good leader and have the

ability to move the board toward its goals, assisting the board in making the best use of its time and resources. Seniority should not be the only factor in choosing a chair.

The chairperson typically has additional duties beyond the coordination and the running of board meetings, including calling special and emergency meetings, acting as spokesperson for the board and coordinating contact with the news media. The selectboard chair also has some statutory duties and rights not held by other members of the board. The chair must keep, or cause to be kept, a record of all orders drawn by the board showing the number, date, to whom payable, for what purpose and the amount. 24 V.S.A. § 1622. The board chair, and vice chair, also have the authority to sign written decisions and orders approved by the board. 24 V.S.A. § 1141.

While the selectboard chair has additional responsibilities, being chair does not take away a board member's rights. The chair may curb his or her participation in board discussions to allow others the opportunity to express their thoughts, but the chair can still have, and express, an opinion. The successful chair makes sure all members have had an opportunity to speak on an issue, and fulfills the board's legal duty to afford the public reasonable opportunity for participation and comment. 1 V.S.A. § 312(h).

Helpful Tips for the Chair Under Fire.

The time comes in every selectboard chair's tenure: A particularly difficult issue has come up for discussion. Passions are high, the public is engaged and the press has arrived. It's neighbor versus neighbor, and everyone wants to be heard. Welcome to the hot seat of local government. As the selectboard chair, you have a statutory obligation to keep order and the responsibility to facilitate appropriate public participation. Here are some tips to keep the difficult meeting on track:

- Adopt rules of procedure. Make copies of the rules available for everyone and politely remind participants that the rules will be observed and enforced.
- Prepare an opening statement acknowledging that the issue up for discussion is controversial and that, while passions may run high, all participants will still be neighbors at the end of the meeting. Mutual respect should be the order of the day.
- Remind everyone that the purpose of the meeting is the civil discussion of the matter under consideration. The focus should be issues and not personalities. Personal comments are not welcome and personal attacks will not be allowed.
- Use the pronoun "we" instead of "you" or "I." Emphasize the collaborative nature of the discussion.
- Be aware of the physical indications of escalating tensions, like raised eyebrows and raised voices. Use humor and humility to bring perspective.
- Summarize what you are hearing and reframe issue as the conversation progresses. Point out areas of common ground and points of divergence that might warrant further discussion.
- Politely, but firmly, enforce the rules.

3. **Rules of Procedure.** Selectboard meetings are not required to be conducted under any specific set of rules or procedures. However, it is strongly recommended that meetings be conducted by some set of procedural rules. A lack of rules can lead to logistical problems, confusion and charges of inconsistent or arbitrary decisions. People dislike what appears to them as the board making up the rules as it goes along. Therefore, if the board is using its own set of rules and procedures, it should have them written and close at hand at each meeting. See the Appendices for VLCT's Model Rules of Procedure.

CHAPTER 5
THE SELECTBOARD AND TOWN OFFICIALS/EMPLOYEES

A. INTRODUCTION

The selectboard of a town has general supervisory powers over all town matters, and must "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. Accordingly, the selectboard has expansive authority over local governmental affairs, which permits it to insure that the business of the town runs smoothly.

The selectboard's powers are limited by statute insofar as selectpersons are prevented from acting in areas reserved for other officers. 24 V.S.A. § 872. This has been interpreted by the Vermont Supreme Court to mean that selectpersons cannot tell other elected officials how to do their jobs unless specifically instructed by the statutes. For example, absent specific statutory authority, selectpersons may not prescribe methods by which the town clerk must keep the town records. *Bennington v. Booth*, 101 Vt. 24 (1927).

Although the selectboard may not interfere with the duties "committed by law" to the care of another officer, the board has some specific statutory authority over other town officers. For example, it might be required to set the compensation of the town officers, fill vacancies in town offices, appoint some officials and establish the amounts of the bonds required to be provided by each officer. We will discuss the relationship between selectpersons and other town officers in more detail in the following paragraphs.

B. SETTING COMPENSATION

The selectboard is responsible for setting the compensation of town officers, elected and appointed, and employees, unless the town voters have done so at the annual town meeting. 24 V.S.A. §§ 932, 933. However, if the town votes to compensate (or not compensate) a town officer for his or her official service at an annual meeting, the voters' decision is binding on the selectboard. 24 V.S.A. § 933. If the town has not set the compensation for members of the selectboard at the annual town meeting, the auditors must fix it at the time of the annual town audit.

Note that the town is only authorized to set compensation at an annual meeting, and if it fails to do so, the selectboard must set the compensation until the next annual meeting.

C. SETTING BONDS

Before certain town officers begin performing their duties, the selectboard must, by law, require each of them to give a bond to the town and/or school district conditioned on the faithful performance of his or her duties. 24 V.S.A. §§ 832, 1234. The officers who must give bond are the school directors, constable, road commissioner, collector of taxes, treasurer, assistant treasurer, clerk (24 V.S.A. § 832) and manager (24 V.S.A. § 1234). However, the municipality must pay for all bonds required of these officers. 24 V.S.A. § 835.

The purpose of the bonding requirement is to protect the municipality from the possible wrongdoing or misappropriation of its officers. Accordingly, the selectboard often sets the bonds

at the amount of money the particular officer is likely to have control over at any particular time. However, the board is not limited by statute as to the amounts in which the bonds must be set, so that it may exercise its discretion and set the bonds as low as zero dollars. By law, the selectboard also sets the surety on the bond and is not limited in this regard, except that it may not allow as surety another officer of the same municipality. 24 V.S.A. § 832.

If an officer fails to provide the required bond ten days after he or she is requested to do so, that office must be deemed vacant. 24 V.S.A. § 832. Note that if the selectboard fails to require bond, it is open to question whether the officer is legally serving even though he or she has been properly elected to office. Under these circumstances, however, a court will consider such person a *de facto* officer, and he or she may continue to act as officer until the office is "vacated" by the selectboard on the officer's refusal to execute a bond to its satisfaction.

The selectboard may, at any time, require a particular officer to provide an additional bond, if it considers the current bond to be insufficient. 24 V.S.A. § 832. When a bond is set by the selectboard and provided by an officer, the board must file such bond in the office of the town clerk for recording in a book kept for that purpose. 24 V.S.A. § 832.

Selectboards have sometimes set an extremely high bond in an effort to remove a town official from office. This is not wise or practical, however, since the town is responsible for paying for the bond. 24 V.S.A. § 835.

D. FILLING VACANCIES

When a vacancy occurs in any town office, the selectboard has the authority to fill the vacancy forthwith on a temporary basis until an annual or special town meeting is held at which the vacancy is filled. 24 V.S.A. §§ 962, 963. An office becomes vacant if the town officer resigns, is removed from office, dies, becomes insane, or moves out of the town in which he or she serves. 24 V.S.A. § 961.

When an office becomes vacant, the selectboard must alert the public of this vacancy by posting notice of the vacancy in at least two public places in the town and in and near the town clerk's office within ten days of the vacancy. 24 V.S.A. § 961. The selectboard may fill the position on a temporary basis prior to such posting. The voters may petition the selectboard for a special election to fill the position. If the voters do not do so, or do so without the required number of signatures (5% of the electorate), the selectboard's temporary appointment may remain in office until the next annual meeting or until another special town meeting is called for some other purpose. If a majority of the selectboard is vacant at the same time, such vacancies must be filled by a special town meeting called for that purpose by the remaining selectpersons, or by the secretary of state if there are no selectpersons in office. 24 V.S.A. § 963.

E. APPOINTMENT OF OFFICIALS

The selectboard has been given express authority to appoint various local officials. First, after the election and qualification of the board, board members elect from their number a chairperson. They may also elect a clerk of the board. 24 V.S.A. § 871. The selectpersons must also appoint from among the legally qualified voters of the town: three fence viewers; a poundkeeper for each animal pound in the town; one or more inspectors of lumber, shingles and wood; one or more weighers of coal; and a tree warden (the poundkeeper does not have to be a town resident so long

as he or she consents to the appointment). 24 V.S.A. § 871. The weigher of coal must not be directly or indirectly interested in the sale of coal. 24 V.S.A. § 1032.

A municipality may have a zoning board of adjustment and a planning commission or it may have a development review board and a planning commission. 24 V.S.A. § 4460. When a municipality has adopted zoning or subdivision bylaws, the planning commission must appoint a zoning administrator with the approval of the selectboard. 24 V.S.A. § 4448.

The selectboard must also appoint a three to nine member zoning board of adjustment or a five to nine member development review board. 24 V.S.A. § 4460. The zoning board of adjustment hears all appeals from decisions of the zoning administrator. 24 V.S.A. § 4465. Where the legislative body of the town decides to appoint a development review board, that board replaces the zoning board of adjustment and takes over all of the development review functions previously delegated to the planning commission and the planning commission continues to perform its other functions of planning and bylaw development. 24 V.S.A. § 4460. Planning commission members may be appointed by the selectboard or elected for a term determined by the voters. 24 V.S.A. § 4323. When they are appointed, they may also be removed by unanimous action of the board. When they are elected, the board may not remove them. However, if a vacancy on the planning commission occurs, the selectboard may appoint a replacement to serve until the next election. 24 V.S.A. § 4323. The municipal legislative body also has the authority to appoint a representative to the regional planning commission and to remove such person by a majority vote. 24 V.S.A. § 4343. Finally, after a town adopts any building codes, rules or regulations, the selectboard appoints a building inspector and may appoint a deputy building inspector. These inspectors must be competent and disinterested people with experience in various types of building construction so that they can enforce the regulations. 24 V.S.A. § 3102.

If the town has not voted to elect road and water commissioners, the selectboard may appoint one or two road commissioners and three water commissioners (unless there is no municipal water system). 17 V.S.A. § 2651. If the town has not elected an agent to convey real estate owned by a town or town school district, the selectboard may appoint such an agent and have the certificate of appointment recorded by the town clerk. 24 V.S.A. § 1061. A town may also authorize the selectboard to appoint an inspector of wiring (24 V.S.A. § 1033), a town energy coordinator (24 V.S.A. § 1131), and a town manager (24 V.S.A. §§ 1241-1243).

On or before April 15 of each year, and whenever there is a vacancy, the selectboard must appoint a town service officer. The selectboard must notify the commissioner of social welfare, who will give him or her a certificate of appointment and a contract for compensation. If the selectboard fails to appoint a town service officer, the commissioner may do so. 33 V.S.A. § 2102. Similarly, the forest, parks, and recreation commissioner must appoint, and may remove for cause, a town forest fire warden with the approval of the selectboard. 10 V.S.A. § 2641. Finally, the selectboard must establish a local organization for emergency management and appoint a chair for it in accordance with the state emergency management program. 20 V.S.A. § 6.

F. RECALL OF ELECTED OFFICIALS

There is no Vermont statute that provides generally for the recall of elected local officials. Some municipal charters do, however, contain provisions for recall. Absent such a provision, elected officials may not be recalled.

G. REMOVAL OF APPOINTED OFFICIALS

There is no statute that gives selectpersons the general authority to remove appointed officials; however, many of the statutes that authorize the selectboard to appoint officials also authorize it to remove that official. For example, the selectboard may remove the town manager for cause by a majority vote of the board. 24 V.S.A. § 1233. The selectboard may also remove the road and water commissioners, if appointed by the selectboard, "for just cause after due notice and hearing." 17 V.S.A. § 2651. The selectboard may remove an appointed planning commission member "at any time by unanimous vote." 24 V.S.A. § 4343. A building inspector may be removed by the selectboard by majority vote. 24 V.S.A. § 3102. Selectboards may only remove a member of a board of adjustment or development review board for cause "upon written charges and after public hearing." 24 V.S.A. § 4460. Absent a specific statute, however, the power of a selectboard to remove an official it appoints is presumed since removal power is incidental to the appointment power.

The selectboard is not generally authorized to remove officers who are not appointed by them. However, the planning commission appoints the administrative officer with the approval of the selectboard, and he or she may only be removed for cause by the selectboard after consultation with the planning commission. 24 V.S.A. § 4448.

H. PERSONNEL POLICIES

In the interest of harmony and efficiency in the workplace, the selectboard may adopt rules relating to personnel administration. The board may establish job classifications and set rules relating to tenure, retirement, pensions, leaves of absence, vacations, holidays, hours of work, group insurance, salaries, layoffs, reinstatement, promotion, demotion, dismissal, transfer, injury, and settlement of disputes and appeals. 24 V.S.A. § 1121(a). Other topics a municipality might consider, and which relate more to employee behavior, include general conduct, attendance/tardiness, appearance and grooming, smoking, employee mail and telephone use, negligence, fighting, insubordination, work performance, sexual harassment, conflict of interest, confidentiality, substance abuse (drug/alcohol), criminal activity and falsifications of records. Note that state law requires employers to have policies on smoking and sexual harassment. Municipalities accepting federal funds must have a substance abuse policy.

Rules adopted by the selectboard may apply to any or all employees of a municipality, including the officers and employees of a fire or police department maintained by the municipality (24 V.S.A. § 1121(b)) and the zoning administrative officer (24 V.S.A. § 4448(a)). However, the statute prohibits the personnel rules adopted by the selectboard from being applied to employees of the town school district. 24 V.S.A. § 1121(b).

The adoption of personnel rules is considered an administrative act of the selectboard. Accordingly, they must be adopted by majority vote and are not subject to the statutory provisions ordinarily applicable to the selectboard's promulgation of ordinances and rules. 24 V.S.A. § 1122; *Martin v. Town of Springfield*, 141 Vt. 554 (1982).

For more information on this topic, please see the VLCT Municipal Assistance Center's *Municipal Employment Law Handbook* (2004).

I. THE TOWN MANAGER

When the town elects to have a manager, the selectboard may appoint a general town manager to supervise the affairs of the town. 24 V.S.A. §§ 1232, 1233. In order to authorize the selectboard to hire a manager, there must be a vote at an annual or special meeting after 5% of the voters petition the selectboard in writing for an article to be warned to authorize the employment of such a manager. 24 V.S.A. § 1241.

The town manager position is non-political; as such, it must be filled based upon the qualifications of the applicant and without reference to his or her political beliefs. 24 V.S.A. § 1233. In addition, the town manager does not have to be a resident of the town for which he or she is appointed. 24 V.S.A. § 1232. The manager may not be a member of the selectboard since the manager is subject to its direction and supervision. 24 V.S.A. § 1233; 1940-42 Op. Atty. Gen. 269.

The manager holds office at the will of the selectboard and may be removed for cause by a majority vote of the board. 24 V.S.A. § 1233. The manager may also be removed if the town revokes the selectboard's power to hire such a manager by majority vote at an annual or special meeting, provided that a proper article is inserted in the warning of such meeting. 24 V.S.A. § 1242.

Compensation of the manager may be fixed by the selectboard, unless otherwise specifically voted by the town. 24 V.S.A. § 1239. The manager must swear to the faithful performance of his or her duties and give a bond to the town before beginning the job, the amount of which, along with other required sureties, is established by the selectboard. 24 V.S.A. § 1234. The town itself pays for the bond. 24 V.S.A. § 835.

The manager is given general supervisory powers over the affairs of the town and is considered the administrative head of all departments of town government. 24 V.S.A. § 1235. Specifically, the manager's duty is to perform all functions required of the town and town school district not committed to the care of any particular officer and to assist the selectboard in all matters reserved for its sole authority. (See enumerated functions in 24 V.S.A. § 1236(2).) The town manager also performs all other duties conferred by law on the selectboard. 24 V.S.A. 1236. For example, the manager acts as the general purchasing agent for the town, is in charge of all public town buildings, does all the accounting for all the departments of the town and town school districts (if so requested by the school board), and supervises and expends special town appropriations. 24 V.S.A. § 1236(3), (4), (7), and (8). In order to perform his or her duties, the town manager must be allowed access to all town books and papers. 24 V.S.A. § 1237.

The manager may perform the duties of road commissioner and/or tax collector if the town so votes; has charge, control, and supervision over the police and fire departments; and may appoint and remove officers and fix their salaries. (For a complete list of the specific duties of a town manager consult 24 V.S.A. § 1236.) Note that the town manager may exercise his or her authority independently of the selectboard and may follow his or her own judgment, even when the selectboard disagrees. If the selectboard is not satisfied with the manager's performance, however, it may remove the manager from office for cause. 24 V.S.A. § 1233.

Finally, a town manager may be employed by two or more towns when those towns have adopted a resolution calling for the appointment of a town manager and have voted to form a union with the other towns for the purpose of sharing a manager. 24 V.S.A. § 1232.

J. TOWN ATTORNEY AND TOWN AGENT

Most selectboards in Vermont employ an attorney to advise them on matters involving the governance of the town. However, no specific statute authorizes the selectboard to hire a town attorney; the power to do so is implied from the selectboard's general duty to run the business of the town. 24 V.S.A. § 872.

The town agent plays a limited role in town government. Although statute provides that an agent to prosecute and defend suits must be elected, no statute provides the agent with any independent authority to act. In fact, case law makes it clear that the town agent has no authority to originate suits in favor of the town or to settle or compromise suits in which the town has a interest, but that the agent's duty consists merely of assisting when litigation is in progress. *Cabot v. Britt*, 36 Vt. 349 (1863); *Clay v. Wright*, 44 Vt. 538 (1872). In addition, the fact that a town agent is elected does not remove the authority of the selectboard to hire an attorney to represent the town, to conduct litigation and to settle suits on behalf of the town. Accordingly, many towns do not have active town agents, and those that do often limit the agent's activities to picking an attorney for the town or acting as a liaison between the selectboard and the town attorney in particular matters.

K. SPECIFIC OFFICIALS

1. **Town Clerk – Indices.** The town clerk in each town is required to keep various general indices. (For specifics on these indices, see the *Handbook for Vermont Municipal Clerks*.) These indices may be kept by a card index system with the consent and approval of the selectboard. This card index must provide full and complete information as required by 24 V.S.A. § 1153.
2. **Absence of Moderator.** In the absence of a moderator at an annual or special town meeting, a selectperson must preside over the meeting until a moderator *pro tempore* is chosen. In towns that elect their officials from the floor, the election of the moderator is usually the first order of business if warned as such. 17 V.S.A. § 2657.

L. EMPLOYMENT OF CHILDREN

Municipalities provide some kinds of work that lend themselves to being done by seasonal or part-time workers. Younger workers may be hired for some of these jobs. However, municipal officials must be aware of state and federal laws governing child labor. Where those laws differ, the stricter will apply. Penalties for violation of child labor laws are hefty – as much as $10,000 per violation of federal law and fines and possible jail time for violations of state law.

The State of Vermont recommends that employers obtain a copy of birth certificates for employees under 19 years of age to avoid accidental, illegal employment. In addition, employees under the age of 16 may need an employment certificate from the Commissioner of the Department of Labor. 21 V.S.A. §§ 431-434. There are time and hour restrictions that vary by age and time of year. For example, children under 16 are limited to three hours per day on school days and eight hours on non-school days. But, a minor 16 to 18 years of age may work up to nine hours per day and 50 hours per week.

Age may also dictate the type of work a child may perform. When hiring, keep in mind that 14 and 15 year olds may not operate power equipment (including mowers or shears), work with ladders, hoists, chemicals, boilers, choppers/slicers, etc. All persons under 18 years of age are prohibited from working with explosives, doing roofing or excavation work and from operating many power-driven machines.

The U.S. Department of Labor advises employers to be aware of:

- when employment certificates are required;
- need for proof of employee's age;
- *permitted* occupations for 14 and 15 year olds;
- *prohibited* occupations for 14 and 15 year olds; and
- *prohibited* hazardous occupations for *all* minors under age 18.

This merely hits a few high spots of child labor law. More detailed information is available from the Vermont Department of Labor, (802) 828-4000, or from the U.S. Department of Labor, Wage and Hour Division, (866) 487-9243. VLCT advises town officials to contact those sources and their insurance carrier before hiring anyone under the age of 18, even as a part-time or seasonal employee.

M. MINIMUM WAGE

Almost all municipal employees are subject to both the federal Fair Labor Standards Act (FLSA) and the state minimum wage laws (21 V.S.A. § 384(a)), so they must be paid the *higher* of the two statutory rates.

Towns get into trouble concerning minimum wage issues with "volunteers" and the definition of employee under FLSA. Elected officials and "personal staff members and officials in policymaking positions who are selected or appointed by the elected public officials" are exempt from the federal minimum wage provisions. 29 CFR § 553.11. Also exempt are executive, administrative and professional employees. 29 CFR § 541.

"Executives" must manage an organization or subdivision or department of an organization, supervise two or more employees, and have the ability to hire and fire or to make recommendation for hiring and firing. "Administrative" personnel must do non-manual work related to management policies or business operations and exercise discretion or judgment. They may also assist an executive or administrative employee, perform only general supervision along specialized lines, or execute specialized assignments under only general supervision. "Professional" employees exempt from the act include teachers and those whose work requires advanced knowledge (e.g., accounting, engineering, law), the exercise of discretion, and which is "intellectual and varied, the output of which cannot be measured in standard units of time."

Employees in municipal recreational programs operating for fewer than seven months of the calendar year (e.g. ice rinks, swimming pools, etc.) are also exempt from the FLSA (Section 13(a)(3) of the Act). However, Vermont's minimum wage law covers these employees, so the municipality must pay them the higher state wage.

Volunteers are not considered employees under the act. 29 CFR § 553.101. Volunteers are those who work "for civic, charitable or humanitarian reasons without promise, expectation, or receipt

of compensation," so long as such services are offered without coercion and unless the individual is doing the same job for the same employer.

Volunteers may be paid expenses, reasonable benefits, and/or a nominal fee and not lose their volunteer status. 29 CFR § 553.106. A nominal fee cannot be tied to productivity but could include a "per call" payment or a nominal monthly or annual stipend.

Additional information is available from the Wage and Hour Division of the Vermont Department of Labor, http://labor.vermont.gov (802-828-2157) or the U.S. Department of Labor, Wage and Hour Division, http://www.dol.gov (866-487-9243).

N. OVERTIME COMPENSATION

Municipalities are exempt from the state law requiring time and one-half compensation for work over 40 hours per week. 21 V.S.A. § 384(b)(6). However, the overtime provisions of the federal FLSA still apply.

The general rule is that employees must be compensated at one and one-half times their regular hourly rate for any time worked over 40 hours per week. As with the minimum wage provisions of FLSA, elected officials, executive, administrative and professional employees, seasonal employees, and volunteers are exempt from the overtime provisions.

Hours worked by employees in a different capacity than their normal work won't, at their discretion, be counted for overtime purposes. 29 CFR § 553.30.

Police departments employing fewer than five full or part-time employees in "law enforcement activities" who are in all categories trained and empowered to enforce the law are exempt from the overtime provisions, as are fire departments with fewer than five employees in fire protection activities. 29 CFR § 553.200.

In larger departments, the time and one-half provisions are required for firefighters only after 53 hours per week (or 212 hours in a 28-day period) and for law enforcement personnel of 43 hours per week (or 171 hours in a 28-day period). 29 CFR § 553.201.

Attendance at required training facilities by police and fire personnel may constitute work and therefore is subject to the overtime provisions above. 29 CFR § 553.214.

Ambulance and rescue service employees are considered police or fire personnel for overtime provisions if they have received training in the rescue of police or firefighters injured on the job and they are regularly dispatched to crimes and/or fires. 29 CFR § 553.215.

Public employees may be given compensatory time off in lieu of overtime pay. It is also earned at time and one-half the hours worked over 40 per week with the above exceptions. Police, fire, and emergency employees, and employees who experience seasonal fluctuations in their workload may accrue up to 480 hours of compensatory time off. All others may accrue 240 hours. 29 CFR § 553.25. Any overtime work performed when an employee has accumulated the maximum number of hours of compensatory time must be paid.

Compensatory time off must be permitted to be used within a "reasonable time" after the request, so long as that does not "unduly disrupt" the operation of the agency. Upon termination, compensatory time must be paid to the employee. 29 CFR § 553.27.

There are several special definitions for "compensable hours" for FLSA purposes regarding public employees. "On call" employees are not reimbursed for time away from the work site unless "the employee cannot use the time effectively for personal pursuits."

Firefighters and police have special rules to determine whether "sleep time" or "meal time" is counted as "compensable hours." 29 CFR §§ 553.222, 223.

Time spent attending training required by the employer is generally compensable. However, attendance at in-house, specialized, or follow-up training required by law for employee certification is not compensable even when held outside regular working hours. Also excluded from compensation is specialized or follow-up training mandated by the state or federal government for employee certification. Police and fire personnel at a training academy are not considered on duty when not attending class or at a training session, if they are free to use such time for personal pursuits. 29 CFR § 553.226.

For a more extensive discussion of federal labor laws, consult the VLCT Municipal Assistance Center's *Municipal Employment Law Handbook*.

O. Other State and Federal Employment Mandates

1. **Military Leave and Reserve Training.** Towns must provide a paid or unpaid leave of absence for up to 15 days per year for permanent employees for armed forces reserve training, if the employee gives 30 days notice of date of departure and return. 21 V.S.A. § 491.
2. **Parental and Family Leave.** Towns employing ten or more full-time persons are subject to 21 V.S.A. §§ 470-474 which mandate leave for parental and family reasons. During any year, an employee is entitled to up to 12 weeks unpaid leave for the birth of a child or adoption of a child under the age of 16. 21 V.S.A. § 472. Likewise, family leave must be allowed in the case of serious illness of certain close family members of the employee. 21 V.S.A. § 472. Short-term family leave must also be allowed for up to four hours per 30-day period or 24 hours per year to allow employees to participate in some school-related activities of their children or to help children or some other family members with medical appointments or emergencies, or with other professional consultations. 21 V.S.A. § 472a. Note that all of these mandates are gender-neutral. For more information on federal and state law on this subject, go to http://www.atg.state.vt.us/display.php?pubsec=4&curdoc=267, the Vermont Attorney General's website.
3. **Legislative Leave.** Any town with five or more employees must allow a temporary or partial leave of absence to an employee elected to the General Assembly to perform any official duty in connection with his or her elected office. There are notification requirements and an appeal process. 21 V.S.A. § 496.
4. **Jury Duty Leave.** Employees must be granted leave to serve as jurors or as court witnesses. Seniority, fringe benefits, credit toward vacations, and other employment benefits must be granted. 21 V.S.A. § 499.
5. **Lie Detectors.** Except for municipal police officers, towns cannot use polygraph tests as a condition of employment or promotion. Examiners administering such tests have to follow rules set forth in the statutes. Violations of this law can result in up to a $1,000 fine and/or a six-month jail sentence. 21 V.S.A. §§ 494a-494e.

6. **Drug Testing.** This is a complex, changing, sometimes duplicative and sometimes contradictory area of employment law. Vermont state law has a general prohibition against drug tests as a condition of employment or promotion. However, an applicant *may* be given a drug test if he or she has been given an offer of employment conditioned on a negative test. Ten days' written notice is given listing all the drugs to be tested. The test is administered as part of a comprehensive physical exam and in accord with statutory requirements. An employee may be given a drug test if the employer has probable cause that the employee is using or is under the influence of a drug on the job. The employee is not terminated after a positive test if he or she successfully completes an employee drug assistance program provided by the employer. There are both civil and criminal penalties for violations. 21 V.S.A. §§ 511-519.

   The federal Omnibus Transportation Employee Testing Act requires drug and alcohol testing of municipal employees in "safety sensitive positions." This includes everyone who has a commercial driver's license (CDL). Town employees who drive commercial motor vehicles (most town highway trucks and municipal or school busses) all have CDLs and must be tested. Testing is required pre-employment, randomly, where there is reasonable suspicion and post-accident. It may also be required upon return to work or as a follow-up. The VLCT Property and Casualty Intermunicipal Fund (VLCT PACIF) runs a program for testing which municipalities may use whether or not they are members of PACIF. For more information, call VLCT at (800) 649-7915.

   Finally, the Drug Free Workplace Act of 1988 requires any federal grant recipient to certify that it will provide a drug-free workplace or lose the grant. Certification requirements include:

   - publishing and providing each employee with a statement notifying them that drug use, possession, or sale is prohibited, and specifying actions to be taken against those who do so;
   - establishing an ongoing drug-free awareness program for employees; requiring employees to abide by the statement above and notify the employer of any drug conviction occurring in the workplace within five days;
   - notifying the granting agency of such convictions; taking appropriate personnel action, up to and including termination; or requiring the convicted employee to participate satisfactorily in a drug abuse assistance program.

   For more information on the Drug Free Workplace Act, visit the United States Department of Labor's website at http://www.dol.gov/elaws/drugfree.htm.

7. **Employment Discrimination, Generally.** Both state and federal law prohibit employment discrimination. Vermont law prohibits discrimination against individuals on the basis of race, color, religion, ancestry, national origin, sex, sexual orientation, place of birth or age. In addition, it is illegal to discriminate against "a qualified handicapped individual" or a person with a positive HIV test. 21 V.S.A. § 495. There are a number of important definitions pertaining to discrimination in 21 V.S.A. § 495d. Note that sexual harassment is defined as a form of sex discrimination. There are numerous court cases and many court decisions that ruled against the employer in discrimination situations. When an employer becomes aware of

discrimination or even should be aware of discrimination, it is imperative to investigate the situation and to remedy the situation as soon as possible.

Employment and personnel problems are serious and can be subtle, pervasive, time-consuming and expensive. The best approach is to be aware of the law and changing public opinion and to tread carefully. Discrimination may occur or be alleged anytime between discussing the qualifications of the job with an applicant and after the employee has left the job. Again, we recommend that you consult the VLCT Municipal Assistance Center's *Municipal Employment Law Handbook.*

8. **Employment Discrimination – Disability.** State law and the federal Americans with Disabilities Act prohibit discrimination on the basis of handicap. 21 V.S.A. chapter 5; 42 USC § 12101. Municipal employers are no exception. If a "qualified individual with a disability" can perform the "essential functions" of a job with "reasonable accommodation" by the employer, he or she must be given equal consideration vis-à-vis other applicants for the position. A "qualified individual" is one who has the skill or training to do the job. For example, a person who is legally blind would not be qualified for a job as a bus driver because he or she would be unable to perform the essential functions of the job (including passing a driving test). An individual who is a skilled accountant but is wheel chair bound is a qualified applicant for the accountant position. If there are two steps from street level up to the town office complex, construction of a wheel chair ramp would be a "reasonable accommodation" to make so that this person could do the job.

   When planning to fill a position, the first step a municipality should take is to identify the "qualifications" needed and the "essential functions" of the job. Does the job require strength and agility, good communication skills, long or irregular hours, special educational background or professional licensure? Must the person hired be able to read and write, carry heavy objects, or perform civil engineering feats of great complexity? Unless the requirements of the job are defined, it will be hard to decide if someone is "qualified" or not.

   So, what is "reasonable accommodation?" This may be a little harder to define since it will vary so much depending on circumstances. No two potential employees are the same, so the specific facts of each situation must be examined. Also, what may be reasonable for a large municipality may be impossible for a small town.

   Another question that arises is whether an employer must hire someone who has a disability. The answer is no. After determining that the applicant is qualified and can do the essential functions of a position, an employer compares him or her with the other applicants on an equal basis. Person A has five years experience; Person B is brand new. Person A has a great track record and references; Person B's are so-so. Make a decision that can be supported as non-discriminatory, just as you would in any close call hiring situation.

   For more information on the Americans with Disabilities Act, visit the United States Equal Employment Opportunity Commission website at http://www.eeoc.gov/types/ada.html.

9. **Unemployment Compensation.** Town employees are eligible for unemployment compensation under 21 V.S.A. Chapter 17 to the same extent as private sector employees. However, as municipal employers, towns have a choice concerning how to pay for unemployment insurance coverage.

Two methods are available. The first is called the "taxable alternative," whereby an employer participates in a state sponsored insurance program. The employer pays taxes into a state fund from which all unemployment benefits are paid. An employer's tax is calculated through a mathematical formula that utilizes the employer's payroll and unemployment claim information.

The second method is called the "reimbursable method" and is available only to municipal employers and other non-profit employers such as the State of Vermont, colleges and churches. Under this alternative, an employer elects not to pay unemployment taxes but agrees to reimburse the state unemployment fund, dollar for dollar, for unemployment benefits paid to former municipal employees. Unless there are claims, an employer may find this method a more attractive financial alternative. The Vermont League of Cities and Towns has taken the reimbursable method a step further with the VLCT Unemployment Insurance Trust, Inc. This risk-sharing pool combines the money saving attraction of the reimbursable method with the added safety of self-insuring a large group. The Trust also provides all administrative and legal services to member municipalities. For questions on unemployment compensation, call David Sichel, Deputy Director for External Affairs & Planning, at (800) 649-7915.

10. **Workers' Compensation.** Town employees are eligible for workers' compensation benefits under 21 V.S.A. chapter 9 to the same extent as private sector employees. Rules governing an employer's purchase of workers' compensation insurance from commercial insurance carriers or related self-insurance options also apply, except that municipal employers have an additional option to participate in group self-insurance through "municipal insurance agreements." Such an option is available with the VLCT Property and Casualty Intermunicipal Fund (VLCT PACIF). This municipal risk management pool currently offers its 346 member city, town and other special districts low cost, high quality workers' compensation coverage, as well as property and liability insurance. VLCT PACIF complements its coverage with a wide range of loss prevention, safety and employee wellness programs for member municipalities and their employees. If you have questions about VLCT PACIF's workers' compensation program, call David Sichel at (800) 649-7915.

P. VERMONT MUNICIPAL EMPLOYEE RETIREMENT SYSTEM (VMERS)

Most Vermont towns (213) provide their municipal employees with a retirement plan offered by the Vermont Municipal Employee Retirement System (VMERS), a retirement system established by the Legislature and administered by the State Treasurer's Office. Towns may join VMERS by vote of the legislative body of the town. 24 V.S.A. § 5053. Once in VMERS, towns may only withdraw through a special act of the Legislature.

The Legislature sets both the employee contribution and the retirement benefits. The oversight of the system and the setting of the town's contribution are done by a five-member retirement board comprised of the state treasurer, a gubernatorial representative, a municipal employer representative and two municipal employee representatives. Participating employees elect the employer and employee representatives. 24 V.S.A. Chapter 125. For information about VMERS, visit http://www.vermonttreasurer.gov/retirement/muni, or call the Retirement Division at the State Treasurer's Office at (802) 828-2305.

Q. COLLECTIVE BARGAINING

Collective bargaining is the process by which a group of employees may organize or unionize in order to negotiate with their employer about conditions and terms of employment. When the employer is a municipality, the methods by which negotiation may be carried out are controlled by the Vermont Municipal Labor Relations Act (VMLRA). 21 V.S.A. Chapter 22. Note that there is also a National Labor Relations Act which, where it conflicts with the state version, will take precedence. 29 U.S.C. §§ 151, et. seq. The Vermont Labor Relations for Teachers Act may apply when the employee is a teacher. 16 V.S.A. Chapter 57; 21 V.S.A. § 1735.

The purposes of the Vermont Municipal Labor Relations Act are to:

- prescribe the rights of both employees and employer;
- provide an orderly and peaceful process for safeguarding those rights;
- protect employees' right to organize and bargain collectively;
- define and proscribe harmful labor practices; and
- protect the rights of the public. 21 V.S.A. § 1721.

Twenty-one V.S.A. § 1722 cites a number of important definitions. For example, a "municipal employer" is one "which employs five or more employees." The term "municipal employee" does not include such people as elected officials, people in supervisory positions, or those with probationary status.

The group of employees represented by an employee organization or union is called a bargaining unit. That unit may be established by voluntary recognition of it by the municipality. Thus, a number of people who work for the municipal electric utility might say they would like to bargain collectively as a local chapter of an electrical workers' union. If the majority of the employees support this idea and there is no rival organization, and the "bargaining unit is appropriate," the employer may recognize that unit and negotiate with it as the exclusive representative of those employees when contract negotiations occur. 21 V.S.A. § 1723.

Alternative procedures for establishing a bargaining unit or for changing bargaining units require that either the employees or employer file a petition with the Vermont Labor Relations Board. The Board or its designee then investigates and may either dismiss the petition or schedule a hearing before the full Board to determine if there is a question regarding employee representation using the criteria listed in 21 V.S.A. § 1724(c). The procedure for the hearing is prescribed by Board rules and by 21 V.S.A. § 1724(b)(1). The Board must then conduct a secret ballot election to determine what group must represent the employees. A majority of at least 51% of the votes is necessary to approve a representative. 21 V.S.A. § 1724. For more information on the Vermont Labor Relations Board, visit http://www.state.vt.us/vlrb.

After the bargaining unit is established, the employee organization and the employer "shall meet at any reasonable time and shall bargain in good faith with respect to wages, hours and condition of employment." 21 V.S.A. § 1725(a). If any provisions of the negotiated agreement conflict with state law, municipal charter, or special act, that negotiated item will be invalid except for matters voluntarily submitted for binding arbitration under 21 V.S.A. § 1734. In contrast, if the legislative body of a municipality approves a written collective bargaining agreement, provisions in the agreement that are in conflict with any local ordinance, bylaw, rule or regulation will prevail. For example, if the negotiated agreement says that any grievance must be filed in writing

within 15 days of the event, then a local regulation requiring filing within ten days would be invalid for those employees covered by the negotiated agreement. 21 V.S.A. § 1725(c).

Since the object of collective bargaining is to provide a safe and fair employer/employee relationship, there is a list of prohibited "unfair labor practices" for both the employer and employee organization. Some are different, taking into account the stance of the particular party, but some are essentially the same. For example, neither party may coerce or restrain an employee in the exercise of his or her rights, or refuse to "bargain collectively in good faith," or discriminate based on "race, color, religion, creed, sex, sexual orientation, national origin, age or political affiliation." 21 V.S.A. § 1726.

Alleged unfair labor practices must be reported to the Board for action in a timely manner. The Board has discretion over whether to bring charges based on the allegations. *Hinesburg School Dist. v. Vt. NEA*, 147 Vt. 558 (1986). If the Board brings charges, the accused is entitled to a hearing which must be conducted, so far as is practical, much like a trial. The Board shall make its decision based on the preponderance of the evidence and shall issue a written decision and order. 21 V.S.A. § 1727. Enforcement of Board orders is made through the superior court. 21 V.S.A. § 1729.

If employer and employees are unable to negotiate an agreement, they may petition for an impartial mediator. 21 V.S.A. § 1731. If the parties still cannot reach an agreement, the commissioner of the Department of Labor will appoint a fact finder with the power to convene hearings, request documents and hear testimony. The fact finder must then reach conclusions and make recommendations, having given weight to the various factors in 21 V.S.A. § 1732(d). The recommendations may be made public after ten days. They are advisory only and not binding on either party. Expenses for the mediation and fact-finding are shared equally by the parties. 21 V.S.A. § 1732(e), (f).

To point out several aspects of collective bargaining not covered above:

- Free speech is protected if it "contains no threat of reprisal or promise of benefit." 21 V.S.A. § 1728.
- Strikes may be prohibited under certain circumstances. 21 V.S.A. § 1730.
- Where parties have negotiated a method to resolve grievances, that method must be exhausted before there can be an appeal to the board. *Burlington Area Public Employees Union v. Champlain Water Dist.*, 156 Vt. 516 (1991).
- *In re AFSCME, Local 490*, 153 Vt. 318 (1989), defines when an employee is a "supervisor" and is barred from belonging to the bargaining unit.
- An employer cannot unilaterally change conditions of employment while engaged in good faith negotiations for a new contract. *Burlington Fire Fighters' Assn. v. Burlington*, 142 Vt. 434 (1983).
- *In re AFSCME, Local 1201* 143 Vt. 512 (1983), defines "confidential" employee.
- Agreements may include a provision for payroll deduction of union dues, etc., and for binding arbitration of grievances (the cost of which to be shared equally). 21 V.S.A. § 1734(a).
- For purposes of determining unfair labor practices under 21 V.S.A. §§ 1726-1729, a teacher shall be considered a municipal employee, and a school district shall be a municipal employer. 21 V.S.A. § 1735.

R. BINDING ARBITRATION

Final and binding arbitration is a method for resolving labor disputes that have not been resolved by collective bargaining or by mediation and fact finding. The legislative body of a municipality and the employees' exclusive bargaining agent may voluntarily submit a contract impasse to final and binding arbitration at any time. Alternatively, the municipality may vote by referendum to adopt binding arbitration, in which case the arbitrator then has the power to resolve all disputed issues involving wages, hours and conditions of employment. 21 V.S.A. § 1733(a).

When a labor dispute has progressed through negotiation, mediation, and fact finding, and there is still an impasse 20 days after the fact finder has made his or her findings public, the matter goes before an arbitration panel. 21 V.S.A. § 1733(b). (Alternatively, the legislative body of the municipality may decide under certain circumstances to go directly from mediation to binding arbitration, skipping the fact finding stage. 21 V.S.A. § 1733(f).) An arbitration panel consists of one representative chosen by each of the two parties and a third member who is either selected by the other members or appointed by the court. The panel has 30 days to decide the disputed issues, and that decision then becomes the agreement between the parties. 21 V.S.A. § 1733(b). In making the decision, the panel must weigh the factors listed in 21 V.S.A. § 1732(d).

An appeal of the arbitration decision may be made to the superior court within 30 days of the delivery of the decision to the applicant (appellant) or within 30 days of the discovery of "corruption, fraud or other undue means." In considering the appeal, the court must consider the factors listed in 21 V.S.A. § 1732(d). According to 21 V.S.A. § 1733(d), the court may reverse the arbitrator's decision if it finds:

- corruption, fraud or other undue means;
- partiality or prejudicial misconduct by the arbitrator;
- the arbitrator exceeded his power or required a person to engage in unlawful conduct;
- there was no enabling arbitration agreement; or
- the decision was not supported by substantial evidence.

Several miscellaneous provisions in 21 V.S.A. § 1734 include:

- certain payroll deductions are negotiable;
- use of binding arbitration is negotiable, and the cost of arbitration shall be shared equally;
- certain grievances and questions of tenure may be decided by binding arbitration even though they were not subjects of the collective bargaining agreement; and
- grievances may be resolved directly between the employer and employee under some circumstances.

S. EMPLOYEE DISCIPLINE, DISCHARGE AND DUE PROCESS

This area of municipal employer-employee relations is governed by a veritable thicket of federal, state and local laws, policies, and, in certain cases, collective bargaining agreements. Because of this, it is responsible for generating many of the calls VLCT receives from local officials.

Faced with disciplining and/or discharging an employee, selectboards must keep in mind that, as a governmental employer, a municipality is subject to the Fourteenth Amendment to the U.S.

Constitution, which prohibits the "state" from depriving anyone of "life, liberty, or property, without due process of law…." This is a key difference between the municipal workplace and the private sector.

In practice, being subject to the Fourteenth Amendment means that if a municipal employee has a property or liberty interest in continued employment, his or her interest is protected by the U.S. Constitution and the municipality must provide constitutionally sufficient due process before 'depriving' the employee of his or her position. Common sources of property interest are employment contracts, collective bargaining agreements, letters of appointment, state statutes, local ordinances, personnel policies or city charters.

Liberty interests are not as obvious as property interests. They arise not from the nature of employment but, rather, from the nature of the particular accusations which form the basis of the termination from employment. A liberty interest involves a person's reputation, honor or integrity, and cannot be deprived by, for example, false accusations which the employee does not have the opportunity to rebut or which will make it difficult for the employee to find subsequent employment.

It is important to understand that a property interest can be as little as the right granted by a personnel policy to a certain series of disciplinary steps before discharge can take place or as extensive as a multi-year contract providing continuous employment if certain conditions are met. Municipal employees do not automatically have a property interest in their positions – each case must be evaluated individually – and there is much a municipal employer can do to prevent the creation of such an interest.

Without a property or liberty interest in his or her job, a municipal employee in Vermont generally serves as an "at will" employee. (In an at will employment situation either party may terminate the employment relationship at any time without process and for any or no cause.) It should be noted, however, that even an at will employment relationship does not permit an employer to discharge an employee for reasons which are contrary to the public's interest. For example, to discharge an employee on the basis of his or her age or sex would probably be found by the courts to violate public policy interests (in this case laws protecting workers from discrimination based on age or sex).

1. **What Constitutes Adequate Due Process?** The United State Supreme Court initially considered the due process requirements of discharge from government employment in its landmark decision *Cleveland Board of Education v. Loudermill* when it stated that due process requires "some kind of hearing prior to the discharge." *Loudermill*, 470 U.S. 532, 542-44 (1985) *quoting Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). According to the Court, the essential requirements of due process are notice of the charges and an opportunity for the employee to present his or her side of the story prior to discharge. Note that the Court did not hold that a full evidentiary hearing is required to satisfy due process requirements, but, rather, that the employee must simply be provided an opportunity to respond to the employer's termination notice. *Id*.

   A municipality that violates an employee's right to due process prior to his or her dismissal may face liability under Section 1983 of the Civil Rights Act. 42 U.S.C. § 1983. This is a very common source of lawsuits alleging wrongful discharge and employment discrimination. Generally, however, courts have found municipalities to be liable under

Section 1983 only if the deprivation of due process was part of a general policy, practice or custom, not simply an individual incident.

2. **Personnel Policies and Due Process.** As noted in Section H. above, municipalities may adopt workplace policies that govern the behavior of employees and spell out the employer and employee's roles and obligations. As beneficial as they are, many municipalities are hesitant to adopt personnel policies because of the impact the policies could have on the at-will employment relationship the municipality has with its employees. While each municipality must strike this balance for itself, experience has shown that wrongful discharge lawsuits are more often avoided by communities that have adopted and scrupulously follow clear and detailed personnel policies, than those that have no formal employment procedures or policies in place. This may be because an employee who is discharged may be more likely to feel as though he or she was given arbitrary or discriminatory treatment if no personnel policy guided the discharge.

   If your municipality does decide to enact a personnel policy, there are a number of provisions that can be included to minimize lawsuits or help to favorably resolve those which are brought.

CHAPTER 6
BOARDS AND COMMISSIONS

A. BOARD OF CIVIL AUTHORITY

The board of civil authority is the body responsible for determining voter eligibility and hearing property tax appeals. 17 V.S.A. Chapter 43; 32 V.S.A. Chapter 131. The town clerk serves as clerk of the board and she or he, or any selectperson, may call a meeting of the board by posting notice and giving written notice to each member. The board must choose a chairperson. 24 V.S.A. § 801.

Unless otherwise specified by municipal charter, a town board of civil authority is comprised of the selectpersons, town clerk and justices residing in town. 24 V.S.A. § 801. In a city, the mayor, aldermen, city clerk and justices residing in the city make up the board and in a village, it is comprised of the trustees, village clerk and justices residing in the village. 7 V.S.A. § 2103(5). If the board of civil authority does not have at least three members from each major political party, and there is a request by the party committee or by three or more voters, the selectboard must appoint additional members to bring the underrepresented party's membership on the board to three. The selectboard must appoint the additional members from a list of names submitted to it by the underrepresented party. The persons so appointed serve as board members for election duties only and have no authority to act in matters unrelated to elections. 17 V.S.A. § 2143.

1. **Elections.** Section 2142 of Title 17 provides that the town clerk shall call such meetings of the board of civil authority "as may be necessary before an election or at other times for revision of the checklist." However, at least one meeting must take place after the deadline for filing applications to be added to the checklist and before the day of an election. The deadline for filing an application is 12 noon on the second Monday before the election. 17 V.S.A. § 2144.

   When the board is addressing election matters, the general rule is that "those members … present and voting shall constitute a quorum, provided that official action may not be taken without the concurrence of at least three members of the board." 17 V.S.A. § 2103(5). There is a statute that seems to create an exception to the rule that there must be three members present in order to act. However, it applies to *Election Day only*. Seventeen V.S.A. § 2451 says, "A quorum … shall be available at all times when the polls are open, and those members … present … shall constitute a quorum…." This has been interpreted to mean that, if even one member of the board of civil authority is present at the polls, that person may rule on voter qualification and registration at that time.

   When the board is dealing with non-election matters, "The act of a majority of the board present at the meeting shall be treated as an act of the board." 24 V.S.A. § 801. For example, if five of the 12 members are present, then the concurrence of three of those five would be a valid act of the board.

   During the time that the board of civil authority meets, it will consider all the applications for addition to the checklist. If there is some question concerning an application, the applicant may be examined under oath concerning the facts stated in the application. 17 V.S.A. § 2146(a). The board is prohibited from requiring additional information or personal

appearances before the board by any particular class or group of individuals (e.g. students). Each applicant must be treated separately.

Note that when the "motor voter" law went into effect in Vermont in 1997, it added to the ways in which a person may register to vote. Registration may now be done simultaneously with application for a motor vehicle driver's license, by a "voter registration agency" (defined in 17 V.S.A. § 2103 (41)), or directly by the town clerk. 17 V.S.A. § 2144a–2145b. Completed "motor voter" applications are forwarded to the Secretary of State's Office where they are processed and forwarded to the voter's town of residence.

When the board approves an application, it must notify the applicant by returning to him or her one copy of the application. A second copy must be sent to the town in which the applicant was previously registered to vote before adding the applicant's name to the checklist. The original application must remain on file in the town clerk's office. 17 V.S.A. § 2145.

If the board rejects an application, it must provide the applicant with an immediate explanation of its action, either in person or by first class mail. Notice of the rejection must include the reason for the rejection and must be in substantially the form found in 17 V.S.A. § 2146. The rejected applicant may ask to appear before the board for reconsideration and may present additional information or witnesses to plead the case. Alternatively, the applicant may appeal directly to the courts.

When a town clerk receives a copy of a voter's death certificate, official notice that a voter is now a registered voter in another town, or a written request from a voter that his or her name be stricken, the clerk shall remove the voter's name from the checklist. 17 V.S.A. § 2150(a). In addition, the board of civil authority may challenge the eligibility of a voter at any time whom they believe to be dead, moved out of town or registered in another place. The board has the authority to remove the names of persons no longer qualified to vote. However, the board must act in accordance with procedures outlined in 17 V.S.A. § 2150.

If the board of civil authority does not immediately know if a voter is still qualified to vote in the municipality, the board shall attempt to determine with certainty his or her true status. The board may rely on official and unofficial public records (for example, telephone directories, city directories, newspapers, death certificates, tax records, and voter checklists from the past four years), and may designate a person(s) to try to contact the voter personally.

If the board cannot locate the voter or finds that the voter may no longer be eligible to vote in its municipality or has not voted for the past four years, then the board should send written notice to the voter in accordance with 17 V.S.A. § 2150. The board shall remove his or her name from the checklist under the following conditions:

- the voter consents to removal of his or her name from the checklist;
- all efforts to determine current residency have failed; or, finally,
- evidence indicates the voter is no longer eligible to vote in the town.

If at any time following removal of a name from the checklist the board determines that the person was qualified to vote, the person's name is to be added to the checklist. 17 V.S.A. §§ 2147, 2150(d). Each voter has a primary responsibility to make sure that his or her name is properly added to and retained on the checklist. 17 V.S.A. § 2147.

The board of civil authority is required to keep detailed records of its proceedings with respect to removing names from the checklist. The records must include a clear statement of the reason(s) that each name was removed from the checklist, and the working copy or copies of the checklist used in the biannual checklist review. 17 V.S.A. § 2150(c). A letter certifying that the board has complied with these requirements must be filed with the Secretary of State by September 20th of each odd-numbered year. These records must be forwarded upon request to the Secretary of State, and to any district or superior court judge. 17 V.S.A. § 2150(5)(c).

Any person whose application to vote has been rejected or whose name has been removed from the checklist may appeal to any superior or district judge in the county or district in which the applicant claims residence. 17 V.S.A. § 2148(a). The appeal shall be conducted as soon as possible to permit a successful appellant to vote at the pending election. The applicant shall not be permitted to vote unless and until the town clerk receives a written order from the court stating that the voter be permitted to vote.

2. **Tax Appeals.** Property owners who disagree with the listers' appraisals are entitled to a hearing before the listers. 32 V.S.A. § 4221. If they are not satisfied with the decision following that hearing, they may appeal to the board of civil authority. The appeal must be made in writing, stating the grounds for such appeal, and must be lodged with the town clerk, who shall record it and call a meeting of the board of civil authority "forthwith" to hear the appeal. 32 V.S.A. § 4404.

   At the beginning of the meeting, the members of the board must take, sign, and file in the town clerk's office the oath set out in 32 V.S.A. § 4405. The oath and the list of members taking the oath should be recorded in the minutes. The board then sits as a quasi-judicial body and considers the evidence presented by the aggrieved taxpayer (or his or her agent), the listers and the town agent. 32 V.S.A. § 4408. After it considers the evidence presented, the board must appoint an inspection committee consisting of three or more members to inspect each property subject to appeal. The committee must inspect the property and submit a written report to the board within 30 days. Within 15 days of receiving the committee report, the board shall issue a written decision, which must include the reasons the board arrived at its conclusion. This document is then filed with the town clerk, who records it in the same book where the appeal was recorded and, without delay, notifies the appellant of the action of the board by certified mail. 32 V.S.A. § 4409.

   Note that, "if the board does not substantially comply with the [statutory] requirements" and if the appeal is not withdrawn, the appraisal will remain at the amount set before the appealed change was made by the listers. The town clerk must record that fact and notify the taxpayer by certified mail. 32 V.S.A. § 4404.

   If a taxpayer or selectperson of a town is not satisfied with the decision of the board of civil authority, he or she may appeal to the director of the Division of Property Valuation and Review or the superior court. 32 V.S.A. § 4461.

B. LOCAL BOARD OF HEALTH

1. **Appointment and Removal of Local Health Officer.** The legislative body of a municipality must recommend a local health officer to the state commissioner of Health. Upon receipt of

the selectboard's recommendation, the commissioner will appoint the person recommended and issue a certificate of appointment. 18 V.S.A. § 601(a). The health officer is appointed for a term of three years and until replaced. 18 V.S.A. § 605. The commissioner may remove a health officer at any time for cause. 18 V.S.A. § 601. Although the statute does not specify any qualifications one must have to serve as a local health officer, inasmuch as the health officer's authority and responsibilities are considerable, he or she should be chosen carefully.

If the selectboard does not recommend someone to the commissioner of Health, the commissioner shall give 30 days written notice to the board of the need to make a recommendation. At the end of the 30-day notice period, the commissioner of Health shall appoint a local health officer even if no recommendation has been made. The commissioner or the state board of health may exercise all authority of a local health officer. 18 V.S.A. § 109.

The selectboard provides and controls all compensation to the local health officer and may reimburse the health officer for all reasonable expenses incurred in the execution of his or her duties. 18 V.S.A. § 602. The health officer shall not incur significant expense in the name of the municipality for the prevention, removal, or destruction of any public health hazard or the mitigation of any public health risk without the consent and approval of the local selectboard. 18 V.S.A. § 615.

2. **Health Districts.** Municipalities have the option, with the approval of the commissioner, to form a health district with other cities and towns. Through the selectboard of the member municipalities, appointment of a district health officer may be recommended to the commissioner of health. Once appointed, the district health officer may notify the selectboards of member municipalities that he or she will perform the duties of the local health officer, and proceed to do so at any time after the written notice. Upon authorization of the selectboard of each member municipality, and with the advice of the district board of health, the district health officer may employ people necessary to help the health officer in carrying out a preventive, protective and promotional health program in the district. 18 V.S.A. § 601(b).

   If two or more municipalities join to create a health district, they may establish an advisory district board of health. The selectboards of the member municipalities may also provide for the appointment and terms of service of members who are to represent citizens of the district's member municipalities. Member municipalities may accept grants and may dedicate local tax revenues to the support of the district health officer, advisory board, district employees and programs. 18 V.S.A. § 60l(b).

3. **Local Health Board.** The local health officer, with the selectboard of a town or the city council, constitutes the local board of health. 18 V.S.A. § 604. The health officer is the secretary and executive officer of the local board of health. 18 V.S.A. § 605.

4. **Power of the Board of Health.** The local board of health may make and enforce rules and regulations that relate to prevention, removal or destruction of public health hazards and the mitigation of public health risks. These rules and regulations must be approved by the commissioner of health and posted and published in the same manner as is required for ordinances. 18 V.S.A. § 613(a). (See Chapter 9 of this handbook or 24 V.S.A. chapter 59 regarding ordinances.)

The local health board has jurisdiction over sewage disposal and treatment if they pose a risk to the public health. The health board may act to abate nuisances affecting public health caused by a system that allows surfacing of sewage, pollution of drinking water supplies, groundwater and surface water, and that does not maintain sanitary and healthful conditions during operation. Under this chapter, the health board *may not* adopt ordinances, rules or regulations relating to design standards for on-site sewage disposal systems. On-site septic system ordinances must be adopted by the selectboard and must be approved by the Vermont Department of Environmental Conservation. 18 V.S.A. § 613(b)(c); 24 V.S.A. chapter 102.

The health board or local health officer may call upon sheriffs, constables, and police officers to assist them in carrying out their responsibilities. Should an officer refuse or neglect to give assistance, he or she may be fined up to $200. In addition, the health officer may always call state health officials for technical assistance. 18 V.S.A. § 617. The first contact should be with the "Environmental Health Designee" for the Health Department's district office.

5. **Local Health Officer Responsibilities.** In addition to serving as secretary and executive officer of the board of health, the local health officer has the following responsibilities. Within his or her jurisdiction, he or she shall:

   a. Conduct investigations upon receipt of information regarding a condition that may be a public health hazard;

   b. Enforce the provisions of Title 18, and rules and permits issued under its authority;

   c. Prevent, remove or destroy any public health hazard or mitigate any significant public health risk consistent with the provisions of Title 18; and

   d. In consultation with the State Department of Health, take steps to enforce the provisions of Title 18, Chapter 3 (which refers to responsibilities of state board of health and commissioner of health, some of which may be delegated to the local health officer). Health hazards relating to a public water system or a food or lodging establishment must be reported immediately to the division of environmental health (802-863-7220 or 800-439-8550). Any other health risk must be reported to the environmental health division within 48 hours, as must be any action taken by the health officer. 18 V.S.A. § 602(a). (For more information, see "Subsection 6, Enforcement" below.)

   The health officer shall also inspect schools, school lunch facilities and public buildings on an annual basis and report the findings in accordance with 18 V.S.A. § 608.

6. **Enforcement.** A health officer may issue an emergency health order without prior hearing when necessary to deal with an imminent and substantial health hazard or substantial public health risk. Such order must include a written statement of the reasons for the order, the supporting evidence and the procedural rights of the alleged violator. This order must be served in accordance with Vermont Rules of Civil Procedure, Rule # 4. The person accused has a right to a hearing before the selectboard within five days. 18 V.S.A. § 127.

   A non-emergency health order may be issued by the selectboard or by the commissioner for the reasons cited in 18 V.S.A. § 126. Again, there are procedural requirements that must be followed. Civil enforcement of a health order may be taken in superior court, which has broad powers including injunctive relief and fines of up to $10,000 per violation. Likewise, criminal enforcement may be pursued, which provides for fines up to $25,000 or jail time up to six months or both. 18 V.S.A. § 130-131.

Any act, decision or health order may be appealed to the State Board of Health. Hearings on those appeals shall be conducted according to the Vermont Administrative Procedures Act. 3 V.S.A. chapter 25. Appeals from the State Board's decision are to the Vermont Supreme Court. 18 V.S.A. § 128.

7. **Dead Bodies.** The town clerk or deputy is charged with responsibility for registering deaths that occur in town and for issuing "burial-transit permits." In many cases, a person dies in a hospital; thus, a physician attends to the details of the death. Language still in the statutes talks about a local health officer's role when death results from certain communicable diseases. However, this section of the statute has fallen into disuse because of the roles now played by medical examiners and physicians. 18 V.S.A. § 5201.
8. **Health Care Services.** Although not directly related to the functions of a local board of health, a municipality or two or more municipalities working together may appropriate money for services to be provided by doctors, nurses, ambulances and hospitals. 24 V.S.A. chapter 69.

C. CEMETERY COMMISSIONERS

Generally, town cemetery matters are the responsibility of the selectboard. However, a town may vote to place its public burial grounds under the charge of three or five elected cemetery commissioners. In that case, all responsibility on the part of the selectboard regarding town cemeteries shall cease. 18 V.S.A. § 5373. Unlike other town offices, the selectboard does not fill vacancies on the cemetery commission. Rather, they are filled "by the remaining commissioners until the next annual meeting." 18 V.S.A. § 5374. The board of cemetery commissioners has sole control over monies received and expended for town cemetery purposes (18 V.S.A. § 5377), and has authority to adopt bylaws and regulations for such burial grounds (18 V.S.A. § 5378). The town, by vote, may take its burial ground out of the charge of the board of cemetery commissioners and give it back to the selectboard. 18 V.S.A. § 5381.

D. BOARD OF TAX ABATEMENT

The board of abatement for each town consists of the members of the board of civil authority (town clerk, the selectpersons, and the justices of the peace), the listers and the town treasurer. This board has jurisdiction over the abatement of town taxes and town school district taxes.

Generally, the majority of the board (a quorum) must be present in order to hold a meeting. The act of a majority of that quorum is required for a binding action of this board. (For example, of a 13-member board, seven must be present to hold a meeting, and the concurrence of four of those present will constitute binding action.) However, this quorum requirement is not necessary if the town treasurer, a majority of the listers and a majority of the selectpersons are present at the meeting. For example, a meeting of the treasurer, two listers and two of a three-member selectboard is a legal meeting of the board of abatement. 24 V.S.A. § 1533. The meetings of the board of abatement are noticed in the same manner as for the board of civil authority. (See above section on board of civil authority.) 24 V.S.A. § 1534.

Twenty-four V.S.A. § 1535 provides authority to abate, in whole or in part, taxes, interest and collection fees accruing to the town in the following cases:

- taxes of persons who have died insolvent;

- taxes of persons who have moved from the state;
- taxes of persons who are unable to pay their taxes, interest, and collection fees;
- taxes in which there is manifest error or a mistake of the listers;
- taxes upon real or personal property lost or destroyed during the tax year; and
- certain taxes exempt under 32 V.S.A. § 3802(11).
- taxes upon a mobile home moved from the town during the tax year as a result of a change in use of the mobile home park land or parts thereof, or closure of the mobile home park in which the mobile home was sited, pursuant to 10 V.S.A. § 6237.

If the board abates a certain amount of tax, the uncollected interest and fees relating to that amount are also automatically abated. The board of abatement must state in detail the reasons for its decisions. Note that there is room for the board's discretion but *only within the grounds listed in the statute*. The board may not abate taxes for non-statutory reasons.

Any amount already paid on taxes that are abated may be refunded or applied as a credit against the tax for the ensuing year or years. Note that if the town has voted to collect interest on overdue taxes under 32 V.S.A. § 5136, a like amount of interest must be paid to the person whose taxes have been abated under 24 V.S.A. § 1535.

The board of abatement must make a record of any taxes, interest and fees that are abated, and this record must be recorded in the office of the town clerk. A certified copy shall be forwarded to the collector of taxes and to the town treasurer. The tax collector then shall mark in the tax bill the taxes, interest and fees abated. 24 V.S.A. § 1536.

The question arises as to how Acts 60 and 68 have affected abatement of taxes. The local board of abatement may still abate property taxes, including education taxes. However, that does not reduce the amount of money the municipality will receive or will be required to pay to the school district. For example, the board of abatement reduces X's taxes so that X's school tax drops from $500 to $300. The municipality still owes $500 to the system, and must make up the difference. (Questions regarding this may be addressed to Property Valuation & Review at 802-828-5860.)

E. LIBRARY TRUSTEES

A town may establish a public library. 22 V.S.A. § 141. If it does, unless the municipality votes to elect a board of library trustees, the selectboard must appoint not fewer than five trustees for staggered terms. 22 V.S.A. § 143. The trustees then have full power to manage the public library, make bylaws, establish a library policy and receive, control and manage library property. 22 V.S.A. § 142. The trustees may appoint a director. 22 V.S.A. § 143. Until trustees are elected or appointed, monies raised for a library shall be paid out by an agent appointed by the selectboard. 22 V.S.A. § 144.

The selectboard may vote to place in the library copies of certain documents received. They remain the property of the municipality but can be used by the library until the board votes otherwise. 22 V.S.A. § 146. (For more on libraries, see Chapter 13, Section L.)

F. WATER COMMISSIONERS

If a town has a municipal water system, it may vote to have a board composed of three water commissioners to supervise the system. If the town does not vote to have such a board, the selectboard must appoint three commissioners to supervise the water system. The terms of the commissioners will be for three years each, with the first water commissioners serving a one-year, a two-year and a three-year term so as to stagger the terms of office. 17 V.S.A. § 2649. These commissioners may be members of the selectboard.

A water commissioner who has been appointed by the selectboard may also be removed by the board, if it finds cause to do so, after he or she has been given due notice and a hearing has been held.

If an existing or proposed municipal water system does not have commissioners, a petition signed by at least five percent of the town's legal voters may be presented to the selectboard asking that an article to determine whether the town wishes to have such officers be inserted in the annual town meeting warning. 17 V.S.A. §§ 2651, 2652.

These water commissioners are the supervisors of the town's water department. It is their responsibility to establish the water rates and all the rules and regulations for the control and operation of the department. If they choose to, they may appoint a superintendent who then may also be removed from that position. The law stipulates that this appointment and removal is "at the pleasure" (of the commissioners), so a hearing need not be held nor reason given in the event of the removal of a superintendent appointed by the commissioners, unless the municipality's personnel policy or the union contract provides otherwise. 24 V.S.A. § 3313.

All the rents and receipts received by the water department for commercial and residential water use within the town must be used to repay the principal and interest on the water bonds, for repairs and for the general management of the department until such time as all the bonds have been paid. 24 V.S.A. § 3313.

Every bond issued by the town for water purposes under the provisions of 24 V.S.A. §§ 3309 and 3310 must be signed by the town clerk and treasurer, and certified by the clerk indicating that the bond is one of a series authorized by the town. Records must be kept of these bonds, when they are due, and the payment date of each. 24 V.S.A. § 3314.

The town in which a municipal water district is located has the power to make, alter, amend or repeal ordinances, bylaws and regulations pertaining to the water district, as long as these are consistent with Vermont law. The town also has the right to impose and enforce penalties for those water customers who disregard these regulations. 24 V.S.A. § 3315.

For more information on municipal water treatment systems, see Chapter 12, Section C.

G. SEWER COMMISSIONERS

Municipalities have the authority to own and operate "sewage systems" and "sewage disposal systems" under 24 V.S.A. chapters 97 and 101. It appears from the statutes that a "sewage disposal system" includes a sewage treatment plant, whereas the plain "sewage system" includes only the pipes and sewers needed to convey sewage to a treatment plant. Under either chapter, management is vested in commissioners.

Reading statutes 24 V.S.A. §§ 3506 and 3514 together, it appears that the "sewage system" or the "sewage disposal system" board of commissioners may consist of the legislative body of the municipality or it may be appointed by that legislative body. If the board is appointed, its members must be legal voters of the municipality. Appointed members may be removed from office by the legislative body after notice and hearing. It is possible to have a single board or separate "sewage system" and "sewage disposal system" boards. 24 V.S.A. § 3506.

There is much overlap in the authority given to municipal "sewage systems" and "sewage disposal systems." There are the powers to purchase, construct, tax, set rates and charges, enter onto land, enforce liens, bond and pass ordinances. Many of the powers given explicitly to the "sewage disposal system" are also given to the "sewage systems" by 24 V.S.A. § 3508. A commissioner on one of these boards must be familiar with both chapters 97 and 101 in order to understand his or her authority and duties.

For more information about municipal sewer systems, see Chapter 12, Section D.

H. LIQUOR CONTROL COMMISSIONERS

Selectboards have two responsibilities in the sale of malt and vinous beverages (i.e. beer and wine) and spirituous liquors. First, the voters of each town have the power to determine whether or not beer and wine or liquor may be sold in town through action of an annual or special town meeting. Five percent of the voters may petition the board to present one or both of the following questions for a vote:

- shall licenses for the sale of malt and vinous beverages be granted in this town?
- shall spirituous liquors be sold in this town?

If the board receives such a petition, it shall call a special meeting or present the questions at the annual meeting for the voters to decide. 7 V.S.A. § 161. The election requires special ballots and procedures, so towns involved in such election should consult the statutes. 7 V.S.A. §§ 161-165.

When a town or city has approved such sale, the selectpersons or the city council members become the liquor control commissioners. 7 V.S.A. § 166. The second duty then comes into effect, which is to administer and enforce the relevant law. With the approval of the state liquor control board, the local commissions may grant first and second class liquor licenses. 7 V.S.A. § 222. First class licenses are for the sale of beer and wine for consumption only on the premises and second class licenses are issued where beer and wine will be consumed off-premise. 7 V.S.A. § 2. (Third class licenses allow licensees to sell spirituous liquors in a hotel, restaurant, cabaret, club, boat or dining car and must be issued by the state board.)

The local liquor control commissioners may suspend a license they have granted, after notification and a hearing, if the licensee conducts the business in violation of V.S.A. Title 7, rules and regulations of the Liquor Control Board, or conditions issued as part of the license being granted. 7 V.S.A. §§ 167, 236. Note that § 167 allows the voters to authorize the local board to condition the issuance of a liquor license on compliance with any duly adopted local ordinance regulating entertainment or public nuisances.

The liquor control commissioners must operate under the laws and regulations governing the sale of alcoholic liquor, which are promulgated by State of Vermont Liquor Control Board. These rules are frequently updated. For further information, and to obtain the latest copy of the laws

and regulations, visit http://www.state.vt.us/dlc/enforcement/regulations, or contact the board at (800) 642-3134.

I. CONSERVATION COMMISSIONS

As an aid to planning and community development, the selectboard may vote to create a conservation commission as described in 24 V.S.A. Chapter 118. It may appoint three to nine members, each of whom must be a resident of town. Members may be removed from office for just cause and are entitled to a public hearing if they so choose.

A newly appointed commission "shall adopt by majority vote of those present and voting such rules as it deems necessary and appropriate...." (Note that the simple majority vote of those present here applies only to the organizational meeting and any further votes by the commission must conform to the general rule which requires a majority of the total board.) Meetings are subject to the open meeting law and a record of proceedings must be kept.

The purpose of the commission is to inventory and monitor town resources (including natural, scenic and recreational resources) and town lands that have, for example, special historical, cultural or architectural importance. The commission may act in an advisory capacity to the legislative board and may receive and manage money, grants, properties and other gifts. Money in a conservation fund may be carried over from year to year and must be used for conservation purposes only. Likewise, land, rights or other property acquired for conservation or recreational purposes may not be diverted to other uses without the vote of the town. The conservation commission may also work with other town boards, the district environmental commission and private organizations on matters affecting the resources under its purview. Finally, it may serve an educational function by creating and making available information about natural resources.

For more information about Vermont's conservation commissions, contact the Association of Vermont Conservation Commissions, 822 Center Road, Middlesex, VT 05602, or visit their website at http://www.avccvt.org.

CHAPTER 7
CHARTERS AND MERGERS

A. CHARTERS

1. **Introduction.** A local government may exercise only those powers expressly granted to it plus those necessarily implied therefrom. *Town of Brattleboro v. Nowicki*, 119 Vt. 18 (1955). Local governments derive their express authority to act from portions of the state constitution, from specific provisions in state statutes, and, in some cases, from a governance charter.

   Thirty-three cities and towns in Vermont currently have governance charters, Poultney has a special act that functions as a charter, and 46 villages have charters. In addition, all but two Vermont towns have a land grant charter issued by New Hampshire, New York or Vermont. Land grant charters simply define the boundaries of the city or town, while governance charters are, in effect, a constitution for the municipality that provides a framework for self-rule.

   Once a city or town has been granted a governance charter by the state, that charter becomes the primary source of power and structure for the local government. Where the charter provides for procedures other than those established by statute, the provisions of the charter will generally prevail unless the statute or charter specifically provides otherwise. The reason for this general principal is that a charter is a legislative enactment and, as such, it has the same status as a statute. When two statutes conflict, the more specific statute will prevail over the more general one. *Looker v. City of Rutland*, 144 Vt. 344 (1984); *Village of St. Johnsbury v. Thompson*, 59 Vt. 300 (1887). (The municipal charter, as a special law of the Legislature, will supersede the general law within such municipality.) Because the charter deals with the procedures a particular town must follow to govern, the charter is generally found to be more specific than a general statute enacted for the benefit of all local governments. In addition, 17 V.S.A. § 2631 states that "[w]here the charter of a municipality provides for procedures other than those established by [17 V.S.A. Chapter 55, dealing with local elections], the provisions of that charter shall prevail."

   Cities and towns choose to adopt charters for various reasons. Primarily, it gives the local government the flexibility to design a system of self-governance suited to its particular needs and concerns. A charter may also diverge from state law by allowing such things as voter initiatives and recall of elected officials, allowing local governments to fill in what they may perceive as gaps in state law.

2. **Forming Charters.** The state constitution permits the Legislature to "grant charters of incorporation." Vt. Const. Chapter 2 § 6. However, unlike states which permit "home rule" (self-governance without continued legislative control over the local government), the Vermont Constitution also provides for the continued control over the charter by the State Legislature. It provides that "[n]o charter of incorporation shall be granted, extended, changed or amended by special law, except for such municipal … corporations as are to be and remain under the patronage or control of the State." Vt. Const. Chapter 2 § 69.

   Curiously, prior to 1987 there was no provision in the statutes or constitution which enabled the voters of a local government to propose the adoption or amendment of a charter, or which

set out a procedure by which a city or town could vote to adopt a governance charter. Until then, only the selectboard or the city council could initiate such an action. However, in 1987, 17 V.S.A. § 2645(a)(1) was amended to state, in part, that "a proposal to adopt ... a municipal charter may by made by the legislative body of the municipality or by petition of five percent of the voters of the municipality." This empowers the voters of the local government to initiate a proposed charter for the General Assembly to enact. Although the remaining provisions of section 2645 refer only to the process by which charters may be amended, by implication, this procedure should be extended to the proposed adoption of a charter. In addition, the Legislature, in theory, could draft and grant a charter for a city or town without being requested to do so by the local government, and without being presented with a draft charter for enactment. However, principles of legislative restraint make this an unlikely method for the chartering of local governments. Finally, when two or more municipalities elect to merge, and such merger is approved by the General Assembly, their plan of merger becomes the charter of the consolidated municipality. 24 V.S.A. § 1485.

Most cities and towns which have adopted charters have either amended their land grant charter by adding governance provisions or have adopted a charter using the statutory procedure set out in 17 V.S.A. § 2645 and then submitted it to the Legislature for enactment. Since the Legislature has the blanket authority to grant governance charters, once a charter has been legislatively enacted, it is not legally relevant whether or by what procedure the town initially drafted and approved of the proposed charter.

3. **Amending Charters.** Seventeen V.S.A. § 2645 provides the process by which a municipality may propose charter amendments to the General Assembly. This same process should also be used when a town initially seeks to adopt a charter or when it wishes to repeal its charter.

   In order to request that the Legislature amend its charter, a majority of the legal voters of the municipality must have approved the amendment by an Australian ballot vote at an annual or special meeting properly warned for that purpose.

   First, a proposal to amend a municipal charter may be made either by the legislative body of the local government or by petition of five percent of the voters. An official copy of the proposed amendments must be filed with the city or town clerk at least ten days before the first public hearing, and copies must be made available to members of the public upon request.

   Next, the legislative body must hold at least two public hearings prior to the vote on the proposed charter amendments. The first public hearing must be held *at least* 30 days before the meeting at which a vote will be held. Proposals made by the legislative body may be revised by that body as a result of recommendations made at a public hearing, but such revisions must be made and posted no less than 20 days before the date of the meeting at which the vote will be held. Notice of the revisions must be posted in the same places as the warning for the meeting, and copies of the revisions must be attached to the proposal in the clerk's office for public inspection. 17 V.S.A. § 2645(a)(4).

   If the proposal to amend the charter was made by petition, the second public hearing must be held no later than ten days after the first hearing. After the warning and hearing requirements have been satisfied, the petitioned amendments must be submitted to the voters at the next annual meeting or next primary or general election in the form in which it was filed, except for technical corrections. 17 V.S.A. § 2645(a)(5). It appears that a petitioned amendment

must be presented to the voters as it was proposed and thus will be voted either "yes" or "no." If it is voted "no," then it is back to the drawing board for any proposed amendment.

Notice of the public hearings and of the annual or special meeting must be given in the same way and time as for annual meetings of the local government. Therefore, the meetings and hearings must be posted and published in accordance with 17 V.S.A. § 2641. Because the first hearing must be held at least 30 days before the annual or special meeting, and must be warned in accordance with 17 V.S.A. § 2641, the first hearing must be warned no later than 60 days (or earlier than 70 days) prior to the meeting at which the amendment will be considered. The second hearing must also be warned no later than 30 days or more than 40 days before it is to be held.

Once the town has voted to amend its charter, the municipal clerk must announce and post the results and, within ten days of the vote, certify to the Secretary of State each proposal of amendment, its origin and the procedure followed. The Secretary of State must file the certificate and deliver copies of it to the Attorney General, the Clerk of the House of Representatives, the Secretary of the Senate and the chairs of all committees concerned with municipal charters. The amendment will become effective upon affirmative enactment of the proposal, either as proposed or as amended, by the General Assembly. 17 V.S.A. § 2645.

4. **Repealing Charters.** Seventeen V.S.A. § 2645 authorizes a municipality to propose to the General Assembly the repeal of its charter by the same process as is described above for amendment.

B. MERGERS

1. **Introduction.** Twenty-four V.S.A. Chapter 49 authorizes cities, incorporated villages, special purpose districts and school districts to elect to merge. Adjoining municipalities within a town may merge with each other, or they may merge with the town. 24 V.S.A. § 1485. To successfully merge, these municipalities must either carefully follow the procedure set out in Title 24, chapter 49, or, if a special act exists authorizing the particular merger, they may proceed in accordance with the special act. 24 V.S.A. § 1487.

2. **Procedure for Merger.** The procedure for merger set out in Chapter 49 is as follows:

   a. The legislative bodies of each party to the merger must prepare a plan of merger, which must be approved by a majority of each body. 24 V.S.A. § 1482.

   b. The plan of merger must be approved by a majority vote by Australian ballot of each municipality concerned at a meeting duly warned for that purpose and held in each such municipality. 24 V.S.A. § 1485(a). Not fewer than 30 days prior to the meeting, copies of the plan of merger must be posted in three or more places in each of the areas involved.

      In addition, two public hearings in each of the areas involved must be held, at intervals of two weeks, the last of which shall be held not less than five days before the meeting at which the vote will be held. Notice of the hearings must be advertised in accordance with 24 V.S.A. § 1484.

   c. Within ten days after the municipalities have voted to adopt a plan of merger, the clerk or equivalent officer of the municipality into which merger has taken place must notify the Secretary of State of the merger. 24 V.S.A. § 1486.

3. **The Plan of Merger.** The plan of merger is a very important document. When it is approved by the voters and ratified by the General Assembly, the permanent provisions of the plan become the charter of the consolidated municipality. 24 V.S.A. § 1485. In order to seek ratification, the municipality must request that the secretary of state file the plan of merger and deliver copies of it to the attorney general, clerk of the House of Representatives, secretary of the Senate and chairs of all committees concerned with municipal charters, in accordance with 17 V.S.A. § 2645(c).

   The plan of merger must include "provisions relating to structure, organization, functions, operation, finance, property and other appropriate matters." In addition, the plan must include special provisions from the charters of the municipalities involved which the municipalities wish to retain as charter provisions of the consolidated municipality. Finally, the plan must provide that any area or group of voters in the consolidated municipality may elect to have special services provided to them not common to all of the voters in the municipality, so long as the costs of these services are born by the taxpayers receiving the services. 24 V.S.A. § 1483.

C. CONSOLIDATION

1. **Introduction.** Twenty-four V.S.A. Chapter 45 provides the mechanism for towns or parts of towns that desire to consolidate to do so. Towns may wish to consolidate for various reasons, the most common of which is governmental efficiency: it makes economic sense not to unnecessarily duplicate the expenses of local government.

2. **Procedure.** In order to consolidate, the selectpersons of one or all of the towns must appoint a committee to study the feasibility and desirability of consolidating such town or parts of the town with another town or towns or parts thereof. 24 V.S.A. § 1421. This committee must confer with the assistant judges of the county or counties within which the towns are located to study the feasibility and desirability of such consolidation. If the assistant judges decide that consolidation would be beneficial to the inhabitants of the areas proposed to be consolidated, and there is a reasonable possibility of such consolidation, they must suggest to the selectboard of the other town (or towns) that it appoint a committee to consider the proposed consolidation. 24 V.S.A. § 1422. Committees appointed upon request of the assistant judges must meet and confer with the committee of the town proposing consolidation. If the committees determine that consolidation would "promote the interests of the residents of the areas to be consolidated and that greater governmental efficiency would result," they must work together to draw up a detailed plan for consolidation. 24 V.S.A. § 1423.

   Once drawn up by the joint committee, the consolidation plan is submitted to the assistant judges for their approval. 24 V.S.A. § 1424. If the assistant judges approve of the plan they must notify the selectboards of the towns involved, which must then post the plan in three places in their town for three consecutive weeks and publish it in a newspaper once a week for three consecutive weeks. Within 30 days after publication, a town meeting shall be called in each town, on the same day, for voting on the proposal. Note that voting shall occur in each town "by ballot" and "the polls shall be open from 6:00 a.m. to 6:00 p.m." 24 V.S.A. § 1425.

The clerk of each town must certify the results of the vote to the county clerk who, if a majority in each town has approved of the consolidation plan, must certify the adoption of the plan to the Secretary of State who then reports to the General Assembly and submits the plan for its consideration. 24 V.S.A. § 1427. If the towns wishing to consolidate lie in more than one county, the assistant judges of each county must recommend to the secretary of state within which county the consolidated town should be included. 24 V.S.A. § 1430.

If the plan for consolidation is approved and the General Assembly establishes the new consolidated town, the county clerk must call a meeting of the qualified voters of the consolidated towns to elect a slate of town officers to serve until the next annual town meeting. 24 V.S.A. § 1428. The state treasurer acts as fiduciary for the consolidated towns and determines the outstanding bonds and bills and collects amounts of interest and principal due to be paid by such consolidated town. 24 V.S.A. § 1429.

3. **The Plan.** The joint plan for consolidation must set forth the boundaries of the areas to be consolidated, as well as scheduling, listing and assigning a fair market value to land, buildings and equipment owned by each town which will not be needed after consolidation. Land, buildings and equipment deemed necessary for the consolidated areas must also be scheduled and listed, along with the liabilities of each town. A balance sheet showing the true assets and liabilities of the consolidated town must be drawn up and included in the plan. 24 V.S.A. § 1423(a).

   The plan for consolidation may allow one or more of the towns to consolidate as a village within the consolidated town and it may provide that any zoning ordinances in effect or bonded debt in such town to will continue as village ordinances and obligations, respectively. Finally, any plan may also provide that school districts within the areas to be consolidated may be established as incorporated school districts within the consolidated town. 24 V.S.A. § 1423(b).

D. BOUNDARY LOCATION AND ALTERATION

When the selectboards of adjoining towns cannot agree as to where the boundary line is located between the towns, one of the selectboards may petition the superior court to appoint commissioners to locate the line. The court will then appoint three disinterested persons, one of whom shall be a surveyor, to hear the evidence and view the premises and then to recommend where the line should be established. 24 V.S.A. Chapter 47.

Where towns wish to alter existing town boundaries or where there is a petition to create a new town, the General Assembly shall follow the procedure in 2 V.S.A. § 17.

The establishment of village boundaries or the alteration thereof is governed by 24 V.S.A. §§ 1301-2.

CHAPTER 8
ANIMALS

Animals are a frequent cause of concern and complaints from the public. The state statutes discussed below govern many topics such as rabies control, licensing, and cruelty to animals. In addition, the legislative body of a municipality has the authority to adopt ordinances regulating the keeping of domestic pets and wolf-hybrids, and to enforce many of the state statutes regarding animals. The local board of health (selectboard plus the health officer) also has broad powers to identify public health hazards and to enforce local and state laws concerning such hazards.

A. DOMESTIC PETS AND WOLF-HYBRIDS

1. **Fees and Licenses.** Any person who owns or keeps a dog or wolf-hybrid that is more than six months old must annually, on or before April 1, have it registered with the town clerk in the town where the animal will be kept. The animal must be numbered, described and licensed on a form provided by the secretary of the Agency of Agriculture, Food and Markets, and must wear a collar, to which is attached the license tag issued by the town clerk. In order to have an animal registered, the owner must provide a certificate from a duly licensed veterinarian verifying that the animal has had pre-exposure rabies vaccine as required by 20 V.S.A. § 3581.

   When a person acquires a dog or wolf-hybrid after April 1 or owns a dog or wolf-hybrid which becomes six months old after April 1, he or she must register the animal within 30 days. When a timely application is submitted after October 1, the license fee is one-half of the normal fee. If the animal is not registered within 30 days, a penalty of 50% of the normal fee is assessed. 20 V.S.A. § 3582.

   A license issued anywhere in the state is valid throughout the state, so long as it is recorded by the clerk of the municipality in which the animal is kept. 20 V.S.A. § 3591.

   An animal from another state may be brought into Vermont for a period not to exceed 90 days if the owner possesses a certificate signed by a licensed veterinarian in the other state verifying that the animal has a current rabies vaccine, good for the entire 90-day period. 20 V.S.A. § 3587.

   Each year the selectboard must designate one or more people to keep a record of dogs and wolf-hybrids and whether they are properly vaccinated and registered. If an animal is not properly vaccinated and registered by May 30, the list of those animals shall be given to the selectboard. Owners shall be notified that unlicensed or unvaccinated animals may be destroyed. 20 V.S.A. § 3590.

   The legislative body has the authority to issue a warrant to impound and destroy any unlicensed dogs or wolf-hybrids within the municipality. The warrant must be in the form mandated by 20 V.S.A. § 3622 and shall command a police officer or constable "to impound and destroy in a humane way or cause to be destroyed in a humane way all dogs and wolf-hybrids not duly licensed according to law…." 20 V.S.A. §§ 3621-3622. The officer must take action within 90 days. Officers may be compensated and other expenses may be paid from the money received from licensing fees. 20 V.S.A. § 3624.

2. **Kennels.** The owner or keeper of two or more domestic pets (dogs, cats and ferrets) or wolf-hybrids four months of age or older kept for sale or breeding purposes must apply for a kennel permit. The permit must be displayed prominently on the premises and it must be renewed by April 1 each year or be subject to a late penalty. 20 V.S.A. § 3681. All other provisions of 20 V.S.A. Chapter 193, subchapters 1, 2 and 4 that are not inconsistent with Section 3681 also apply to the kennel permit.

   Kennels are subject to inspection by law enforcement officers, officials from the U.S. Department of Agriculture or humane societies and licensed veterinarians to ensure the animals are kept under sanitary and humane conditions, that there is no communicable disease among them and that there is no threat to the health and safety of people. A quarantine may be imposed if such problems are found to exist. If the conditions are not remedied or if diseased or quarantined animals are removed from the kennel, the owner may be subject to criminal penalties under 13 V.S.A. § 353(a)(1). 20 V.S.A. §§ 3682-3684.

   A separate statute also applies to owners or keepers of domestic pets and wolf-hybrids kept for breeding purposes. Twenty V.S.A. § 3583 provides for a special license which may be issued if the animals are housed in an enclosure that keeps the animals and others safe and if the animals are all properly immunized.

3. **Regulation of Dogs by Municipalities and Treatment of Vicious Dogs.** The legislative body has the authority to adopt an ordinance regulating the keeping of domestic pets and their running at large. 20 V.S.A. § 3549. Many towns have leash laws and "pooper-scooper" laws. Enforcement may be by the constable, animal control officer or other law enforcement officers. These officers are also responsible for enforcement of the state laws outlined below which regulate vicious dogs.

   a. **Animal Bites, Humans.** If a domestic pet or wolf-hybrid bites a person while the animal is off the premises of its owner and the victim requires medical attention, that person may file a written complaint with the legislative body. The complaint should include the time, date and place of the attack, the name and address of whomever was bitten, and other relevant facts. The legislative body shall respond within seven days by investigating the charges and holding a hearing. If the owner of the animal can be ascertained "with due diligence," he or she should receive notice of the time and place of the hearing and the facts alleged.

      After a hearing, the board shall order measures that will provide such protection as is deemed necessary. The order may require that the animal be disposed of in a humane way, muzzled, chained or confined. The order must be sent by certified mail, return receipt requested. Failure to comply with the order may result in penalties provided in 20 V.S.A. § 3550. 20 V.S.A. § 3546. If necessary, a search warrant may be issued to aid in locating and seizing a dangerous animal. 20 V.S.A. § 3551.

      When a domestic pet bites someone and is *suspected of having rabies*, the procedures described below under Section B, Rabies Control, must be followed.

      Enforcement of municipal ordinance provisions may occur in the Judicial Bureau (formerly the Traffic and Municipal Ordinance Bureau) or in the Superior Court.

      Any person may kill a domestic pet or wolf hybrid if that animal has attacked a person and it is necessary to kill the animal in order to stop the attack and where the animal is

not restrained, is not within an enclosure provided for it, or is on the premises of its owner. This sounds a little confusing, but what it really means is that if the attacked person is at fault (rather than the dog) because that person has invaded the dog's pen or its owner's property, the right to kill it does not exist under the statute.

b. Animal Bites, Livestock. When dogs (or wolf-hybrids) have "worried, maimed or killed" domestic animals, the owner of such animal may proceed against either the owner of the animals or against the town. The owner may also notify a selectperson within 24 hours of the damage. That selectperson shall investigate and appraise the damage. If he or she finds that it is more than $20.00, then the total should be appraised by that board member and two disinterested persons whom he or she may appoint. The board shall issue an order to the treasurer to pay for all or part of the damage. The board may also order that the dogs that caused the damage be killed. If the selectboard fails to act, the damaged party may recover in civil action. The town may also recover damages from the owner of the dog via a civil action. The board may also offer a bounty of $5.00 for any dog killing or worrying sheep. 20 V.S.A. §§ 3741-3749.

A domestic animal may be killed when such killing is reasonably necessary to prevent injury to an animal or fowl that is being attacked by the animal. 20 V.S.A. § 3545.

B. RABIES CONTROL

Rabies is a viral disease that is usually spread by animal bites. It is currently present in Vermont primarily in bats, raccoons and foxes. Humans, domestic pets and many other animals may become infected through exposure to infected animals. A "rabies hotline" is available at (800) 4 RABIES (800-472-2437). This service is a cooperative effort between the State Departments of Health and Fish and Wildlife and the federal Fish and Wildlife Service. It should be the first number called with a general rabies question, especially those involving wildlife.

Broad responsibilities and powers are given to the commissioners of the Agency of Agriculture, Food & Markets and the Departments of Fish and Wildlife, and Health to work with towns in case of a rabies outbreak. Affected areas may even be quarantined. 20 V.S.A. §§ 3801-3803.

An effective preventive vaccine is available and required for all domestic pets (dogs, cats and ferrets). There is some question as to the efficacy of the vaccine for wolf-hybrids. However, until a separate vaccine is approved for them, owners are required to have their wolf-hybrids immunized just as other pets. Generally, the vaccine must be administered by a licensed veterinarian. However, in the case of feral felines, a non-veterinarian may administer the vaccine. As mentioned above in Section 1, Fees and Licenses, a current rabies vaccine certificate is required in order to license dogs and wolf-hybrids. 20 V.S.A. §§ 3581, 3581a. The commissioner is required to facilitate reduced-cost rabies vaccine clinics around the state, and volunteers helping with such clinics are protected from liability associated with their clinic work. 20 V.S.A. §§ 3812-3813.

Any domestic pet or wolf-hybrid may be confined or impounded when:

- it is suspected of having been exposed to rabies.
- it is believed to have been attacked by a rabid animal.
- it has been attacked by a wild animal.

- it has been running at large in violation of any provision of 20 V.S.A. Chapter 193, Subchapter 5.
- it has an unknown rabies vaccination history.

The owner of the impounded animal, if known, shall be notified directly, if possible. If the owner's address is unknown, notice may be posted as prescribed in the statute. 20 V.S.A. § 3806. When a proper official "reasonably suspects" that an animal impounded under Section 3806 has been exposed to rabies, attacked by a rabid animal or has been running at large in violation of the law, he or she shall order the animal killed. If it is not reasonable to suspect actual exposure to rabies, the official may deliver the animal to its owner. However, if the owner cannot be found or it is impractical to impound or confine the animal, the officer may order it killed. 20 V.S.A. § 3807.

If a pet is suspected of exposing a human or another animal to rabies, it shall be managed under the relevant statute and the rules established by the Health Department. If *any* wolf-hybrid (even one vaccinated against rabies) bites or exposes a human or animal to rabies, it shall be killed and the head sent to the Health Department for testing for the presence of rabies. 20 V.S.A. § 3807(c). Note that *the legislative body of a municipality or an official designated by it* is responsible for enforcement of the provisions in 20 V.S.A. § 3807.

Any person may kill a suspected rabid animal, which attacks a person or other animal, and he or she may not be held liable for any damages for such killing. 20 V.S.A. § 3809. The carcass of any animal suspected of having had rabies may be disposed of by incineration. 20 V.S.A. § 3811. In some cases, the head of the suspected animal must be sent for testing and should not be incinerated.

C. OTHER ANIMALS, GENERALLY

A person who knowingly permits cattle, horses, sheep, goats or swine to run at large in the following areas, without the permission of the selectboard, shall be fined:

- in a public highway or yard belonging to a public building, not less than $3.00 nor more than $10.00. 20 V.S.A. § 3341.
- in a public park, common or green, not less than $5.00 nor more than $25.00. 20 V.S.A. § 3342.
- in a yard of a townhouse, church or schoolhouse which is properly enclosed, not less than $3.00 nor more than $10.00. 20 V.S.A. § 3343.
- in a properly enclosed burial ground. 20 V.S.A. § 3344.

Each town must maintain at least one pound for the impounding of certain animals, such as those found running loose or causing damage. The pound may be in another town. Failure to maintain a pound for six months or longer calls for a fine of $30.00. 20 V.S.A. §§ 3381-3382.

The selectboard may, with permission of the owner of lands affected, destroy "fur-bearing animals" (e.g. beavers) in order to protect town highways and bridges. 10 V.S.A. § 4828. An opinion of the Vermont Attorney General, interpreting prior law, said that selectboards could destroy beavers and disturb their dams only if there was "an actual proximate threat to the safety of highways and bridges." That same opinion also said that selectboards could delegate this authority to "peace officers." (See Annotations under 10 V.S.A. § 4828.)

D. CRUELTY TO ANIMALS

In 1997 the Legislature passed 13 V.S.A. Chapter 8, entitled *Humane and Proper Treatment of Animals*. Improper or cruel treatment or neglect of animals is a crime, and a person found guilty of such a crime may be jailed or heavily fined, as well as ordered to pay costs, undergo psychiatric counseling, forfeit the right to own animals, etc. 13 V.S.A. § 352.

The importance of this subject to selectboards is that the local board of health is an "officer" or "humane officer," as defined in subsection 351(4), and has the authority to enforce the law prohibiting cruelty to animals. This includes authority to accept and care for animals alleged to have been mistreated, obtain a search warrant and seize animals, rescue an animal in imminent peril, arrange for euthanasia of a severely injured animal, and file motions in any ensuing criminal action. 13 V.S.A. § 354. The health officer and the board of health may enlist the help of law enforcement officers in carrying out these duties. 18 V.S.A. § 617.

CHAPTER 9
ORDINANCES and REGULATIONS

A. AUTHORITY AND PURPOSE

Local control exists in Vermont exclusively by license: a municipality may do only what the Vermont Legislature has granted it the authority to do. As a result, the areas in which a municipality can enact ordinances are narrowly defined by statute or municipal charter, leaving a town virtually no latitude to invent new subjects of legislation. The authority of municipalities to set local speed limits and parking rules, to define enforceable standards for zoning districts, and to regulate dogs – to name only a few of the many fit subjects for local legislation – exists exclusively by ordinance or bylaw. In many cases, without an ordinance, a town would have no authority to act.

An ordinance is "an expression of the municipal will, affecting the conduct of the inhabitants generally, or of a number of them under some general designation." *City of Barre v. Perry & Schribner*, 82 Vt. 301 (1909). Improperly drafted or enforced, a local ordinance can do great, inadvertent harm. Alone, it cannot solve all of a community's problems. But a well-written and effectively enforced ordinance that solves a particular problem or situation can be a significant community asset. An ordinance can help guarantee equal protection and due process of the law to every person in town. It can also articulate a community's goals and aspirations, and bend practice in the direction of policy.

Understanding when a municipality can enact an ordinance, how the enactment and enforcement processes work, and how the courts have treated local ordinances and bylaws is critical for selectboards and other local legislative bodies. The penalty for not enacting ordinances correctly is reversal by the courts and criticism at home by those who have relied on the board's expertise.

1. **General Legislative Powers of Municipalities.** The constitutional basis for municipal ordinances and bylaws is Chapter I, Article 2 of the Vermont Constitution, "That private property ought to be subservient to public uses when necessity requires it." This authorizes the use of police power for the purpose of protecting the public health, safety, and welfare. This is the power that requires you to keep your dog on a leash in a town with a dog control ordinance, and that justifies fines for jaywalking and speeding.

   State statute is the source for all local legislative authority in most municipalities. In some towns, all cities, and an occasional village or fire district, the municipality enjoys enhanced legislative authority by municipal charter, which is special legislation adopted by the General Assembly specific to that municipality. (See Chapter 7, *Charters and Mergers*.) Here we limit our discussion to general powers.

   The subjects of local legislation are varied, and scattered through many different titles of the Vermont Statutes Annotated (V.S.A.). The central source of power is 24 V.S.A. § 2291, which includes a list of 18 different subjects. Examples include "to set off portions of public highways of the municipality for sidewalks and bicycle paths and to regulate their use" and "to compel the cleaning or repair of any premises which in the judgment of the legislative body is dangerous to the health and safety of the public." Beyond this list, the authority to adopt ordinances is found in various locations throughout the V.S.A.

2. **The Relationship Between Ordinance and State Law.** The most important rule of construction in understanding the relationship between state law and ordinance is the primacy of higher law. The municipality may not enact ordinances unless the Legislature has expressly granted it the authority to adopt local legislation on the subject. Where the state law establishes limits on the ordinance or bylaw, the municipality must stay within those limits.

   In some cases, state law specifically overrules existing ordinances. When Vermont's billboard law took effect in 1968, for instance, the statute expressly superseded any inconsistent local ordinance on the same subject. 10 V.S.A. § 505. On the other hand, some state programs expressly give way in the case of inconsistent local legislation. For example, no Act 250 permit may be issued or denied by a district environmental commission if it is "contrary to or inconsistent with a local plan, capital program or municipal bylaw ... unless it is shown and specifically found that the proposed use will have a substantial impact or effect on surrounding towns, the region, or an overriding interest of the state and the health, safety and welfare of the citizens and residents thereof requires otherwise." 10 V.S.A. § 6046.

   Finally, if a bylaw is authorized by municipal charter, it has the effect of a special law of the Legislature within the limits of the municipality and supersedes any general law existing on the same subject "for the charter giving the village power to pass the bylaw inconsistent with and repugnant to the general law, by necessary implication, operated to repeal the general law within the territorial limits of the village, on the principle that provisions of different statutes which are in conflict with each other cannot stand together; and, in the absence of anything showing a different intent on the part of the Legislature, general legislation upon a particular subject must give way to later inconsistent special legislation on the same subject." *St. Johnsbury v. Thompson*, 59 Vt. 300, 309 (1887).

   In the *Thompson* case, the higher law was not the general state statute, but the charter, which itself is a form of statute for the village alone. In most cases, if there is a conflict between statute and ordinance, the ordinance must give way, unless the statute expressly authorizes the ordinance to be stricter or more severe. Sometimes the statute has to be read with the ordinance for the latter to make sense. *Rutland Cable T.V. v. City of Rutland*, 122 Vt. 162, 166 A.2d 191 (1960).

3. **The Relationship Between Ordinance and Collective Bargaining Agreements.** The law on municipal labor relations includes the following statement: "In the event any part or provision of a collective bargaining agreement is in conflict with any ordinance ... adopted by the municipal employer or its agents, the lawful vote of the legislative body approving the written agreement shall validate the collective bargaining agreement and shall supersede such ordinance ..." 21 V.S.A. § 1725. This section does not mean to place the collective bargaining process above ordinances involving health or environmental concerns. Rather, it applies to municipal policies relating to personnel matters, including sick leave, vacation time, and the like. In the case of a conflict, the agreement prevails. See 24 V.S.A. § 1121 (authority to adopt personnel rules).

   State law also recognizes that a municipal policy, presumably on personnel matters, gives way in the case of voluntary submission of a municipality and its employee labor organization to binding arbitration to settle a grievance or controversy. 21 V.S.A. § 1734(b).

4. **Drafting Ordinances**. In drafting an ordinance, do not neglect the hard work other municipalities have put into their ordinances. A few words with the right person, along with a

copy of a good sample from another community, can save you weeks of frustration. Once you start to draft the ordinance itself, return to your statutory source of authority more than once during the process, always asking whether what you propose is justified by the statute or charter. If your charter is insufficient, amend it; if general law is insufficient, adopt a charter. The possibilities of ordinance invention are as yet unexplored. Indeed, many local ordinances show a notable lack of imagination, although that may be a necessary characteristic of the police power at work.

Seek competent legal counsel before promulgating the ordinance. It is money well spent in comparison to legal fees from a challenge to the municipality's authority to act in the way the ordinance proposes. The VLCT Municipal Assistance Center staff is available to review your draft ordinances, and also has an extensive collection of sample ordinances on different subjects from municipalities around the state. Finally, listen to the public at all costs. There is nothing so unpleasant as a special election to disapprove an ordinance that the board has drafted and approved.

Organize your ordinances and bylaws. They should all be kept in a book, perhaps a three-ring binder, where any person can find them while visiting the town office. A backup copy of the same notebook for archival purposes only will help preserve these important records of the town.

B. ORDINANCE ADOPTION AND PERMISSIVE REFERENDUM

The basic law on the adoption, amendment and repeal of municipal ordinances is 24 V.S.A. §§ 1971-1976. Please read these sections carefully, in addition to reviewing our discussion of them below. Also note that the statutory authority for the adoption of an ordinance occasionally includes additional steps for the adoption process. The law on adopting building ordinances, for instance, includes a mandatory public hearing and notice period. With these exceptions in mind, let's review the basic process for adopting an ordinance.

The process starts with the drafting of the ordinance, and its review by the legislative body. The body then *adopts* the ordinance formally, by a majority vote of its members, ensuring that the action and a copy of the proposed ordinance are entered in the minutes of the meeting. Adoption in this context is not the same as making the ordinance effective – that comes after a few more steps.

The next step is public notice. The ordinance has to be posted in five conspicuous places within the municipality. The full text, or a concise summary including a statement of purpose, principal provisions, and table of contents or list of section hearings, must be published in a newspaper of general circulation not more than 14 days following action by the legislative body. The notices, published and posted, should include a reference to a place where the full text of the ordinance can be found; the name, address, and telephone number of a person who can answer questions about the ordinance; and an explanation of how voters can petition to disapprove the ordinance. 24 V.S.A. § 1972(a). The explanation might say, for instance, "This ordinance was adopted on [give date]. It will take effect on [name the day 60 days from the first date], unless a petition signed by at least five percent of the voters of [name municipality] is filed with the municipal clerk by [name the day 44 days from the first cited above], asking for a vote to disapprove the ordinance. If a petition is received, the [municipal legislative body] will warn a special meeting and the voters may vote on that question." 24 V.S.A. § 1973.

Voters equal to five percent then have until (and including) the 44th day following action by the legislative body to petition for a vote to disapprove the ordinance. The legislative body receiving such a petition must warn the meeting within 60 days, or if the annual meeting is within the 60-day period may warn the question for a vote at the annual meeting. 24 V.S.A. § 1973(b) and (c).

Voting would be in the traditional, open-type town meeting, unless the municipality has voted to use the Australian ballot system for public questions. 17 V.S.A. § 2680. In either case, two copies of the proposed ordinance must be posted in each polling place during the hours of voting and copies made available upon request (and presumably without a fee) to voters at the polls. If an Australian ballot is used, there is no need to reprint the entire ordinance or amendment on the ballot. A warning (and ballot) would be sufficient if it asks this question: "Shall the voters of [name of municipality] disapprove the proposed [name] ordinance?" Asking to disapprove obviously is more complicated than asking to approve, but the language in the statute is quite specific on this. 24 V.S.A. § 1973(d). If there is a petition and the ordinance is voted on, it takes effect on passage if the voters fail to disapprove it by a majority vote. If disapproval is their choice, its life ends on the day of the vote.

Although the petition process is central to the ordinance adoption process, a petition cannot legally require selectboards to propose an ordinance, its amendment or repeal. The initial decision on whether to adopt or not appears to reside entirely within the discretion of the selectboard. Selectboards can, of course, be persuaded by political pressure or common sense arguments to adopt, amend, or repeal an ordinance.

C. ENFORCEMENT

1. **Generally.** Municipal ordinances other than zoning bylaws and traffic offenses have historically been within the jurisdiction of the district courts. Like other crimes, violations of local ordinances were usually prosecuted by the state's attorney or attorney general, although in special cases a town grand juror or town attorney acting in his or her behalf was authorized to prosecute violations of ordinances, with the express consent of the state's attorney. Since 1994, enforcement of municipal ordinances has been through the Judicial Bureau. The law now allows municipalities to enforce their civil ordinances by writing tickets. If a citizen chooses to contest the ticket instead of paying the fine or waiver fee, the ticket complaint is heard by the Judicial Bureau.

   The Judicial Bureau was created to increase the options available to municipalities seeking to enforce their bylaws, as many were frustrated in their efforts to have overburdened state's attorneys prosecute local ordinance violations. To take advantage of the Bureau, selectboards must designate each of their ordinances (except parking) as civil or criminal and set a schedule of civil penalties and waiver fees. Specially designated local officials ("issuing officials") may issue tickets to the individuals and businesses they believe are in violation of the municipal ordinances.

   In the course of investigating a possible ordinance violation, an issuing official may not conduct a warrantless search of private property. The issuing official may, however, visit all of the publicly-traveled portions of the property. (A good test to determine whether a portion of the property is publicly-traveled is whether a visitor, mail carrier or delivery person would be welcome or expected at that location.) If, from the publicly-traveled portion of the property, the issuing official can see a violation or can see indications that a violation is

happening in the private portion of the property, there is probably sufficient evidence of a violation to issue a municipal complaint. Health officers should also consult 18 V.S.A. § 107, which grants them additional authority to make inspections to detect violations of health ordinances, but does not exempt them from the requirement to obtain a search warrant if necessary. 18 V.S.A. § 121. Search warrants are available for other ordinance violations according to the procedure set out in 13 V.S.A. § 4701.

Once issued, if a municipal complaint is contested, a municipal official may represent the town in the hearing before the Bureau as it is designed to operate without attorneys. Assuming the Bureau enters judgment for the municipality, the person found in violation of the municipal ordinance has up to 20 days to pay the penalty to the Bureau. The Bureau will remit the penalties to the town monthly, less a $6.00 per ticket administrative fee. Appeals from a Bureau decision are taken to district court. For more information about the Judicial Bureau, please consult the VLCT Municipal Assistance Center's *Ordinance Enforcement Handbook.*

For matters relating to zoning violations, the administrative officer is authorized by law to give alleged offenders seven days' notice by certified mail that they are violating the bylaws, and then to take them to court to assess the $100.00 per day fine. All fines are then paid over to the municipality whose bylaw has been violated. See 24 V.S.A. § 4451(a) for details of the notice to violators. The zoning administrator may also choose to pursue the offender into court with an action to enjoin any development contrary to the bylaws. 24 V.S.A. § 4452. Each of these two decisions may be appealed to the zoning board, and from there to the Environmental Court. 24 V.S.A. §§ 4471. Certain, but not all, zoning violations may be suitable for enforcement in the Judicial Bureau. Please consult your town attorney or the VLCT Municipal Assistance Center for guidance on zoning enforcement in the Judicial Bureau.

Whenever a court hears a case in which a municipal ordinance is alleged to be unconstitutional, the municipality must be served and is entitled to be heard; whenever the validity of a municipal ordinance is at issue, a municipality has a right to be made a party. 12 V.S.A. § 4721. On the other hand, the courts cannot legally take judicial notice of an ordinance as they can of a state statute. An ordinance must be offered into evidence. *Hebert v. Stanley*, 124 Vt. 205, 201 A.2d 698 (1964); *State v. Pelletier*, 123 Vt. 271, 185 A.2d 456 (1962).

2. **Presumption of Validity.** When a bylaw or ordinance is challenged, the municipal ordinance is given the benefit of the doubt by the courts. "When an ordinance is passed relating to a subject matter within the legislative power of the municipality, every reasonable presumption is made in favor of its validity. It is not to be adjudged unconstitutional without clear and irrefragable evidence that it infringes the paramount law." *Brattleboro v. Nowicki*, 119 Vt. 18, 117 A.2d 259 (1955). The Legislature has been no less generous. For instance, in the law relating to traffic offenses, the following language appears: "Testimony of a witness as to the existence of a traffic control sign, signal, or marking, or sign establishing a speed zone, shall be prima facie evidence that any such traffic control device existed pursuant to a lawful statute, regulation, or ordinance and that a defendant was lawfully required to obey the directions of such device." 23 V.S.A. § 2206(b).

This presumption is also reflected in the way the law handles procedural problems in the adoption and amendment of zoning bylaws. The law provides that "A certificate of the clerk of a municipality showing the publication, posting, consideration, and adoption or amendment of a plan, bylaw, or capital budget or program shall be presumptive evidence of the facts as they relate to the lawful adoption or amendment of that plan, bylaw, or capital budget or program, so stated in any action or proceeding in court or before any board, commission, or other tribunal." 24 V.S.A. § 4447. It also provides for a statute of limitations preventing any challenge of bylaws on purported procedural defects after "two years following the day on which it would have taken effect if no defect had occurred." 24 V.S.A. § 4483.

3. Challenges to Ordinances.

a. Reasonable Fees. A regulatory ordinance will be struck down if it requires the payment of "excessive" fees. An excessive fee is one whose sole purpose is to raise revenue, and does not bear a real and substantial relationship to the public health, safety, welfare, and convenience. *Champlain Valley Expo. v. Vill. of Essex Jct.*, 131 Vt. 449, 309 A.2d 25 (1973). Note that a fine or penalty for the violation of a regulatory ordinance can be designed to punish and deter future violations, so there is no similar limit on the penalty amounts.

b. Reasonableness. In *Burlington v. Jaycee, Inc.*, 130 Vt. 212 (1972), a city ordinance prohibiting eating establishments from selling food and beverage between 1:30 a.m. and 5:30 a.m. was challenged by a restaurant owner on the grounds of reasonableness. The court worked hard to find a reason to support it, but in the end did, claiming reduced noise and the need to maintain order, with only a minimal impact on the defendant's business. The "classification must not be purely arbitrary or irrational, but based upon a real and substantial difference, having a reasonable relation to the subject of the particular legislation." The standard of review is whether the ordinance is palpably unreasonable and arbitrary. Is there no reasonable basis on which to rest? Only if there is none will an ordinance fail to pass muster.

There is always a question about how ordinances should be read in light of changed circumstances after their enactment. Shortly after automobiles became commonplace, the owner of a car leasing company argued he did not need a license as a "hackman," since the licensing ordinance was written before there were automobiles. The court was unimpressed, however, finding the nature of the service of carrying passengers for a fee consistent, whether a carriage and horses or a motor vehicle were being used for the conveyance. *State v. Jarvis,* 89 Vt. 239 (1915).

When Burlington tried to argue that its own ordinance could be read to justify its use of electric power poles owned by a private utility, however, the court was not as willing to support its decision. The court concluded that if it were to read the ordinance in that way, it would be unconstitutional. The action of the city would constitute a taking without just compensation. The court saw its duty as saving the ordinance, even if that meant giving it a different meaning from what the city alleged. "[Saving the ordinance] can be accomplished by holding that, so far as poles already in the streets were concerned, the ordinance did not contemplate a use for purposes so unlike that then enjoyed by the city

as the use now claimed would be." *Burlington L. & P. Co. v. City of Burlington*, Vt. 27 (1918).

c. Constitutional Issues. There are a number of federal constitutional provisions that have an impact on municipal regulatory authority. For example, the Fourteenth Amendment Due Process and Equal Protection Clauses prohibit ordinances that are too broad or overly vague, or which unlawfully discriminate against a particular class of individuals, or treat one group differently than others with no rational basis. In addition, the First Amendment limits the degree that a regulation may abridge an individual's freedom of speech or association; the Fifth Amendment prevents the taking of private property without just compensation; and the Commerce Clause prevents an ordinance from unduly interfering with interstate commerce.

In at least two cases, municipal ordinances have been struck down or declared invalid as applied based on the power of the First Amendment to the U.S. Constitution. The Rutland City peddler ordinance that prohibited selling pamphlets without a license was held invalid because it violated the right of freedom of the press, as guaranteed by the First and Fourteenth Amendments to the U.S. Constitution. *State v. Greaves*, 112 Vt. 222 (1941). In 1987, a Burlington City ordinance required all newspapers being sold out of street corner vending machines to pay a $5.00 per week fee to the city. The court quickly struck down the ordinance as invalid, saying it was standardless and conferred excessively broad authority on city officials. *City of Burlington v. New York Times Co.*, 148 Vt. 275, 282, 532 A.2d 562 (1987).

d. Too Much Discretion. The leading ordinance case in Vermont judicial history involved an ordinance that gave no standards on how the legislative body could determine who should qualify for a license to conduct a junk business. *Village of St. Johnsbury v. Aron*, 103 Vt. 22 (1930). The court found the ordinance invalid because of the wide discretion it left in the hands of the trustees. "No rules are laid down for the guidance of the trustees; they are not required to consider the personal fitness of the applicant, the propriety and convenience of his location or premises or any other thing in granting or withholding permission to carry on the business." The question of "[w]hether or not the license is to be granted lies wholly in the discretion of the trustees and this discretion they may exercise arbitrarily and for personal and private reasons." *Village of St. Johnsbury v. Aron*, 103 Vt. 22 (1930).

Keeping these guidelines and potential challenges in mind as you draft your ordinance will result in an ordinance that is less vulnerable to legal challenge. If you have any questions about the provisions of a draft or existing ordinance, please contact the VLCT Municipal Assistance Center.