

**TOWN OF SHELBURNE  
ETHICS COMMITTEE REGULAR MEETING  
Wednesday, April 25, 2018 at 7 PM  
Town Offices Meeting Room 1**

**DRAFT AGENDA**

1. Call to Order
2. Review and Approve the Agenda for April 25, 2018
3. Approve Minutes from March 28, 2018
4. Opportunity to Disclose Conflicts of Interest
5. Public Participation and Comments
6. a. Committee Discussion of Suggested Revisions to the Ethics Ordinance – Tom Little  
b. Public Comments on the Committee’s Discussion  
c. Further Committee Discussion and Next Steps
7. Reconsideration of the Start Time of our Regular Meetings – Pete Gadue
8. Vermont Legal Research Service Project Update – Mike Ashooh
8. Other Business
9. Adjournment

Please call Diana Vachon at 264-5075 or email at [dvachon@shelburnevt.org](mailto:dvachon@shelburnevt.org) if you are unable to attend.

*Reasonable accommodations shall be provided upon request to ensure that this meeting is accessible to all individuals regardless of disability.*

**Town of Shelburne  
ETHICS AND CONFLICT OF INTEREST ORDINANCE**

**THE SELECTBOARD OF THE TOWN OF SHELBURNE HEREBY ORDAIN:**

**Preamble**

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

**Vermont League of Cities and Towns. Serving and Strengthening Vermont Local Governments. Handbook for Vermont Selectboards**

**Chapter 1: Authority, Purpose and Definitions.**

**Articles 1 through 3 Apply to All Public Officials, in both Quasi-Judicial Proceedings and Non-Quasi-Judicial Proceedings.**

**ARTICLE 1. Authority.**

Under the authority granted in 24 V.S.A. Chapter 59 and 24 V.S.A. § 2291, the Selectboard for the Town of Shelburne hereby adopts the following civil ordinance concerning ~~ethics and~~ conflicts of interest and ethical behavior. This ordinance applies to all Town public officials, as defined in the ordinance. In the event of a conflict between this ordinance and any procedures or policies adopted by any Town board, commission, committee or subcommittee, this ordinance shall prevail.

**ARTICLE 2. Purpose.**

This ordinance serves as a statement to define and codify the Town's expectations and requirements for public official conflicts of interest and appearances of conflicts of interest, and to provide aspirational guidance for other ethical behavior generally. ethical behavior of its public officials, as defined by this ordinance. The proper administration and operation of Town government requires that public officials be independent, impartial, and responsible, free from conflicts of interest, ~~treat Town public officials and employees fairly and equally,~~ and treat each and every member of the public whether a person, firm, corporation or other organization with equal consideration and without special advantage. This ordinance is designed to further these interests to assure that:

- ~~Public officials disclose conflicts of interest and take appropriate steps including, where appropriate, recusal; Town decisions and policy be made in proper channels of the governmental structure;~~
- Public office not be used for personal gain;
- No public official gains a personal or pecuniary advantage from his or her office; and

April 18, 2018 – T. Little

- The public has confidence in the integrity of its Town government and public officials.

The purpose of this ordinance is to establish standards of conduct and guidance so that all decisions made by public officials are based on the best interest of the Town and that no public

official with a ~~conflict of interest~~personal or financial interest in the outcome of a particular matter will appear in the eyes of the public to have influenced any decisions of the Town on that matter.

**ARTICLE 3. Definitions.** For the purposes of this ordinance, the following definitions shall apply:

- a **“Appearance of a conflict of interest”** means the impression that a reasonable person might have, after full disclosure of the facts, that a public official’s judgment might be significantly influenced by outside interests, even though there may be no actual conflict of interest.
- b **“Business associate”** means any person who is a partner in a partnership or joint venture or similar association with the public official or any member of that public official’s immediate family or household; a shareholder or member of a corporation or limited liability company in which the public official or an immediate member of the public official’s immediate family or household is at least a 10% shareholder or member; or any person with whom the public official or any member of his or her immediate family or household has a significant commercial relationship.
- c **“Conflict of interest”** means a direct or indirect personal or financial interest of a public official, his or her spouse or other immediate family household member, or persons related with the fourth degree of consanguinity or affinity, business associate, employer or employee, in the outcome of a particular matter, policy, cause, proceeding, application or any other matter pending before the public official or before the public body on which he or she serves or holds office. “Conflict of interest” does not arise in the case of votes or decisions on matters in which the public official has a personal or pecuniary interest in the outcome no greater than that of other persons generally affected by the decision, such as adopting a by-law or setting a tax rate.
- d **“De minimis”** means an insignificant interest that could not raise a reasonable question as to a public official’s impartiality.
- e **“Emergency”** means an imminent threat or peril to the public health, safety or welfare.
- f **“Employee”** includes all individuals covered by Section 1.4 of the Shelburne Personnel Policy, as amended from time to time, including volunteer fire and rescue personnel.
- g **“Ex parte communication”** -means a direct or indirect communication between a public official and any party, party’s representative, party’s counsel, or a person interested in the outcome of any quasi-judicial proceeding pending before the public official that occurs outside of a public proceeding, and concerns the substance or merits of the proceeding.
- h **“Fourth degree of consanguinity”** means the person’s spouse, as well as the person’s and the spouse’s: parent, child, brother, sister, grandparent, or grandchild.
- i **“Immediate family member or household member”** includes any person with whom the public official ~~lives~~or resides, the public official’s spouse, civil union or life

partner,

children (including stepchildren and foster children), brother, sister, mother, father and any in-laws through such persons.

- j. **“Official act or action”** means any act performed by any public official while acting on behalf of the Town.
- k. **“Meeting”** means a gathering of a quorum of a public body.
- l. **“Member”** means a member of a public body subject to this ordinance.
- m. **“Private entity”** means a corporation, partnership, limited partnership, limited liability company, limited liability partnership, joint venture or association, or other form of business organization, in each case whether organized for profit or not for profit.
- n. **“Probable cause”** means credible facts and circumstances sufficient for a prudent person to form a reasonable belief about a public official’s conduct in the context of reviewing a complaint filed under this ordinance.
- o. **“Public body”** means the Town and its departments, boards, councils, commissions, committees or subcommittees, or other instrumentalities.
- p. **“Public interest”** means an interest of the Town as a whole, conferred generally upon all residents of the Town.
- q. **“Public official”** means a person elected or appointed to perform executive, administrative, legislative or quasi-judicial functions for the Town, whether paid or unpaid, including members of all public bodies of the Town~~boards, committees, subcommittees and commissions of the Town~~ and representatives of the Town on regional governmental entities. For purposes of this Ordinance, “public official” does not include Town employees except for the Town Manager, Town Clerk and Library Director.
- r. **“Quasi-judicial proceeding”** means a contested hearing as defined by the Vermont Municipal Administrative Procedures Act, 24 V.S.A. Sections 1203-1209, as amended, or a case in which the legal rights of one or more persons who have or are granted party status are adjudicated, which is conducted in such a way that all parties have opportunities to present evidence and to cross-examine witnesses presented by other parties, and which results in a written decision, the result of which is appealable by a party to a higher authority.
- s. **“Recusal”** is the process by which a public official is disqualified from hearing a matter or taking official acts or actions on a matter pending before the public official because of a conflict of interest or appearance of a conflict of interest.

**Comment [TL1]:** Are there public officials who are not members of a public body? Yes: Town Manager, Town Clerk, Town Moderator, Town Constable, Fence Viewer?

## Chapter 2. General Provisions - All Official Acts or Actions

### Articles 4 through 7 Apply to Public Officials in both Quasi-Judicial Proceedings and Non-Quasi-Judicial Proceedings.

#### ARTICLE 4. Obligations of Public Officials.

It is the obligation of every public official to support the Constitution of the United States, the Constitution of the State of Vermont, the Town Charter and Town ordinances and to treat all Town officials, volunteers and employees fairly and equally in compliance with the law. No public official shall knowingly violate the two Constitutions, the Town Charter, Town ordinances or provisions of the Vermont statutes nor knowingly take any action ~~which would be~~ detrimental to the best interests of the Town.

#### ARTICLE 5. Fairness and Impartiality.

Every person shall receive fair and impartial treatment on any matter coming before any public body. ~~No public official shall make any promise or pledge to any person concerning any matter pending before the public official.~~

**Comment [TL2]:** This seems too broad; it includes a public official's promise to persons appearing before a public body that the public official will take action to protect the best interests of the Town.

#### ARTICLE 6. Use of Town Property.

No public official shall use or permit the unauthorized use of Town-owned vehicles, equipment, materials or property for personal convenience or profit, except for occasional *de minimis* use or when such services are available to the public generally, as provided pursuant to Town policy for the use of such public official in the conduct of official business, or as otherwise authorized by a written policy of the Selectboard or its designee.

#### ARTICLE 7. Confidential Information.

The use of public trust for private gain ~~is in~~ conflicts with good government. No public official shall use confidential or advance information obtained by virtue of public office ~~or appointment~~, for the personal or financial advantage of him or herself or any persons identified in Article 3(c).

## Chapter 3. Ethical Guidelines

~~It is vital to the public good in the Town of Shelburne that p~~Public officials ~~and Town Employees should~~ serve with high standards of integrity by aspiring to the following guidelines and principles:

**Comment [TL3]:** Not sure about this; concerned about conflict with employee personnel policies.

1. Treat each other and members of the public with honesty and integrity;
2. Treat all people in a manner that would be considered respectful, just and fair and in a manner that demonstrates civility;
3. Provide courteous, equitable and prompt service to everyone;
4. Make themselves available to the public; listen to diverse opinions and communicate effectively;
5. Apply policies and directives fairly, impartially, equally and with mutual respect;

**Comment [Is4]:** We should ask the Selectboard to explore whether the employee personnel policies can be written so as to conform with these guidelines

6. Be fiscally responsible and demonstrate concern for the Town's assets in order to ensure that public resources are used and conserved for the public good.

**Chapter 4. Official Acts or Actions, Non Quasi-Judicial Proceedings**

**Articles 8 through 10 Apply to Public Officials in Non-Quasi-Judicial Proceedings.**

**ARTICLE 8. Gifts, Favors or Special Privileges for Public Officials Not Involved in Quasi-Judicial Proceedings.**

The conduct of Townpublic business by public officials shall be free of any influence arising from gifts, favors or special privileges. It is the obligation of every public official to refuse personal gifts, favors or special privileges in every instance where the gift is or may reasonably be considered to be designed to influence the actions of the public official. Except as provided in Chapter 4 of this ordinance concerning public officials acting in quasi-judicial proceedings, a public official may, in any one fiscal year, accept a single personal gift, favor or special privilege from any one person or entity so long as (a) the reasonable value thereof does not exceed \$25.00, (b) all gifts, favors and privileges from all sources during the fiscal year do not exceed \$100.00 in value and (c) the gift, favor or privilege may not reasonably be considered to be designed to influence or reward the.



actions of the public official. No public official shall solicit anything of value from any person who has received or sought a financial benefit from the Town nor seek personal or financial advantage by means of his or /her public office ~~or appointment~~.

**ARTICLE 9. Disclosure in Proceedings Which are Not Quasi-Judicial.**

- a. A public official who has reason to believe that he or she has or may have a conflict of interest or the appearance of a conflict of interest, but believes that he or she is able to act fairly, objectively and in the public interest in spite of the conflict of interest or its appearance shall, prior to participating in the matter at a meeting or taking any official action on the matter prepare or make a written or oral public statement describing the matter under consideration, the nature of the conflict of interest or its appearance, and why he or she believes that he or she is able to act in the matter fairly, objectively and in the public interest. The statement shall be a public record.
- b. In the case of a public official who is a member of a public body, the remaining members of that body shall have the authority to inquire of the public official about a possible conflict of interest or appearance of a conflict of interest and to suggest or recommend that the member recuse him or herself from the matter. If the member believes that he or she does not have a conflict of interest or theirs appearance of one, or believes that he or she is able to act fairly, objectively and in the public interest in spite of a conflict of interest or its appearance, the member shall, prior to participating in the matter, prepare or make a written or oral public statement describing the matter under consideration, the nature of the potential conflict of interest or its appearance and why he or she believes that he or she is able to act in the matter fairly, objectively and in the public interest.
- c. If a public official prepares a written statement under subsections (a) or (b) above concerning participation at a meeting, it shall be signed by the public official and filed as part of the minutes of the meeting of the public body ~~in~~ which the public official serves. If the statement was made orally, the minutes shall reflect the substance of the statement. If the statement concerns an official act or action outside of a public meeting, it shall be in writing and promptly filed with the Town Clerk prior to the taking of the action.

**Comment [TL5]:** In which set of records would the Clerk file the statement?

**ARTICLE 10. Disqualification and Recusal in Proceedings Which Are Not Quasi-Judicial.**

**a. Disqualification**

Except as provided in Article 9, a public official shall notis disqualified from participatcing in any non-quasi-judicial matter if he or she has a conflict of interest or the appearance of a conflict of interest in the matter. This Article does not preclude a public official who is disqualified from participating in one part of a particular matter from participating in consideration of another part of the matter or the matter as a whole.

**b. Representation**

Except as provided in Article 9, a public official shall not personally represent, appear for, or negotiate in a private capacity on behalf of any person or organization in any non-quasi-judicial matter pending before the public body of which the public official is a member.

**c. Steps Following Recusal**

If a public official determines in a non-quasi-judicial proceeding that he or she must be disqualified and may not participate in a matter under consideration on account of a conflict of interest or the appearance of one, the public official shall recuse him or herself and take the following steps:

- 1) Make a simple, brief statement of the underlying facts supporting recusal.
- 2) Refrain from attempting to influence the decisions or actions of other public officials involved in the matter.
- 3) Leave the ~~table and leave the room~~ while the matter is being discussed and voted upon.
- 4) At any time prior to the adjournment of the meeting, the public official may submit a written public statement to the public body which shall be included in the minutes of the meeting. Otherwise, the public official may participate in the hearing or proceeding only through a representative (notwithstanding anything to the contrary in subsection (b) of this Article) or when requested by the public body.
- 5) Refrain, him or herself or through a representative, from ~~advocating communicating on for a position or discussing~~ the matter with any other public official or employee outside of a public hearing except when requested by the public body.

**d. Appearance by a Representative**

Nothing in Article 10 shall preclude a representative of a public official from appearing on behalf of the public official before a public body in a non-quasi-judicial matter in which the public official has recused him or herself.

**Chapter 4. Official Acts or Actions - Quasi-Judicial Proceedings  
Articles 11 through 14 Apply Only to Public Officials when Participating in  
Quasi-Judicial Proceedings.**

**ARTICLE 11. Disclosures in General in Quasi-Judicial Proceedings**

- a. Immediately prior to taking up each matter on the agenda of a quasi-judicial proceeding, the Chair ~~of the public body~~ shall request that the public body members disclose all conflicts of interest, appearances of conflicts of interest and any ex parte communications. The Chair may also make this request at the outset of the meeting.
- b. In any quasi-judicial proceeding and when recognized by the Chair, any person may request disclosure of conflicts of interest, appearances of conflicts of interest and ex parte communications.

**ARTICLE 12. Disclosure of Ex Parte Communications in Quasi-Judicial Proceedings**

A public official who has an ex parte communication on any issue relating to a quasi-judicial proceeding shall place on the record at the outset of the proceeding:

- a. Copies of all written ex parte communications received ~~or sent~~ by the public official and all written responses to those communications, and
- b. a memorandum stating the substance of all oral ex parte communications ~~in which received by~~ the public official ~~participated~~, all responses made, and the identity of each person making or receiving the ex parte communication.

**ARTICLE 13. Disqualification and Recusal in Quasi-Judicial Proceedings**

**a. Conflict of Interest**

- 1) A public official shall disclose a conflict of interest or an appearance of a conflict of interest and shall place the nature of the conflict of interest on the record at the outset of the proceeding.
- 2) A public official is disqualified from participating and shall not participate in a quasi-judicial proceeding in which he or she has a conflict of interest;
- 3) An ~~applicant or any~~ person may request that a member recuse him or herself due to a conflict of interest. The request shall not constitute a requirement that the member recuse him or herself.

**b. Appearance of a Conflict of Interest**

- 1) Except as provided in Subsection ~~b(3-2)~~ of this Article, a public official is disqualified from participating and shall not participate in a quasi-judicial proceeding in which he or she has an appearance of a conflict of interest.
- 2) An ~~applicant or any~~ person may request that a member recuse him or herself due to an appearance of a conflict of interest. The request shall not constitute a requirement that the member recuse him or herself.
- 3) A public official who has reason to believe that he or she has or may have an appearance of a conflict of interest but reasonably believes that he or she is able to act fairly, objectively and in the public interest in spite of the appearance of the conflict of interest shall, prior to participating in a proceedinghearing on the matter, prepare or make a written or oral public statement describing ~~the~~ matter under consideration, the nature of the appearance of a conflict of interest and why he or she believes that he or she is able to act in the matter fairly, objectively and in the public interest. In such circumstances, the public official may participate and act in the proceeding.

**c. Pre-Judgment of the Merits**

- 1) Except as provided in Subsection ~~c-(2-)~~ of this Article, a public official is disqualified from participating and shall not participate in a quasi-judicial proceeding in which the public official has publicly displayed a prejudgment of the merits of a particular matter pending before the public body of which the public official is a member.
- 2) A public official who has reason to believe that he or she is able to act fairly, objectively and in the public interest in spite of ~~the~~ having made a prior public display of ~~the~~ prejudgment of the merits of a particular matter pending before the public body, shall, prior to participating in a proceedinghearing on the matter, prepare or make a written or oral public statement describing the matter under consideration, the nature of the prior public display, and why he or she believes that he or she is able to act in the matter fairly, objectively and in the public interest.

**d. Written or Oral Statements**

If a public official prepares a written statement under subsections (a), (b) or (c) ~~of this Article above~~, it shall be signed by the public official and filed as part of the minutes of the meeting of the public body ~~in~~ which the public official ~~serves~~ holds. If the statement was made orally, the minutes shall reflect the substance of the statement.

**e. Post-Disclosure Requests to Recuse**

If, after disclosure under Subsection ~~b.(2)~~ or ~~c.(2)~~ of this Article, the public official chooses to participate in the hearing, the Chair of the public body shall request any additional relevant information from the public official needed to fully understand the appearance of a conflict of interest or the nature of any prior public display of pre-judgment. If after ~~this~~ inquiry, the Chair or the remaining members of the public body believes that the appearance of a conflict of interest or the ~~display of pre-judgment display~~ of the merits will undermine public trust and confidence in the integrity of the ~~proceeding~~ hearing, the Chair or the remaining members may request that the public official recuse him or herself from the hearing. The request shall not constitute a requirement that the member recuse him or herself.

**f. Representation.** A public official shall not personally represent, appear for, or negotiate in a private capacity on behalf of any person or organization in any quasi-judicial matter pending before the public body of which the public official is a member or to which he or she appoints members. Notwithstanding the preceding sentence, a representative of the public official may appear at a quasi-judicial proceeding to advocate for the public official's own interests in the outcome of the ~~proceeding~~.

**g. Steps Following Recusal**

If the public official determines at a public meeting that he or she will recuse him or herself in a matter under consideration, the public official shall take the following steps following his or her recusal:

- 1) Make a simple, brief statement to the public body of the underlying facts supporting recusal.
- 2) Refrain, him or herself or through a representative, from attempting to influence others' decisions or actions concerning the matter at the proceeding or outside of the public hearing.
- 3) Leave the ~~table and leave the~~ room while the matter is being discussed.
- 4) The recused public official may prior to adjournment of the proceeding submit a written public statement to the public body, which shall be included in the minutes of the proceeding. Otherwise, the public official may participate in the hearing or proceeding only through a representative (notwithstanding anything to the contrary in subsection 10 (b) of this ordinance) or at the request of the public body.

**Comment [TL6]:** But see (g)(2), below  
Inconsistent.

**ARTICLE 14. Gifts, Favors or Special Privileges in Quasi-Judicial Proceedings**

It is the obligation of every ~~member of public official on~~ a public body ~~acting in a with~~ quasi-judicial ~~capacity/authority~~ to refuse personal gifts, favors or special privileges of any value in every instance where the gift is or may reasonably be considered to be designed to influence or reward the ~~quasi-judicial~~ actions of the public official.

**Comment [TL7]:** Some public bodies (BCA, e.g.) can act at different times as quasi-judicial and not.

## Chapter 5. The Ethics Committee

### ARTICLE 15. Creation of an Ethics Committee.

- a. A ~~five~~-member Ethics Committee is established. The Selectboard shall solicit volunteers from among Town residents who are willing to serve on the Committee.
- b. From those volunteers, the Selectboard shall select five members and ~~two~~~~one~~ alternate members. The members and the alternates shall serve terms of three years and may be reappointed for a second three-year term, and then be eligible for further service on the Committee after a hiatus of at least one year. When the Committee is first formed, however, in order to stagger the terms, one of those members and the alternate shall be appointed to a one-year term, two to two-year terms, and two to three-year terms, following which each shall be appointed to a three-year term. A member or alternate member who serves an initial term of fewer than three years shall nonetheless be eligible to serve two consecutive three-year terms thereafter. The list of members and the name of the alternate shall be filed with the Town Clerk along with the date they were selected and the date on which their terms shall expire.
- c. If a member cannot participate in a particular matter, ~~the one of the~~ alternates shall ~~be designated by the Committee's Chair to fill in.~~ The Committee may conduct a proceeding with a quorum of three. Any decision of the Committee shall require a vote of three; e.g., a majority of the whole ~~five members~~.
- d. The members of the Ethics Committee shall serve without compensation for their services. The Ethics Committee shall not incur any expenses in the performance of its duties without the prior approval of the Town Manager, ~~which shall not be unreasonably delayed or withheld.~~ ~~In the event that the Town Manager has a conflict of interest, the Selectboard may designate another town official or employee to approve a funding request from the Ethics Committee.~~
- e. The Selectboard shall invite the Town Clerk to serve as Clerk for the Ethics Committee. Should the Town Clerk decline or be unavailable, or if the complaint involves the Town Clerk, then the Chair of the Ethics Committee shall appoint a person to serve as Clerk of the Ethics Committee *pro tempore* and make the clerk *pro tempore* known to the public.
- ~~f. The Ethics Committee shall elect a chair and vice chair from among its members, and shall establish rules of procedure.~~
- g. The Ethics Committee is authorized to:
  1. ~~Determine materials to be posted and retained on the Ethics Committee section of the Town website;~~
  2. ~~Educate and inform public officials and the public on provisions of the ordinance and Committee activity;~~
  3. ~~Appoint one of its members or a Town resident not on the Committee an independent Ombudsperson to serve in a volunteer capacity:~~
    - (a) ~~to provide [non]binding advisory opinions to public officials as to whether their own~~

Comment [Is8]: Add additional language re funding. See my memo.

Comment [Is9]: Consider replacing section d. with: The Ethics Committee may incur expenses necessary to perform its duties unless the Town Manager disapproves. (to mitigate the conflict of interest issue)

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Comment [TL10]: Unsure that Committee has authority to delegate binding authority in this regard.



- behavior has violated or may in the future violate the ordinance.
- (b) provide non-binding advice to public officials as to whether their own behavior has violated or may in the future violate the ordinance
  - (c) assist persons as a neutral, impartial practitioner to prepare file complaints; and
  - (d) assist public officials as a neutral, impartial practitioner to respond to complaints.
  - (e) Any member who provides formal or informal advice on a public official's behavior or assists a public official to file or respond to a complaint shall recuse him or herself from any quasi-judicial proceeding involving that matter.
4. Appoint a qualified person mediator as appropriate to attempt to achieve a mediated resolution of the complaint for Ethics Committee approval before and/or after the filing of a cFormal Complaint;
  5. Investigate complaints.
    - (1) Appoint one of its members, an investigator, auditor, special counsel or other experts as appropriate to investigate a complaint and/or to file a Formal Complaint;
    - (2) Any member who investigates a complaint or who files a Formal Complaint shall recuse him or herself from any quasi-judicial proceeding involving that matter.
  6. Subpoena Witnesses and compel testimony during an investigation or at a hearing on the Formal Complaint;
  7. Adopt Rules of Procedure that align with the ordinance and that strive for secure the simple, informal and inexpensive disposition of every complaints.
  8. Issue concise public statements regarding confidential proceedings when needed to provide fairness to a public official.

Comment [TL11]: Concerned that state law may not permit subpoena power here.

h. Hearings conducted by the Ethics Committee shall be conducted in accordance with the Vermont Municipal Administrative Procedures Act, 24 V.S.A. Sections 1203-1209, as amended.

**ARTICLE 16. Hearing before the Ethics Committee.**

- a. ~~Any person who believes that a public official should: (i) recuse him or herself from a matter because of a conflict of interest, or an appearance of a conflict of interest or the prior public display of prejudgment of the merits of a matter; or (ii) that the public official should provide a disclosure statement regarding a conflict of interest, or an appearance of a conflict of interest in the matter, or a prior public display of prejudgment of the merits of a matter; or (iii) is otherwise engaged in conduct proscribed by Articles 8-14 of this ordinance may should first communicate such concern to the Chair of the Selectboard within 3015 days of having discovered the matter of~~

Comment [TL12]: My intention is to limit this to conflicts of interest, appearances of the same, or prior public displays of prejudgment of the merits of a matter – and to exclude complaints arising under Article 2, Chapters 4-7.

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concern. In the event that the Chair of the Selectboard is the subject of the alleged conflict of interest, then the person may communicate ~~thesuch~~ concern to the Vice Chair of the Selectboard within ~~the same 3015 days of having discovered the matter of concern.~~ The Chair of the Selectboard, or Vice Chair as the case may be, should promptly discuss the concern with the concerned person and in particular discuss with the person why the person believes that the public official's action is a conflict of interest or the appearance of a conflict of interest ~~or otherwise a violation of Articles 8-14 of this ordinance.~~ If the matter is not resolved to the concerned person's satisfaction as the result of these discussions, the Chair or Vice Chair, as the case may be, then ~~mayshall~~ informally but in a timely manner address the matter with the public official in question and report back ~~in writing~~ to the concerned person. If after such discussions the person is not satisfied with the resolution of the matter, but no later than 30 days of the person having been notified by the Chair or Vice Chair of the proposed resolution of the matter, the person may file a complaint with the Clerk of the Ethics Committee.

Notwithstanding the procedure to resolve a complaint informally as described in ~~Subsection (a) of this Article.~~ a. Any person who believes that a public official should: (i) recuse him or herself from a matter because of a conflict of interest, an appearance of a conflict of interest or the prior public display of prejudgment of the merits of a matter; or (ii) that the public official should provide a disclosure statement regarding a conflict of interest, an appearance of a conflict of interest in the matter, or a prior public display of prejudgment of the merits of a matter; or (iii) is otherwise engaged in conduct proscribed by Articles 8-14 of this ordinance may a person may file a complaint directly with the Clerk of the Ethics Committee within 20 60 days of the person having discovered the matter of concern, alleging a violation of Articles 8-14 and a person or members of the public body may request disclosure or recusal in accordance with Articles 9, 11 or 13. The burden of proving the date the person first discovered the matter of concern shall be on the person filing the complaint.

Comment [TL13]: My intention is to limit this to conflicts of interest, appearances of the same, or prior public displays of prejudgment of the merits of a matter – and to exclude complaints arising under Article 2, Chapters 4-7.

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- b. A complaint filed under this ordinance shall be a signed, sworn statement, based on the concerned individual's personal information using a complaint affidavit form developed by the Ethics Committee and available from the Clerk of the Committee or a form substantially similar to that. Until the determination of probable cause under subdivision (d), a complaint shall be confidential and not subject to disclosure under the Vermont public records laws.
- c. Upon receipt of a complaint regarding a public official, the Ethics Committee shall undertake a confidential preliminary investigation of the complaint in a closed, executive session, to determine if there is probable cause to believe that a violation has occurred. The Committee may interview the complainant or the respondent, or both, under oath, in the closed session, and may appoint an investigator to gather additional facts. ~~If probable cause is not found by the Ethics Committee, the Chair of the Committee shall notify the person who filed the complaint and the public official in question that probable cause was not found and the complaint and file shall be closed, sealed and exempt from disclosure under the Title 1, Section 317(c)(1) and (7) of the Vermont public records laws; provided, however, that the public official in question may have access to the file.~~ Upon finding probable cause that a violation has occurred, the ~~Chair of the Ethics Committee shall so notify the Chair of the Selectboard and the Clerk shall set a date for a hearing before the Ethics Committee as soon as possible but considering the scheduling and hearing preparation needs of the complainant~~

Comment [Is14]: See my memo re new complaint process.

Comment [TL15]: I am not yet on board with that proposed new process. Seems too complex and it seems to ask for a "merits" determination that is different than a probable cause determination – but the two seem indistinguishable to me.

~~and the respondent public official.~~ Personal notice shall be given to each member of the Ethics Committee, including the alternates, to the complainant, and to the respondent, ~~i.e., the person complained about.~~ Notice of the hearing shall be posted in accordance with Vermont's Open Meeting Law. At any time, the Ethics Committee may appoint a mediator to attempt to resolve the complaint and to submit any mediated agreement to the Ethics Committee for approval.

Comment [TL16]: Need clarity on whether the Committee has the legal authority to compel mediation.

d. The Ethics Committee shall consider the matter in accordance with the Vermont Municipal Administrative Procedures Act, 24 V.S.A. Sections 1203-1209, at a public hearing. ~~Oral or written testimony and other evidence shall be taken under oath.~~ The complainant and

~~and~~ respondent shall have a right to present evidence personally or by other witnesses, to examine and cross-examine witnesses and to be represented by counsel. The hearing shall be audio or video recorded at Town expense.

e. At the conclusion of the hearing, the Ethics Committee shall consider all of the evidence and render a decision, and may go into a closed deliberative session in doing so. The Committee shall issue a written decision, using a preponderance of the evidence as its standard of proof. On whether the public official violated Articles 8-14 of the ordinance, If so, the Ethics Committee and, if so, may order that the public officials shall be required to (i) recuse him or herself from the matter in question due to a conflict of interest; ~~or~~ (ii) provide a disclosure statement concerning a conflict of interest; or (iii) cease and desist from conduct otherwise proscribed by the ordinance. In each case the Committee and shall state in writing the reasons for its decision.

Comment by Lee: What burden of proof should the ordinance require?

Standard definitions of the three possible burdens of proof are:

Preponderance of the Evidence

In most civil cases, the burden of persuasion that applies is called "a preponderance of the evidence." This standard requires the judge or jury to return a judgment in favor of the plaintiff if the plaintiff is able to show that a particular fact or event was more likely than not to have occurred. Some scholars define the preponderance of the evidence standard as requiring a finding that at least 51 percent of the evidence favors the plaintiff's outcome.

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Clear and Convincing Evidence

In some civil cases, the burden of proof is elevated to a higher standard called "clear and convincing evidence." This burden of proof requires the plaintiff to prove that a particular fact is substantially more likely than not to be true. Some courts have described this standard as requiring the plaintiff to prove that there is a high probability that a particular fact is true. This standard sets a higher threshold than the preponderance of the evidence standard, but it does not quite rise to the widely recognized standard used in criminal cases, known as "beyond a reasonable doubt."

Substantial Evidence

In administrative law proceedings, the standard of proof that most commonly applies is the substantial evidence standard. This standard requires the plaintiff or moving party to



provide enough evidence that a reasonable mind could accept as adequate to support a particular conclusion.

Lee: I believe that the Committee should consider going with "Substantial Evidence," the standard used in most administrative law proceedings. In these cases, the sanctions are more similar to the sanctions that we could impose for ordinance violations.

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- f. If one or more members of the Ethics Committee is/are the subject of a complaint, and/or the other members recuse themselves because of their Committee association with the subject of the alleged complaint, or for any other reason a quorum is impossible, the Selectboard may appoint from the residents of the Town persons to serve *pro tempore* on the Ethics Committee to achieve a quorum.

## **Chapter 5. Additional Provisions**

### **ARTICLE 17. Enforcement.**

- a. Refusal to comply with the decision of the Ethics Committee shall be considered a violation of this ordinance and shall constitute "cause" under Sections 147-3.4 and 147-3.7 of the Town Charter. The Selectboard, acting on behalf of the Town, may seek injunctive relief in the Civil Division of the Superior Court which where lawful and appropriate may include, but not be limited to, an order voiding any vote or other official action taken by the public official in the matter and may remove the public official from office for cause in accordance with and as authorized by the Town Charter.
- b. In addition to any other remedies provided by law, the Ethics Committee may place a copy of its written decision in a public file maintained by the Town Clerk and may recommend training for the public official, issue a private or public censure or reprimand may publicly censure of a public official who violates Articles 8-14 of this ordinance and may recommend that the Selectboard remove the public official from office for cause.

### **ARTICLE 18. Exception – Emergencies.**

The provisions of Article 10 shall not apply if the Selectboard determines that an emergency (as defined by this Ordinance) exists and that necessary actions of a public official or body to address that emergency could not take place by strict adherence to this Ordinance. In such cases, a public official who has reason to believe he or she has a conflict of interest shall disclose such conflict as provided in Article 10.

### **ARTICLE 19. Severability.**

If any section of this ordinance is held by a court of competent jurisdiction to be invalid, such finding shall not invalidate any other part of this ordinance.

**ARTICLE 20. Authority Preserved.**

Nothing in this ~~O~~rdinance shall be construed to divest the Selectboard of any powers, duties or authority (i) that it may possess under applicable provisions of the Town-of Shelburne Charter, or (ii) to enforce any provisions of local, state or federal law or Town policy that it is otherwise charged with enforcing.

**ARTICLE 21. Reports.**

In ~~January~~December of each year the Ethics Committee shall prepare and file with the Selectboard a report about its activities during the preceding year, including the number of complaints received and the disposition of them, recommendations for amendments to the ~~O~~rdinance, and other pertinent information.

**ARTICLE 22. Amendments to the Ordinance.**

The Selectboard shall have authority to adopt amendments to this ~~O~~rdinance in accordance with the Town-of Shelburne Charter (24 V.S.A. App. § 147-1.6).

**Chapter 6. Effective Date**

This Ordinance shall take effect immediately upon approval of the voters of the Town and supersedes the Shelburne Ethics and Conflict of Interest Ordinance adopted by the Selectboard on April 28, 2009. Any Amendments to the Ordinance that the Selectboard might adopt shall take effect immediately upon adoption by the Selectboard (24 V.S.A. App. § 147-1.6)

**Comment [TL17]:** Revise as appropriate depending on when the ordinance revisions are adopted by the Selectboard.