

VLCT SPRING SELECTBOARD INSTITUTE

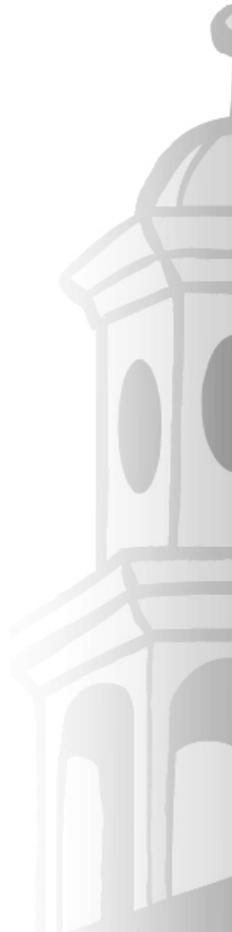
Quasi-Judicial Roles of a Selectboard



Municipal Assistance Center
Vermont League of Cities and Towns
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The Three Roles of The Selectboard



Your Executive Role

A photograph of the White House in Washington, D.C., featuring a fountain in the foreground and a clear blue sky. The text "EXECUTIVE BRANCH" is overlaid in white on a dark horizontal band across the middle of the image.

EXECUTIVE BRANCH

Your Executive Role

- A Selectboard can adopt policies to govern:
 - Personnel;
 - Facility use/renting of town buildings;
 - Conflict of interests;
 - Purchasing and bidding;
 - Class 4 road;
 - Plowing;
 - Open Meeting/Public Records;
 - Drug and alcohol;
 - Investment of town funds (with agreement of the Treasurer);
 - Delinquent tax collection (with agreement of the DTC);
 - Social media, etc.



Your Legislative Role



LEGISLATIVE BRANCH

Your Legislative Role

- A Selectboard can enact ordinances and bylaws to regulate:
 - Land use development;
 - Vehicles (speed limits/parking) and pedestrian traffic;
 - Junkyards;
 - Domestic pets and animals/animal cruelty;
 - Storage/dumping/burning of solid waste;
 - Public nuisances (e.g. loitering, noise, etc.);
 - Possession/consumption of open alcoholic beverages;
 - Water and sewer capacity and usage;
 - Dangerous/vacant buildings;
 - ATV/snowmobile operation;
 - Building/housing/plumbing codes;
- Etc.



Your Quasi-Judicial Role

JUDICIAL BRANCH

The image shows the front facade of the United States Supreme Court Building. It features a grand portico with eight tall, white, fluted columns supporting a triangular pediment. The pediment is filled with a relief sculpture. In front of the building is a wide set of steps. To the right, there is a large, ornate stone vase or urn. The sky is a clear, bright blue.

Your Quasi-Judicial Role

- A Selectboard may have to conduct hearings on:
 - Terminating employees;
 - Laying out, discontinuing, reclassifying roads;
 - “Vicious” dogs;
 - Tax appeals (as members of the BCA);
 - Request for abatement (as members of the BOA);
 - (Emergency) health order appeals;
 - Highway access permits;
 - Tree warden appeals;
 - Local liquor control license hearings.



Vermont's Open Meeting Law

Meetings

Regular
Special
Emergency

Legislative Hearings

Quasi-Judicial
Hearings



Vermont's Open Meeting Law

- **Regular, Special, an Emergency Meetings:** are meetings held to discuss the business of the public body or for the purpose of taking action. Includes organizational meetings.
- **Legislative Hearings:** are statutorily required rule making hearings. **Ex.'s: Selectboard** adopting/amending/repealing the Town Plan and/or Zoning Bylaws or the Town Governance Charter).



Vermont's Open Meeting Law

- **Quasi-Judicial Hearings:** “(A) case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have opportunity to present evidence and to cross-examine witnesses presented by other parties, which results in a written decision, and the result of which is appealable to a higher authority.”

1 V.S.A. § 310(5).



Vermont's Open Meeting Law

Quasi-Judicial Hearings

1. Rights of parties are being considered
2. Parties have opportunity to present evidence
3. All parties can cross-examine witnesses/question evidence
4. Hearing results in a written decision
5. Decision is appealable



Quasi-Judicial Hearings

A quasi-judicial hearing occurs when a public body meets to consider the rights of one or more parties:

- Selectboard acts much like a court;
- Hearings (typically) have their own specific statutory notice requirements;
- Quasi-judicial hearings are about the parties;
- Parties are entitled to due process and have the right to present evidence and cross-examine witnesses; and
- Hearings result in written decisions that can be appealed.



Conducting Effective Quasi-Judicial Hearings

- The best tool for running effective quasi-judicial hearings is to follow your rules of procedure.
- Doing so will lead to impartial decision making and ensure proceedings:
 - are free from ethical dilemmas;
 - instill public confidence in the local government;
 - are orderly and reasonably efficient (roadmap for the Chair to manage the hearing).

All of which helps limit appeals



Conducting Effective Quasi-Judicial Hearings

- Each Selectboard member should review the application/complaint/evidence and the relevant sections of the laws/regulations/policies before the hearing.
- Review your rules of procedure and discuss them, so that all the members will know what to expect when the hearing begins.
- Review the agenda and the application/complaint/evidence.
- Get a sense for the hearing and what to expect.
- Nothing beats experience, but preparation comes close.



Conducting Effective Quasi-Judicial Hearings

- Make a list of information you'll need from the hearing to make a decision.
- Prepare questions that you'll need to have answered at the hearing.
- Adopt a judicial demeanor:
 - Decisions you make have important consequences.
 - The proceedings, as well as the participants, should be shown due respect.
 - Put on your judicial robes.



Conducting Effective Quasi-Judicial Hearings

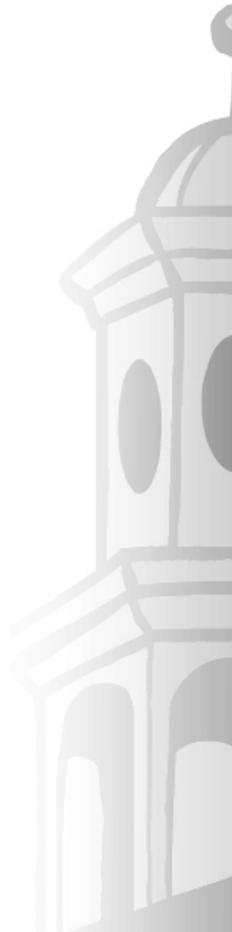
Questions to ask yourself:

- What type of hearing is this?
- What are the issues (i.e. the fundamental questions that need to be addressed)?
- Which criteria of your laws/regulations/policies will be implicated at this hearing?
- What information is required to make a decision based on those criteria?
- Is some (or all) of the information required to make a decision contained in the application/complaint/evidence?



Conducting Effective Quasi-Judicial Hearings

DUE PROCESS



Conducting Effective Quasi-Judicial Hearings

- Parties have a property right protected by the Constitution

“...nor shall any State deprive any person of life, liberty, or property without due process of law.”

U.S. Constitution, Amendment XIV



Conducting Effective Quasi-Judicial Hearings

- Due Process refers to the process that is constitutionally required before an individual is deprived of life, liberty or property
 - **Notice** – the government is taking an action that may effect your property
 - **Hearing (opportunity to be heard)** – before the government takes this action, it will hear what you have to say



Conducting Effective Quasi-Judicial Hearings



- One of the essential components of Due Process is that the hearing must appear to fair.
- Fairness exists when parties have the opportunity to present testimony and evidence to an impartial and unbiased decision maker.



YOU ARE THE GOVERNMENT

Conducting Effective Quasi-Judicial Hearings

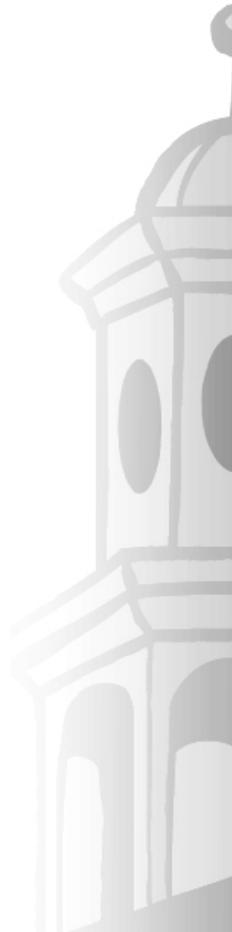
**An effective hearing is a fair hearing.
Elements of a fair hearing:**

- Maintaining order;
- Managing evidence;
- Avoiding/Managing ethical dilemmas.



Conducting Effective Quasi-Judicial Hearings

MAINTAINING ORDER



Conducting Effective Hearings

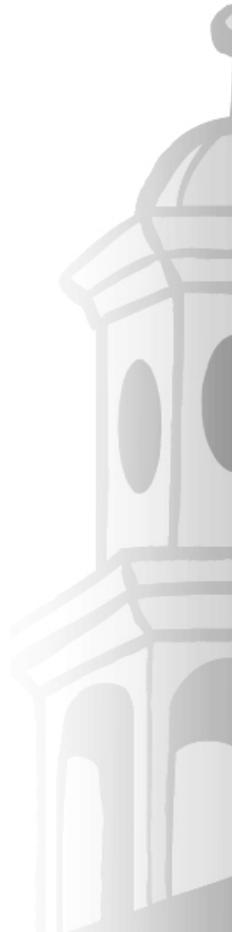
Maintaining Order

- Rules provide a script for the hearing
- Allows the Chair to run proceedings consistently and to maintain order:
 - Hearing is not a free-for-all;
 - Addresses order of participation
 - Addresses role of chair, vice chair, clerk, and staff.
 - It is a hearing IN the public, not OF the public.



Conducting Effective Quasi-Judicial Hearings

MANAGING EVIDENCE



Conducting Effective Hearings

Managing Evidence

- “Evidence” is testimony, documents, and tangible objects that prove or disprove the existence of an alleged fact.

Black’s Law Dictionary 8th Edition

- “Evidence is substantial if it is relevant and a reasonable person might accept it as adequate to support a conclusion.”

In re Halnon 174 Vt. 514 (2002)



Conducting Effective Hearings

Managing Evidence

- Ask factual questions: Who, What, Where, When, Why and How?
- Guide the testimony and flow of the hearing to the questions the public body has prepared and any other questions that might arise during the hearing.
- Ask questions you've prepared and make sure the questions you ask are relevant to the application/complaint and the laws/regulations/policies at play.



Selectboards shouldn't answer their own questions.

Conducting Effective Hearings

Managing Evidence

- **Relevant:**
 - Does the evidence support a standard in the law/regulation/policy at play?
- **Credible:**
 - Is there documentation to support the testimony?
 - Is the evidence based on personal experience or observation?
 - Is the testimony provided by an expert?



Conducting Effective Hearings

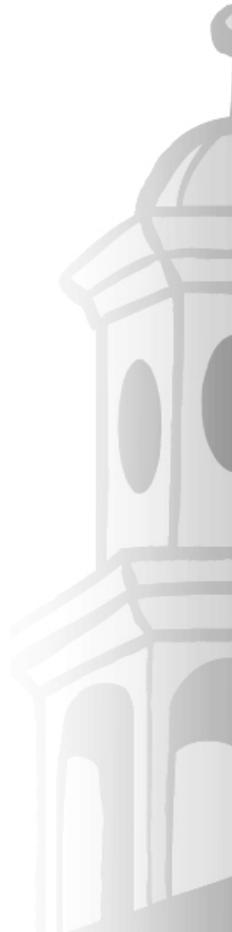
Managing Evidence

- For documentary evidence, mark each document with:
 - Applicant's exhibit number;
 - Interested person's exhibit number; and
 - Name and number of application.
- For oral evidence, keep a record of:
 - Who spoke and what was said.



Conducting Effective Quasi-Judicial Hearings

AVOIDING/MANAGING ETHICAL DILEMMAS



The Consequences of Ethical Dilemmas

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



The Consequences of Ethical Dilemmas

- Civil rights claim against the municipality.
- “(E)very person who, under color of any statute, ordinance, regulations, custom, or usage...subjects or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law...”

42 U.S.C. § 1983



The Consequences of Ethical Dilemmas

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



Conducting Effective Hearings

Ethical Dilemmas

What are we talking about?

- Conflicts of interest
- Bias/Prejudice
- Ex parte communications



Conducting Effective Hearings

Conflicts of Interest

- What is a **Conflict of Interest**?
 - “A real or seeming incompatibility between one’s private interests and one’s public or fiduciary interest.”

Black’s Law Dictionary, 8th Ed.



Conflicts of Interest

- Four types of interests that may result in a conflict:

Financial

- Direct financial interest
- Indirect financial interest

Personal

- Direct personal interest
- Indirect personal interest



Conflicts of Interest

Direct Financial Interest

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



Conflicts of Interest

Indirect Financial Interest

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



Conflicts of Interest

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 to the official.



Conflicts of Interest (Indirect Personal Interest)

Indirect Personal Interest

A conflict may be present when a local official acts on a matter in which the official'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.



Conducting Effective Hearings

Managing Conflicts of Interest

Four Step Process:

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



Managing Conflicts of Interest

1. Disclose

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



Managing Conflicts of Interest

2. Discuss

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



Managing Conflicts of Interest

3. Consider Recusal

- “Notwithstanding the appearance of a conflict, I believe that no actual conflict exists because...”

OR

- “Notwithstanding the appearance of a conflict, I believe I can remain impartial and objective because...”
- Make sure the record reflects what was disclosed as well as the ensuing discussion and action taken.



Managing Conflicts of Interest

Consider Recusal

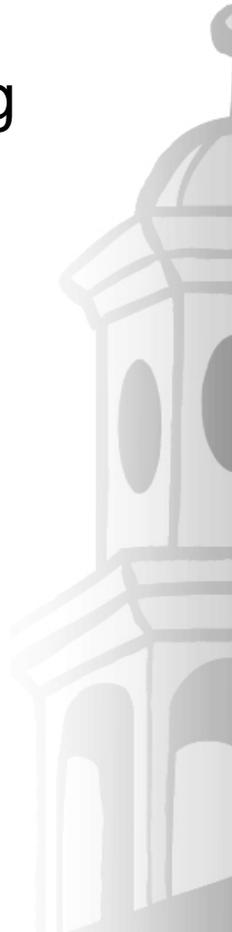
- When a conflict is present or appears to be present, the cleanest course of action is complete recusal from discussion, comment, and voting on the matter under consideration.
- Close Calls: Err on the side of caution when dealing with real or perceived conflicts.



Managing Conflicts of Interest

4. Record

- Make sure discussions and any actions surrounding a conflict are recorded in your minutes.
- Supports contention that decision was not only fair but that care was taken to appear fair.



Managing Conflicts of Interest Remedies

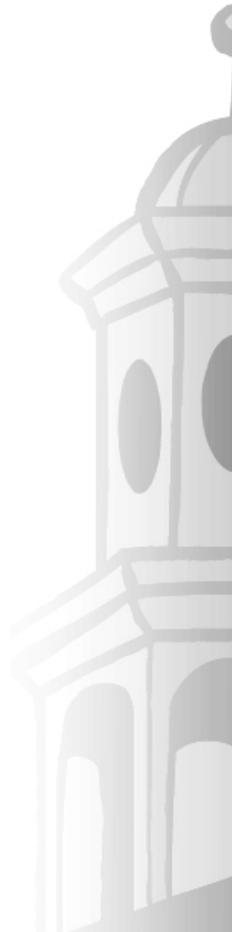
- Absent a local conflict of interest ordinance or charter provision, a Selectboard probably cannot force a conflicted member into recusal.
- May be able to pass a resolution censuring the member, but this can have its pitfalls. *LaFlamme v. Essex School District*, 170 Vt. 475 (2000).



Conducting Effective Hearings

Bias

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



Bias

- A fair hearing before an unbiased decision maker is a fundamental part of due process.
- Bias is less of a concern in legislative functions, such as hearings on town plan or zoning bylaw amendments, or amending the town governance charter.
- The law is fairly circumspect about assertions of bias by local board members.
- The Vermont Supreme Court presumes that local quasi-judicial boards act with “honesty and integrity.”



Bias

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



Conducting Effective Hearings

Ex Parte Communication

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



Ex Parte Communication

- Usually, a one-sided, off-the-record, or private communication between a member and a party concerning a matter that is pending before the Selectboard.
- Generally, does not include staff or legal counsel.
- Could include other municipal officials.



Communication may include face-to-face conversations, phone calls, written correspondence and e-mail

Ex Parte Communication

- ***Ex parte communication:***
 - Is a concern in quasi-judicial functions. In legislative functions (hearing on the town plan/zoning/charter amendments) where public input is sought, it is not inappropriate, it may even be encouraged.
 - Undermines the integrity of the local hearing process by contributing to the perception that decisions are based on access and influence rather than the facts and the rule of law.



Ex Parte Communication

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



Ex Parte Communication

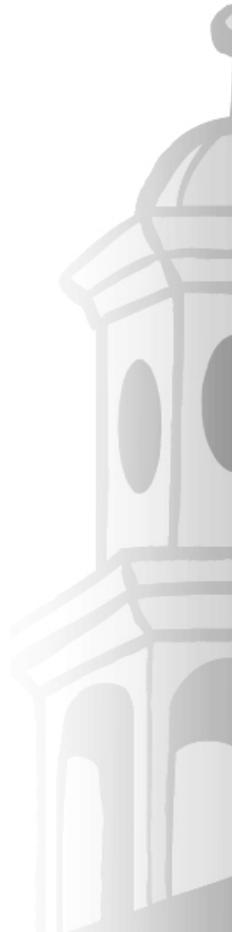
The key to managing *ex parte* communication is disclosure:

- All **oral** *ex parte* communication received by a board member should be disclosed through a memorandum and/or included in the minutes of the proceeding.
- All **written** *ex parte* communications received by a board member should be included in the record and provided to all parties to the proceeding.



Conducting Effective Quasi-Judicial Hearings

Closing the Hearing and Reaching a Decision



Closing the Hearing

- At the end of the hearing, make sure you are satisfied that you have all the information you need to make a decision.
- Once the Selectboard has determined that it has all of the information it needs, close the hearing.
- Do not “conditionally” close the hearing, i.e., close the hearing and instruct the applicant to submit a piece of information at a later date.



Reaching a Decision Deadlines

- Be mindful of any statutorily imposed deadlines for reaching a decision:
- The BCA for example must issue its decision, with reasons, within 15 days of the report of the inspection committee.

32 V.S.A. § 4404(c)



Reaching a Decision

Deliberating

- Two methods:
 - Private deliberative session and
 - Public deliberation.
- Your rules of procedure should set out which method you choose.
- Deliberative session is:
 - Exempt from the Open Meeting Law:
 - No need to warn, notice, take minutes, or publicly declare votes.
 - Allows the Selectboard to deliberate and reach a decision in private, similar to a jury.



Reaching a Decision

Deliberating

- **When can a Selectboard use deliberative session?**
 - To make decisions after hearing evidence in the context of a quasi-judicial proceeding; and
 - To determine if it needs to take additional evidence during the course of a hearing.



Reaching a Decision

Deliberating via E-mail

- Because deliberative session does not need to be warned, conducting deliberations via e-mail does not violate the Open Meeting Law or the Public Records Law.
 - Deliberations can also occur over the phone or in a member's home.
- Use this time to develop a thoughtful decision that explains to the applicant and others what your decision is and how that decision was made.



Reaching a Decision

Voting

- “When joint authority is given to three or more, the concurrence of a majority of such number shall be sufficient and shall be required in its exercise.”

1 V.S.A. § 172

- If no concurrence of the majority, then no action has been taken.
- Ex. A split vote (2 to 1) of a bare quorum (5 members) is not a concurrence of the majority.
- There are exceptions to this rule for the BCA and BOA.



Reaching a Decision

Issuing the Decision

- **Avoid giving applicants an oral decision at the end of a hearing:**
 - On occasion, Selectboards have changed their minds when writing the decision. This puts them into the difficult situation of re-issuing an amended decision that reverses or modifies the earlier oral decision.
 - Preferably, Selectboard should never issue an oral decision; it is far easier to ask parties to wait a few days or weeks for a carefully reasoned decision than to issue a quick decision on the spot only to reverse it later on.



Questions



**Contact VLCT's
Municipal Assistance Center:
(800) 649-7915
info@vlct.org**

