

Opinions

Office of the Vermont Secretary of State



Vol.7, #5

May 2005



A Message from the Secretary

Every once in awhile we are asked about how the Secretary of State's office began to publish opinions on issues of local government law. *Opinions* began as a formal publication in 1981 by then Secretary of State Jim Douglas, and his deputy Paul Gillies. The belief then was that by publishing questions and answers from the previous month, it would let people know what was going on in local government around the state, and would help officials learn from the experiences of others. They also hoped that this information would eliminate some of the telephone calls that can – and sometimes still do – consume this office.

I can tell by the number of calls and cards we have received in response to our re-institution of *Opinions* that local officials and citizens continue to value learning about the ever-changing landscape of local government law and practice. Perhaps it is because, when we see our own town's challenges reflected in the stories of other communities, we feel less alone in our work.

Though I hope our *Opinions* are interesting to read and sometimes help you solve a problem or avoid a mistake, they are not rulings that are binding on towns or citizens like a decision of a court. Rather, when we issue opinions they are just that – our opinions. We have no power to force citizens or officials to do the right thing – to treat each other civilly - to follow the law. Rather, through our opinions, Deputy Secretary Bill Dalton, Director of Elections Kathy DeWolfe, and I share with you what we believe the law requires based on our best legal judgment and from our many years of observing Vermont's local governments and following the decisions of our courts.

The thoughts expressed in our opinions also reflect our philosophy of openness and fairness in government and in the inherent value of local control. Whenever there is a question about what the law says or what is required of an official, our advice is conservative. We try to keep you out of trouble by counseling prudence over risk-taking, openness over secrecy and due process over bureaucratic expediency.

The citizen volunteers who run our local governments in Vermont deserve all the support we can give them. It is my hope that *Opinions* offers them that support and, in doing so, helps to strengthen our town governments.

Deborah L. Markowitz, Secretary of State

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A Record Making Event?

This month marks the fortieth anniversary of one of the most momentous events in Vermont history: the reapportionment of the Vermont legislature. Since 1777 the Vermont Constitution mandated a Vermont House apportioned on the basis of one representative from each municipality. When the state senate was created in 1836 each county was accorded one senator, with the remaining sixteen senators apportioned among the counties on the basis of population.

Uneven growth among the towns and counties created growing imbalances in terms of representation. The 1856 Council of Censors, for example, calculated that towns holding one-quarter of the population could wield a legislative majority (the Censors pointed out that Essex County had fourteen representatives—one for each town—though only 4,650 people resided in the county, while Chittenden County's fifteen representatives served, in the county aggregate, 29,036 Vermonters).

By the mid-1960s these imbalances were even greater. A house majority could be achieved by representatives from towns holding only 9% of Vermont's population. Conversely Vermont's twenty-two largest municipalities were represented by less than 9% of the house members. Those twenty-two communities also paid 64% of the State's income tax and over half the property tax. The senate was less malapportioned but senate delegations did not reflect shifts in county populations.

In 1964 the federal court declared the Vermont legislature malapportioned. It allowed the 1964 elections to proceed under the historic apportionment scheme but declared that the 1965 general assembly had to reapportion itself or the courts would do so. In May 1965 the general assembly passed new apportionment schemes, reducing the house from 246 to 150 members (apportioned initially on the basis of voter registration and later on population) and eliminating the requirement that each county have at least one senator.

The debates, within and without the legislature, that preceded reapportionment were among the most contentious and emotional experienced in Vermont. Small town representatives wept openly on the floor of the house, predicting that their communities would never again be able to send a resident to the statehouse. Representative Frank Hutchinson of Stannard ended his floor remarks with a plea to the future, reapportioned house, "Don't forget Stannard."

On May 14, 1965, with Governor Phil Hoff looking on from the balcony, the house voted 163 to 62 to reapportion itself.

The impacts of reapportionment continue to be profound. Where once small town representatives routinely voted to support programs funded by the larger communities, the nature of services and how they are funded changed. To many this was a positive, opening the door for modernizing state government and services. Conversely some small town Vermonters began to complain that the population centers, notably within Chittenden County, now controlled the state agenda and ignored their needs. And the Stannards were indeed

forgotten to the degree that a significant number of Vermont municipalities—including Stannard—have not had a resident serve in the house since 1965.



Of course this is a column from the state archives so let us look not at the impact of reapportionment but at the records of the reapportionment debate and process. One would assume that such a momentous event would be well represented within the archives's holdings; alas, such an assumption would be wrong. There are some committee records, including those of the special committee on reapportionment, but these are fragmentary, often restricted to scribbled calculations on how to achieve equal representation among 150 districts. The bill files containing correspondence between legislators and the legal staff who draft bills are held in the Middlesex record center, not the archives. While the reapportionment struggle began in the Vermont court system, the archives does not currently receive judicial records; those records are scattered in courthouses and in the record center. Governor Hoff, who played a leading role in reapportionment, left the bulk of his records with the University of Vermont, not the archives. Oral histories with, or records created by, key participants, when gathered at all, are likewise scattered.

There is no central index or finding aid that can help guide researchers to where records relating to reapportionment are held. Even if the public records generated by the reapportionment debates could be gathered for deposit with the archives, there is simply no space to accept them.

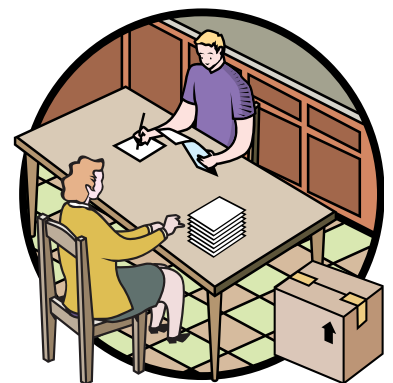
This failure to effectively document reapportionment is not unique. The disjointed approach to documentation and government accountability largely continues today. The archives, however, is seeking to improve government recordkeeping. The comprehensive archival management law passed in 2003 provides the authority, but not the resources, to systematically preserve and keep accessible government archival records. An on-going judicial records program, launched in 2004, is moving toward the coordinated identification and preservation of archival court records. There is currently a request within the capital construction bill to select a site and begin developing an archives research center with space adequate for holding archival records. There is also a current request to add a third archival position to the staff to allow a more active program of working with agencies to identify and preserve archival records.

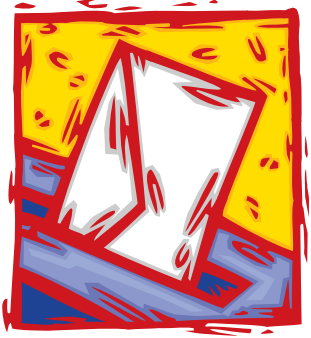
If successful these steps will greatly enhance Vermonters' ability to locate and review the important actions of their government. The on-going efforts to improve archival management are addressed in the 2005 annual report of the state archives. Copies are available upon request to archives (26 Terrace St., Montpelier, VT 05609-1101; or phone 802 828-2308; or e-mail me at: gsanford@sec.state.vt.us).

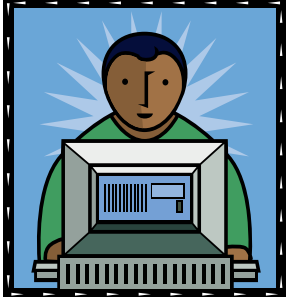


Opinions of *Opinions*

1. **The voter checklist must include the mailing address of each voter.** This should be the current mailing address. This means that your checklist should be updated to include the most recent postal address changes. If you have not updated your mailing addresses recently, you will want to update them this year so that when you send out purge letters, you will be using the most current mailing address. (Town Clerks must certify that the checklist has been purged in September 2005.)
2. **Entrance checklist is public record.** The law provides that the entrance checklist from each election must be kept for five years following the election and a copy shall be made available upon request at cost to the public. 17 V.S.A. §2590. Although the ballots and tally sheets may be destroyed 90 days after a local election, and 22 months after an election including federal offices, the entrance checklist must be retained for five years.
3. **Clerk may not reject documents based on a neighbor's complaint.** A town clerk must record properly submitted deed and survey (conforms to statutory requirements in 27 V.S.A. §341) even if an abutter objects that it contains incorrect information. The recording function is a ministerial duty that allows the documents to provide notice to others. If a correction needs to be made, a new corrected deed or survey must be submitted for recording.
4. **Bond vote requires board resolution of public necessity.** The legislative body (selectboard or school board) must pass a resolution of public necessity to begin the process for a bond vote. 24 V.S.A. §1755. All bond votes require special and additional notice and warning to be provided as directed in 24 V.S.A. §1756. The ballots must be prepared as directed in 24 V.S.A. §1758. The legislative body and town clerk must then provide copies documenting the various steps to bond counsel if the bond vote passes. It is wise to confirm that you have prepared for all the required postings and newspaper publications with bond counsel before the warning period begins.
5. **Town adopts manager form of government in the same way it elects officers.** The manner in which a town votes to either adopt or revoke the town manager system is determined by the manner in which the town has voted to elect its town officers. 24 V.S.A. §1242 and 1243. If a town has voted to elect its officers by Australian Ballot, then any vote on the town manager system of government is done by Australian Ballot (whether to adopt or to revoke.) If a town still votes its officers from the floor by voice vote or paper ballot, then the vote to adopt or revoke the town manager system is by the floor system of voting. The legislature decided to “piggyback” the manner of voting to the manner in which officers are elected rather than dictate Australian ballot for all towns.



6. **Board should take care not to discuss business outside public meeting.** In one town a public board was reported to “recess” its meeting for a brief time in order for board members to leave the room to continue to discuss board business in private. **This violates the open meeting law.** All board business must be discussed in public unless it meets one of the two exceptions to the open meeting law: executive session or deliberative session.). It is perfectly appropriate for a board to take a brief recess to allow members to use the facilities, take a stretch, or return an important telephone call. However, the recess should not be a ruse so that board members can discuss board business outside of the hearing of the attending public.
7. **Executive session is an exception to the open meeting law.** A board may go into executive session when it is discussing certain topics, permitted by law, to be discussed in closed session. This exception in the law can only be used very narrowly when the subject that needs to be discussed fits into one of the reasons listed in 1 V.S.A. §313. To enter executive session, there must be a motion stating the statutory reason with specificity; and the motion must be seconded and passed by 2/3 vote. In most situations no action can be taken in executive session and the board can only discuss the subject that it publicly announced as the subject of the closed session.
8. **Deliberations of quasi-judicial boards do not need to follow the open meeting law.** Deliberative sessions of a board are not subject to the open meeting at all. Deliberative sessions may occur when a board is acting in a quasi-judicial capacity (like a court deciding such issues as a zoning application or tax appeal). The law only exempts deliberations of a board when the decision of the board will be in writing. A deliberative session occurs after the board has heard all of the evidence in a matter as part of a public hearing process. In a deliberative session the board may meet in private to weigh the evidence and make its decision. Deliberative sessions do not need to be warned and the board can reach its decision during the session. Frequently, after the decision is reached, one member is designated to draft the written decision and circulate it to other members. The intent of a deliberative session is to allow a board to have candid discussions to weigh the evidence and to reach a decision. The deliberative session should be attended by all board members who will be participating in the decision.
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9. **No testimony can be taken in deliberative session.** When the DRB or ZBA closes a hearing no additional testimony can be taken on the application (unless the board decides to later reopen the hearing). This means that in deliberative session the board members may only discuss the evidence that was already presented to them in the hearing. Any individuals they have asked to assist them in the deliberations (most commonly the zoning administrator or a clerk for the board) are limited to providing information about the zoning bylaws and how the bylaws have been applied in the past - no new evidence (facts) about the particular application can be given.
10. **E-mail may be used for deliberation.** Ordinarily, decisions made by a board outside of a public meeting – whether they are made at a party or through use of e-mail – will violate the open meeting law. However, because deliberations of a quasi-judicial body (when the board is acting like a court) where the decision will be in writing, can be held outside of a public meeting, there is no prohibition against a board conducting its deliberations through e-mail by passing draft decisions back and forth between board members.

- 11. E-mail may be used for routine communication.** Boards must take care not to violate the open meeting law through use of e-mail. Decisions about town business must be made at the public meeting – as should information gathering and discussion of the town business by a majority of the board. This means that e-mail should play a limited role in the conduct of town affairs. In one town the manager sends daily or weekly reports to board members – this is appropriate. In another, board members e-mail the chair with items for the meeting agenda and the chair e-mails the board members to discuss when the best time is to schedule a special meeting of the board.
- 12. Beware: e-mails sent between board members about public business may be public record!** Even if two board members e-mail to and from their home computers, those messages will be subject to the requirements of the public record laws. This means that if the subject matter of the e-mail is not exempt from the public records law, by, for example, being about a personnel matter, then it must be disclosed upon request.
- 13. Record custodian can require records to be reviewed in the presence of a town employee.** A public agency may make reasonable rules to preserve the security of public records or documents, and to protect them from damage. 1 V.S.A. §316. It is not unreasonable for the custodian of public records to require the presence of a town employee when records are being reviewed to ensure that no papers are removed from the office.
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- 14. Custodians of records are not required to find and fax.** The public records law does not require the custodians of records to fax copies of documents to anyone, or require that the custodian conduct research to find documents. While each custodian can establish additional office practices, we caution clerks and others to be aware of potential risks of liability for the town if a requested document is missed or the wrong document is sent. 1 V.S.A. § 316(a).
- 15. Minutes must be available before they are approved by the board.** State law requires meeting minutes to be made available to the public five days after the date of a public meeting. Because boards generally do not approve the minutes until their next meeting, the minutes made available for public review before they are formally approved should be marked “draft” or “unapproved.” 1 V.S.A. § 312(b) (1).
- 16. Former official must pass town property – including papers and records - to new official.** When a town or town school district office becomes vacant by expiration of the term of office or otherwise, and a successor is elected or appointed, the new official is entitled to receive from the last incumbent, on demand, the records, files, books and papers of such office, or property of the town or the town school district. A person having such records, files, books, papers or other property in his possession who refuses for ten days after such demand to surrender the same may be fined (only \$10/week) for his or her refusal. 24 V.S.A. § 991.

17. Municipalities can set up recreation systems. There is a special area in the law devoted to municipal authority over recreation. It provides that municipalities, singly or jointly, may establish, maintain and conduct a system of public recreation including playgrounds. They can buy, lease or accept gifts of land, buildings or other recreational facilities, they can bond for these public improvements and they may hire a recreation director and assistant director. 31 V.S.A. § 202.

18. Municipal recreation programs can be overseen by the legislative body or by a recreation board. The legislative body of a municipality can oversee recreation themselves – or through their town manager or it can establish a recreation board. When the legislative body establishes the recreation committee or board it must decide how many members to include and it must determine the terms of office. The law requires that the terms be staggered so that the term of one member expires annually. 31 V.S.A. § 202.



19. The law that applies to towns generally will also apply to villages and cities. In most cases the laws that apply to the inhabitants and officers of towns apply equally to the inhabitants and similar officers of all municipalities, whether they be villages, cities or special districts. 1 V.S.A. § 139. The exception to this rule is that when an act of incorporation, special law or charter applies to a particular municipality, that special law will apply rather than the general statutes.

20. Only the town or abutting landowner may remove trees and shrubs within the right of way. Vermont law provides that “a person, other than the abutting landowner, shall not cut, trim, remove or otherwise damage any grasses, shrubs, vines, or trees growing within the limits of a state or town highway, without first having obtained the consent of the agency for state highways or the board of selectmen for town highways.” 19 V.S.A. § 901. A person who violates this law will be subject to a fine. 19 V.S.A. § 902.

21. Town can permit planting in the highway right of way. The selectboard may enter into agreements with individuals or organizations who wish to plant grasses, shrubs, vines, trees or flowers within highway limits. 19 V.S.A. § 903.

22. Selectboard may cut brush in right of way. The selectboard, if necessary, may cut a burned tree, or remove from within the limits of the highways under their care trees and bushes which obstruct the view of the highway ahead or that cause damage to the highway or that are objectionable from a material or scenic standpoint. Shade and fruit trees that have been set out or marked by the abutting landowners shall be preserved if the usefulness or safety of the highway is not impaired. Young trees standing at a proper distance from the roadbed and from each other, and banks and hedges of bushes that serve as a protection to the highway or add beauty to the roadside, shall be preserved. 19 V.S.A. § 904.

In our monthly Opinions we provide what we believe the law requires based upon our legal judgment, years of observing Vermont's local government practices, and Vermont Court decisions. This information is intended as a reference guide only and should not replace the advice of legal counsel.

VERMONT VOTER REGISTRATION STATEWIDE CHECKLIST

May 2005 Update



The Help America Vota Act of 2002 requires every state to develop and implement an electronic statewide voter checklist on or before January 1, 2006. The public policy purpose for a statewide checklist is to provide more accurate voter lists with less duplicate names. Each clerk will be able to "read only" information on voters in other towns in order to search for duplicates, but will only be able to add and edit voters within his or her town.

The Office of the Secretary of State is finalizing the database application, forms, and reports for the Statewide Checklist during April and early May.

During May, the process of converting data from individual town or city electronic files or database applications to an ASCII format to be imported into the statewide checklist will begin. Soon after your town or city data is collected, Kathy DeWolfe, Elections Director, will announce training locations and times for those towns that have had data converted to the list. You will be given a User's Manual and detailed instructions at the training session. We will schedule additional trainings as needed.

As previously announced to Selectboards and Clerks, by July 1, 2005, each clerk needs to have access to the internet and a browser such as "Internet Explorer" in order to use the statewide checklist—either at the office, or in smaller towns through arrangements with the school, your library, your home, or another clerk's office.

We will continue to add towns and provide training throughout the year until all towns are added to the checklist. We expect to have all towns added and at least one training provided before the end of October 2005. We will continue to provide training and incorporate suggestions for improvement on an ongoing basis.

High School Voter Registration



Every May, a mailing goes out to Vermont high schools reminding them to encourage every graduating senior to register to vote. You may be receiving requests from your area high school to provide them with assistance with the voter registration forms, rules, etc. Please remind all that a person must be over 18 to take the voter's oath. Thanks for your help in reaching out to first time voters!

Tip of the Month

This month's tip comes from Doreen Aldrich and Brenda Divignon in Rockingham:

Instead of blacking out the social security numbers on the Vermont Property Transfer Return after copying, Doreen and Brenda put a little sticky note over the area BEFORE copying. The very smallest sticky notes fit the space perfectly and it goes through the automatic document feeder without any problems. We do the same in Vernon and send a copy without the SS#'s back to the attorney for their records as well.



To submit a tip, please email Sandy Harris (VMCTA President) at vernontc@sover.net or mail it to: Sandy Harris, Town of Vernon, 567 Governor Hunt Road, Vernon, VT 05354



Mark Your Calendar with the Vermont League of Cities and Towns' Upcoming Events!

For more information, go to www.vlct.org, email info@vlct.org or call 800/649-7915.

Legal and Technical Aspects of Property Taxes Thursday, May 5

Town & County Resort, Stowe, VT

This workshop is designed for Selectboards, Listers, Justices of the Peace, Town Treasurers, and Town Clerks. All local officials are welcome to attend. In 2005, Vermont municipal governments will collect over \$1 billion in property taxes. With ever increasing pressure on the property tax, it is increasingly important that the appeals process be properly administered. Come learn what your town can do to conduct effective property tax appeals.

VTCTMA Spring Conference Thursday May 19

Inn at Willow Pond, Manchester, VT

This event will be held on Thursday and Friday, May 19 and 20. Stay tuned for more details.

Municipal Clerks and Treasurers Workshop Thursday May 26

Capitol Plaza Hotel, Montpelier, VT

This annual workshop will focus on the nuts and bolts issues faced by municipal clerks and treasurers. Particular attention will be given to licensing dogs, record keeping requirements, and recent statutory changes.

Announcing the 2005 Winners of the Poster & Essay Contest!

After considering over 250 entries from exceptionally talented Vermont students, the Secretary of State's office has chosen the winners of the 2005 Poster & Essay Contest. As in past years, we are able to present the winners online. The winning entries can be viewed on our Kids' Page at http://www.sec.state.vt.us/Kids/kids_index.htm. A number of the posters we received will be hung on the walls of the Secretary of State's office in the coming weeks. The winning posters will also be displayed in a special showing at the State House in the fall. We encourage you to check out the show if you are visiting Montpelier during that time! The winners are as follows:

Grades K-2 Poster Contest on Official Vermont Symbols:

Winners:

Rachael Enzor, Northeast Primary School, Rutland
Maricate Mangan, Northeast Primary School, Rutland

Honorable Mention:

Rosemarie Clauson, Chamberlin Elementary School, South Burlington
Camille Spafford, Home School, Rutland



Rachael Enzor

Grades 3-5 Poster Contest on a Vermont History Theme

Winner:

Walter Weaver, Home School, Northfield

Honorable Mention:

Victoria Biller, Maple Street School, Manchester
Dylan Macfarlane, Maple Street School, Manchester

Class Honorable Mention:

Helen Martin's Grade 5 Class, Gilman Middle School, Gilman



Walter Weaver

Grades 6-8 Essay Contest on the Vermont Constitution

Winner:

Marty Cain, Home School, Marlboro

Honorable Mention:

Mathieu Morissette, Home School, St. Albans
Samantha Grise, Mater Christi School, Burlington

Grades 9-12 Essay Contest on Vermont Law

Winner:

Ben Brewster, Mount Saint Joseph Academy, Rutland

May 2005 Calendar

- May 15** Last day for Town Clerk to remit to State Treasurer an accounting of dog and wolf-hybrid licenses sold and remit the license fee surcharge for an animal and rabies control program. 20:3581(f)
- May 30** Memorial Day. 1:371
(*Within 60 days of petition*) If a petition for reconsideration or rescission of a question considered or voted at Town Meeting has been filed, this is the last day on which a municipal vote may be held at a duly warned meeting. 17:2661(b)
- May 31** (*91st day after Town Meeting election*) In towns using Australian Ballot, Town Clerk may open and destroy used Town Meeting ballots and tally sheets, except as otherwise provided by law. 17:2590(d)

June 2005 Calendar

- June 1** Deadline for Listers to lodge personal property inventories with Town Clerk. 32:4007
- June 4** Last day for Listers to lodge the grand list with Town Clerk for public inspection for town of fewer than 5000 inhabitants. 32:4111(d), 4341
- June 24** Last day for Listers to lodge the grand list with Town Clerk for public inspection for town of greater than 5000 inhabitants. 32:4111(d), 4341
- June 30** End of fiscal year for all school districts, charter provisions notwithstanding, and for municipalities that have adopted July 1 through June 30 fiscal year calendar. 32:1, 24:1683(b), (c)
- June 30** Reminder for Town Clerk in municipality with fiscal year ending June 30 to publicly disclose fees kept as compensation for that fiscal year. 24:1179

Quote of the Month

My grandfather once told me that there were two kinds of people: those who do the work and those who take the credit. He told me to try to be in the first group. There is much less competition.

Indira Gandhi

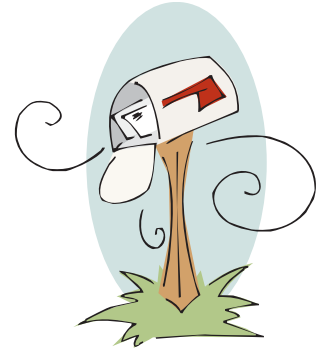


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Help us keep our mailing list up to date!

Let us know if:

- your address needs to be updated,
- your name is misspelled, or
- you'd rather receive *Opinions* a week early via email.



Send us a note via fax: 802-828-2496,

email: kmathieson@sec.state.vt.us,

or post: 26 Terrace St. Drawer 09, Montpelier, VT 05609-1101.

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