

ARTICLE

A CRISIS IN CONFIDENCE: MUNICIPAL OFFICIALS UNDER FIRE

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INTRODUCTION

*The proper operation of democratic government requires that public officials and employees be independent, impartial and responsible to the people; that government decisions and policy be made in proper channels of the governmental structure; that public office not be used for personal gain; and that the public have confidence in the integrity of its government.*¹

Questions regarding the ethical conduct of municipal officials are causing a crisis of confidence in local government. Cases involving ethical breaches by local government officials have dotted the newspapers across the country. For example, in New York City twenty-eight health inspectors were charged with extorting hundreds of thousands of dollars from restaurants by threatening to close them or to cite them for sanitation violations.² In Mingo County, West Virginia, more than fifty government officials and employees were convicted and jailed for criminal activities including theft of public funds, bribery, and perjury.³ In yet another instance, a city council member of Albany, California was found to have defrauded the city by selling a piece of city real estate to a corporation that later, with his approval, sold it back to the city.⁴

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1. RUTLAND, VT., CODE OF ETHICS § 451 (1982).

2. Selwyn Raab, *Inspectors Seized in Wide Extortion from Restaurants*, N.Y. TIMES, Mar. 25, 1988, at A1.

3. B. Drummond Ayres, Jr., *Corruption Inquiry Brings Hope to Bloody Mingo*, N.Y. TIMES, Mar. 25, 1988, at A12.

4. Thomson v. Call, 699 P.2d 316 (Cal. 1985).

Rural Vermont has not been immune to charges of unethical conduct of local government officials. In a recently publicized case in Windsor, Vermont, three planning commission members failed to recuse themselves from consideration of a matter, even after the town selectboard had requested them to do so because of conflicts of interest and the appearance of impropriety.⁵

One author has noted that "the very structure of some local government functions cause[s] ethical conflicts for elected and appointed officials which exacerbates the difficulty of conducting assigned responsibilities in an open and equitable fashion."⁶ Local government ethics are particularly problematic in Vermont because the lack of clear guiding standards for municipal officials engenders a feeling that municipal officials are not held accountable for their ethical breaches. Except in the most extreme circumstances, a person harmed by an official's ethical breach has no recourse. As a result, developers, businesses, local citizens, and, most critically, courts have developed a general distrust of municipal officials.⁷

Local government officials must be held to high ethical standards to ensure that government activities are conducted in the public's interest. Public officials must act in an impartial and responsible manner in order to gain public confidence in the integrity of government. Government decisions must be made within the proper governmental channels, and public office must not be used for private gain. Governments have a responsibility to the public to avoid even the appearance of impropriety and to act to reduce the opportunities and incentives for unethical behavior by

5. *In re Vermont Dep't of Bldg.*, No. S460-WrCa (Super. Ct. Windsor County filed Aug. 30, 1990) (dismissed by stipulation of parties on Feb. 26, 1991). This case involved a decision of the Windsor Planning Commission to disapprove a site plan request by the state for a prison to be built in Windsor. The state charged that three members of the Board should not have participated in the decision because of conflicts of interests: two members were abutting landowners, and the third member had made public statements against the project. These planning commission members continued to participate in decisions on this case, despite the Selectboard's order to refrain from continued participation (pursuant to the Selectboard's authority to decide matters of conflict of interest set out in the Windsor municipal charter). *Id.*

6. Douglas Larson, *A Model Ethical Code for Appointed Municipal Officials*, 9 *HAMLIN J. PUB. L. & POL'Y* 395, 395 (1989).

7. A consequence of the court's distrust of municipal boards has been expressed by many Vermont municipal attorneys who often complain that in enforcement actions or appeals from municipal officials, judges presume that an individual's rights have been violated by the local government, and the municipality has, in effect, a burden to prove that it acted fairly.

their officials and employees.

As the demands on local government officials become increasingly complex, outright dishonesty has become only one minor aspect of the ethical problems facing those in government service.⁸ Most ethical dilemmas raise the more subtle questions of conflict of interest, self-dealing, and preferential treatment and consequently, fall into the "gray" area between proper and improper behavior.

For example, it is all too common in Vermont for an attorney to arrive at a local zoning board proceeding, only to discover that one or more of the board members have potential conflicts of interest: one may own property abutting the proposed development; another may have a relative with an indirect financial interest in the outcome of the proceedings; and, if the development is controversial, one of the board members may have publicly opposed the project. The attorney is faced with a dilemma when a zoning board member fails to recuse himself from the decision: does she risk alienating the board (who perhaps already distrust her because she is a lawyer) by requesting that the member refrain from participating in the decision? Moreover, if after such a request the board member nevertheless chooses to participate in the decision, the only option for challenging the board member's participation is the appellate process. This prohibitively time-consuming and costly process is not a viable option for the permit applicant.⁹

The matter is as equally complex and disturbing from the board's perspective. Vermont's local boards consist primarily of lay people who volunteer their time. The boards operate mainly without legal assistance. With no specific guidance as to ethically permissible behavior, individuals are left to their own devices to decide when recusal from a decision is appropriate. Most local government boards and commissions try to conduct their proceedings in a professional and ethical manner. These well-meaning attempts may be insufficient, however, when made without adequate guidance.

The superior court's *de novo* review of permit applications further complicates the ethical standards issue for local boards. *De*

8. See *infra* text accompanying notes 113-33.

9. In such a case an attorney would have to seek an injunction in superior court to force the official to step down from the matter. Cf. *In re Vermont Dep't of Bldg., No. S460-WrCa* (Super. Ct. Windsor County filed Aug. 30, 1990).

de novo review in this circumstance creates a circular problem. There is no incentive for board members to conduct more professional and more ethically conscious hearings because the superior court's *de novo* review will decide the matter without regard to what occurred on the board level. The board's lack of professionalism affects public confidence in the local regulatory process which, in turn, bolsters the belief that *de novo* review is a necessary protection for applicants. However, *de novo* review by the superior court means that actions of the local board are rarely, if ever, reviewed and provides no opportunity for precedents to develop with respect to ethical standards and proper conduct for board proceedings.

The challenge facing municipal governments is how to make local government boards and officials more accountable for their conduct. One step some towns and cities have taken is to adopt codes of ethics by individual municipal charter.¹⁰ However, these efforts are piecemeal in nature and often inconsistent with one another, and thereby do little to foster greater public confidence in the operation of local government.

This article examines existing ethical standards for Vermont municipal officials, found both in the federal and state constitutions and in Vermont statutory law and case law. As discussed herein, the existing standards provide inadequate guidance for municipal officials. This article then takes an in depth look at three major ethical concerns for local government officials—honesty and conformity to law, conflict of interest, and procedural fairness—as well as some of the more subtle moral issues arising from local government's policy-making functions. This article suggests possible solutions to public officials' current lack of ethical accountability.

I. EXISTING ETHICAL STANDARDS FOR VERMONT MUNICIPAL OFFICIALS

Constitutional law, case law, statutory law, and local ordinance or policy are the sources of existing ethical standards for local government officials. Each of these areas will be considered in turn.

10. At least, Brattleboro, Burlington, Middlebury, Rutland and Windsor have charter provisions which deal with the ethical conduct of municipal officials and employees. BRATTLEBORO, VT., ETHICS CODE art. 2 (1978); BURLINGTON, VT., CHARTER § 133; Middlebury, Vt., Selectmen's Rules Relating to Conflicts of Interest on the Board of Selectmen; RUTLAND, VT., CODE OF ETHICS §§ 451-460 (1982); WINDSOR, VT., CHARTER ch. 4, § 31.

A. Constitutional Standards

1. The Fourteenth Amendment's Due Process Clause

The Due Process Clause of the Fourteenth Amendment to the United States Constitution constrains the behavior of municipal officials to the extent that it requires all state and local government decision makers to be unbiased.¹¹ The United States Supreme Court, in the landmark case of *Hortonville School District v. Hortonville Educational Association*, applied the constitutional requirement of unbiased government decision making to decisions made at the local government level.¹² The Hortonville, Wisconsin school district decided to fire teachers who, in an attempt to force the Board to agree to certain contract terms, were striking.¹³ Although the Wisconsin Supreme Court determined that the Due Process Clause of the Fourteenth Amendment required that the teachers' conduct be "evaluated by an impartial decision maker other than the board,"¹⁴ the United States Supreme Court disagreed.

The majority agreed with the Wisconsin court that the Due Process Clause requires biased officials to disqualify themselves from participating in decisions.¹⁵ However, the majority determined that "the Board members [did not have] the kind of personal or financial stake in the decision that might create a conflict of interest, and there [was] nothing in the record to support charges of personal animosity."¹⁶ The Court held that mere involvement in the negotiations which precipitated the strike was not sufficient to warrant disqualification of the Board, particularly in light of the presumption of honesty and integrity that attaches to decisions of policy makers.¹⁷ The Court noted that "a decisionmaker [is not] disqualified simply because he has taken a posi-

11. The Fourteenth Amendment to the United States Constitution states in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." U.S. CONST. amend. XIV, § 1.

12. *Hortonville Joint Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 490-91 (1976). See also *Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955).

13. *Hortonville*, 426 U.S. at 484-85.

14. *Id.* at 486.

15. *Id.* at 496-97.

16. *Id.* at 491-92.

17. *Id.* at 492-93, 497. The Court also stated that "[m]ere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not, however, disqualify a decision maker." *Id.* at 493.

tion, even in public, on a policy issue related to the dispute, in the absence of a showing that he is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'"¹⁸

In contrast, the dissent in *Hortonville* asserted that "under a realistic appraisal of psychological tendencies and human weakness . . . there is a constitutionally unacceptable danger of bias where school board members are required to assess the reasonableness of their own actions during heated contract negotiations."¹⁹ Accordingly, the dissent would have remanded the case to the Wisconsin court for a determination of whether, in light of Wisconsin law with respect to the discharge of teachers, the school board could sit as an impartial decision maker.²⁰

Since the *Hortonville* decision fifteen years ago, the United States Supreme Court has not resolved any other case that would provide guidance to municipal officials regarding the ethical requirements of due process. Instead, the issue has been left for state court determination under state constitutions and the federal constitution.²¹

2. The Vermont Constitution

The Vermont Supreme Court has indicated that the state constitution does not limit the ethical behavior of local government officials. *In re Crushed Rock* presented the issue of whether the State Environmental Board's concurrent involvement in administrative permit revocation proceedings and permit enforcement proceedings in superior court violated the Vermont Constitution.²² The appellant alleged that the Board's initiation of a superior court action precluded an impartial decision in the revocation proceeding. The Vermont Supreme Court held that "the dual involvement of the Board in the court action and the revocation proceeding" did not violate the Vermont Constitution.²³

18. *Id.* at 493 (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941)).

19. *Id.* at 499 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

20. *Id.* at 497-99.

21. See *infra* text accompanying notes 28-79.

22. *In re Crushed Rock*, 150 Vt. 613, 622, 557 A.2d 84, 89 (1988).

23. *Id.*, 557 A.2d at 89. Chapter II, § 28 of the Vermont Constitution states: "The Courts of Justice shall be open for the trial of all causes proper for their cognizance; and justice shall be therein impartially administered, without corruption or unnecessary delay." Vt. Const. ch. II, § 28.

Although the court in *Crushed Rock* noted that chapter II, section 28 of the Vermont Constitution provides that justice shall be "impartially administered, without corruption or unnecessary delay," it held that this provision did not apply to administrative boards.²⁴ The court's reasoning was based on the fact that the provision in question appears within the portion of the constitution concerned with the judicial department. Consequently, the constitution "provides [only] that within 'Courts of Justice . . . justice shall be . . . impartially administered, without corruption or unnecessary delay.'"²⁵ The court concluded that separation of powers precludes the application of the provision for the judicial branch to the other branches of government.²⁶

Although *Crushed Rock* concerned a state administrative board proceeding, the principle applies equally to local board proceedings. Because local governments are creatures of the state legislature, and are limited to the authority delegated to them by the legislature,²⁷ the prohibitions of chapter II, section 28 do not apply to municipal boards or to local government officials.

3. Vermont Case Law

The Vermont Supreme Court has enunciated the general rule that federal constitutional due process accords individuals involved in proceedings before quasi-judicial boards the right to a "full, fair and impartial hearing before a tribunal that entertained no bias against them."²⁸ Because most appeals from local board decisions are to the superior court for *de novo* review, the Vermont Supreme Court rarely has had the opportunity to consider the constitutional implications of the conduct of local quasi-judicial proceedings.²⁹

24. *Crushed Rock*, 150 Vt. at 622-23, 557 A.2d at 89-90.

25. *Id.*, 557 A.2d at 89-90 (quoting Vt. CONST. ch. II, § 28).

26. *See id.*

27. It is a fundamental principle of municipal law that local governments are creatures of the state and, absent "home rule," have no authority to act that is not specifically delegated by the state legislature. *See* EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 1.38 (3d ed. 1987). *See also* Vt. CONST. ch. II, § 69 ("No 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."); *Thompson v. Smith*, 119 Vt. 488, 498, 129 A.2d 638, 645 (1957) (Municipalities are created to perform such governmental functions as permitted by the state.).

28. *In re Davenport*, 129 Vt. 546, 555, 283 A.2d 452, 456 (1971). *See also* *Emerson v. Hughes*, 117 Vt. 270, 279, 90 A.2d 910, 915 (1952).

29. *But see In re Judy Ann's Inc.*, 143 Vt. 228, 464 A.2d 752 (1983); *Davenport*, 129 Vt. 546, 283 A.2d 452 (1971); *Eno v. City of Burlington*, 125 Vt. 8, 209 A.2d 499 (1965).

Instead, the court has found the precedents for local board proceedings by analogizing to cases involving administrative boards.³⁰

The Vermont court first considered the impartiality of a local board acting in a quasi-judicial capacity in 1916 when the Mayor and Board of Aldermen of the City of Burlington, acting pursuant to the city charter, removed certain water commissioners for improper conduct.³¹ In *Rutter v. Burke*, the court considered whether the Mayor was disqualified from participating in the removal decision because he presented and pressed the charges against the commissioners.³² The court noted that

the constitution of the city council, its exclusive jurisdiction as a trier, and the diversity of the duties imposed on it, preclude the idea that impartiality can be made the test of the right of its members to sit in a hearing affecting the subordinate officers of the city government.³³

The court held that if the officer's "removal was made for a legal cause, on proceedings sufficiently regular, the mayor's motive in presenting the charges is immaterial."³⁴ Although the *Rutter* case did not expressly discuss the constitutional implications of the quasi-judicial proceeding, it stated that the mere fact that an official acts as both prosecutor and decision maker was not sufficient to violate the fundamental requirements of fairness.³⁵

The Vermont Supreme Court again considered the standards for impartiality of public officials acting in quasi-judicial capacities in *Emerson v. Hughes* which involved the removal of the President of the State Liquor Control Board by the Governor.³⁶ The court noted that the Constitution guarantees to a person a "full and impartial hearing before a court that is not biased or prejudiced against him." This rule applies not only to the judiciary, but also

30. See generally *In re Crushed Rock*, 150 Vt. 613, 557 A.2d 84 (1988); *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 328 A.2d 667 (1974); *Emerson*, 117 Vt. at 270, 90 A.2d at 910.

31. *Rutter v. Burke*, 89 Vt. 14, 28-29, 93 A. 842, 849 (1915).

32. *Id.*, 93 A. at 849.

33. *Id.* at 28, 93 A. at 849.

34. *Id.* at 29, 93 A. at 849.

35. *Id.*, 93 A. at 849. See also *Bergeron v. Jackson*, 94 Vt. 91, 97, 108 A. 912, 915 (1920) (alderman may act as prosecutor and trier when considering removal of road commissioner).

36. *Emerson v. Hughes*, 117 Vt. 270, 90 A.2d 910 (1952). Note that *Emerson* is cited as authority in cases involving local board proceedings, so its holding and rationale are relevant for the purposes of this discussion. See *In re Davenport*, 129 Vt. 546, 555, 283 A.2d 452, 456 (1971).

to administrative tribunals acting in a quasi-judicial capacity.³⁷

The constitutional implications of the conduct of a municipal official were next contemplated by the Vermont Supreme Court in *Eno v. City of Burlington* which involved an appeal from a decision by the Burlington Board of Aldermen.³⁸ The Board of Aldermen upheld a decision by the city's building inspector and survey board to condemn and order the demolition of a building found to be a fire and health hazard.³⁹ After the building inspector's testimony before the Board of Aldermen, but prior to the landowner's or any of the landowner's witnesses' testimony, one of the board members moved that the Building Inspector immediately proceed with tearing down the building.⁴⁰ The landowner requested that the board member remove himself from the proceeding because he had "obviously" prejudged the case.⁴¹ The board member refused to step down and the Board, after hearing the remainder of the testimony, ordered the building removed.⁴²

The *Eno* court held that the Alderman's motion, by itself, was not of a character to necessitate his disqualification.⁴³ Because there was no indication that the incident had an undue influence on the other members of the Board and because there was plenty of evidence to support the Board's determination, the court upheld the decision. The court concluded that a board member's premature motion in favor of a particular outcome, "although indiscreet and unwise, without more, does not in and of itself sufficiently establish plaintiff's claim of prejudice or operate as a disqualification."⁴⁴

The Vermont Supreme Court looked at the issue of prejudice again in *In re Davenport*.⁴⁵ *Davenport* involved a decision by the Town of Hartford School Board to suspend three teachers for their participation in a student petition⁴⁶ and protest of the United

37. *Emerson*, 117 Vt. at 279, 90 A.2d at 915.

38. *Eno v. City of Burlington*, 125 Vt. 8, 209 A.2d 499 (1965).

39. *Id.* at 10, 209 A.2d at 502.

40. *Id.* at 10-11, 209 A.2d at 502.

41. *Id.*, 209 A.2d at 502.

42. *Id.*, 209 A.2d at 502.

43. *Id.* at 15, 209 A.2d at 505.

44. *Id.*, 209 A.2d at 505 (citing *State v. Rickert*, 124 Vt. 380, 383, 205 A.2d 547, 550 (1964)); *Green v. Laclair*, 91 Vt. 23, 99 A. 244 (1916).

45. *In re Davenport*, 129 Vt. 546, 283 A.2d 452 (1971) (involving a direct appeal from a decision of a school board).

46. The petition in question "requested permission from the school board to procure

States involvement in the Vietnam War.⁴⁷ The teachers challenged their suspension, arguing in part that the Board's action violated their constitutional right to due process because the tribunal that heard the appeal of their suspension was the same body that both denied the petition and issued the suspension.⁴⁸

The court recognized that the difficulty posed in this case resulted from an administrative body having both administrative and quasi-judicial functions.⁴⁹ However, it concluded that, absent any actual evidence of bias sufficient to preclude an impartial hearing, "prejudgment founded on prior participation will not oust the only tribunal that has authority to act in the premises."⁵⁰ The *Davenport* court noted that the mixture of administrative and judicial functions by one governmental body may raise issues of impartiality, but it provided little specific guidance as to what behavior would be impermissible.⁵¹

The *Emerson* and *Davenport* cases are interesting not only because they discuss the constitutional implications of prejudgment, but because they both also involve the rule of necessity. The rule of necessity is a common law exception to the general rule that an official must recuse himself if biased or prejudiced against one of the parties.⁵² According to this rule, "an administrative officer exercising [quasi-judicial] functions may act in a proceeding wherein he is disqualified by bias or prejudice if his jurisdiction is exclusive and there is no legal provision for calling in a substi-

school release time for the purpose of having a symposium or class discussion in protest of the nation's involvement in Southeast Asia" *Id.* at 557, 283 A.2d at 457.

47. *Id.* at 556-59, 283 A.2d at 457-59.

48. *Id.* at 554-55, 283 A.2d at 456.

49. *Id.* at 555, 283 A.2d at 456. The court noted that such a mixture of judicial and administrative power is constitutionally permissible so long as the "combination is incidental to the primary governmental function of the administrative body." *Id.*, 283 A.2d at 456. In this case, the primary governmental function of the school board was to manage the schools within its district, and, accordingly, that it acted in both a judicial and administrative capacity to further this purpose was permissible. *Id.*, 283 A.2d at 456.

50. *Id.*, 283 A.2d at 456. The court stated that "[c]ourts cannot assume in advance that an administrative hearing will be unfairly conducted. This holds true even though the hearing is by the same authority that preferred the charges." *Id.*, 283 A.2d at 456 (citing *Fahey v. Mallonee*, 332 U.S. 245 (1947)).

51. *Davenport*, 129 Vt. at 555-56, 283 A.2d at 456. The court restated the general rule that a claim of prejudgment by a board, absent any evidence of actual prejudice, will not be sufficient to require disqualification, and held that the fact that the quasi-judicial body was reviewing their own decision did not, alone, constitute a sufficient basis to establish that the board had prejudged the issues before it. See also *Eno*, 125 Vt. at 15, 209 A.2d at 505; *Emerson*, 117 Vt. at 279, 90 A.2d at 915.

52. *Emerson*, 117 Vt. at 279, 90 A.2d at 915.

tute."⁵³ Therefore, where a board has exclusive decision-making authority and the recusal of the official would preclude the board from making the decision, a mere showing of prejudgment or conflict of interest will be insufficient to require removal of the official.⁵⁴ In *Davenport*, however, the court qualified this rule by holding that "[w]here actual bias exists to the point of precluding an unbiased hearing, no rule of necessity will supplant a constitutionally protected right."⁵⁵

The prejudgment issue arose again more recently in *In re Judy Ann's Inc.*⁵⁶ In that case, the Vermont Supreme Court held that members of the Burlington Liquor Control Commission did not abuse their discretion by failing to disqualify themselves when they had already taken public positions on the issue before the Commission.⁵⁷ The court held that "[a]bsent a showing that a commissioner is not 'capable of judging a particular controversy fairly on the basis of its own circumstances,' . . . disqualification is not required."⁵⁸ The court also held that "[t]he presumption of honesty and integrity which attaches to administrative tribunals . . . is not rebutted by bare allegations of bias."⁵⁹

In re State Aid Highway No. 1, Peru, Vt. is the only case in which the Vermont Supreme Court reversed a decision of an administrative board because of bias or conflict of interest. *State Aid Highway* involved an appeal to the Vermont Environmental Board of the District Environmental Commission's determination that state highway improvements required a state environmental permit.⁶⁰ The Vermont Natural Resources Council (VNRC), an environmental organization, was given party status in the appeal. The

53. *Id.*, 90 A.2d at 915.

54. A typical example of when the rule of necessity comes into play involves a five member board, which requires a quorum of three to take any action. VT. STAT. ANN. tit. 1, § 172 (1985). If there is a vacancy on the board and another member has recused herself from the matters, the rule of necessity will operate to prevent the removal of any of the other board members, unless actual wrongdoing can be shown, since unless all three remaining board members participate, no board action may be taken.

55. *Davenport*, 129 Vt. at 555, 283 A.2d at 456.

56. *In re Judy Ann's Inc.*, 143 Vt. 228, 464 A.2d 752 (1983).

57. *Id.* at 235, 464 A.2d at 756.

58. *Id.* at 234, 464 A.2d at 756 (citing *Hortonville Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493 (1976)).

59. *Judy Ann's*, 143 Vt. at 233, 464 A.2d at 755. Cf. *In re Crushed Rock*, 150 Vt. 613, 621, 557 A.2d 84, 89 (1988) (prejudgment of legal issues will not result in disqualification, particularly where appeal of legal issues to a court is possible).

60. *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 328 A.2d 667 (1974).

conflict of interest issue arose because one of the members of the Environmental Board was on the governing board of VNRC, and another member was a financial contributor to VNRC.⁶¹

Referring to the standards that generally apply to the judiciary, the court in *State Aid Highway* stated that there is a strong "necessity for impartiality and the avoidance of even the appearance of partiality in [the] judicial process."⁶² Pointing to the American Bar Association's Code of Judicial Conduct,⁶³ the court held that the member of the Environmental Board who was also a member of the VNRC governing board should have disqualified herself.⁶⁴ Nonetheless, the court held that the second Environmental Board member's contribution to VNRC was grounds for disqualification only "if his contribution or feelings generally were sufficient to give him an interest in the event."⁶⁵ In addition, the court noted that the board members should have made a full disclosure on the record, explaining the reasons for not disqualifying themselves. The board members also should have sought a waiver from the parties.⁶⁶

Although the court in *State Aid Highway* indicated that the same strict ethical standards which apply to the judiciary also will apply to administrative boards, this case has uncertain precedential value in light of a more recent decision, *In re Crushed Rock*.⁶⁷ In *Crushed Rock*, the court made it clear that administrative boards are not held to the same ethical standards as the judiciary.⁶⁸ The court noted that the Code of Judicial Conduct, enacted

61. *Id.* at 7-9, 328 A.2d at 668-70.

62. *Id.* at 9-10, 328 A.2d at 670.

63. At the time of this decision the Code of Judicial Conduct had not yet been adopted in Vermont. See Vermont Supreme Court Administrative Order No. 10, VERMONT CODE OF JUDICIAL CONDUCT (1988).

64. *State Aid Highway*, 133 Vt. at 9, 328 A.2d at 670. The court reasoned that the member of the VNRC governing board was prohibited from participating in the decision pursuant to title 12, § 61 of Vermont Statutes Annotated, which prohibits judicial officers from acting when there is a conflict of interest. Apparently, the Court felt that participation on a governing board of an organization created a sufficient interest to require disqualification on matters involving that organization. *Id.*, 328 A.2d at 670.

65. *Id.*, 328 A.2d at 670.

66. *Id.* at 10, 328 A.2d at 670. The court referred to Canon 3 of the ABA Code of Judicial Conduct which relates to impartiality and "suggested that the parties and lawyers, independently of the judge's participation, may agree in writing that his relationship is immaterial or his financial interest insubstantial, so that he is not disqualified." *Id.*, 328 A.2d at 670.

67. *In re Crushed Rock*, 150 Vt. 613, 557 A.2d 84 (1988).

68. *Id.* at 623, 557 A.2d at 90. See also *infra* text accompanying notes 71-79.

pursuant to title 4, section 3 of the Vermont Statutes Annotated, permits the Supreme Court "to adopt a code of judicial ethics which shall be binding on [judicial] officers for disciplinary purposes."⁶⁹ Because the Code of Judicial Conduct is adopted by administrative order of the court rather than by the legislative process, the court reasoned that an extension of the code to local government officials would allow the judiciary to regulate the conduct of administrative and legislative officials and would violate the separation of powers envisioned by the Vermont Constitution.⁷⁰ Consequently, the court determined that the ethical standards in the Code of Judicial Conduct will not apply to officials outside the judicial branch of government.

Crushed Rock is also notable because it is the Vermont Supreme Court's most recent consideration of the federal due process issues associated with the conduct of administrative officers. The court determined that no due process violation occurred even though the State Environmental Board initiated a permit enforcement proceeding in superior court before holding its own permit revocation hearing.⁷¹ The court stated that "prejudgment of the law does not normally rise to a due process violation."⁷² Consequently, the Board's initiation of a proceeding "after determining that there was sufficient cause to believe that the permit-holder had violated the permit would not create an unacceptable risk of bias to overcome the presumption of honesty and integrity" that ordinarily attaches to board proceedings.⁷³ The court also noted that, in this case, there was none of the "personal intermixing of roles that normally is a hallmark of a due process violation" because, although the Board apparently authorized the legal action, the Attorney General pursued the action without further involvement of the environmental board members.⁷⁴

Although Vermont case law makes it clear that "biased officials" must disqualify themselves,⁷⁵ the degree to which the court will tolerate bias before requiring disqualification is unclear. Pre-

69. *Crushed Rock*, 150 Vt. at 623, 557 A.2d at 90 (quoting VT. STAT. ANN. tit. 4, § 3 (1988)). The court noted that the Code would only apply to other government officials if the legislature expressly extends it to non-judicial branch officials. *Id.*, 557 A.2d at 90.

70. *Id.*, 557 A.2d at 90. See *supra* text accompanying notes 23-27.

71. *Crushed Rock*, 150 Vt. at 622, 557 A.2d at 90.

72. *Id.* at 621, 557 A.2d at 89.

73. *Id.* at 619, 557 A.2d at 88.

74. *Id.* at 621-22, 557 A.2d at 89.

75. See *supra* text accompanying notes 52-59.

judgment of facts or law is apparently not enough to constitute impermissible bias;⁷⁶ nor is prior participation in a matter under consideration by a board sufficient in itself to disqualify officials.⁷⁷ In order to establish a violation of constitutional due process, one who questions the integrity of an official must surmount the presumption of honesty and integrity which government officials enjoy.⁷⁸ Finally, conflicting Vermont Supreme Court precedents do not make it clear whether the judicial standard of avoidance of even the appearance of impropriety applies to municipal officials.⁷⁹

B. Vermont Statutory Standards

Like Vermont case law, Vermont statutory law provides few clear standards for the conduct of local government officials. No state legislation exists that directs or limits the ethical conduct of municipal officials significantly. However, certain statutes do provide limited guidance to local government officials.⁸⁰ Also, in a limited number of cases, the legislature has enacted municipal charters which include standards of ethical conduct.⁸¹

For example, in order to avoid the conflicts which might arise from a single person holding two public offices simultaneously, Vermont statutes prohibit a single person from holding more than one of the listed "incompatible offices."⁸² In addition, Vermont

76. See *Crushed Rock*, 150 Vt. at 623, 557 A.2d at 90; *Judy Ann's*, 143 Vt. at 233-34, 464 A.2d at 755-56; *Eno*, 125 Vt. at 11, 209 A.2d at 502-03.

77. See, e.g., *Hortonville Sch. Dist. v. Hortonville Educ. Ass'n*, 426 U.S. 482, 492-93 (1976); *Davenport*, 129 Vt. at 555, 283 A.2d at 456.

78. See, e.g., *Davenport*, 129 Vt. at 556, 283 A.2d at 457.

79. Compare *Crushed Rock*, 150 Vt. at 623, 557 A.2d at 90 (judicial ethical standards inapplicable outside the judiciary branch of government) with *State Aid Highway*, 133 Vt. at 9, 328 A.2d at 670 (judicial ethical standard applies to environmental board proceeding). These conflicting precedents do not make it clear whether the judicial standard of even the appearance of impropriety applies to municipal officials.

80. See, e.g., VT. STAT. ANN. tit. 17, § 2647 (1982) (incompatible offices); VT. STAT. ANN. tit. 24, §§ 932-933 (1975) (prohibition on fixing own compensation); VT. STAT. ANN. tit. 13, § 1102 (1974 & Supp. 1990) (prohibition on accepting gifts); VT. STAT. ANN. tit. 13, §§ 1106-1107 (1974 & Supp. 1990) (prohibition against kickbacks); and VT. STAT. ANN. tit. 12, § 61(a) (1973 & Supp. 1990) (conflicts of interest).

81. See *supra* note 10.

82. VT. STAT. ANN. tit. 17, § 2647 (1982 & Supp. 1990) and VT. STAT. ANN. tit. 16, § 558 (1989 & Supp. 1990). Note that most incompatibility exists because one office has discretionary authority or oversight over another, or because statutory duties may conflict. For example, title 17, § 2647 prevents the auditor from also serving as town treasurer, since it is the auditor's responsibility to ensure that the treasurer is doing his job properly. VT. STAT. ANN. tit. 17, § 2647 (1982 & Supp. 1990). The common law rule of incompatibility holds generally that when an officer accepts the second, incompatible office, resignation of the first

statutes prohibit town officials and employees from fixing their own compensation.⁸³ These statutes may be an attempt both to prevent local government officials from facing clear conflicts of interest and to reduce temptation to use public service for private gain.

Other statutes make certain actions by government officials criminal offenses. It is a crime to solicit or accept gifts with the understanding that the gift will influence any matter within the official capacity of the town official.⁸⁴ It also is illegal for a governmental official to solicit or accept kickbacks from persons applying for a permit or license, or seeking to contract for labor or services with the governmental unit.⁸⁵ Moreover, laws against larceny and embezzlement apply to local government officials.⁸⁶

Finally, those acting in a judicial capacity will be disqualified for certain conflicts of interests.⁸⁷ Specifically, title 12, section 61(a) provides:

A justice of the supreme court, judge, juror or other person shall not act in a judicial capacity or as trier of a cause or matter in which he has been retained or acted as an attorney or counsel, or is interested in the event of such cause or matter, or is related to either party . . . within the fourth degree of consanguinity or affinity⁸⁸

office will be imputed. See 2(a) CHESTER J. ANTIEAU, MUNICIPAL CORPORATION LAW § 22.20 (rev. 1990).

83. VT. STAT. ANN. tit. 24, §§ 932-933 (1975). These statutes require the town to vote the compensation of officers at the annual town meeting. If the voters fail to do so, § 933 allows the selectmen to fix all of the salaries except their own. In this situation, the town auditors are assigned the responsibility of fixing the selectmen's compensation. *Id.*

84. VT. STAT. ANN. tit. 13, § 1102 (1974 & Supp. 1990). A person who violates this section, for gifts valued at less than \$500, faces up to two years in prison and up to a \$5,000 fine. If the value of the gift is over \$500, the penalty is up to 10 years in prison and up to a \$10,000 fine. *Id.*

85. See VT. STAT. ANN. tit. 13, §§ 1106-1107 (1974 & Supp. 1990).

86. See *id.* §§ 2501-2502, 2531.

87. VT. STAT. ANN. tit. 12, § 61(a) (1973 & Supp. 1990). See *In re State Aid Highway, No. 1, Peru, Vt.*, 133 Vt. 4, 328 A.2d 667 (1974) (applies title 12, § 61(a) to administrative tribunal). Note that the impact of this statute on local government bodies is limited because the Vermont Supreme Court held in *In re Crushed Rock* that this statute will not disqualify officials who combine both quasi-judicial and administrative functions on the basis of this combination of functions alone. *In re Crushed Rock*, 150 Vt. 613, 557 A.2d 84 (1988).

88. VT. STAT. ANN. tit. 12, § 61(a) (1973 & Supp. 1990). Although *In re State Aid Highway No. 1, Peru, Vt.* cited title 12, § 61(a) for the more general proposition that judicial officers must avoid even the appearance of conflict of interest, the precedential value of this interpretation is questionable in light of *Crushed Rock*. *State Aid Highway*, 133 Vt. at 9, 328 A.2d at 670; *Crushed Rock*, 150 Vt. at 623, 557 A.2d at 90.

The Vermont Supreme Court has determined that this section applies to administrative officers acting in a quasi-judicial capacity, and there is no reason to believe that it does not also apply to municipal officials.⁸⁹

Vermont statutory law provides more specific guidance for municipal officials than case law. Bribery, graft, kickbacks, and embezzlement are all prohibited.⁹⁰ However, like Vermont case law, Vermont statutory law gives little guidance with respect to the degree of conflicting interest required for a disqualification under section 61(a).⁹¹ Moreover, even if an official violates the prohibition against acting with conflict of interest, there are no clear, fast, or easy means either for enforcing this obligation or for prosecuting a violation.

C. Local Ordinance or Policy

In Vermont only six municipalities have charters which either include or enable the selectboard to adopt codes of ethics to govern the conduct of municipal officials and employees.⁹² Two other towns have policies regulating the ethical conduct of officials who administer grants from the Vermont Community Development Fund.⁹³ Still other towns include rules of ethical conduct in their

89. See *State Aid Highway*, 133 Vt. 4, 328 A.2d 667.

90. See *supra* notes 84-86 and accompanying text.

91. For example, when an organization to which an official belongs takes a strong position on an issue before the board, is there a conflict of interest requiring removal? If the organization is a party to the action before the board, the court indicates that it is only necessary for that official to remove himself if his feelings were "sufficient to give him an interest in the event." *State Aid Highway*, 133 Vt. at 9, 328 A.2d at 670. What if the board member was not a member of any organization, but simply had very strong feelings on the issue? In *In re Judy Ann's Inc.*, the court held that the mere fact that a board member had taken public positions on an issue prior to the hearing on the matter was not sufficient alone to require disqualification. *In re Judy Ann's Inc.*, 143 Vt. 228, 233, 464 A.2d 752, 755 (1983). Or, what if the official was married to someone who was outspoken publicly on the issue before the board?

92. Burlington and Windsor have codes of ethics as part of their municipal charters. BURLINGTON, VT., CHARTER § 133; WINDSOR, VT., CHARTER ch. 4, § 31. Middlebury, Colchester, Brattleboro, and Rutland have codes of ethics in the form of a municipal ordinance authorized by the municipal charter. BRATTLEBORO, VT., ETHICS CODE art. 2 (1978); COLCHESTER VT., CODE OF ETHICS §§ 1-10 (1972); Middlebury, Vt., Selectmen's Rules Relating to Conflicts of Interest on the Board of Selectmen; RUTLAND, VT., CODE OF ETHICS §§ 451-460 (1982).

93. See Bradford, Vt., Code of Ethics for Administration of Vermont Community Development Program (Sept. 28, 1989); Middlebury, Vt., Code of Ethics for Administration of Community Development Program (Aug. 7, 1990). These policies are designed to cover all public officials, employees, and affected contractors who are involved with the Vermont

personnel rules,⁹⁴ and local boards have been known to adopt ethical policies to govern their own proceedings.⁹⁵

A major reason for the paucity of municipal codes of ethics is the limited authority of the local legislative body to enact such codes. The lack of specific enabling legislation from the state prevents local legislative bodies from enacting municipal ordinances to govern the conduct of local officials and boards.⁹⁶ Absent an authorizing charter provision, the selectboard, city council, or trustees may only regulate the conduct of their own boards through a written policy and municipal officials through a personnel manual.⁹⁷ Municipal legislative bodies have no authority to regulate the conduct of other elected officials or independently authorized local boards.⁹⁸ Even in the limited situations in which ethical standards have been adopted, no recourse generally exists for breaches of these standards.⁹⁹ In conclusion, local governments cannot turn ef-

Community Development Program. It prohibits all conflicts and all appearance of conflicts of interest and requires all procurement actions to be open to public review.

94. See, e.g., Montpelier, Vt., Personnel Manual; Shelburne, Vt., Personnel Manual (June 14, 1988); Stowe, Vt., Personnel Manual (May 22, 1989). The Montpelier policy includes prohibitions on the receipt of gifts, use of confidential information, pecuniary interests in city contracts, and use of office for personal gain. The Shelburne policy is somewhat different than the Montpelier code, including provisions on favoritism, self-interest, nepotism, and incompatible employment, as well as provisions concerning gifts and confidentiality. The Stowe policy regulates the use of office for personal or political gain, personal use of town property, pecuniary interest in city contracts, or decisions of the town, and receipt of gifts or benefits in exchange for political favor.

95. Selectboards and zoning boards have, on occasion, adopted policies regarding conflict of interest, but without specific statutory authority these policies have no effective enforcement mechanisms.

96. Note that, as a creature of the state, a municipality may only regulate when expressly authorized by the state legislature to do so. See *supra* note 27.

97. See VT. STAT. ANN. tit. 24, § 872 (1975 & Supp. 1990). This statute authorizes the selectboard to adopt rules relating to personnel administration. Although not specifically listed in the statute, presumably such rules could include standards of ethical conduct for municipal employees. However, these rules do not apply to employees of the town school district or to the officers of the municipality with the exceptions of the zoning administrator and police and fire department officers.

98. Title 24, § 872 limits the selectboard's powers to act in areas reserved for other officers of the municipality. VT. STAT. ANN. tit. 24, § 872 (1975 & Supp. 1990). This limitation has been interpreted by the Vermont Supreme Court to mean that the selectboard cannot tell other elected officials how to do their jobs unless specifically instructed to by the statutes. For example, absent specific statutory authority, the selectboard may not prescribe the town clerk's record keeping methods. See *Bennington v. Booth*, 101 Vt. 24, 140 A. 157 (1928).

99. In extreme situations, a violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution may be alleged. Such a challenge often involves a court proceeding that is entirely disproportionate in scope and expense to the municipal action in question. Therefore, recourse under the Due Process Clause may not be

fectively to constitutional law, case law, or statutory law for much guidance concerning ethical standards for municipal officials.

II. THE NEED FOR EXPRESS STANDARDS

Some observers opine that municipal codes of conduct to provide standards for officials are not necessary because the political process will oust officials whose moral conduct is less than exemplary. Unfortunately, in Vermont the political process does not often succeed at this. There are no general statutory provisions for recall or impeachment of elected local government officials, and only a few municipal charters have such provisions.¹⁰⁰ Consequently, the only remedy for a town burdened with a public official who is acting unethically is to wait until that person's term expires and then to elect someone else to that position. This solution has obvious limitations. Because most voters have short term or selective memories, the passage of time may diminish the importance of the ethical breach. In addition, it is often difficult to find citizens willing to run for local elective office, and, as a result, most officials run unopposed.¹⁰¹

The lack of guidance facing municipal officials is exacerbated by the fact that, in Vermont, most municipal actions are never reviewed by a court. The superior court generally considers appeals from municipal matters *de novo*.¹⁰² Lack of appellate review means

practical.

100. See, e.g., BRATTLEBORO, VT., ETHICS CODE § 5.5-37 (1978); BURLINGTON, VT. CHARTER § 133(c); COLCHESTER, VT. CHARTER § 203; MIDDLEBURY, VT. CHARTER § 307; SPRINGFIELD, VT. CHARTER § 111(B)(4). Absent a specific charter provision, no elected official has the authority to remove another elected official for any reason. However, the general rule is that an official who has the power to appoint a particular official also has the inherent authority to remove that official. See also *Rutter v. Burke*, 89 Vt. 14, 93 A. 842 (1915) (can only remove appointee for incapacity, negligence, or misconduct). See generally EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 12.115 (3d ed. 1990). In Vermont, this rule has been narrowed. The appointing officer may only remove the appointed official "based on a verifiable breach of statutory duty that constitutes, at law, the claimed inefficiency or neglect of duty." *Davis v. Cain*, 127 Vt. 296, 299, 248 A.2d 688, 691 (1968).

101. There have been a number of well-known cases in other states involving public officials who are reelected to office while serving a prison term or while under indictment for corrupt practices. See, e.g., *Alaska Lawmaker on Trial for Machine Gun Possession*, Jan. 1, 1991, available in LEXIS, Nexis Library, UPI file; Wayne King, *Our Towns; When Patronage is King, Contracts are for the Loyal*, N.Y. TIMES, Nov. 17, 1989 at B1; *Imprisoned State Legislator Easily Elected to an Eighth Term*, N.Y. TIMES, Nov. 8, 1984 at A21. More than one municipal official in Vermont has rationalized unethical behavior by pointing to their consistent reelections despite repeated questionable actions.

102. For example, when deciding appeals from zoning boards, the superior court disre-

that courts rarely have an opportunity to judge the propriety of the moral conduct of municipal officials. Thus, the courts are unable to provide standards for the behavior of local public servants.

The general lack of ethical standards for Vermont's municipal officials results in a public perception that local government boards and officials may function without any concern for ethical propriety beyond the basic legality of their actions.¹⁰³ The problems that arise from this paucity of standards often have serious and complex ramifications for the general public, as well as for those who must deal directly with municipal boards and officials. These problems are compounded by the inability of the political process to handle ethical breaches quickly or effectively.

III. SPECIFIC ETHICAL CONCERNS

Before presenting possible solutions to municipal officials' need for ethical guidance, it is necessary to further define specific ethical concerns which municipal officials face. One scholar, Professor York Willbern, has studied the various components of municipal ethics¹⁰⁴ and has formulated six types of ethical considerations that face local government officials: "(1) basic honesty and conformity to law; (2) conflicts of interest; (3) service orientation and procedural fairness; (4) the ethic of democratic responsibility; (5) the ethic of public policy determination; and (6) the ethic of compromise and social integration."¹⁰⁵ In his article, Professor Willbern differentiates between the first three issues and the last

gards the evidentiary record developed during the zoning board proceeding. Rather, the superior court proceeds as though there were no prior proceedings in the matter and develops the evidentiary record anew. See VT. STAT. ANN. tit. 24, § 4472 (1975 & Supp. 1990). See also *In re Poole*, 136 Vt. 242, 245, 388 A.2d 422, 424 (1978). Because its review was *de novo*, superior court was required to set its own permit conditions rather than simply to affirm the decision below. *Poole*, 136 Vt. at 245, 388 A.2d at 424.

103. In fact, in Vermont, unless a board adopts its own ethical guidelines, there are no legal constraints on the behavior of local government officials, except in extreme situations such as bribery, graft, embezzlement, and conflicts of interest. See *supra* text accompanying notes 90-91.

104. York Willbern, *Types and Levels of Public Morality*, 44 PUB. ADMIN. REV. 102, 103-04 (1984). Professor Willbern makes an initial distinction between what he calls "the ethical behavior (honesty, rectitude) of the official and consideration of the moral content of the public policy or action the official promulgates or carries out." *Id.* at 102. Willbern notes that although most public criticism of officials is based on violations of the former concerns, the latter concerns may have more far reaching consequences for public faith in local government. *Id.*

105. *Id.* at 103-04.

three. The first three issues deal with the ethical responsibility of the public official with respect to his or her individual moral conduct; the second three ethical concerns take a broader view of municipal ethics by holding local government responsible for the ethical implications and consequences of its policies.¹⁰⁶ Willbern notes that honesty, conflict of interest, and procedural fairness deal with the "conduct of public officials as they go about their business."¹⁰⁷ In contrast, democratic responsibility, public policy determination, and compromise and social integration involve intrinsic morality. These last three ethical components concern the "moral choices involved in deciding *what* to do, in pursuing the purposes of the state and the society."¹⁰⁸ Codes of conduct for municipal officials are usually confined to the first three issues cited by Willbern;¹⁰⁹ ethical considerations, both with respect to the functioning of the democratic process and with respect to the moral implications of various policy decisions, generally are not included in municipal codes.¹¹⁰

Professor Willbern reasons that attention is not generally focused on the last three areas of concern because they involve more intricate decisions and policy making "in which the individual moral responsibility is shared with others in complex ways."¹¹¹ It may also be that codes of ethics are not generally designed to address ethical implications of governmental policy and processes because they involve systemic difficulties which would require radical change in our notions of government accountability.¹¹² Professor

106. *Id.*

107. Willbern, *supra* note 104, at 103.

108. *Id.*

109. See, e.g., MIDDLEBURY, VT. CHARTER, RULES RELATING TO CONFLICT OF INTEREST; RUTLAND, VT., CODE OF ETHICS §§ 451-460 (1982 & amend. 1988).

110. Willbern, *supra* note 104, at 103. For example, the ethical implications surrounding decisions that affect who is a part of the political process and who is excluded from it ordinarily are not included in municipal codes of conduct.

111. *Id.*

112. One author comments that in order to address Professor Willbern's concerns for the morality of government decisions and actions

[g]overnmental ethics . . . must also encompass the policy making functions of government officials. . . . Officials that are unwilling or unable to provide justification for their decisions are abrogating their responsibility and undermining the ethical foundations of our democratic system. Democracy can no longer tolerate officials who make decisions contemplating only short term consequences and the official's immediate 'Gallup Poll' standings.

Larson, *supra* note 6, at 405.

The National League of Cities recently published *Standards of Conduct and Guidelines for Government Decision Makers* which creates standards that enunciate public offi-

Willbern's categories will provide a framework for the following discussion of ethical concerns in Vermont.

A. *Basic Honesty and Conformity to the Law*

Municipal officials, like all members of society, are morally obligated to obey the law.¹¹³ Conformity to the law is particularly important for public officials and employees because they are vested with the authority of the state and are highly visible to the public.¹¹⁴ Nonetheless, Professor Willbern notes that "the fact that public officials are vested with the power of the state produces more danger and more opportunity for transgression of the basic moral code."¹¹⁵ Not only may "[p]ower and access to public goods provide more temptation; the necessity to communicate and deal regularly with the public may lead to more occasion to prevaricate or to ignore promises and commitments."¹¹⁶

In Vermont, as elsewhere, situations arise in which individual municipal officials act as though they are immune from the ordinary constraints of the law. In the past decade there have been numerous incidents of embezzlement, graft, and kickbacks. More recently, the stress of the need to comply with state and local regulations has resulted in incidents of falsification of records and environmental reports.¹¹⁷ While these incidents are certainly damaging to the public's trust in local government, more subtle and less

officials' responsibility to pursue the public interest and to ensure public respect when formulating and implementing public policy. See Thom McCloud, *Standards of Conduct and Guidelines for Government Decision Makers: Spelling Out Do's and Don'ts of Ethics in Government*, NATION'S CITIES WEEKLY, July 15, 1991 (Special Report) (summary of standards and guidelines endorsed by the National League of Cities' Board of Directors). These standards emphasize the need to protect minority interests as well as the more traditional prevention of the use of public office for private benefit. *Id.* Moreover, these standards substantially meet some of the concerns expressed by Professor Willbern, and will be considered in greater detail in section III.D of this article.

113. Most political philosophers have agreed that there is a prima facie obligation to obey the law. One political philosopher, John Rawls, has written that "at least in a society such as ours, [there is] a moral obligation to obey the law, although it may, of course, be overridden in certain cases by other more stringent obligations." John Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (S. Hook ed., 1964).

114. See Willbern, *supra* note 104, at 103.

115. *Id.*

116. *Id.*

117. Notable cases in the past few years have involved embezzlement by the treasurers or town clerks of Northfield, Bakersfield, Manchester, and Stannard. Other notable cases have involved graft and kickbacks in Bennington and falsification of records in Websterville, Fair Haven, and Essex Junction.

spectacular dishonest practices often have the greatest negative effect on public confidence in local government.

For example, it is not uncommon for a town's zoning administrator to "bend" the zoning rules for his friends or relatives, for a town clerk to exempt herself from filing fees, or for a town animal control officer to exempt himself from the requirements of the local dog ordinance. It is also not unusual to hear about a town highway foreman using the town grader to fix his own driveway, or a town manager using the town mowers to cut her lawn. In addition, nepotistic practices are not uncommon, particularly in Vermont's smallest communities. Municipal officials have been known to award contracts for snow removal or construction services to friends, relatives, or even themselves. Generally, the more extreme cases of dishonesty and lawlessness are controlled adequately by the application of Vermont's criminal laws.¹¹⁸ The more common, "minor" dishonest practices are harder to punish and almost impossible to prevent. While these incidents are well-known in the local communities in which they occur, they rarely are reported in local newspapers, almost never are challenged in court, and seldom are raised at town meeting. These problems are systemic and create a significant impact on the public image of Vermont's local governments.

B. Conflict of Interest

Conflict of interest is probably the most common and the most difficult of the ethical issues facing local government officials in Vermont. Broadly stated, conflict of interest includes all occasions in which the private interest of an individual public official or employee influences the exercise of her official discretion or duties. Conflicts of interest arise in many forms. They may involve use of confidential information for personal gain,¹¹⁹ nepotism,¹²⁰ award of public contracts without competitive bidding,¹²¹ receipt of gifts

118. See *supra* text accompanying notes 80-91.

119. See, e.g., *Evans v. Hall*, 396 A.2d 334, 336 (N.H. 1978).

120. Nepotism is the "bestowal of patronage by public officers in appointing others to positions by reason of blood or marital relationship to appointing authority." BLACK'S LAW DICTIONARY (5th ed. 1979). Nepotism also includes appointment based on political party affiliation and, while it is generally prohibited by state law, it is very difficult to eradicate.

121. See, e.g., *Bergeron v. Jackson*, 94 Vt. 91, 98-99, 108 A. 912, 915 (1920) (violation of city charter when street commissioner's firm contracted with city to provide materials and services and city had not first advertised for bids).

from individuals or companies who deal with the local government,¹²² and use of public office to further personal goals.¹²³

As fiduciaries of the public, municipal officials have a particular obligation to act with exclusive loyalty to the government they serve. Private interests must not be put ahead of the more general public interest.¹²⁴ This disinterested service is particularly important in light of the fact that, as the regulatory authority of local governments has expanded, both the power of municipal officials to give or withhold privileges, such as zoning permits or liquor licenses, and the value of those privileges have grown.¹²⁵ For example, government contracts often involve significant sums of money and many businesses have come to rely on the receipt of such contracts. Therefore, the objective award of such contracts is important to insure that the municipality gets the best price possible and to protect the fiscal health of the community.¹²⁶

Although Vermont law clearly prohibits municipal officials from acting with conflicts of interest, the statutes and case law provide very little guidance to municipal officials who are faced daily with situations where their own interests and values might affect their public duties.¹²⁷ The existing standards do not acknowledge that some conflict of interest is inevitable insofar as individuals bring to public office unique perspectives, experiences, and values which necessarily affect the exercise of their duties. Moreover, the fact that a municipal official lives in the town in which she presides naturally will raise interesting and perplexing conflicts because, like all citizens, she is affected by the local government's decisions and regulations.¹²⁸ The question remains, how-

122. Some states, including Vermont, have statutes prohibiting officials from accepting gifts or benefits with the understanding that the gift will influence any matter within the official capacity of the public servant. See, e.g., Vt. STAT. ANN. tit. 13, § 1102 (1974 & Supp. 1990); N.Y. GEN. MUN. LAW § 809(d)(2) (McKinney Supp. 1991).

123. For example, a member of the planning commission in a town may have volunteered for the position precisely because she is anti-planning and wishes to thwart the planning process, or because she has strong feelings about how the town ought to be developed, and she wishes to push her views.

124. Willbern notes that the ethical issues surrounding conflicts of interest and conformity to the law intersect when officials embezzle, accept bribes, or pad expense accounts and who are obviously pursuing their own interests in contravention of the public trust. Willbern, *supra* note 104, at 104.

125. Zoning permits, liquor licenses, and sewer allocations are three examples of permits which, if denied, may have a major impact on the applicant's livelihood.

126. See generally 56 AM. JUR. 2D *Municipal Corporations* §§ 295-96 (1971).

127. See *supra* text accompanying notes 90-91.

128. For example, a zoning administrator who wishes to build on her own property in

ever, at what point does an individual's subjective interest in a matter create an impermissible conflict of interest requiring recusal from the situation?

Conflicts of interest are found most easily when the official or employee directly stands to gain financially from a decision. In this situation the public official or employee clearly would be disqualified from acting on the matter.¹²⁹ The issue becomes a bit more complex when the financial gain of the official or employee is indirect.¹³⁰ For example, when the official's father-in-law will gain financially from the transaction or when an organization to which the official belongs will gain financially, it is not clear that a court will find an impermissible conflict of interest.¹³¹ A court also might be less inclined to find that a conflict exists if a municipal official or employee stands to gain indirectly from a decision solely because of membership in an organization or in a particular profession.¹³² Nonetheless, the connection between an official's personal interests and official obligations need not be direct, immediate, or monetary to undermine the public's faith in local government.¹³³

The types of conflicts which arise vary depending on the public office. Many of the more subtle problems arise when officials with significant authority, such as selectpersons, mayors, and managers, must reconcile their personal and political goals with their official duties.¹³⁴ It may not be in local government's best interest

the town must make a permit application to herself, and a selectperson seeking a variance will have to appear before a zoning board that she has appointed. See VT. STAT. ANN. tit. 24, § 4463 (1975 & Supp. 1990) (No land development may be commenced without a permit issued by the zoning administrator.); VT. STAT. ANN. tit. 24, § 4461 (1975 & Supp. 1990) (zoning board appointed by the legislative body of the municipality).

129. See VT. STAT. ANN. tit. 12, § 61(a) (1973 & Supp. 1990).

130. See, e.g., *Fairbanks v. Rockingham*, 72 Vt. 419, 48 A. 654 (1900) (fact that justice was taxpayer in town and penalty or fine would go to town treasury is sufficient to disqualify him from determining liability or damages). See also *Waters v. Day*, 10 Vt. 487 (1838).

131. See *In re State Aid Highway No. 1, Peru, Vt.*, 133 Vt. 4, 9-10, 328 A.2d 667, 670 (1974).

132. For example, many members of planning commissions and zoning boards are realtors. If the effect of a decision on their profession in general would be a reason to disqualify a member, realtors would never be able to participate in any matters related to zoning or development.

133. Note that some courts require only direct pecuniary interests to cause a conflict; and for others, personal interest in the matter is sufficient. See, e.g., *Atherton v. Concord*, 245 A.2d 387, 388-89 (N.H. 1968) (requiring direct personal and pecuniary interest).

134. See also Jill Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587 (1991) (discussing *Austin* and corporate influence on elections and public officials). Cf. *Austin v. Michigan Chamber of Commerce*, 110 S.Ct. 1391, 1393-94 (1990) (Michigan statute

to exclude all individuals with relevant expertise from public service merely because that expertise may give rise to conflict of interest.¹³⁶ In smaller towns, a municipality would have a particularly difficult time trying to find volunteers for its boards if service required volunteers to sever all employment and business connections with the municipality.

The goal of local government must be to strike a balance between encouraging broad participation by respecting the legitimate personal interests of public officeholders and preventing conflicts of interest and biases which could adversely influence the objective functions of government.¹³⁶ Although it may be difficult to formulate set guidelines to achieve this balance, one author suggests that requiring disclosure of potential conflicts would, at the very least, help raise officials' level of awareness of potential impermissible conflicts.¹³⁷ Conflict of interest is an exceedingly subjective determination. However, because it is the paramount interest of local government to encourage public faith in the operation of government, disqualification of officials for conflict of interest should be based upon the "appearance of fairness" rather than upon actual influence.¹³⁸

C. Procedural Fairness

"Procedural fairness" is the ethical responsibility of municipal officials both to conduct proceedings and to fulfill their other duties with openness and objectivity and to treat all that come before

prohibiting corporations from using general funds to contribute to state elections helped to prevent corruption or appearance of corruption.)

135. For example, one solid waste district determined that the best choice for district manager was the owner of two of the local landfills. The board reasoned that his expertise in the field of solid waste outweighed the danger of conflicts of interest that might arise because of his ownership of the landfills. The same rationale is frequently used to support the applications of realtors to planning commissions and planning boards.

136. Vermont statutes provide some limited rules to prevent some of the more blatant conflicts between personal interest and official duties. See, e.g., VT. STAT. ANN. tit. 17, § 2647 (1982 & Supp. 1990) (incompatible offices); VT. STAT. ANN. tit. 24, §§ 932, 933 (1975) (cannot fix own compensation); VT. STAT. ANN. tit. 13, §§ 1106, 1107 (Supp. 1990) (kickbacks).

137. See John D. Feerick et al., *Municipal Ethical Standards: The Need for a New Approach*, 10 PACE L. REV. 107, 113-15 (1990).

138. This approach is similar to the judicial doctrine of "appearance of impropriety" because like a judge, a municipal official would be disqualified whenever a disinterested person would be reasonably justified in thinking partiality existed. See *West Slope Community Council v. City of Tacoma*, 569 P.2d 1183, 1187 (Wash. 1977). See also Supreme Court Administrative Order 10, VERMONT CODE OF JUDICIAL CONDUCT Canon 2 (1988).

them equally. Procedural fairness encompasses issues of conflict of interest, prejudice, *ex parte* communications, and discrimination.¹³⁹

The fundamental service role of municipal government adds a moral component to procedural fairness. Government is created to provide a benefit to the public. This basic obligation to serve may become obscured in the official exercise of power and authority.¹⁴⁰ Professor Willbern noted that "there is real moral danger in the possibility that the authority comes to overshadow the service."¹⁴¹ However, the dangers associated with the arrogance of municipal officials are only one minor aspect of the concern for procedural fairness.

The moral and practical concerns related to procedural fairness arise in all aspects of municipal operations, particularly in small Vermont communities where everyone knows everyone else. For example, the town's zoning administrator will be tempted to treat with some skepticism an application made by a citizen she considers disreputable, even though a similar application from another citizen would receive immediate approval.¹⁴² Town listers are notorious for valuing properties according to whether the owners can afford to pay high taxes and, sometimes, according to whether the owners are year-round residents or vacation homeowners.¹⁴³ Finally, while a matter is pending before the zoning board of adjustment, board members often discuss the matter with one of the parties whom the board member may happen to meet on the street or at a social gathering. This discussion creates an opportunity for unfair advantage and the appearance of bias.

Municipal officials are given only limited guidance regarding the avoidance of situations which impede procedural fairness.

139. See Willbern, *supra* note 104, at 105-07.

140. *Id.* at 105.

141. *Id.*

142. Zoning administrators commonly ask whether they have to grant permit applications to an applicant who they know is operating an illegal junkyard, or who is delinquent in paying property taxes. These issues are unrelated to their obligation to grant applications when required by the ordinance.

143. Because listers have been inconsistent in their listing practices, and because the Vermont Constitution promises uniformity, one can infer that §§ 3481-3485 of title 32 were enacted to require the State Board of Appraisers and the Board of Civil Authority to determine whether the property on appeal was valued at a different level of fair market value than comparable properties. VT. STAT. ANN. tit. 32, §§ 3481-3485 (1983). See *Alexander v. Town of Barton*, 152 Vt. 148, 152-54, 565 A.2d 1294, 1296-98 (1989).

While extreme examples of bias and prejudice may rise to the level of constitutional violations,¹⁴⁴ in most instances they go unchallenged. Yet, frequent incidents of unethical behavior by municipal officials have a clear deleterious effect on the public's trust in local government. Because local governments are conducted generally in a relaxed and informal manner, even well-meaning officials may require specific standards to guide them.

D. Policy-making Functions

Issues of public morality involve more than a simple inquiry into the conduct of municipal officials and employees; they concern the intrinsic morality of government processes and policies.¹⁴⁵ Both local government policies and appropriation decisions often have long-term effects on the quality of life of particular citizens and particular constituencies of a community. These policies and decisions also may have permanent effects on the health of the environment and the economic well-being of the business community. Therefore, it is important that policy decisions be made openly and objectively, with the greatest possible concern for the general welfare of the community.¹⁴⁶ Officials do not often acknowledge the ethical obligations associated with their policy decisions; in many instances, vital and far-reaching decisions are based on parochial concerns for a particular constituency or particular individuals.

Professor Willbern has noted that the concern for objective policy making is part of a municipal official's obligation to respect the democratic ideals inherent in our system of government which requires public servants to respect the clear will of the people.¹⁴⁷ Accordingly, when making public policy determinations and when expending public funds, officials must consider the varied interests of the community and must act to preserve as many of these interests as possible. Where necessary, officials must compromise and must protect minority interests.¹⁴⁸

144. See *supra* text accompanying notes 38-66.

145. See *supra* text accompanying notes 107-12.

146. As one author has noted, "[g]overnmental ethics can no longer be limited to restrictions on individual conduct, but must also encompass the policy making functions of government officials." Larson, *supra* note 112, at 405. "To restore citizen faith in government, especially on the local level, local elected and appointed officials must understand the long term impacts of their decisions and consider those impacts in their decision making." *Id.*

147. See Willbern, *supra* note 104, at 106-07.

148. See *id.* at 107-08.

A recent report published by the National League of Cities (NLC), entitled *Standards of Conduct and Guidelines for Government Decision Makers*, recognizes the importance of these more subtle ethical considerations.¹⁴⁹ The report lays out a coherent set of principles to help public officials "discover the boundaries of propriety."¹⁵⁰ The guidelines express the need for policy makers to put the public interest over all else.¹⁵¹ Specifically, the report recognizes that it is important for government policy makers to pursue the broadest public good, without loyalty to a political party, to a narrow constituency, or to particular individuals when formulating policy and allocating public funds.¹⁵² Principles of representative democracy require policy to be made in the shadow of public accountability.¹⁵³ However, the will of the majority must be tempered "by a commitment to consider and protect the rights and advance the interest of minorities, especially those that are not sufficiently represented in the normal decision-making process."¹⁵⁴ Only when public officials recognize that both the determinations of public policy and the expenditure of public funds are essentially moral judgments that turn on considerations of human values, will government officials truly be accountable for the consequences of their policies and programs.

IV. POSSIBLE SOLUTIONS

There is a pressing need for legislative reform in order to allow municipalities to provide municipal officials, the majority of whom are above reproach, with guidance to insure that they follow high ethical standards. Local codes of conduct must provide specific standards of conduct for municipal officials. In addition, codes also must contain certain and immediate consequences for those public servants who dishonor all public servants either by using their offices to further private interests, or by violating our notions of openness and fairness in government. The municipality must strike

149. See McCloud, *supra* note 112.

150. *Id.*

151. *Id.*

152. Public servants, when formulating policy, "should put loyalty to democratic principles and to the broadest public good above loyalty to political party, their constituencies and individuals." *Id.*

153. The summary of the NLC guidelines state that when allocating funds and formulating general policies, officials must "evaluate information objectively and decide what is best for the public as a whole, not just for a narrow constituency." *Id.*

154. *Id.*

a delicate balance between insuring that ethical standards are followed and avoiding "overly burdensome requirements that would cause hardship to smaller municipalities and possibly discourage public service."¹⁵⁵

The issues surrounding local government ethics are complex and varied, and do not lend themselves to simple legislative solutions.¹⁵⁶ Reasonable people will disagree about what is or is not proper ethical conduct for municipal officials, and the propriety of particular conduct may vary depending upon the particular circumstances of the community involved.¹⁵⁷ Accordingly, any solution must provide for the utmost flexibility and maximum local control.

155. Feerick, *supra* note 137, at 112.

156. Other states have handled the issue of local government ethics in a variety of ways. Predictably, most states have case law and statutes which prohibit acting with conflicts of interest. See generally EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 12.126, 12.136 (3d ed. 1990 & Supp. 1990). Also, local government officials are often subject to state ethics acts which require avoidance of even the appearance of impropriety. *Id.* § 12.126. Among the New England states, Rhode Island has a code of ethics that, by constitutional mandate, applies to all municipal officials. R.I. CONST. art. 3, § 8. Massachusetts, Maine, New Hampshire, and Vermont all have specific statutes which address certain aspects of municipal ethics. See MASS. GEN. L. ch. 268A, §§ 2, 3, 11, 12, 17-20 (1980 & Supp. 1991); ME. REV. STAT. ANN. tit. 30-A, § 2605 (West Supp. 1990); N.H. REV. STAT. ANN. § 95:1 (1990); VT. STAT. ANN. tit. 12, § 61(a) (1973 & Supp. 1990). Maine and New Hampshire also have enabling legislation which allows the legislative body of each municipality to adopt a code of ethics to govern the conduct of its officials. See N.H. REV. STAT. ANN. § 31:39-a (1988); ME. REV. STAT. ANN. tit. 30-A, § 101 (West Supp. 1990). Finally, the Connecticut legislature allows its municipalities to establish local ethics boards or commissions to investigate allegations of unethical conduct by municipal officials and employees. CONN. GEN. STAT. ANN. § 7-148h (West 1989 & Supp. 1991).

157. For example, in a small town it might make sense to hire the planning commission member's landscaping company to mow the town green and cemetery, or to buy new road maintenance equipment from the road foreman's heavy equipment business. Ethical rules must recognize that in some instances, it is appropriate and necessary to permit a municipal official to contract with the town so long as that official does not participate in the decision-making process for awarding the particular contract. This rule recognizes that in many small towns, citizens would be hesitant to volunteer for public office if, by doing so, they would be prevented from contracting with the town for business. Moreover, in many instances, it is more convenient and less expensive for the town to contract with the local company for services rather than to contract with an outside company. It would not make sense to require the town to spend more than necessary merely because the lowest bidder is a municipal official. See Feerick, *supra* note 137, at 114.

A. Local Control

In order to provide local control over municipal ethics, the Vermont legislature should enact some form of enabling legislation that would permit local governments to promulgate local codes of ethics¹⁵⁸ and to create ethics boards or commissions to investigate and prosecute violations.¹⁵⁹ Local codes of ethics should merely supplement existing statutory law and case law and should be written with sufficient specificity to provide real and practical guidance to municipal officials.¹⁶⁰

For example, with conflict of interest, a bright line test cannot be created easily for balancing the various considerations involved. However, officials might be sensitized to potential "dangerous" conflicts if a public disclosure requirement were adopted for potential pecuniary or nonpecuniary interests.¹⁶¹ The municipality also might decide to adopt standards requiring officials to recuse themselves from any matter in which there is even an appearance of impropriety. On the other hand, the local government might choose to require evidence of actual bias or impermissible interest before recusal is mandated. Larger municipalities might choose to prohibit all contracts between the municipality and any public official, but smaller communities might choose simply to exclude public officials who bid on a contract from participating in the decision regarding the award of that contract.

A balance must be struck between the prevention of unethical conduct by public officials and the avoidance of unrealistic or unduly burdensome requirements which discourage public service. Each local government is best suited to strike its own balance based upon the particular needs and concerns of the community. If municipalities are authorized by statute to promulgate ethical standards and the municipalities promulgate such standards, officials will have the needed guidance to conduct themselves in an irreproachable manner. As a result, the public's faith in local government will be restored.

158. See *supra* text accompanying notes 96-98.

159. Note that such legislation could be quite simple. It could enable the local legislative body to promulgate rules of conduct, and could authorize the local legislative body to sit as an ethics board or commission. It could also make provisions for situations in which a member of the legislative body is under investigation.

160. See, e.g., *supra* text accompanying note 155.

161. See *supra* text accompanying notes 136-37.

B. Appellate Review

The rare review of local government actions by appellate tribunals also contributes to Vermont's paucity of ethical standards.¹⁶² In most cases, appeals from local board decisions are heard *de novo* by the superior court, and appeals to the supreme court are decided based upon the superior court's record.¹⁶³ One suggestion currently before the legislature is to make local officials more accountable for their conduct by eliminating *de novo* review of acts of local government boards who follow an administrative procedures act.¹⁶⁴ If this proposal is adopted by the Vermont legislature, the superior court's decision will then be based upon a review of the local board's proceeding. Appellate, rather than *de novo*, review of board actions will provide incentive for boards to act more thoroughly and professionally because a court will scrutinize their conduct. Appellate review also will result in further precedents to assist local governments in the formulation of ethical standards.

C. Recall, Removal, or Impeachment of Local Officials

Simply providing greater local regulatory guidance as well as appellate review of municipal conduct alone will not solve the crisis in confidence in local government. Unless municipal officials who violate ethical standards are held accountable quickly and unequivocally by the municipality, public faith in local government will continue to falter. At present, unless a municipal charter provides otherwise, municipal officials may not be removed, recalled, or impeached, no matter how seriously they may have violated their fiduciary responsibility to the public trust.¹⁶⁵ The obvious solution is for the State to enact legislation that would enable either the legislative body, acting as a municipal ethics board, to remove municipal officials, or the municipality to remove them by recall vote. The threat of removal or recall would provide the necessary teeth for any local government's ethical code and would give the public ultimate recourse against corrupt government officials.

162. See *supra* text accompanying notes 102-03.

163. For example, appeals from the Zoning Board of Adjustment and the Civil Board of Authority are heard *de novo* by the reviewing body.

164. See H. 293, 1991 Vt. Legis. Sess. See also VT. STAT. ANN. tit. 3, §§ 801-848 (1985 & Supp. 1990) (Administrative Procedures Act).

165. See *supra* note 100.

CONCLUSION

Municipal officials have the paramount responsibility of preserving the public trust and acting to further the public interest. In so doing, these officials have a moral imperative to exercise their power and authority in an irreproachable manner. Currently, Vermont case law and statutory law provide only minimal guidance to officials. Without clear guiding standards, municipal officials are left to their own devices, providing ample opportunity for the unethical few to tarnish the reputation of all.

Enabling legislation for local codes of ethics, appellate review of local decisions, and provisions for removal of officials would provide specific guidance to municipal officials. Public faith in local government, however, will not be restored simply by these means. Rather, once the public realizes that the municipality will not tolerate ethical breaches and that officials who violate ethical standards will be swiftly sanctioned or removed, the public will again consider local government a place of true representative democracy; a place where the public good is sacrosanct and where all who deal with it are treated fairly and with respect.