

Town of Norwich

The Municipal Manager Form of Government

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Municipal Assistance Center



June 2015

AGENDA

- VLCT Municipal Assistance Center Introduction
- Statutory forms of local government
- Performance evaluations
- Nelson v. Town of St. Johnsbury case



The Structure of Vermont Local Government

Vermont is a Dillon's Rule state.

- “A municipality has only those powers and functions specifically authorized by the Legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof.”

Hunters, Anglers and Trappers Ass'n of Vermont, Inc. v. Winooski Valley, 913 A.2d 391, 2006 VT 82 (2006).



The Basic Statutory Form of Vermont Local Government

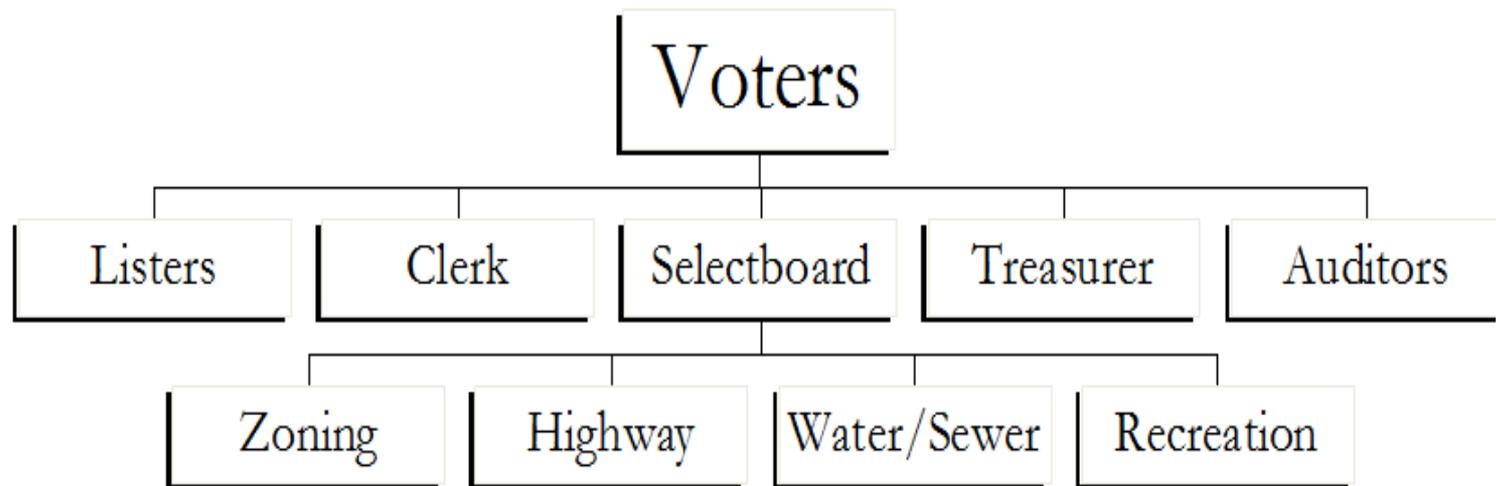
The **basic statutory model** of Vermont local government is the **town**.

Under this statutory form different **town officers** are responsible for different areas of the town's operation:

- Selectboard
- Clerk
- Treasurer
- Constable
- Town Agent
- Listers
- Auditors
- Grand Juror
- Moderator
- Others]



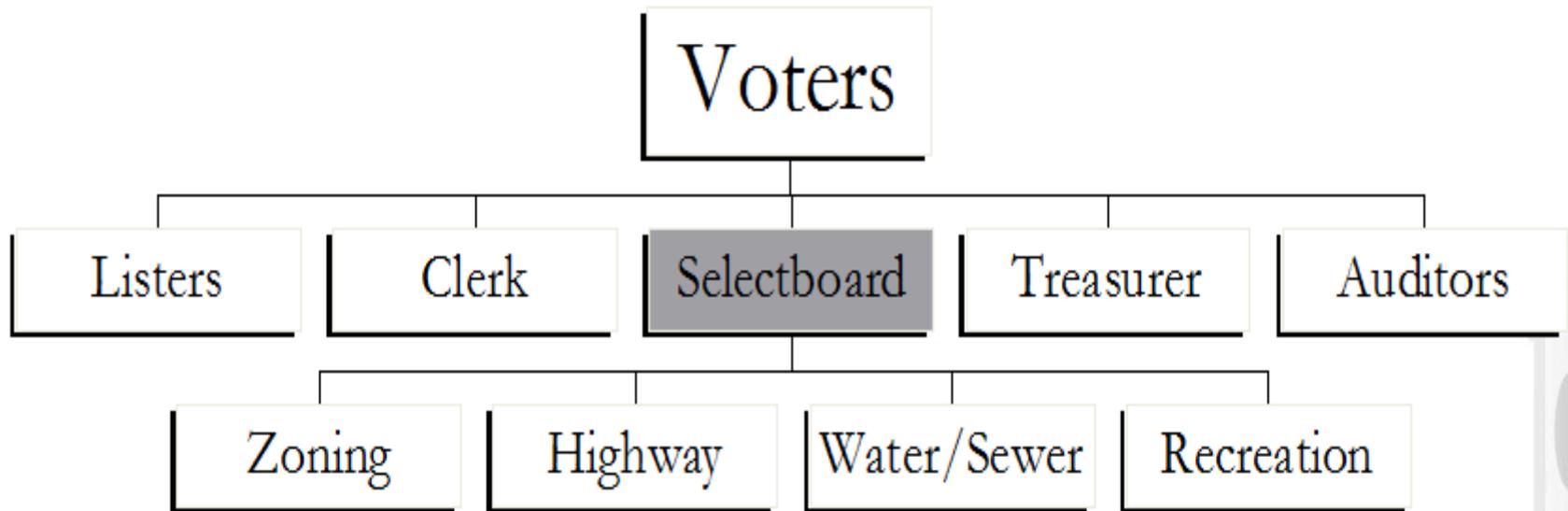
The Basic Statutory Form of Vermont Local Government



None of these elected town officers is directly **accountable** to the others in the performance of his/her statutory duties.

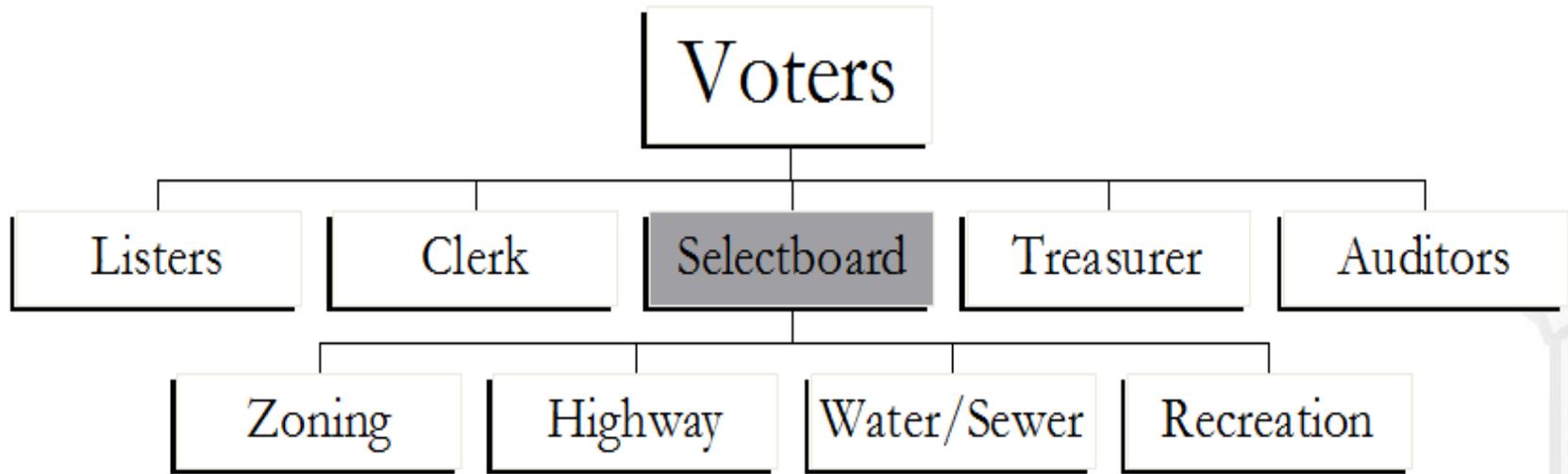
Town of Bennington v. Booth,
101 Vt. 24 (1928).

The Basic Statutory Form of Vermont Local Government



In the statutory form of town government, the selectboard performs almost all of the executive, legislative, and quasi-judicial functions of local government.

The Basic Statutory Form of Vermont Local Government



The selectboard does this as a 3-5 member volunteer board meeting typically once or twice a month. Their authority is vested in the group, not any individual member and any actions or decisions require a concurrence of a majority of the members of the board.

The Municipal Manager Form of Local Government

- The most common variation from the basic statutory model is the municipal manager form of government.
- 24 V.S.A Chapter 37 authorizes municipalities to adopt the municipal manger form of government through a local vote.
- Some municipalities have adopted the manager form of government through a municipal governance charter.



The Municipal Manager Form of Local Government

1. Killington Town	802	15. West Rutland Town	2,283
2. Orleans Village	802	16. Swanton Village	2,387
3. Ludlow Village	805	17. Vergennes City	2,584
4. Woodstock Village	891	18. Fair Haven Town	2,693
5. Enosburg Falls Village	1,323	19. Putney Town	2,700
6. Cavendish Town	1,363	20. Weathersfield Town	2,810
7. Johnson Village	1,459	21. Pittsford Town	2,943
8. Poultney Village	1,595	22. Hardwick Town	2,968
9. Waterbury Village	1,796	23. Woodstock Town	3,012
10. Wilmington Town	1,853	24. Chester Town	3,116
11. Ludlow Town	1,945	25. Westminster Town	3,132
12. Dorset Town	2,008	26. Hartland Town	3,385
13. Bethel Town	2,020	27. Poultney Town	3,387
14. Northfield Village	2,086	28. Norwich Town	3,393



The Municipal Manager Form of Local Government

29. Williamstown Town	3,394	43. Northfield Town	6,185
30. Johnson Town	3,495	44. St. Albans City	6,894
31. Windsor Town	3,498	45. Winooski City	7,239
32. Bellows Falls Village	3,500	46. Shelburne Town	7,449
33. Brandon Town	3,919	47. St. Johnsbury Town	7,591
34. Richmond Town	4,093	48. Montpelier City	7,787
35. Manchester Town	4,339	49. Barre Town	7,933
36. Stowe Town	4,390	50. Middlebury Town	8,477
37. Newport City	4,530	51. Williston Town	8,962
38. Castleton Town	4,665	52. Barre City	8,967
39. Randolph Town	4,762	53. Springfield Town	9,284
40. Waterbury Town	5,102	54. Essex Junction Village	9,498
41. Rockingham Town	5,190	55. Hartford Town	9,838
42. St. Albans Town	6,136	56. Milton Town	10,526



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The Municipal Manager Form of Local Government

57. Brattleboro Town	11,848
58. Bennington Town	15,555
59. Colchester Town	17,245
South Burlington	
60. City	18,400
61. Essex Town	20,057



The Municipal Manager Form of Local Government

- In total, 61 Vermont municipalities operate under the manager form of government.
- Range in population from 802 to 20,057
- Approximately half of all Vermonters live in a municipality with a municipal manager.



The Municipal Manager Form of Local Government

- The municipal manager form vests most of the **administrative and management** functions in a professional manager who reports to the selectboard.



The Municipal Manager Form of Local Government

- The selectboard retains the **leadership and policy functions** and responsibility to ensure that the **management and administrative functions are being carried out** by the manager to the community's satisfaction.



The Municipal Manager Form of Local Government

- Allows selectboard to hold one person **accountable** for the efficient and effective delivery of municipal services.
- Removes selectboard from operational decisions and allows it to **focus on policy issues** facing the municipality.



What is Management?

What is Policy?

- **Policy setting activities** can be described in four general processes:
 1. Establishing goals and priorities.
 2. Deliberating and choosing from a list of alternatives.
 3. Establishing protocols that govern future behavior.
 4. Advocating for values and perspectives.

What is Management?

What is Policy?

- The list of **policy issues** that face Vermont communities is endless:
 - Should the police department use Tasers?
 - Are there opportunities to diversify our municipal revenue stream?
 - Can we share services or equipment with nearby towns?
 - Do we need a new firehouse?
 - Are conflicts of interest being managed appropriately?



What is Management?

What is Policy?

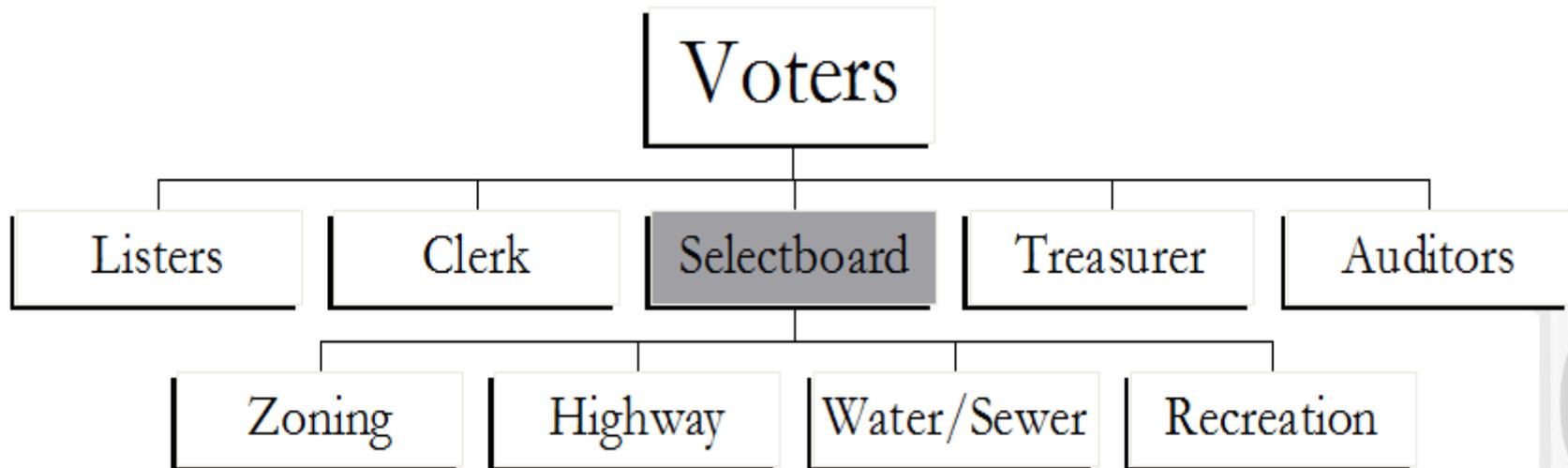
- **Managerial activities** can be described as four core functions:
 1. Directing and coordinating the activity of others.
 2. Accounting for the performance of others.
 3. Obtaining, analyzing, and presenting information to others.
 4. Making operational decisions that reflect established policy priorities.

The Municipal Manager Form of Local Government

- The adoption of the municipal manager form of government substantially alters the role of the selectboard in Vermont local government.

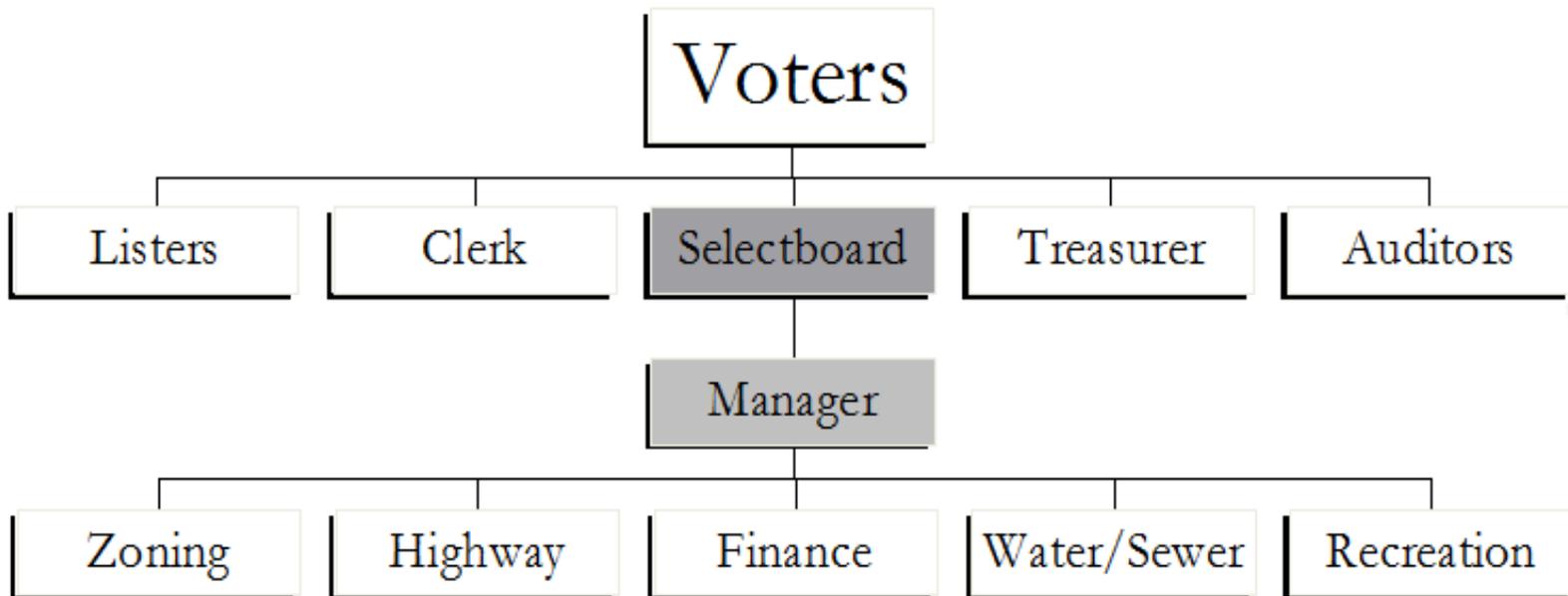


The Basic Statutory Form of Vermont Local Government



BASIC STATUTORY FORM OF VERMONT LOCAL GOVERNMENT

The Municipal Manager Form of Local Government



MUNICIPAL MANAGER FORM OF VERMONT LOCAL GOVERNMENT

BEFORE and AFTER

Selectboard

The selectmen shall have the general supervision of the affairs of the town and shall cause to be performed all duties required of towns and town school districts not committed by law to the care of any particular officer.

24 V.S.A. § 872



Town Manager

Subject to the requirements of this chapter, he shall have general supervision of the affairs of the town, be the administrative head of all departments of the town government and shall be responsible for the efficient administration thereof.

24 V.S.A. § 1235

BEFORE and AFTER

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24 V.S.A. § 872



Municipal Manager

The manager shall have authority and it shall be his duty:

To cause duties required of towns and town school districts and not committed to the care of any particular officer, to be duly performed and executed.

24 V.S.A. § 1236(1)

June 2015

BEFORE and AFTER

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24 V.S.A. § 1236(1)

BEFORE and AFTER

The manager shall have authority and it shall be his duty:

To have charge and supervision of all public town buildings, repairs thereon and repairs of buildings of the town school district upon requisition of the school directors; and all building done by the town or town school district, unless otherwise specially voted, shall be done under his charge and supervision.

24 V.S.A. § 1236(4)



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24 V.S.A. § 1236(4)

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BEFORE and AFTER

The manager shall have authority and it shall be his duty:

To perform all the duties now conferred by law upon the road commissioner of the town, including the signing of orders; provided, however, that when an incorporated village lies within the territorial limits of a town which is operating under a town manager, and such village fails to pay to such town for expenditure on the roads of the town outside the village, at least fifteen percent of the last highway tax levied in such village, the legal voters residing in such town, outside such village, may elect one or two road commissioners who shall have and exercise all powers of road commissioner within that part of such town as lies outside such village.

24 V.S.A. § 1236(5)



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BEFORE and AFTER

The manager shall have authority and it shall be his duty:

To do all the accounting for all of the departments of the town and of the town school districts when the board of school directors so request.

24 V.S.A. § 1236(7)



BEFORE and AFTER

The manager shall have authority and it shall be his duty:

To have charge, control and supervision of the following matters:

- (A) The police department, if any, and shall appoint and may remove the officers thereof and shall fix their salaries;
- (B) The fire department, if any, and shall appoint, fix the compensation of and may remove all officers and employees thereof;
- (C) The system of licenses, if any, not otherwise regulated by law;
- (D) The system of sewers and drainage, if any, except the making of assessments therefor;
- (E) The lighting of streets, highways and bridges;
- (F) The sprinkling of streets and highways and laying of dust, except the making of assessments therefor;
- (G) The maintenance of parks and playgrounds

24 V.S.A. § 1236(9)



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BEFORE and AFTER

- **The manager shall have authority and it shall be his duty:**
- **To perform all duties now conferred by law upon the selectmen,** except that he shall not prepare tax bills, sign orders on the general fund of the town, other than orders for poor relief, call special or annual town meetings, lay out highways, establish and lay out public parks, make assessments, award damages, act as member of the board of civil authority, nor make appointments to fill vacancies which the selectmen are now authorized by law to fill; but he shall, in all matters herein excepted, render the selectmen such assistance as they shall require.

24 V.S.A. § 1236(2)



BEFORE and AFTER

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- To perform all duties now conferred by law upon the selectmen, except that he shall not prepare tax bills, sign orders on the general fund of the town, other than orders for poor relief, call special or annual town meetings, lay out highways, establish and lay out public parks, make assessments, award damages, act as member of the board of civil authority, nor make appointments to fill vacancies which the selectmen are now authorized by law to fill; but he shall, in all matters herein excepted, render the selectmen such assistance as they shall require.

24 V.S.A. § 1236(2)



Municipal Manager

- **The manager shall have authority and it shall be his duty:**
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24 V.S.A. § 1236(2)



BEFORE and AFTER

- **The powers, duties and liabilities imposed upon any other departments of the town inconsistent with the provisions of this chapter shall be suspended and shall be conferred and imposed upon the manager.**

24 V.S.A. § 1238



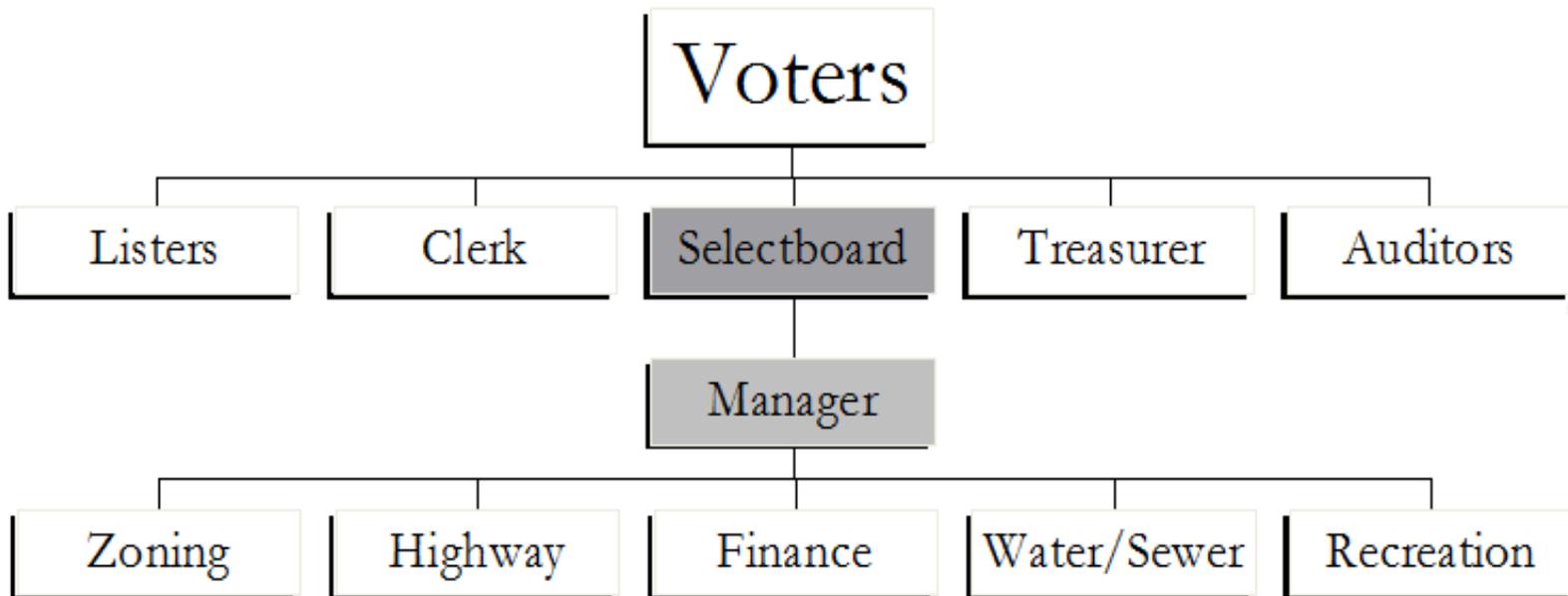
BEFORE and AFTER

- Such a manager shall be selected with special reference to his education, training and experience to perform the duties of such office and without reference to his political belief. **In all matters he shall be subject to the direction and supervision and shall hold office at the will of such selectmen, who, by majority vote, may remove him at any time for cause.**

24 V.S.A. § 1239



The Municipal Manager Form of Local Government



The selectboard retains the **leadership and policy functions** and responsibility to ensure that the **management and administrative functions** are being carried out by the manager to the their satisfaction .

The Municipal Manager Form of Local Government

- The selectboard should strive to be strategically engaged but operationally distant.
- The selectboard should step back from the day-to-day operations and management of staff.
- Honor your organizational structure and the chain of command. Discourage end runs around the municipal manager.



Questions



Performance Evaluation Policy

- The selectboard's role is to communicate its goals and objectives to the manager and evaluate whether those goals and objectives are being achieved.
- Develop a job description that reflects the selectboard's expectations and an annual work plan that reflects its policy priorities.
- Perform regular (at least annual) performance evaluations of the municipal manager.



What is a Performance Evaluation Policy?

- A system of evaluating an employee's performance which involves evaluating and giving feedback of actual performance based on key competencies that support the achievement of the overall organizational mission.



Why Implement a Performance Evaluation Policy?

- **Harmonizes expectations:** The employer's and employee's expectations of the employee's performance and the standards that he/she will be held to.
- **Performance Measurement/Improvement.** Regular evaluation helps employees improve performance and align their goals with the organization.
- **Retention.** Career growth, learning, and professional development are the things employees value most. Kaye and Jordan-Evans, Love 'Em or Lose 'Em: Getting Good People to Stay, 1999.



Why Implement a Performance Evaluation Policy?

- **Avoiding Litigation.** A performance evaluation policy allows employers the opportunity to make a complete record of the reasons for their actions, making it easier to defend any lawsuit that may result from employee termination.
 - If a performance evaluation policy is in place, it must be followed consistently.
 - Failure to follow it can give rise to an inference that termination was arbitrary or unlawful.

Performance Evaluation Policy: The Requirement

- If a PE policy is adopted, the employer must document that it has been followed.
 - From the jury's perspective, if an evaluation wasn't documented, it probably never happened.
 - Lack of documentation allows a terminated employee to exploit the inference that termination was for some other (unlawful) reason.
 - "Three week documentation" can be worse than no documentation at all.



Nelson v. Town of St. Johnsbury, LaMotte, Oddy, Ruggles, Rust, Timson, 2015 VT 5

- **Facts of the case:**

- St. Johnsbury hired Ralph Nelson (plaintiff) as town manager in September 2010;
- No contract;
- Alleged issues with performance:
 - Misrepresentations regarding renovation and leasing the Town's Pomerleau Building;
 - Allegations of sexually harassing employees, creating a hostile work environment, attempting to influence a school board member and lying.

Nelson v. Town of St. Johnsbury, LaMotte, Oddy, Ruggles, Rust, Timson, 2015 VT 5

- **Facts of the case:**
 - March 16, 2012: Selectboard member James Rust sends a letter to Nelson informing him that the selectboard had concerns about his performance and would be conducting an inquiry.
 - April 2, 2012: Rust informed Nelson that the Selectboard would be meeting to discuss his job, requested that he hand in his keys and laptop and go home.
 - April 3, 2012: Rust called Nelson to tell him that the Selectboard would be meeting, but that Nelson was not obligated to attend. Nelson attended.



Nelson v. Town of St. Johnsbury, LaMotte, Oddy, Ruggles, Rust, Timson, 2015 VT 5

- **Facts of the case:**

- April 3, 2012: Selectboard met and entered executive session, to which it later asked Nelson to join them. In executive session they discussed the proposed Pomerleau Building.
- Selectboard asked Nelson to resign. He declined.
- Selectboard returned to public session and passed a vote of “no confidence.”
- April 4, 2012: Selectboard issued a press release announcing Nelson’s termination.



Nelson v. Town of St. Johnsbury, *LaMotte, Oddy, Ruggles, Rust, Timson*, 2015 VT 5

- Nelson brought suit against the Town of St. Johnsbury in Caledonia County Superior Court alleging:
 - He was wrongfully terminated and that the Selectboard deprived him of his right to due process of law.
 - Central to this case was the issue of whether Nelson was an **at-will** or for **cause** employee.
- **Superior Court held:**
 - Nelson had no legal interest in his employment because he was an at-will employee.



Nelson v. Town of St. Johnsbury, LaMotte, Oddy, Ruggles, Rust, Timson, 2015 VT 5

- “[A]n employment contract for an indefinite term is an ‘at-will’ agreement, terminable at any time, for any reason or for none at all.”

Ross v. Times Mirror, Inc.,
164 Vt. 13 (1995)

Nelson v. Town of St. Johnsbury, LaMotte, Oddy, Ruggles, Rust, Timson, 2015 VT 5

- “(S)ome substantial shortcoming detrimental to the employer’s interests, which the law and a sound public opinion recognize as a good cause for his dismissal.”

In re Brooks,
135 Vt. 563 (1977)

Nelson v. Town of St. Johnsbury LaMotte, Oddy, Ruggles, Rust, Timson, 2015 VT 5

- **Nelson appealed to the Vermont Supreme Court;**
- **The Vermont Supreme Court reversed:**
 - Superior Court's ruling on claim of wrongful termination:
 - "In all matters he shall be subject to the direction and supervision and shall hold office **at the will** of such selectmen, who, by majority vote, may remove him at any time for **cause**."
24 V.S.A. § 1233.
 - VT Supreme Court interpreted "**at-will**" as meaning that only the Selectboard may terminate the town manager's employment and "**cause**" as a limitation on the exercise of the selectboard's discretionary authority to terminate the manager."



Cause Termination

14th Amendment of the U.S. Constitution (Due Process Claim)

- The Due Process Clause (14th Amendment of the U.S. Constitution) governs the termination of an employee with a property interest in continued employment.
 - “[N]or shall any state deprive any person of life, liberty, or property, without due process of law...”



Cause Termination

- “Public employees who can only be discharged for cause have a constitutionally protected property interest in their tenure and cannot be fired without affording them due process.”

Gilbert v. Homar, 520 U.S. 924 (1997)

- “An essential principle of due process is that a deprivation of ...property ‘be preceded by notice and opportunity to be heard...’ This principle requires ‘some kind of hearing’ prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”

Loudermill v. Cleveland Bd. Of Ed.,
470 U.S. 532, (1985)



Cause Termination

- **Cause Termination:**
 - Termination for **misconduct** or **performance** that results in a substantial detriment to the employer's interest.
 - The standard is one of reasonableness: Did the employee have notice that the misconduct or performance deficiency would be considered grounds for termination and were the grounds for the termination reasonable?

Dulude v. Fletcher Allen Health Care, Inc.
174 Vt., 74 (2002)



What Process is Due?

- **“Due Process”** governs the process for terminating a for cause employee.
- “Once it is determined that Due Process applies ‘the question remains what process is due.’”

Cleveland Bd. Of Ed. v. Loudermill,
470 U.S. 532 (1985)



What Process is Due?

- To determine what process is due, courts will balance the interests at stake (Mathews balancing test):
 - The private interest (the employee's interest in keeping his/her job);
 - The employer's interest in removing unsatisfactory employees and avoiding administrative burdens; and
 - Preventing mistakes (the risk of erroneous deprivation of property) through the likely value of additional procedures.

Mathews v. Eldridge,
424 U.S. 319 (1976)



What Process is Due?

- The U.S. Supreme Court has recognized three procedures that protect Due Process in the context of public employees terminable for cause. The one to use depends on the weight of the interests:
 - **Limited pre-termination hearing coupled with a more comprehensive post-termination hearing.** *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532 (1985);
 - **Suspension with pay.** *Cleveland Bd. Of Ed. v. Loudermill*, 470 U.S. 532 (1985);
 - **Suspension without pay.** *Gilbert v. Homar*, 520 U.S. 924 (1997).

Questions

