Articles written/Letters to the Editor, and Town Manager's columns printed in the Bennington Banner

Charter review will kick off

ED DAMON - THE BENNINGTON BANNER Charter Review Commission members meet at the Bennington town offices on Friday. From left: Co-chair Sean-Marie Oller, Jonathan M. Cohen, Assistant Town Manager Dan Monks, Robert Ebert, Daniel Malmborg, Robert F. Plunkett, Michael A. Keane.



Posted Friday, July 21, 2017 7:21 pm By Edward Damon edamon@benningtonbanner.com

BENNINGTON — A commission charged with reviewing the town's charter met for the first time Friday, where its seven members appointed two chairpeople and laid groundwork for creating a report to the Select Board.

Members unanimously elected two co-chairs during an afternoon meeting at town office. They discussed amendments they could recommend, including a move to a mayoral form of government, the size of the downtown improvement district, and adopting a local option tax.

Co-chairing the newly formed Charter Review Commission will be Sean-Marie Oller, the former vice chairwoman for the Vermont Board of Education and former chairwoman for the Mount Anthony Union School Board, and Robert F. Plunkett, a deputy state's attorney for Bennington County and a Mount Anthony Union School Board member.

Commission members will have James W. Barlow, an attorney specializing in Vermont local government, as a resource. Barlow will be retained to give the commission guidance.

Select Board Chairman Tom Jacobs told members that their charge is to determine whether there are any changes they want to see, and whether they would recommend them to the Select Board.

Members also talked how to collected input from the public.

A citizens comment portion of the meeting would be required under the open meeting law, Plunkett said.

Oller suggested holding a forum and creating a dedicated section on the town's website to house documents and a central email address for the public to send comments.

"We're trying to educate people and educate ourselves," she said, adding that the information should be easily accessible.

Members chose Aug. 2 as the tentative date for their next meeting.

The Select Board appointed members to the commission at their July 10 meeting, voting by secret ballot from a dozen candidates interviewed in closed session.

Member Michael Keane said the commission should create an outline of the final report that will be presented to the Select Board.

The Select Board will decide which, if any, amendments to pursue. Any charter amendments would go before voters at an annual or special town meeting, as well as approval from the Legislature and governor.

Oller acknowledged discussion over switching to a mayoral format has come up for years.

Under the current structure, Town Manager Stuart Hurd works with the seven-member Select Board. The town manager has authority to hire and manage employees, while the board hires the manager and approves policies and overall budgets.

Kean noted there are mayoral structures that can differ in strength of executive power, known as "weak" or "strong," and around term limits.

Lynn Green said it would be important to lay out the town manager position for comparison.

Members in general requested more information on issues around the charter, which Assistant Town Manager Dan Monks would try to provide.

"I like the idea of looking at 'best practices," member Dan Malmborg said. "The more information we can get, the better we can proceed."

Reach staff writer Edward Damon at 802-447-7567, ext. 111 or @edamon banner.

Committee begins review of Bennington charter

Posted Wednesday, August 16, 2017 6:42 pm

By Jim Therrien, itherrien@benningtonbanner.com

BENNINGTON — The town's Charter Review Committee began a line-by-line review of the existing charter on Wednesday and quickly found that task could be complex and time-consuming.

The seven-member committee, appointed in July by the Select Board, will review the 23-page document with an eye toward recommending amendments, to be submitted in a report to the board. The Select Board will then decide which, if any, changes should be placed before town voters for adoption and later submission to the Legislature and governor for final approvals.

The committee also discussed having an enhanced online information and public commenting page within on the Bennington website.

Currently, there is information on the group's meetings, meeting minutes and a copy of the Bennington charter — located at http://benningtonvt.org/meetings/charter-review-committee.

Sean-Marie Oller, the committee's co-chair, and other members said they would like to have a comment box people can check on to leave suggestions or comments or ask questions. It is hoped the seven committee members also will have access to the comments and be able to respond or add their own comments.

The feedback is expected to be discussed during the committee's meetings, scheduled for Wednesdays from 11:45 a.m. to 1 p.m.

The group also plans to hold a public forum on possible charter amendments, and residents are invited to attend the weekly committee meetings to offer comments.

Some of the broad topics that have been mentioned include alterations to the current town manager/seven-member select board governmental format, such as a switch to a mayoral system; and taxing changes, such as adding a local option tax.

Today, the manager has authority to hire and manage employees, while the board hires the manager and approves policies and overall budgets.

The review committee had hoped to get through the first four chapters of the charter document Wednesday, but they halted after completing just one chapter and the preamble statement. A few language changes for clarification purposes or to update sections were discussed and either approved or left as is.

And there were some questions left open in the chapter, pending consultation with James

Barlow, an attorney specializing in Vermont local government, who is advising the group.

The first chapter is titled Powers of the Town and includes broad statements such as "The Town of Bennington shall have all the power and functions conferred upon towns and villages by the Constitution and general laws of this state and shall also have all implied powers necessary to implement such powers and functions"

While approving a chapter section on Additional Town Powers, the committee decided to seek input from Barlow concerning authorization to "adopt, amend, repeal and enforce ordinances."

Some topics were specifically noted as powers relating to "removal of garbage, ashes, rubbish, refuse, waste and scrap by the town ... ," and relating to specific areas of building code enforcement; "relating to the use of firearms in settled areas," and to "packaging, marketing and handling of produce and other foodstuffs."

Possible changes proposed included adding drone use to this section and possibly eliminating some topics no longer applicable.

However, Town Manager Stuart Hurd and committee Co-chair Robert Plunkett said that language on the specific powers of the town is actually authorized through state or possibly federal law or regulation.

Hurd said the section dates back at least to the 1960s but now would be covered through state law. "All our powers come down from the state," he said.

The group will, however, refer some questions about that section to the consultant.

Among language changes approved were dropping a 15-day time limit for gathering a citizen petition signatures to force a recall of an elected town official.

Section 104 of the first chapter, an amendment from the 1990s, states that a petition signed by at least 30 percent of registered town voters is required to force a recall vote. Group members said they felt that short time limit made a difficult process nearly impossible. If those signatures were obtained, a special election would then be held, and it would still require a two-thirds majority vote to recall an official and vacate that office.

Town Clerk Cassandra Barbeau said 30 percent of registered voters would be more than 2,000 signatures.

Other charter chapters to be reviewed include those on elected town officers, appointed officers, compensation for officials; the Select Board and its powers; the town manager and that official's duties, authority and compensation, as well as the procedure for removal of a manager; taxation; fair market value of real estate; special assessments; the Bennington Downtown District; Fire District No. 1; the annual town budget; zoning and its administration; ordinances; the water system; and appointment of a charter review committee.

Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BB_therrien on Twitter.

Charter review committee OK's online commenting

The Bennington Charter Review Committee has approved an online commenting feature for the group's page on the town's website.

JIM THERRIEN PHOTO



Posted Wednesday, August 23, 2017 7:12 pm By Jim Therrien, jtherrien@berningtonbanner.com

BENNINGTON — The Charter Review Committee has approved an online commenting tool for residents to offer input on possible amendments to the town government charter.

The committee, meeting Wednesday afternoon, also considered changes in a chapter covering town office-holders, debating whether the town treasurer and/or other posts should be appointed rather than elected.

The seven-member group, appointed by the Select Board to recommend on possible changes to the 26-page government charter, discussed making the treasurer's and the town clerk's position appointed before deciding in favor of both remaining elected posts.

Daniel Malmborg said he had concerns about the treasurer's job, in that there apparently are no requirements a person needs to be qualified to handle town finances. He noted that the town of Coventry went through a lengthy and difficult process to remove an elected clerk-treasurer and delinquent tax collector, during whose terms as much as \$1.4 million in town funds is estimated by auditors to be unaccounted for.

While saying Bennington has been fortunate in having good candidates run for those posts, committee Co-Chair Sean-Marie Oller and Michael Keane asked how the town might ensure that everyone elected treasurer is qualified to handle town finances.

The consensus was that there is no requirement a resident must meet before running for one of the offices, although Oller said she would like to learn more from the state or from

committee consultant James Barlow on whether requirements might be added through language in the charter.

P. Lynn Green said the ultimate remedy for Bennington could be in the charter's recall provision for town officials or through regular elections.

Town Manager Stuart Hurd, who is not a member of the group but attends the weekly meetings, said it should be noted that "Bennington is not Coventry."

Hurd said the town has regular financial audits performed by independent professional firms, whereas some smaller towns have relied on elected auditors who also do not have to meet any requirement for their position.

The Bennington town treasurer is Joan Pinsonneault, and the town clerk is Cassandra Barbeau.

The committee also decided to eliminate language calling for the annual appointment of a town constable. Hurd said none have been appointed in many years and are not likely to in the foreseeable future, as, unlike smaller Vermont towns, Bennington has a police force.

He said another provision in the charter also allows the Select Board to add constable or other appointed positions as needed.

And the committee revised language concerning the appointed part-time listers, reducing the number of listers to no more than three from no more than five.

Members also discussed whether listers are needed since Bennington has a full-time town assessor, deciding that property owners grieving their tax bill might feel they will receive a better hearing at the town level if the decision is up to more than one person.

Committee member Robert Ebert, who serves as one of the part-time listers, said there currently are only two appointed listers. He said tax assessment appeals are heard at the town level by the part-time listers and Assessor John Antognioni, and that decisions are afterward reached by consensus "99 percent of the time."

The other town lister is Carol Holm.

Online commenting feature

Town Human Resources and Contracts Administrator Michele Johnson said that, after some last-minute adjustments, the commenting feature will be activated on the Charter Review Committee's page on the town's website — located at http://benningtonvt.org/meetings/charter-review-committee.

The committee approved a comments box that asks for feedback from the public, including comments and suggestions, about possible charter amendments. The comments will be distributed to town staff members and then to the committee members, with the staff setting aside any comments that might be considered inappropriate to be reviewed by the committee.

The intent is to post online the comments with the hope of fostering discussion of what residents would like to see in the charter.

Oller and Co-Chair Robert Plunkett also will give a presentation at the Select Board meeting on Monday, Aug. 28, of what the committee has been discussing during its weekly meetings, held Wednesdays at the town offices conference room, from 11:45 a.m. to 1 p.m.

Residents also are encouraged to attend those meetings to offer comments.

Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BB_therrien on Twitter.

Charter group votes to allow fire department option

Posted Wednesday, September 6, 2017 6:06 pm By Jim Therrien, jtherrien@benningtonbanner.com

BENNINGTON — Bennington's Charter Review Committee voted Wednesday in favor of allowing the Select Board the option to forming a partially paid fire department.

The current government charter, under a section identifying the powers of the board, authorizes it to organize or reorganize the Bennington Fire Department, but also specifies that "such department shall be a volunteer fire department"

Committee member Robert Ebert said he was not comfortable with that provision, because it prevents the board from organizing a partially paid department that might include personnel who are not volunteers. That option should be available without requiring a charter change, he said, if a situation arises in which paid personnel become necessary.

Co-Chairwoman Sean-Marie Oller said she wasn't necessarily opposed to the change, but noted that it might seem "a huge change" to some members of the volunteer fire company and might require "a lot of explaining" during public hearings on the proposed charter revisions.

The seven-member committee was appointed by the Select Board to review the 26-page document for possible changes, either to the language or the substance of the governing provisions.

Town Manager Stuart Hurd, who is not a committee member but was invited to attend the group's meetings, said that there has, in fact, been "discussion of whether we should pay the [BFD] chief."

He said the town already provides paid clerical assistance for the chief, as increasing state reporting requirements have made escalating demands on the time of the elected volunteer department leader. Hurd said he believes those types of reporting responsibilities will continue to increase.

Committee members Jonathan Cohen and Co-Chairman Robert Plunkett cited a desire to seek input from members of the BFD before voting to recommend the change. But the group eventually approved that revision and other language changes in the section on Select Board powers.

Members noted that it is understood there will be at least two public hearings on their report, and that any revisions must be approved by the board and ultimately through a townwide vote, probably during the March annual meeting.

The committee decided to change the wording concerning the fire department to allow organization of a "volunteer or paid" department, taking a suggestion from P. Lynn Green.

That same change was inserted in a provision covering the town contracting with other fire departments for services, such as with the Bennington Rural Fire Department, which is operated as a fire district.

The question was raised of whether in the future the BFD might have trouble finding enough volunteers and then need paid personnel, but Hurd said that has not been a problem in Bennington. He said there currently are about 60 members of the company.

The committee also agreed Wednesday to hold a televised public information session on Sept. 27, with charter consultant James Barlow expected to give a presentation and address questions from residents.

Public hearings on the committee's proposals will be scheduled in mid-October and mid-November, members decided, and their goal is to report to the Select Board in December.

The committee, which is meeting Wednesdays at 11:30 a.m. at the town offices, also is taking questions or comments during meetings and has a section on the Bennington town website providing information and allowing for online comments from residents.

Information can be found at http://benningtonvt.org/meetings/charter-review-committee

Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BB therrien on Twitter.

Bennington charter group won't discuss a mayor before forum

Posted Wednesday, September 13, 2017 5:15 pm By Jim Therrien, jtherrien@benningtonbanner.com

BENNINGTON — The Charter Review Committee decided Wednesday to put off any discussion of the mayoral form of government until after a scheduled public meeting on the ongoing review and amendment options.

The committee also discussed term limits for Select Board members and a removal process for those who are absent from meetings for extended periods before tabling those issues pending receipt of more information. The group also will seek input from charter consultant and attorney James Barlow.

The consultant will give a public presentation on charter-related options in Bennington on Sept. 27, and the committee is considering other public forums in October and November to update residents on issues being discussed.

The controversial topic of whether Bennington should change from a town manager/select board format to a mayoral form of government might have come up Wednesday during a review of charter sections on the select board and the manager. But there was general agreement that topic should wait until after Barlow's presentation and input from the public.

Some members appeared ready to discuss the mayoral question. Jonathan Cohen said the group "should not shy away" from the topic and might determine quickly that there is agreement one way or another and then "move on."

But a consensus emerged that the topic will be postponed until after Sept. 27.

The mayoral option was one of those suggested earlier this year when a charter review began to be considered, along with a local option tax.

Committee members said Wednesday that Select Board Chairman Thomas Jacobs has recommended that term limits for board members and a provision allowing removal of board members who are absent for extended period be considered.

The seven-member committee appeared about evenly split on term limits, which Michael Keane — a proponent — said should involve a limit of about nine years on the board.

He said a limit would allow more "younger people a chance to serve," and could have a "refreshing" effect on town government. He added that the proposal could include the option of running again for the board after three years.

Other committee members indicated they were ambivalent or philosophically opposed to term limits, but the question was put off pending consultation with Barlow and further input from residents. Input is encouraged during the group's regular Wednesday meetings at the against.

In March 2003, the mayoral format option went down to defeat again, 1,730 votes to 1,062.

Hurd was first appointed to the manager's post in 1992. He is hired by and works with the seven-member select board, with each board member elected at large. The town manager has authority to hire and manage employees, while the board hires the manager and approves policies and overall budgets.

Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BB_therrien on Twitter.

Bennington Banner (VT) - September 29, 2017

Charter consultant describes change options

JIM THERRIEN

BENNINGTON - The town Charter Review Committee's consultant provided a charter options overview Wednesday that touched on two of the key issues under consideration.

The idea of switching Bennington from a manager/ select board form of government to a mayoral format and a proposed 1 percent local option tax are among those still to be reviewed by the seven member committee, which began meeting weekly in July.

Consultant James Barlow outlined the several mayoral form options that the nine Vermont cities have adopted, including a mayor that also acts as a government manager (as in Rutland), and others in which there is also a city manager and the mayor fills more of a ceremonial role.

During the presentation at the Bennington Firehouse, Barlow said there are a number of options for a mayor, including both "strong" and "weak" mayor formats, largely depending on the extent of authority to appoint employees and oversee budgets.

In answer to questions, Barlow added that some type of part-time mayor who could represent Bennington but not have managerial authority is possible, as is a formal designation of the select board chairman for such a role.

However, the type of mayoral format that has been considered at least twice in the past - each time being rejected in townwide votes - was to replace the manager position with a mayor/manager position.

PETITION DRIVE MOUNTED

In fact, Mike Bethel, long a supporter of such a change, said during the meeting that he is mounting a petition drive to place that charter amendment option before voters.

CONSULTANT, Page 4

FROM PAGE 1

He produced a ballot question to that effect, which he said was drawn up by attorney Paul Gillies, aiming for a town vote in March.

Bethel said he believes the vote would be binding, but certain details, such as the length of term for the mayor, might require further charter amendments, and implementation also would require a second annual town meeting vote.

He said Thursday that he already has close to half the approximately 500 signatures needed to place a question on the ballot.

The charter review committee had decided to postpone discussion of a mayoral format and the town manager position until after Barlow had given his presentation. The committee has been meeting Wednesdays at 11:45 a.m. at the town offices on South Street and is encouraging input from residents during meetings and through a comment box on the committee's page on the town website - http://benningtonvt.org/meetings/ charter-review-committee.

That webpage also includes information on the review process thus far, committee meeting minutes and agendas; a includes copy of the current charter and Powerpoint presentations by Barlow.

LOCAL OPTION TAX

Concerning a proposed local option tax, officials believe it could bring in about \$1 million in additional tax revenue, with a portion going to the state.

It could be imposed as an addition to the state sales tax and/or to rooms, meals and liquor taxes.

Asked if the option tax revenue could be designated for a specific expense, Town ManagerStuartHurdsaidhe believes that could be done through use of a reserve fund added to annually.

Bethel suggested putting forth the option tax and other changes for the March 2018 annual town meeting while allowing further consideration of other issues if necessary for a later vote.

Sean-Marie Oller, cochairwoman of the review committee, said she would like to see all of the suggested charter changes included in a report to the Select Board - preferably in time for the March ballot - without singling out any issue as more important. Hurd said that since the Select Board will ultimately decide which, if any, proposed amendments to submit to voters, they could decide to hold out some issues for more consideration.

As to whether the amendments will be submitted to voters as a single package or by section, Select Board Chairman Thomas Jacobs said they "most likely will be voted on in sections."

The final step, Barlow said, would be submission to the Legislature and governor for approval, as charter changes are considered amendments to state law. Basically, he said, state law is considered to be in effect unless a local charter provision specifically differs, in which case the town charter (assuming prior approval by the state) takes precedence.

Oller said the charter group intends to add detail in its report about every change in language or substance that it will recommend to the Select Board, including notes on discussions that led to the change.

Currently, Barlow noted, Bennington is one of 54 Vermont communities with a municipal manager

format, in which the manager is hired by the select board but then typically has authority over hiring of employees and oversees the budget after it is adopted.

That contrasts with the more than 175 towns that have a more typical government format, in which the select board "acts more like the operators of a small business," Barlow said.

Under the municipal manager format, he added, the board is more "like a corporate board" of directors overseeing a type of CEO in the manager.

Barlow also referred to the format used by most of the smaller towns like Pownal, Shaftsbury, Arlington and others in the county, principally noting that the government includes up to 16 independently elected officials - such as the town clerk, treasurer, listers and others - none of whom is directly managed by the select board. In some instances, a town administrator is hired to work with the select board.

The managerial format that Bennington has allows more direct accountability, he said, because it often includes a limited number of independently elected posts, with the select board appointing most, including the manager, and possibly adding positions like city planner or development director.

In the smaller towns, accountability typically comes in the form of "political remedies [elections] and social control," as everyone is more likely to know their neighbors than in a larger community. Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BBtherrien on Twitter.

"The final step would be submission to the Legislature and governor for approval, as charter changes are considered amendments to state law. Basically, state law is considered to be in elect unless a local charter provision specifically dilers, in which case the town charter [assuming prior approval by the state] takes precedence."

JAMES BARLOW,

Charter consultant

- Caption: James Barlow, a consultant working with the Bennington Charter Review Committee, gave a presentation Wednesday on options for government charter amendments. JIM THERRIEN BENNINGTON BANNERConcerning a proposed local option tax, olcials believe it could bring in about \$1 million in additional tax revenue, with a portion going to the state. It could be imposed as an addition to the state sales tax and/or to rooms, meals and liquor taxes.
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Absenteeism rule eyed for Board members

Bennington Banner (VT) - October 6, 2017

BY JIM THERRIEN

BENNINGTON - The Bennington Charter Review Committee is considering a provision for removing Select Board members who are repeatedly absent from meetings.

Meeting this week, the committee also set dates for public hearings on the charter changes they are considering and added some longer committee meetings during the evening to increase the pace of the review.

Once again, the group discussed on Wednesday afternoon whether it should meet a Select Board request for a report on suggested charter changes by the end of December.

Robert Ebert reiterated his opinion that the group should not strive to meet "an artificial deadline" but continue the line-by-line review into 2018 if necessary. He noted that the charter allows a review committee up to a year to consider changes.

The seven-member citizen group was appointed in July by the Select Board to consider changes and include those in a report to the board. Among major changes floated have been a switch from a manager/ Select Board government format to some form of mayoral government and a proposed 1 percent local option tax that would boost revenue to the town.

Co-Chairman Sean-Marie Oller and other members have indicated they would like to submit a report before the end of the year. She suggested Wednesday adding some longer meetings to the committee's schedule, which now is to meet at the town offices from 11:45 a.m. to 1 p.m. on a weekly basis.

RULE, Page 4

Robert Ebert reiterated his opinion that the group should not strive to meet "an artificial deadline" but continue the line-by-line review into 2018 if necessary.

FROM PAGE 1

After more discussion, the group decided to schedule a three-hour meeting once a month, to begin at 4:30 p.m. The first longer session was set for Oct. 17.

The committee also tentatively scheduled public hearings on the charter review for Oct. 26 and Nov. 28 and said a December hearing will be added.

ABSENTEEISM RULE?

The committee seemed resolved Wednesday to propose a method of removing a Select Board member

who is absent for extended periods. Although there is no problem with that at the moment, town officials have said absenteeism has been an issue in the past.

The tentative charter language proposed - pending a review by the committee's consultant, attor ney James Barlow - would be to make missing four consecutive board meetings or 50 percent of meetings over either a six- or 12-month period grounds for removal, regardless of the cause of the absences.

The goal "should be to encourage participation" and avoid having a Select Board with six members that could result in tie votes on key issues before the town, said committee member Michael Keane.

Other communities with such provisions include Barre and Rutland, committee members said, and those provisions are being reviewed as possible examples.

MAYOR ISSUE

The committee also debated when to begin its discussion of the mayoral form of government, with Ebert saying he believes it should begin immediately. He noted that the committee had postponed that topic until after a Sept. 27 public information session led by Barlow to allow more questions and comments from the public, but that has now been held.

However, co-Chairman Robert Plunkett, Keane and others said that discussion should wait at least until the town manager portion of the charter is review, possibly at the next meeting.

Keane said there "will always be someone to run the operational part of the town," so it makes sense to address other possible charter changes that affect town operations before making any decisions on whether a mayor should be added to the charter and/or replace the town manager.

Some of the mayoral options outlined by Barlow during his presentation include a part-time mayor who is a city council member and fills a ceremonial role, while a city manger oversees daily operations, or an elected mayor who also acts as a city manager, as is the case in Rutland.

An expanded role for a select board chairman also is possible, Barlow said.

Also hanging over the review, Oller pointed out, is a petition drive that resident and mayoral format advocate Mike Bethel has mounted to force a town vote on a mayor format that eliminates the town manager's position.

Oller and Plunkett cited the need to determine exactly what the petition would do if approved by voters at the March town meeting. That topic will be part of the committee's discussion of the mayoral option, Plunkett said. Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BBtherrien on Twitter.

CHARTER COMMITTEE - Members oppose 'strong' mayor idea

Bennington Banner (VT) - October 19, 2017

BY JIM THERRIEN

BENNINGTON - Charter Review Committee members have voiced objections to the so called "strong mayor" form of government, which is proposed in a citizen petition now circulating among Bennington voters.

No votes were taken during a committee meeting Tuesday, but each member addressed the question that has hovered over the group's sessions since the seven members were appointed in July by the Select Board to review the charter and recommend changes.

A willingness to consider a so-called "weak mayor" government format was expressed, however, but not with significant enthusiasm by members.

A weak mayor format would entail a ceremonial position, possibly involving the head of the Select Board assuming that role, but it would retain the current town manager position with authority to oversee government operations.

In sharp contrast, a petition being circulated by longtime mayoral format advocate Mike Bethel and others is calling for a strong mayor - meaning an elected official who would replace the town manager.

The petition also states that the mayor "shall have the power to veto any action of the Select Board," a line that drew criticism from charter committee members.

"Without some additional due diligence, I would be reluctant to make a recommendation on [a mayoral format] based on our opinions alone," said committee member Jonathan Cohen.

He also said it was not his understanding when he volunteered that the charter review would consider completely changing the local government format.

Cohen said it was fortunate the petition is available "so the public can have their say," but he also recommended that the committee discuss what the Select Board might do to educate the public on the mayoral issue if question goes to a town vote.

COMMITTEE, Page 4

FROM PAGE 1

Bethel said Wednesday that he needs about 100 more voter signatures to place the mayoral petition on the March ballot and hopes to gain the required 5 percent of registered voters outside the polls for the Act 26 school merger vote on Nov. 7.

He said the question, if approved in March, would also require a committee to work out details like the length of the mayoral term, and that would have to be followed by a second townwide vote in March 2019 before the mayoral format could take effect.

Bethel said the format is similar to the one Rutland has, or "the strongest form of mayor you can get in Vermont."

Other than the eliminated town manager's position, all other aspects of town government would remain the same as in the current charter, he said, with the elected mayor assuming the duties of the manager.

Robert Ebert said that in talking to residents about the mayor idea, he has heard "basically two answers ... People feel that a mayor would bring vision, leadership and accountability to town government. The other thing people say is that [Town Manager] Stu Hurd has been here too long."

But Ebert added, "I look at the town, and I think the town is being run pretty well, so if that is what too long means, sign me up."

Hurd has been town manager for 25 years, working without multi-year contracts under a charter provision that allows a majority of the board to remove him at any time after a notice period.

Ebert would be willing to consider a weak mayor format, which he said could mean simply designating the Select Board chairman to handle ceremonial duties and represent the town, and possibly having the chairman elected directly by the voters, rather than by fellow board members.

"There is a vehicle [the petition] for considering the mayoral form of government," said P. Lynn Green.

She agreed that the committee itself shouldn't consider "turning our form of town government on its head," but added that the group should continue to address charter sections relating to the town manager, such as qualifications for the job and provisions to foster accountability.

Others said they don't believe a petition that hasn't been widely debated - in the manner they've been debating less drastic changes - is a wise method of changing local government.

"I would be very, very concerned if this were written into the charter," Daniel Malmborg said, referencing the proposed mayoral veto.

New approaches might foster a clearer vision for the town, he said, but given the amount of time the group has spent discussing the charter line by line, he was skeptical that a rigid petition format would lead to positive changes.

Michael Keane said the petition was "poorly thought through," and said he isn't comfortable considering a mayoral format before intensive efforts to educate the public on the form of government Bennington has and on what other options are possible.

Co-Chairwoman Sean-Marie Oller said of the petition's veto provision, "I liken it more to a monarchy than democracy."

She said voters would lack concrete examples with which to compare the proposed mayoral format, or to decide "what would be the benefit for the people of Bennington."

"I believe that what I hear in town is that what the people want is accountability," Oller said.

She contended the committee is addressing that through smaller proposed charter changes.

Those include an absenteeism provision that could remove Select Board members who fail to attend meetings, annual board reviews for the town manager and a required vote to renew the manager's appointment every three years.

Committee members said issues that could arise in considering a weak mayor format include whether the person would be able to dedicate enough time to the ceremonial/ promotional effort, as the part-time select board members currently receive only about \$1,400 per year.

Keane said he wonders who would be available for the kind of effort such a post would require. There might be a half dozen residents who could do that well, he said, but they are too busy with full-time jobs.

"I don't see a stable of potential candidates to take us through the next 8 to 10 years of mayoral elections," Keane said.

"I have not heard a very strong, forceful or convincing argument as to why we should have [a mayor]," said co-Chairman Robert Plunkett, although he would like to hear those opinions, he said, particularly on creating a ceremonial position.

Plunkett added, "I don't like the idea of a town mayor," saying he prefers that local government retain a town format and feel, as opposed to that of a city.

The committee also discussed writing a letter to the editor explaining members' views of mayoral government options and the changes the group is proposing in the charter.

Oller said members should prepare to address the mayoral question at two upcoming hearings on the charter review and continue to seek input during weekly meetings and online through the charter committee page on the town's website, at http:// benningtonvt.org/meetings/ charter-review-committee. Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BBtherrien on Twitter.

Caption: Bennington Charter Review Committee members voiced opinions Tuesday on the mayoral option for town government. The group is reviewing the current charter and will make recommendations for revisions to the Select Board. JIM THERRIEN - THE BENNINGTON BANNER

Charter group weighs local option taxes

Bennington Banner (VT) - October 26, 2017

BY JIM THERRIEN

BENNINGTON - Charter Review Committee members voiced support Wednesday for a local option tax but made no decisions on what specific format they might recommend to the Select Board.

Supporters of the idea consider the option a method of reducing the burden on property taxpayers while raising at least a portion of revenues from visitors to the area.

Whether to propose a 1 percent tax on sales and/ or meals and rooms is one of the key issues to be considered by the committee, which was appointed to study the current charter for possible revisions.

The Select Board will then accept, reject or revise those recommendations for submission to the voters in March. Reviewing the tax section in the charter, some committee members indicated they favor adding the local option to the sales tax, while others indicated support for including the rooms and meals tax as well.

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FROM PAGE 1

With a charter change, 1 percent local tax can be added to the state's 6 percent sales tax, and/or the 9 percent rooms and meals tax and 10 percent alcoholic beverages tax. After the taxes are collected by the state, 70 percent of the local option portion would be returned to the municipality.

The idea of a local option is an attractive one, Robert Ebert said, in that it shifts some of the burden from property taxpayers and from residents when non-residents are paying it.

However, he added, "I think that meals and rooms should be excluded," saying he believes that tax is high without adding another 1 percent.

Daniel Malmborg, said he believes meals and rooms taxes might more often be payed by non-residents, while townspeople are likely to be affected by a hike in the sales tax.

Jonathan Cohen and P. Lynn Green expressed reservations about the effects on restaurants and motels if the meals and rooms tax is increased.

Lynn, owner of the Four Chimneys Inn, said that from discussions with people in the business she believes owners would be less likely to oppose a meals and rooms tax if some of the funding could be earmarked for tourism promotion.

Cohen recommended seeking the support of business owners by designating a portion of the new

revenue toward promotion of the area. At any rate, he said, the committee should seek more input from the public on the tax issue.

Ebert contended that voters are more likely to support additional funding for street repairs or similar needs than for ads or videos to lure tourists to Bennington.

Green said she also has heard that owners of lower to medium priced motels fear losing business to other towns if the rooms tax rises from 9 to 10 percent.

Committee members asked Town Manager Stuart Hurd to research information on what formats other Vermont communities that have adopted a local option tax have instituted.

He said the local revenue option was allowed after passage of Act 60 for socalled "gold towns," or those that send more in taxes to the state than they receive for their schools. They can adopt a local tax through a town meeting vote.

For so-called "receiving" towns like Bennington, the option tax now can only be adopted, but only through a change in the governmental charter.

Among communities that have recently adopted local option taxes are Montpelier and Brandon in 2016, Colchester in 2015, and Wilmington in July 2012.

Manchester is among county towns with a local tax on sales, adopting that in 2008, and adopting a local sales tax in 1999. Winhall adopted local option taxes in 2010, Dover in 2007 and Stratton in 2004.

Those with a local rooms and meals tax include Brattleboro, adopted in 2007.

The charter group also said Wednesday that a forum on the charter review process set for tonight at 5:30 p.m. will be rescheduled because of a potential conflict with the Act 46 merger informational meeting, scheduled for 7 p.m. at Mt. Anthony Union High School.

More information on local option taxes is available at http://tax.vermont.gov/ business-and-corp/salesand- use-tax/local-option-tax Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger.org. @BBtherrien on Twitter.

EDITORIAL - Local option tax requires clarity

Bennington Banner (VT) - October 27, 2017

The Bennington Charter Review Committee's discussion of whether to pursue a 1 percent local option tax - possibly on sales, possibly on rooms and meals, or both - raises some interesting questions and possibilities for the town.

Raising revenue, much of it from visitors to the area, from sales and/or rooms and meals, could help ease the burden by property owners at tax time.

A 1 percent hike would raise the sales tax to 7 percent from 6 percent, and the rooms and meals tax to 10 percent from 9 percent. Those are not outlandish rates, given what some larger communities charge for hotel and meal taxes.

The discussion might naturally start at the charter level, thanks to state law, but it surely must not end there. We think any decision on adding a new revenue stream needs to be made as a top-down, holistic study of the town's revenue picture. And it needs to come with a clear picture of how those tax dollars would be used.

There's already some ground being staked out over the best way for Bennington to proceed, if it chooses this path. Some see the rooms and meals tax as the best way to focus on visitors to the region and the sales tax as affecting local residents more directly. Others are concerned that raising the meals and room tax would negatively affect the hospitality industry here.

While we understand that concern, we're not convinced that visitors are likely to turn down a room at a local inn because the tax on a \$200 a night stay suddenly increases to \$20 from \$18.

The truth is there's no way to exclude locals from a local option tax of either sort. Maybe area residents don't stay at area hotels, but they sure dine at local restaurants, and they shop at local stores.

For such a tax to be fair, whatever additional money comes of out local pockets ought to balance out on the property tax bill, one way or another. Otherwise, it risks becoming regressive - hurting the very people who can afford it the least.

The good news is that if properly administered, local option taxes can help ease the property tax burden.

Take Manchester, which has had a 1 percent local option tax for years. Even though the state keeps a portion of the revenue, Manchester's local option tax helps the town fund a full-time police department, a broad range of recreation programs and a one-third share of the operating expenses for its remarkable community library, while its property tax rate remains among the lowest in the state.

Presently, Manchester's local option revenues are healthy, with meals and rooms tax revenues growing faster as the hospitality business in the Northshire expands. But what goes up must come down, and after the Great Recession started in 2008, Manchester saw a decrease in local option revenue as would-be visitors changed spending habits in the midst of financial crisis.

That has to be kept in mind as Bennington considers its options.

If there's one thing taxpayers dislike more than the taxes themselves, it's surprises. And depending on revenue that might disappear with the next recession would be a most rude surprise indeed. As we've seen recently in state government, when you use one-time revenue to keep taxes low one year, you must pay up the next.

So how could Bennington wisely use a local option tax?

Capital expenditures such as roads, sidewalks and equipment come to mind. Money set aside in a rainy day fund for the next weather disaster or emergency infrastructure repair would be sound policy. Earmarking funds for yearly human service agency requests might also make sense.

What that revenue should not be is a spending spree.

Our experience is that tax increases are easier to explain if it's clear to the taxpayer knows what it's buying and understands why it's needed. Fail to provide that clarity, and the suspicious taxpayer naturally starts to wonder where the money went and why he or she is paying.

That clarity is what's needed if Bennington

By JIM THERRIEN Banner/VTDigger

mend giving the Select Board the authority to develop a local option tax plan for submisview Committee will recom-BENNINGTON—The Charter Re sion to voters

the committee voted After some debate Wednes-

inanimously to include that recommendation in a report members expect to present to the Select Board by the end of December on possible revisions to the town's governmental charter.

of the Select Board as "the head of town government for The committee also recommended designating the chair

all ceremonial purposes," but that was approved on a split 4-2 vote with one abstention.

egories allowed by the state ing amendment, the Select to develop a plan for adding With the proposed tax-Board would have authority four local option tax cat

alcohol taxes. Committee

percent to any or all of the sales, rooms, meals and

specify where the revenue

pe

generated should

which categories should be reached a consensus that they should not try to specify members increased by 1 percent, nor

The committee approved ously discussed.

marked, as had been previ-

a proposal to submit to town would simply authorize the charter amendment that Select Board to put together voters for final approval.

ter passage of Act 60, the education funding law, as a way for so-called "gold towns," which send more to the state Local option taxes were approved by the Legislature af-

education funding, to boost in taxes than they receive in town revenues.

like Bennington, or one that receives more in education funding then it sends to the state, a charter change is required before local option taxes can be considered. For a "receiving

TAX, Page 4.

collected annually.

CEREMONIAL POST

narrowly approved recommending a more formal ceremonial role for the the committee chair of the Select Board. Also Wednesday.

> to add 1 percent to the state sales tax now 6 percent); the rooms and meals ax (9 percent), and the alcohol sales

The program allows a community

ROW PAGE 1

bers felt the more formal designation that the chair of the Select Board ten does attend ceremonial events, but a majority of committee mem-That official, who is chosen during an annual vote of the board, now of-Language that is used in several other charters in Vermont states also serves as the town's representative for all ceremonial purposes. would be appropriate.

> The amendment proposed by the review committee allows the Select Board to propose one or all of those

ax (10 percent).

charter changes will be included in a detailed report to the board by late December. The board can then submit some, all or none of the recommended changes to the voters in

All of the group's recommended

option for the town.

fulfilling that role was discussed and won some support. And those voting in favor of the concept said they believe it should be up to the person to decide whether an event required his The idea of a small annual fund to offset costs to the chairperson in or her attendance.

> lature and the governor also will be It is estimated that in the range of

required.

Final approvals from the Legis-

March for approval

Lynn Green and Michael Keane "It could backfire," Green said, in were opposed to the concept.

ed by the state, which reimburses the could be generated by a local option

tax in Bennington. The tax is collectcommunity 70 percent of the amount

\$1 million in additional tax revenue

sure on the chairperson to attend evthat the designation could add presery event or be criticized.

most board members have full-time jobs that can prevent from attending She noted that serving on the board includes only a stipend and events.

"I'm amazed [board members] show up at so many events," she said.

that goal.

other jobs; they have their jobs," he members and select board chairs is essentially a more voluntary than it about adding such a designation to the charter. "It's not that they have and what they do as select board Keane raised similar concerns "They have their professions, is a compensated position." said.

Sean-Marie Oller, Daniel Malmborg, Jonathan Cohen and Robert Ebert voted in favor of the amendment, while Robert Plunkett abstained.

bivalent about the idea." He said he nated to represent the town, but also like that someone would be desigliked "the fact that we have a select Plunkett said he had gone back and forth on the issue and was "am-

Ebert termed the amendment lanboard of complete equals."

guage "pretty innocuous and non-threatening," but one that might lead to more effective representation for the town.

and leadership," he added, saying the change might be a step toward "We've been talking about vision

that a citizen petition now being circulating could force a town vote format for Bennington, which would replace the town manager for an Cohen and Malmborg both noted in March on a mayoral government elected mayor/manager post

would more effectively represent, the hen said, referring to supporters of a town than a seven-member Select "This is a way to kind of address mayoral format, who claim a mayor what some folks see as a void," Co-Board.

we have heard from the public," Malmborg said, adding, 'I think we should heed that call, which we have "I think this helps us heed a call

line.

cism for not attending one event or another, saying that from her experi-Oller said she wasn't worried that ence on school boards, criticism over such issues is the norm.

one seeking the board chairmanship would understand they would be ex-She added that she liked that any pected to fill the ceremonial role.

The review committee, which bepointed by the Select Board, has one more meeting scheduled — on Dec. 20, beginning at 4:30 p.m. at the conference room at the Town Offices on gan meeting in July after being ap-South Street

group's meetings is posted on the minutes and comments from the town website at http://benningtonvt.org/meetings/charter-reviewcommittee — along with meeting public, which can be submitted onthe OD O Information

Jim Therrien writes for New England Newspapers in Southern Vermont and VTDigger. org. @BB_therrien on Twitter. Letter to the Editor Bennington Banner

Bennington Charter Review Informational meeting Wednesday Sept 27, 2017, 5:30 PM Bennington, Fire House

The public is invited to a presentation given by Jim Barlow, an attorney that specializes in municipal law. Mr. Barlow will review: what a municipal charter is, the different forms of local government in Vermont, things to consider while reviewing a charter and the governance amendment process to change a charter. Mr. Barlow will\ answer questions on these topics as well as presenting information.

The Charter Committee has been meeting weekly reviewing the Bennington Town charter page by page section by section. The public is welcome to attend these meetings as well as submit comments to the committee via the Bennington Town website http://benningtonvt.org/meetings/charter-review-committee/. The Bennington Charter can be found at web link above, in addition, all the past agendas and minutes are at this website.

In October and November there will be two evening forums for citizens to give input and ask question of the Charter Committee.

Please consider attending or watching on CATV.

Hope to see you there.

Sean-Marie Oller on behalf of the Charter Review Committee

Letter: Charter Review Committee seeks input from public

Posted Sunday, November 26, 2017 2:27 pm On Tuesday, November 28, at 5:30 p.m., the Bennington Charter Review Committee will hold a public forum at the Bennington Fire House. We want to hear from the citizens of Bennington. Much information is on the Town of Bennington website with regard to the work the Charter Review Committee has done to date: benningtonvt.org/meetings/charter-review-committee/

The committee is working its way through the eighteen-page, eight-section Town Charter document, section by section, line by line. The committee has heard from a limited number of citizens, some people are interested in seeing changes to certain sections, some think things should stay the way they are, and we have also been made aware of a petition circulating to put a mayoral form of government on the ballot. In addition, the committee has heard from Fire Department members with regard to a recommendation to insert language in the charter that would allow the Select Board to use volunteer or paid fire departments, should that need ever arise.

The committee has discussed changes to the powers of the Select Board, Town Manager and taxation sections. Some examples of recommended changes include: an annual performance review of the Town Manager; a three-year term contract for the town manager, which may be renewed for successive three-year terms; specific language has been recommended to address absenteeism of Select Board members; and other recommendations reflect current law. The committee has made reference in the charter to Vermont statutes so it is clear where there is state law. In addition, discussions have taken place around intrusive technologies, including drones, in order to provide a balance between recreational interests, commercial opportunity, law enforcement, and the protection of fundamental rights of citizens. These are few examples of the in depth discussions the committee has had.

Our work has been thoughtful and deliberate. The committee members are open minded and willing to listen to all points of view. Our charge is to recommend changes to the Select Board, their charge will be to consider the committee's recommendations as a whole or in part, then any changes to the Town Charter will be voted on by the citizens of Bennington.

We look forward to hearing from you.

Sean-Marie Oller

Co- chair, Bennington Charter Review Committee

Town Manager's Column – June 2017 JUNE 16, 2017 BY BETH ANTOGNIONI

ALL ABOUT TOWN

Stuart A. Hurd, Town Manager

At its first meeting in May, the Select Board announced the formation of a seven (7) member Charter Review Commission. Applications now total twelve (12). The Board has planned on a seven-member committee. The process to select appointees has not been set just yet. Although the Select Board has not worked out its charge to the Commission, the areas of the Charter that may be reviewed include the Select Board's powers and authority, whether current elected officers, the Town Clerk, the Treasurer, and the Moderator, should remain as elected or changed to appointed as now allowed by State law, the Manager's duties and responsibilities, whether the Downtown Taxing District purposes and powers should be amended and whether the Downtown Improvement District Map should become set by the Select Board, whether the Town's current governing structure should be changed, and whether a 1% local option sales tax should be adopted for Bennington. The Select Board retains the final authority on what changes should be put before the voters in March 2018 or beyond.

The work on the development of a Tax Increment Financing District (TIF) will begin later this month. The consulting firm, White and Burke, is the pre-eminent firm for this type of work. We wish to develop a TIF District within our downtown and gather the necessary data and documentation to support it. Under current legislation, once the District is identified and an application for a TIF District developed, it must be presented to the Vermont Economic Progress Council (VEPC). It is important in this process that the community understand the impacts of the District and that the viability of the District can be shown to VEPC. I am told the process and review are rigorous and detailed. Once approved by VEPC, the Town must seek approval from the voters. The approval sought is to allow the Town to incur debt for the identified infrastructure improvements, roads, lighting, sidewalks, storm sewers, parking, etc., which will then stimulate development in the District. The debt incurred is then paid off utilizing the incremental increase in the Grand List due to the new development which then allows for the use of increasing education tax funds so that there is no impact on the taxpayers.

The negotiations between Saint-Gobain and the State continue. It now appears that there may be movement towards a resolution for those wells contaminated and located west of the railroad tracks that run to North Bennington from Bennington. There is disagreement between the State and Saint-Gobain for those properties east of the railroad tracks. Saint-Gobain continues to point to the former

Houghton Lane landfill which was closed under EPA guidelines in 1999. Saint-Gobain's engineering firm is developing plans to test soils and ground water in this area, including the former landfill. The Town is awaiting a review of those plans by the State and EPA before signing on.

You may have noticed work on a new solar farm progressing on the easterly side of Route 7 south just across from the Sheriff's Department. This development by Encore Redevelopment will provide reduced cost electricity to the Town's Wastewater Treatment Plant. When completed, all of the Town's electricity will be provided by two renewable energy sources through net-metering agreements. The other source is the hydro facility at the Papermill Bridge operated by Bill Scully. Pretty cool, if you ask me.

We continue to move forward with necessary work at the Wastewater Treatment Facility to get ready for the bond vote in October. When successful, we will then complete the necessary upgrade of the Plant. Some of the work underway may create odors from time to time. We are working hard to mitigate that and avoid any other problems this work may create.

Remember, if anyone has any questions or suggestions arising from this column or on any town matters, please contact me at 442-1037 or stop in at the Town Offices on South Street.

Stuart Hurd is Bennington's Town Manager. He writes a monthly column on town issues

Town Manager's Column – July 2017

JULY 19, 2017 BY BETH ANTOGNIONI

ALL ABOUT TOWN

Stuart A. Hurd, Town Manager

At its first meeting in July, the Select Board voted to select the Charter Review Committee members. They are Jon Cohen, Robert Ebert, Lynn Green, Michael Keane, Dan Malmborg, Sean Marie Oller, and Bob Plunkett. The Select Board has not yet worked out its charge to the Committee. The Committee will elect its own Chair. The Town will supply a secretary and handle all meeting notices, postings, etc.

The Committee will meet soon to organize and begin its work.

The work on the development of a Tax Increment Financing District (TIF) has begun in earnest. Dan Monks and Michael McDonough are handling the lion's share of the staff effort. Working with the consulting firm, White and Burke, we must identify the boundaries of the District, identify potential developments, identify infrastructure and its estimated cost, and analyze the potential Grand List growth. The formal Letter of Intent was signed by the Chair and the Manager and mailed today. Under current legislation, once the District is identified and an application for a TIF District developed, it must be presented to the Vermont Economic Progress Council (VEPC). It is important in this process that the community understand the impacts of the District and that the viability of the District can be shown to VEPC. I am told the process and review are rigorous and detailed. Once approved by VEPC, the Town must seek approval from the voters. The approval sought is to allow the Town to incur debt for the identified infrastructure improvements, roads, lighting, sidewalks, storm sewers, parking, etc., which will then stimulate development in the District. The debt incurred is then paid off utilizing the tax revenue generated by the incremental increase in the Grand List resulting from the new development within the District. There is no impact on the taxpayers because the TIF allows the Town to use increased education tax revenue that would normally flow to the State to pay off local bonds.

The negotiations between Saint-Gobain and the State continue. There continues to be positive movement towards a resolution for those wells contaminated and located west of the railroad tracks that run to North Bennington from Bennington. That is the good news. For those properties east of the tracks, Saint-Gobain is preparing a plan to test soils, surface waters, and subsurface waters to identify to its satisfaction the source of PFOA in this area. The Town is awaiting a final review of those plans by the State and EPA before signing on.

We continue to move forward with necessary work at the Wastewater Treatment Facility to get ready for the bond vote in October. The plans are at the 90% stage. The focus of our efforts will be on replacing the RBC's, a new pre-screening facility to remove debris at the Headworks, upgrading the anaerobic digestion by upgrading both the Primary and Secondary Digesters, and Control Building upgrades including a small addition and electrical work. We hope to unveil the plans and cost estimates very soon to get the community behind this very necessary project.

I am pleased to announce that we have hired a new Community Development Director. She is Zirwat Chowdhury, a Bennington resident, with an impeccable educational background in economics and art history. She will begin her tenure with the Town on July 31, 2017. I am also pleased that our current interim Director, Michael McDonough, will stay on in a contract capacity to continue work on several very important projects including the TIF District application and the Request for Proposals on the two highway garages once our new Public Works Facility can be occupied.

Remember, if anyone has any questions or suggestions arising from this column or on any town matters, please contact me at 442-1037 or stop in at the Town Offices on South Street.

Stuart Hurd is Bennington's Town Manager. He writes a monthly column on town issues.

Town Manager's Column – August, 2017 AUGUST 18, 2017 BY BETH ANTOGNIONI

ALL ABOUT TOWN
Stuart A. Hurd, Town Manager

At its first meeting in May, the Select Board announced the formation of a seven (7) member Charter Review Commission. The Committee is made up of the following: Jon Cohen, Robert Ebert, Lynn Green, Michael Keane, Dan Malmborg, Sean Marie Oller, and Rob Plunkett. The Committee has held two meetings to date. It is establishing a comment page for the web site. The Committee wants to hear from the community. It will hold a forum as well. Its first presentation will be at the August 28th Select Board meeting. Please let your voice be heard. If you've got an idea or a suggestion on how Bennington's Charter should be revised, let the Committee know. One may also get comments to the Committee through my office.

The work on the development of a Tax Increment Financing District (TIF) is well underway. A recent public forum was held to introduce the District map and plan to the community. It is now on the Town's web site and on its Facebook page. We are working with the consulting firm, White and Burke, the pre-eminent firm for this type of work. I heard recently that the TIF will raise taxes for all. That is not the case. The TIF uses the incremental increase in the Grand List (assessed values for real estate) created by new development to pay for the new public improvements such as improved lighting, public parking, new plantings and parks. The Bennington home owner will not see an increase in his/her taxes if the TIF is approved. I have also heard that the TIF is being confused with a 1% increase in the State sales tax. That, too, is not the case. It is important in this process that the community understand the impacts of the District and what it offers. To restate: The approval sought is to allow the Town to incur debt for the identified infrastructure improvements, roads, lighting, sidewalks, storm sewers, parking, etc., which will then stimulate development in the District. The debt incurred is then paid off utilizing a portion of the increased education taxes raised by the incremental increase in the Grand List due to the new development. There is no impact on the taxpayers.

The negotiations between Saint-Gobain and the State have resulted in a partial settlement. Phase 1 is a resolution for those wells contaminated and located west of the railroad tracks that run to North Bennington from Bennington. Municipal water will be extended to all home owners in the area encompassing the Village of North Bennington and the northwestern part of Bennington, Jennings Drive, Gypsy Lane, Silk Road, Bard Road, Austin Hill Road, Murphy Road, and North Bennington Road. There is disagreement between the State and Saint-Gobain for those properties east of the railroad tracks. Saint-Gobain continues to point to the former Houghton Lane landfill which was closed under EPA guidelines in 1999. Saint-Gobain's engineering firm has developed plans to test

soils and ground water in this area, including the former landfill. The Town is awaiting a review of those plans by the State and EPA before signing on.

We continue to move forward with necessary work at the Wastewater Treatment Facility to get ready for the bond vote on October 10th, 2017. A presentation by the Town's engineers will be made at the August 28th Select Board meeting. A second public hearing will be held on October 2. The current estimated cost for the entire project is just under \$10 million. Should the vote be successful, the necessary work will begin as soon as possible. It will most likely take two construction seasons to complete all the work.

Remember, if anyone has any questions or suggestions arising from this column or on any town matters, please contact me at 442-1037 or stop in at the Town Offices on South Street.

Stuart Hurd is Bennington's Town Manager. He writes a monthly column on town issues.

Town Manager's Column – September, 2017 SEPTEMBER 14, 2017 BY BETH ANTOGNIONI

ALL ABOUT TOWN

Stuart A. Hurd, Town Manager

Many of you may have seen my Letter to the Editor seeking support for the October 10 bond vote. A reader pointed out to me that I had not mentioned the Assurance of Discontinuance in strong enough terms. Those of you who may be contemplating a "no" vote are reminded that the Assurance carries with it the threat of fines if we don't complete mandated upgrades. It is unfortunate, but we do find ourselves facing, not only the cost to construct, but also fines to be paid to the State should we not complete the work in a timely manner. The Assurance of Discontinuance arose from the RBC failures in 2015 which, in turn, caused violations of our discharge permit. During that difficult time, the waste water staff worked very hard to keep the Plant within its permit limits. It simply could not be done. That brings us to this moment. We can support the bond vote and do the work, or we can vote "no" and still be mandated to do the work and, on top of that be fined. Regardless of the threat of fines, this work is necessary and must be done. We've pared the project down to the most needed, high priority work. We've committed to some of the work in-house saving some \$2.0 million in construction cost. And we're bonding when the rates are fairly low. The bond costs do not affect the rates until two (2) years after substantial completion or not until FY 2021. Now really is the time to move forward. I hope you will support the Town. Vote "yes". The Walloomsac River thanks you. We thank you.

The TIF Plan has now been approved by the Select Board. The application is scheduled to be submitted by the end of September. I am very hopeful that it will be approved. That's what makes this moment very exciting. The Town will be able to construct necessary public infrastructure such as improved sidewalks, improved pedestrian spaces, improved public parking, improved storm water systems, and the like all to benefit the community and all to be paid for from funds raised through the incremental growth in the Grand List within the TIF District, said growth being the result of new developments tied to the improved infrastructure. The Town is committing 100% of the local incremental increase, and requesting that the maximum, 70%, of the education fund incremental increase be committed to paying for the infrastructure. The Plan does not contemplate raising local taxes. That's why this is such an important development tool.

The construction contracts for the Phase 1 PFOA water line extensions have been awarded. There are 4 contracts for the Bennington work totaling \$11.14 million. Work is anticipated to start in October. This will mean construction in and along many of our rural roads in the northwesterly portion of Bennington. Please exercise care and patience when moving through construction zones. This is a major undertaking. It will create problems for traffic movements. In the area considered

Phase 2, the northeasterly portion of Bennington, soil sampling and water testing are about to begin. Drilling rigs will be along the roadsides and at the Houghton Lane former landfill site. This activity is being paid for by Saint-Gobain. The company is conducting this work to further define how the groundwater moves in this area and determine if the soils show trace contamination. The results should help to identify the cause of PFOA contamination in this area.

The Charter Review Committee continues its work. It has established a comment page for the web site. The Committee wants to hear from the community. It will hold a forum at 5:30 pm on Wednesday September 27 at the Bennington Fire Facility. Please let your voice be heard. If you've got an idea or a suggestion on how Bennington's Charter should be revised, let the Committee know.

Remember, if anyone has any questions or suggestions arising from this column or on any town matters, please contact me at 442-1037 or stop in at the Town Offices on South Street.

Stuart Hurd is Bennington's Town Manager. He writes a monthly column on town issues.

Town Manager's Column - October 2017

October 13, 2017 by Beth Antognioni

ALL ABOUT TOWN
Stuart A. Hurd, Town Manager

I want to thank the voters who took the time from busy schedules to vote on the recent waste water facility improvement bond. The turnout was light. We anticipated that because October 10th is not a normal voting day. As you all know, the bond passed by a two to one margin. We now begin the two year task of completing the planned upgrades and bringing the Facility into the 21st Century. Thank you all for your support.

On Wednesday, October 18, the Vermont Economic Progress Council (VEPC) will visit Bennington to hear from local officials and others about the Town's now filed Tax Increment Financing (TIF) application. This very important application, if approved, will allow the Town to bond for necessary improvements in the identified district and allow those bonds to be paid back by the incremental increase in the Grand List using State Education Tax monies generated by the new developments. In this way, there is no impact on local taxpayers. It will aid in the development of the former Greenberg property and should spur development throughout the District.

Contractors are getting ready to start construction on the extension of the North Bennington and Bennington municipal water systems to provide uncontaminated water to hundreds of homes. This set of projects, known as Phase 1, will not reach every contaminated home. Testing continues in the area known as Phase 2 in an attempt to verify, to the extent possible, contamination sources other than Saint-Gobain. Of course, Saint-Gobain is funding this investigation as part of its agreement with the State. Identifying locations for soils spoil sites, excess soils from the various digs, continues to be difficult. The State, with some assistance from the Town, is working to identify additional sites that can be used to address the impact on surrounding properties. It is not an easy task.

Work continues on the new home for the Public Works Department. We continue to plan on a late Fall occupancy. Much work remains. Staff are focused on getting everything in place. The two old garages will then be available for reuse. You will recall that the Town plans to develop a Request for Proposals (RFP) to gain an understanding of the interest in the buildings and what uses might be planned.

The Charter Review Committee continues its work. This Committee is giving the Charter a very thorough review. A three hour work session is scheduled for Tuesday October 17 from 4:30 pm until 7:30 pm at the Town Offices. The next public forum is scheduled for October 26 at the Bennington Fire Facility from 5:30 pm until 7:00 pm. Weekly noon work sessions will continue as well. The schedule and agenda are posted on the Town's website and its Facebook page. Minutes are published on the website only.

The Public Utilities Commission (PUC), formerly the Public Service Board (PSB), recently denied Allco Energy's request to reconsider the Chelsea Solar project's denial. The Town sought this denial for several reasons and was successful. The revised Apple Hill Solar project continues to be heard by the PUC. The Supreme Court appeal of the Chelsea Solar Project's original denial continues.

Please don't forget the upcoming November 7th vote on the Act 46 solution to school governance.

Remember, if anyone has any questions or suggestions arising from this column or on any town matters, please contact me at 442-1037 or stop in at the Town Offices on South Street.

Stuart Hurd is Bennington's Town Manager. He writes a monthly column on town issues.

Town Manager's Column – November, 2017 NOVEMBER 20, 2017 BY BETH ANTOGNIONI

ALL ABOUT TOWN

Stuart A. Hurd, Town Manager

It's budget building season. Town departments have begun the arduous process of developing budgets

for the coming fiscal year, July 1, 2018 to June 30, 2019 (FY2019). These department budgets are due in the Manager's office by mid-November. Most will be in by the time this is published. I then go through each budget as does the Finance Director, Melissa Currier, first to confirm accuracy of each line item, and then to determine if the proposals are to be included in the budget I send on to the Select Board in mid-December. I will generally meet with each department head to review the final product. The Select Board generally sets two to three work sessions (3-4 hours each) in January to go over each major budget with the department head and the Manager. The final budget, once approved by the Board, is then warned for the vote at March Town Meeting.

On Friday November 17th, a small contingent of people will be heading to Montpelier to present at the second Vermont Economic Progress Council (VEPC) hearing regarding Bennington's application for a Tax Increment Financing (TIF) district. This very important application, if approved, will allow the Town to bond for necessary improvements in the identified district and allow those bonds to be paid back by the incremental increase in the Grand List using State Education Tax monies generated by the new developments. The first hearing held here in Bennington was very well received by the VEPC Board. There will be a third meeting wherein the final decision should be made.

Contractors are well underway on the extension of the North Bennington and Bennington municipal water systems to provide municipal water to hundreds of homes. Testing has been completed in the area known as Phase 2. The results are to be released at the end of December if all goes as planned.

Work continues on the new home for the Public Works Department. We are now shooting for a mid-December occupancy. Much work remains. Staff are focused on getting everything in place and preparing for Winter. The two old garages will then be available for reuse. You will recall that the Town plans to develop a Request for Proposals (RFP) to gain an understanding of the interest in the buildings and what uses might be planned.

The Charter Review Committee continues its work. The Committee has made its way through the first five (5) sections of the Charter which include the Select Board make up and powers, the

Manager, elected officers such as the Town Clerk and the Treasurer, and taxation. The next public forum is scheduled for November 28th at the Bennington Fire Facility from 5:30 pm until 7:00 pm. Following that on November 29th, the Committee will hold another 3 hour work session from 4:30 pm until 7:30 pm at the Town Offices. Weekly noon work sessions will continue as well. The schedule and agenda are posted on the Town's website and its Facebook page. Minutes are published on the website only.

On Monday, November 20th, the Bennington Planning Commission and the Select Board will hold a joint public meeting to receive comments on two solar projects, Battle Creek 1, a project in a "preferred" location behind Carbone and Chelsea adjacent to the Apple Hill project. Having revised the project from its original size, the developer has asked the Public Utilities Commission to consider it anew. The Supreme Court appeal has been withdrawn.

Remember, if anyone has any questions or suggestions arising from this column or on any town matters, please contact me at 442-1037 or stop in at the Town Offices on South Street.

Stuart Hurd is Bennington's Town Manager. He writes a monthly column on town issues.

Appendix A:

General questions regarding Charter Committee and Amendments

8/17/2017 4:26 PM

RE: Charter Advice

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Hello Rob and Sean-Marie,

I've included links to the statutes I have cited below for your refernce, but please be aware that these statutes have not been updated since the last session of the Legislature. A few things could be out of date.

On the question of drones, I am not aware of any Vermont municipalities that have discussed or addressed drone use. The attached article is dated but it discusses many of the issues related to municipal regulation of drones. Because drones are subject to regulation by the FAA, one of the more difficult issues to consider would be <u>federal preemption</u>.

1. Why are there two separate sections regarding ordinances?

I do not know. I doubt there is any intent behind it. Perhaps checking the history of the various charter amendments could shed some light.

Comparing the two introductory clauses, the obvious difference is that <u>Section 102</u> states, "In addition to powers otherwise conferred by law, the <u>Town of Bennington</u> is authorized to adopt, amend, repeal, and enforce ordinances" while <u>Section 302</u> provides, "In addition to powers otherwise conferred by law, the <u>Select Board members</u> are authorized to adopt, amend, repeal, and enforce ordinances" I think this difference was probably just the result of untidy drafting and I doubt that there is any intention in the use of the different terms (Town of Bennington vs. Select Board members).

2. Can or should the two sections be combined?

Yes, the two sections can be combined. Yes, I think that they should be.

- 3. Are these powers already provided under statute?
- 4. And associated with #3, the sections are essentially unchanged since 1966, so is there anything that is glaringly (or dimly) obsolete?
- 5. Also related, is there more modern language that is used (or you would suggest) regarding powers relating to ordinances
 - 102 In addition to powers otherwise conferred by law, the Town of Bennington is authorized to adopt, amend, repeal, and enforce ordinances:
 - (a) relating to collection and removal of garbage, ashes, rubbish, refuse, waste, and scrap by the Town and establishment of rates to be paid to the Town for such service.

Municipal responsibility for the management and regulation of solid waste is generally set out at <u>24 V.S.A. Chapter 61</u>, with duplicative authority to regulate storage, collection, processing and disposal of solid waste granted under <u>24 V.S.A. 2202a</u>. Authority to regulate storage and dumping of solid waste is also granted under <u>24 V.S.A. 2291(12)</u>.

Most, if not all, Vermont municipalities have adopted a solid waste ordinance. Some Vermont municipalities license waste haulers, but I am not aware of any Vermont municipality that provides municipal waste collection services. I am also not aware of any statute that expressly authorizes municipal waste collection, though it is implied in some of the statutes cited above.

With respect to modernization, "solid waste as defined at 10 V.S.A. 6602(2)" could be substituted for "garbage, ashes, rubbish, refuse, waste, and scrap"

(b) relating to construction and alteration of public and private buildings and the use thereof, including establishment of minimum standards for plumbing, heating, and wiring, so as to prevent hazardous and dangerous conditions, fires, and explosions by precautionary regulations and inspection;

The general statutory authority to adopt municipal building codes is found at 24 V.S.A. Chapter 83. The authority to adopt residential housing codes is found at 24 V.S.A. Chapter 123. Both chapters grant authority to conduct inspections. See 24 V.S.A. 3102 and 24 V.S.A. 5003(b)(7). Under 24 V.S.A. 3101(a), municipalities can regulate "building materials, structural design, passageways, stairways and exits, heating systems, fire protection procedures, and such other matters as may be reasonably necessary for the health, safety, and welfare of the public, but excluding electrical installations subject to regulation under 26 V.S.A. chapter 15." Municipal authority to adopt an electrical code and conduct electrical inspections, under delegation from the Commissioner of Public Safety, is granted by 26 V.S.A. 898.

For what it is worth, this subsection arguably grants greater authority to Bennington than 26 V.S.A. 898 because it authorizes adoption and enforcement of an electrical code without delegation from the Dept. of Public Safety.

I'd have to give some thought on modernizing this language. There is certainly some opportunity here.

(c) relating to the use of firearms in settled areas;

Municipalities are authorized to regulate the use and discharge, but not the possession, of firearms under 24 V.S.A. 2291(8). Ordinances adopted under 24 V.S.A. 2291(8) must be consistent with 24 V.S.A. 2295.

(d) relating to the packaging, marketing, and handling of produce and other foodstuffs;

There is no general statutory authority for municipalities to regulate "packaging, marketing and handling of produce and other foodstuffs." Some indirect municipal authority to regulate in this area would come from 18 V.S.A 613(a), which grants the local board of health (i.e., the selectboard) the authority to adopt regulations "relating to the prevention, removal, or destruction of public health hazards and the mitigation of public health risks, provided that such rules and regulations have been approved by the commissioner."

That being said, given the authorities exercised by the Vermont Agency of Agriculture, Food, and Markets and USDA (e.g., conducting meat and poultry inspections, dairy inspections), and the Vermont Department of Health (e.g., conducting inspections of restaurants and food processors), I would consider this subsection obsolete.

(e) relating to the prevention of pollution of streams, ponds, and other waterways within the Town.

There are numerous and varied sources of municipal authority to prevent pollution of surface waters, including shore land regulations adopted under zoning, (see 24 V.S.A 4414(D) and 24 V.S.A. 4424(a)(1)), sewage disposal ordinances, (see 24 V.S.A. 3507 and 24 V.S.A. 3617), and solid waste ordinances (see 24 V.S.A. 2202a and 24 V.S.A. 2291(12).

I think the notion of whether this subsection is obsolete turns largely on one's view of federal, state, and local environmental regulations and laws. Given the breadth of environmental laws and regulations that have been enacted since 1966, some might consider this subsection obsolete. On the other hand, others may view this as a broad and clear grant of authority to address pollution issues on the local level.

302 In addition to powers otherwise conferred by law, the Select Board members are authorized to adopt, amend, repeal, and enforce ordinances:

(1) regulating the parking and operation of motor vehicles; including, despite any contrary provisions of law, the establishment of speed zones wherein the limit is less than 20 miles per hour, all as may be required by the safety and welfare of the inhabitants of the Town;

General statutory authority to regulate motor vehicle operation and parking is found at 24 V.S.A. 2291(4) and (26) and 23 V.S.A. 1008. The authority to establish speed limits is found at 23 V.S.A. 1007. As we discussed, for town highways, the minimum speed is 25 miles per hour, except that "downtown development districts designated under 24 V.S.A. chapter 76A may have posted speed limits of less than 25 miles per hour." See 23 V.S.A. 1007(a)(1)(B) and (g). In my opinion, charter authority to establish speed limits less than 20 mph is worth keeping.

(2) relating to regulation, licensing, and prohibition of the storage and accumulation of junk cars, garbage, ashes, rubbish, refuse, waste, and scrap, and collection, removal, and disposal of such materials;

As noted above, municipal responsibility for the management and regulation of solid waste is generally set out at 24 V.S.A. Chapter 61, with authority to regulate storage, collection, processing and disposal of solid waste granted under 24 V.S.A. 2202a. Authority to regulate storage and dumping of solid waste is also granted under 24 V.S.A. 2291(12).

As I also mentioned above, most Vermont municipalities have adopted a solid waste ordinance under the general statutes. The authority to regulate solid waste under these statutes is very broad.

Interestingly, Bennington's solid waste ordinance refences 24 V.S.A. Chapter 61 and 24 V.S.A. 2202a, but not Sections 102 or 302 of the charter. Given the breadth of general statutory authority to regulate solid waste, this section could be considered obsolete.

Again, with respect to modernization, "solid waste as defined at 10 V.S.A. 6602(2)" could be substituted for "junk cars, garbage, ashes, rubbish, refuse, waste, and scrap".

(3) relating to registration and regulation of bicycles;

General statutory to regulate operation and use of bicycles would come from <u>24 V.S.A. 2291(1)</u> and <u>(4)</u>. There is no general statutory authority to require the registration of bicycles.

I don't know of any Vermont municipality that requires registration of bicycles, but H46 a <u>bill that would require bicycle registration</u> was introduced in the Legislature in the most recent session. This subsection could be considered obsolete. South Burlington repealed its bicycle ordinance a few months ago.

(4) relating to the keeping of dogs, cats, and other domestic animals in settled areas.

General statutory authority to regulate keeping of domestic pets (domestic dogs, cats, and ferrets) and wolf hybrids is found at 20 V.S.A. 3549 and authority to regulate dogs specifically is found at 24 V.S.A. 2291(10). Interestingly, the Bennington charter only allows regulation of dogs, cats, and other domestic animals in settled areas. Given the breadth of general statutory authority to regulate domestic pets, this section could be considered obsolete.

And finally, there was some discussion on our recall provision in Section 104. We agreed to recommend striking the "within fifteen (15) calendar days of it issue" limitation, but the general consensus was that the language would make recall very difficult. We would like to hear any thoughts you might have on that section as well.

These are my thoughts:

- 1. Recall should not be easy to initiate. The value of stability in local government is reflected in the fact that outside municipal charters, there is no statutory provision for recall of elected municipal officers. Recall should not, in my opinion, be an easy process to initiate and the petition to initiate the recall process should reflect broad support for holding a recall vote. Among the town and city charters that provide for recall, the number of required petition signatures ranges from 15% to 35% of the registered voters. Bennington requires 30%. In my opinion, 25% to 30% of registered voters is an appropriate percentage.
- 2. Recall should be without reason or cause. A few charters (e.g., Bennington, St. Johnsbury), require the recall petition to state a cause or reason for the recall. While voters may agree that recall is appropriate, they may not agree on a specific reason. Requiring a reason or cause puts some burden on the petition drafter to effectively capture the sentiment of a large group of people. A reason or cause is not required to elect an official and should not be required to recall an official. We each make or decisions for our own reasons.
- 3. The recall vote should occur within a specified number of days. Bennington requires that the vote occur "after 60 calendar days" from the Select Board's receipt of a valid petition. This could allow the Bennington Select Board to delay a recall vote for a significant period, or even indefinitely. All of the other charter recall provisions require a recall vote within a specified period, typically 40, 45 or 60 days.
- 4. The number of votes required for recall should be easy to determine. Bennington's standard is "approved by a majority of two-thirds of the ballots cast at such special election." I am not sure what this means. The easiest approach is a majority or supermajority (2/3rds). Some charters require a simple majority but only if the total number of persons voting is "at least as many registered voters of the Town vote as voted in the election wherein the officer was elected, or at least one-third of the registered voters of the Town vote, whichever is greater."

I hope that this helps.

Let me know if you have any questions or need any clarification.

Jim

James W. Barlow PLC
Vermont Local Government Law
P.O. Box 112
Plainfield, VT 05667
802.274.6439
www.vtlocalgovlaw.com

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From: Robert Plunkett [mailto:rfplunkett@gmail.com]

Sent: Wednesday, August 16, 2017 4:04 PM

To: James Barlow < iim@vtlocalgovlaw.com >; Sean-Marie N Oller < ollersvt@comcast.net >

Subject: Charter Advice

Jim -

The committee has been meeting and today we started discussion of the language of the charter itself. Our plan is to review each line, and reserve further discussion on some topics until after we have more information, input, etc.

The committee wanted your advice on one (or a couple) of those topics.

The biggest issue was about Section 102 (Additional Town Powers) and Section 302 (Additional Powers of Select Board...). The questions that were raised were:

- 1. Why are there two separate sections regarding ordinances?
- 2. Can or should the two sections be combined?
- 3. Are these powers already provided under statute? (And I know you specifically mentioned the under 20 mph limit and two others, so other than those.)
- 4. And associated with #3, the sections are essentially unchanged since 1966, so is there anything that is glaringly (or dimly) obsolete?
- 5. Also related, is there more modern language that is used (or you would suggest) regarding powers relating to ordinances?

A suggestion about regulating "drones" was also made. Are you aware of any municipalities that have discussed the topic?

And finally, there was some discussion on our recall provision in Section 104. We agreed to recommend striking the "within fifteen (15) calendar days of it issue" limitation, but the general consensus was that the language would make recall very difficult. We would like to hear any thoughts you might have on that section as well.

And again, thank you for your assistance with this endeavor. I think I gave you my number before, but just in case, it is 440-2649. Please give me a call if you want any clarification on what we are asking.

Rob

• Into Unchartered Airspace - Here Come the Drones.pdf (4 MB)

Robert Plunkett <rfplunkett@gmail.com>

8/22/2017 10:33 AM

Fwd: Response to your question concerning "master" copy of town charter.

To Sean-Marie N Oller <ollersvt@comcast.net>

What I got back from the legislative council.

----- Forwarded message -----

From: Luke Martland < LMartland@leg.state.vt.us >

Date: Tue, Aug 22, 2017 at 7:30 AM

Subject: RE: Response to your question concerning "master" copy of town charter.

To: Robert Plunkett < rfplunkett@gmail.com Co: BetsyAnn Wrask < BWrask@leg.state.vt.us <

Hi Robert,

There is no formal style guide for the statutes. I would, as you suggest, focus on the substance. Usually the process is that a town or village determines that they wish to make a change to their charter, they communicate that idea to their local representative, and the representative asks my office to draft the bill to effectuate that change. As a result, I think the substantive change is more important at this stage than the exact language. Once we receive the request from our client (the representative) we will draft the specific language necessary. And, once the bill is drafted the town or other interested parties usually has a change to weigh in, for example when a committee takes up the bill. I hope this helps.

I am cc'ing the attorney, Betsy Ann Wrask, who handles most charter changes.

Take care,

Luke

From: Robert Plunkett [mailto:rfplunkett@gmail.com]

Sent: Monday, August 21, 2017 5:27 PM

To: Luke Martland

Subject: Re: Response to your question concerning "master" copy of town charter.

Luke -

Thank you for getting back to me. I did spend the weekend doing just as you suggested, and then comparing it to the printed version (which was actually a very interesting exercise). I was also just informed that our Town Manager has compiled the text as well. So I expect we will be prepared to go forward.

Separately, I saw that 2 V.S.A. § 424(7) mentions "the style of the Vermont Statutes Annotated." Is that a written style manual that we could reference? It might be something that would be helpful to us to avoid needless grammar discussions. Although now knowing about your revision authority, I think we will be able to focus just on the substantive. (But I am also curious because I'm a prosecutor who wrestles with the criminal statutes all the time.)

Again, thank you.

Rob

On Mon, Aug 21, 2017 at 4:31 PM, Luke Martland < LMartland@leg.state.vt.us > wrote: Dear Mr. Plunkett,

I am sorry about the delay in responding, but I was taking a few days off. Unfortunately, we do not have the town charter as a Word document that I can send to you and that you can save and edit. However, the charter is posted on our website here: http://legislature.vermont.gov/statutes/fullchapter/24APPENDIX/103

If you cut and paste the complete text, you can create such a document. You will probably have to clean up the formatting, but I believe you can create a "master" document in this manner and save into Word. One thing to note, the version displayed on our website does not include any potential changes that were contained in a bill that was signed by the Governor this spring or summer. We are waiting for the vendor we use to send us the updated version of the Vermont statutes, with any changes that became law this year (2017). We usually receive this in the fall, and then post on our website.

I hope this helps. Sincerely,

Luke

Luke Martland

Director and Chief Counsel

Vermont Legislative Council

State House

115 State Street

Montpelier, VT 05633-5301

Tel: (802) 828-2231 or 828-2237 (direct)

Imartland@leg.state.vt.us

From: Robert Plunkett [rfplunkett@gmail.com]
Sent: Thursday, August 17, 2017 12:07 PM

To: Debbie Curtis Cc: Sean-Marie N Oller

Subject: Text of the Charter for the Town of Bennington, Title 24 App Chapter 103

Debbie -

As we talked about earlier, I am a co-chair of the Charter Review Committee for the Town of Bennington. What I hope that the Legislative Council could provide to us is an electronic copy of the exact language of our Town Charter as it has been enacted into law (Title 24 App, Chapter 103). We would then use that file as the base to edit for any amendments we may recommend to the Select Board.

My thought was that the Legislative Council would be the most likely place to find any sort of "master" document, so I called you first.

I am asking because we have been working from documents that do not exactly reflect the certified text as published by LexisNexis. We are not looking for an sort of certification or annotation, though; we just want to work from a file that contains the most accurate text possible.

You had mentioned that the Council does not provide such a document, but suggested that I send a written email request just the same. If it is not possible, we can of course seek other means, but thank you entertaining this request.

Robert F. Plunkett

Co-Chair, Bennington Charter Review Committee

9/12/2017 2:19 PM

RE: Charter Review Committee questions and requests.

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Here is the charter with a proposal for combining Sections 102 and 302.

Jim

From: James Barlow [mailto:jim@vtlocalgovlaw.com]

Sent: Tuesday, September 12, 2017 2:08 PM To: Robert Plunkett; Sean-Marie N Oller

Subject: RE: Charter Review Committee questions and requests.

Rob and Sean-Marie,

In response to your questions:

Do you know of any qualifications that the State requires for [a] town treasurer?

To be elected, a candidate for treasurer must be a registered voter in town. See 24 V.S.A. 2646. This requires one to be 18 years of age, have taken the voter's oath, be a citizen of the United States and a resident of the state of Vermont, and have registered to vote. See 17 V.S.A. 2121. The treasurer must also not be "unable to perform his or her duties due to a mental condition or psychiatric disability." See 24 V.S.A. 962. The treasurer must be bondable. See 24 V.S.A. 832. Also, the treasurer may not simultaneously be an auditor, selectboard member, school director, or town manager. 17 V.S.A. 2647. In some instances, the town treasurer may not be the assistant town clerk. 24 V.S.A. 1622.

Could the town require its own qualifications for an elected position?

Looking at this from the perspective that the Town charter is a state law, the charter could impose any eligibility requirement for an elected office that is consistent with the Vermont and United States constitutions.

However, the United States Supreme Court has held that persons "have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." *Turner v. Fouche* 396 U.S. 346, 363 (1970). Without going into an overwhelming amount of detail, if a fundamental constitutional right is affected by the eligibility requirement, and if the qualification is challenged, the Town would be in the position of having to prove that the qualification is necessary to promote a compelling state interest, which is a very high legal threshold. On the other hand, if the qualification does not impact a fundamental right, the qualification could potentially be justified on a rational basis, which would be much easier to accomplish. The right to be a candidate for public office is potentially a fundamental constitutional right.

We have decided that Section 102 and 302 will be combined into a single section in 302, and we would like your thoughts, including proposed language, on combining and streamlining the sections without listing every power but also without losing any of those powers.

See attached for a starting point. I think that each subsection should be considered by the committee, keeping in mind not only streamlining but preserving existing authority and avoiding unnecessary debates and disputes, both locally and in Montpelier. There may be existing provisions in the charter that perhaps should be left alone, if only because of their "hot button" nature. For example, the provision for regulating, "use of firearms in settled areas" might be something that is best left for another day. It may be helpful for you to talk with Dick Sears and your other reps about what reception the Town should expect in Montpelier on certain topics.

Robert Ebert suggested expansive language for the section: "In addition to powers otherwise conferred by law, the Select Board is authorized to adopt, amend, repeal and enforce ordinances relating to the health, safety and quality of life of Bennington residents."

Again, I would suggest that you talk with your reps about how this might be received in Montpelier. My sense is that "health, safety and quality of life" may be too broad for the Legislature - it is far broader than the ordinance adoption authority granted to any other municipality.

There was also a suggestion to include a power to regulate new technologies. Lynn Green suggested this language:

Where the State Law does not apply and supersede, The Selectboard has power to create and enforce ordinances that address intrusive technologies and advancements to provide the right balance between recreational interests, commercial opportunity, law enforcement and the protection of fundamental rights of citizens including the regulation of:

- Vacation rentals such as Airbnb and car services such as Uber
- Unmanned aerial vehicles (drones)
- Marijuana and e-cigarette use
- Police body cameras
- Solar panel installations

As with my comment on Mr. Ebert's suggestion, I don't have a good sense that this is going to be welcomed by the Legislature. Also, keep in mind that the Town already has authority to address some of these topics (e.g., vacation rentals through zoning, police body cameras through general orders adopted by the police department). There are other topics that the Legislature is very unlikely to turn over to the Town (e.g., regulation of marijuana).

In section 303, is subsection 6 necessary?

Section 303(6) provides, "In addition to powers otherwise conferred by law, the Select Board members shall also have the power to: ... (6) discharge all duties heretofore devolving on the Town Agent by general law and hire attorneys on behalf of the Town. This subsection is not strictly necessary, but it is helpful. Under 17 V.A. 2646(11), a town is required to annually elect "A town agent to prosecute and defend suits in which the town or town school district is interested." This officer is referred to as the town agent. Most of the responsibilities of the town agent have been superseded or vested in other officers, and only a few vestigial responsibilities remain. Many towns no longer bother to elect a town agent. Section 303(6) alleviates the legal requirement to elect a town agent and clarifies that the selectboard has authority to hire attorneys to represent the Town.

I hope this is responsive to the committee's questions. Please let me know if additional clarification is required.

Regards,

Jim

James W. Barlow PLC
Vermont Local Government Law
P.O. Box 112
Plainfield, VT 05667
802.274.6439
www.vtlocalgovlaw.com

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From: Robert Plunkett [rfplunkett@gmail.com]
Sent: Monday, September 11, 2017 8:37 AM

To: James Barlow < iim@vtlocalgovlaw.com >; Sean-Marie N Oller < ollersvt@comcast.net >

Subject: Charter Review Committee questions and requests.

Jim -

Attached is the text of the charter that we are now working from. I believe it to exactly reflect the official language.

We have a number of questions and requests for you:

- 1. Do you know of any qualifications that the State requires for town treasurer? Could the town require its own qualifications for an elected position?
- 2. We have decided that Section 102 and 302 will be combined into a single section in 302, and we would like your thoughts, including proposed language, on combining and streamlining the sections without listing every power but also without losing any of those powers.

Robert Ebert suggested expansive language for the section: "In addition to powers otherwise conferred by law, the Select Board is authorized to adopt, amend, repeal and enforce ordinances relating to the health, safety and quality of life of Bennington residents."

There was also a suggestion to include a power to regulate new technologies. Lynn Green suggested this language:

DRAFT 1.0 of intrusive advancement clause

Where the State Law does not apply and supersede, The Selectboard has power to create and enforce ordinances that address intrusive technologies and advancements to provide the right balance between recreational interests, commercial opportunity, law enforcement and the protection of fundamental rights of citizens including the regulation of:

- Vacation rentals such as Airbnb and car services such as Uber
- Unmanned aerial vehicles (drones)
- Marijuana and e-cigarette use
- Police body cameras
- Solar panel installations
- 3. In section 303, is subsection 6 necessary?
- 4. Regarding the 9/27 presentation: It will begin at 5:30 pm and will be scheduled for 2 hours. It will be a education forum, with questions held until the end of your presentation. With that in mind, we hoped that the presentation would be shorter but still be the overview that you presented before. In terms of what we would like to be highlighted are the process itself, including specifically explain the process for a citizen's petition to amend a charter; a discussion on what having a "mayor" could actually mean; and also an explanation of the ordinance powers of the town.

Please give me a call if you need an further explanation of any of these. My cell is 802-440-2649

Rob

Bennington Charter jb 9.12.17.doc (746 KB)

12/8/2017 5:36 PM

RE: Charter Committee

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Hi Rob and Sean-Marie:

Downtown Improvement District -

It was brought to our attention that some towns might assess a tax on the entire town (or possibly some different delimited area) rather than just on the district itself. Can you let us know which towns do this, and is it by charter or some other mechanism?

I probably need some clarification and background on how the Downtown Improvement District is funded and operated.

Under its general taxing authority, every town can levy property tax on all the non-exempt property on its grand list. For example, a town might develop a "downtown beautification" program, and include expenditures in the town budget for such things as benches, lights, and other public improvements within a specific or limited "downtown beautification area" of the town. The town might also provide additional services, such as increased sidewalk clearing or snow plowing, within this specific or limited area. When the town's budget is approved, and the property tax rate is set, the expenses for these public improvements and services will become part of the property tax levied on the town's grand list. The property tax is effectively assessed on the entire town, even though the improvements and services directly benefit a limited area in the town.

Setting the politics of this aside, so long as there is a rational basis for the town's actions (e.g., the public improvements and services in the downtown beautification area promote the town's general economic welfare), the fact that these services and improvements are provided only in a limited area of the town would not raise constitutional issues. In fact, in the absence of a special district like Bennington's Downtown Improvement District, the property tax for these improvements and services <u>has</u> to be assessed on the entire town. Only through the creation of a special assessment district or something like the Downtown Improvement District, can a town levy a special assessment or tax on a limited area of the town. This authority to levy a special tax or assessment on a limited area of a town is a significant reason why such districts are created.

Section 509 of the Bennington charter provides, in part, "Appropriations other than from contributions, grants, and income shall be raised solely through District taxes which shall be assessed and collected as a tax on property as provided for in section 515 of this charter." If this is being interpreted to limit the Town's ability to fund improvements and services in the area comprising the District, perhaps amending this sentence is in order?

Does this answer your question?

Jim

James W. Barlow PLC Vermont Local Government Law P.O. Box 112 Plainfield, VT 05667 802.274.6439 "downtown beautification area" of the town. The town might also provide additional services, such as increased sidewalk clearing or snow plowing, within this specific or limited area. When the town's budget is approved, and the property tax rate is set, the expenses for these public improvements and services will become part of the property tax levied on the town's grand list. The property tax is effectively assessed on the entire town, even though the improvements and services directly benefit a limited area in the town.

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Jim

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From: Robert Plunkett [rfplunkett@gmail.com]

Sent: Friday, December 1, 2017 4:10 PM

To: James Barlow < iim@vtlocalgovlaw.com >; Sean-Marie N Oller < ollersvt@comcast.net >

Subject: Charter Committee

Jim -

12/10/2017 12:47 PM

RE: Charter Committee

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Rob and Sean-Marie,

Following up on Downtown Improvement District question, the Town of St. Johnsbury also has a Downtown Improvement District similar to Bennington. The District is funded through common area fees that are levied on certain non-residential properties under one of the methods in section 151-2(e)(4) of the St. Johnsbury charter. Section 151-2(e)(3) provides, "Appropriations other than from contributions, grants, and income for the Commission shall be raised through common area fees which shall be assessed and collected as tax on property as provided for in this subsection."

The City of Burlington also has a Downtown Improvement District, as described in section 3-321 of the Burlington Charter. Within the Downtown Improvement District there is the special district called the Church Street Marketplace District. 3-321(b). The Church Street Marketplace District includes Church Street and the properties that have frontage on Church Street. The Church Street Marketplace is that "section of the [Church Street Marketplace] District now or hereafter under the direct control of the City of Burlington including the Church Street right-of-way and adjacent sidewalks." 3-321(c).

A property tax is levied on nonresidential properties in the Downtown Improvement District to fund a parking program that includes free parking. 3-325(a). Also, common area fees are levied upon the owners of taxable properties located in the Church Street Marketplace District to defray the expenses incurred by the City in connection with the operation, maintenance, and repair of the Marketplace. 3-326(a).

Jim

From: James Barlow [mailto:jim@vtlocalgovlaw.com]

Sent: Friday, December 8, 2017 5:37 PM
To: Robert Plunkett; Sean-Marie N Oller

Subject: RE: Charter Committee

Hi Rob and Sean-Marie:

Downtown Improvement District -

It was brought to our attention that some towns might assess a tax on the entire town (or possibly some different delimited area) rather than just on the district itself. Can you let us know which towns do this, and is it by charter or some other mechanism?

I probably need some clarification and background on how the Downtown Improvement District is funded and operated.

Under its general taxing authority, every town can levy property tax on all the non-exempt property on its grand list. For example, a town might develop a "downtown beautification" program, and include expenditures in the town budget for such things as benches, lights, and other public improvements within a specific or limited

12/10/2017 1:52 PM

RE: Charter Committee

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

HI Rob and Sean-Marie,

Fire Department -

Weeks ago we had discussed and approved adding "or paid" after "volunteer" in the language of Section 303(a). The thought was both to allow for payment to positions in the current fire department, and also to allow the Select Board leeway to create a paid department if and when the volunteer organization was no longer able to provide the needed services.

The Bennington Fire Department let us know that its membership was very concerned about this change, as it seemed it would allow the town to control their now volunteer department. We now have decided not to recommend the language change, but we would like to consider alternative language drafted by you that could allow for a paid department but only upon the approval of the presently contracted volunteer department.

I would recommend starting the discussion with this:

303. Further powers of Select Board members

In addition to powers otherwise conferred by law, the Select Board members shall also have the power to:

(1) organize and from time to time reorganize, the Fire Department under the supervision of a coordinating committee formed by the Select Board from its members; Except upon affirmative vote of the majority of the members of the Fire Department authorizing transition to a paid or combination paid and volunteer department, as set forth in a plan for such transition proposed by the Select Board, such Department shall be a volunteer department, and t The Select Board shall have authority to continue any existing contract with a volunteer fire department or to enter on behalf of the Town into contracts with other volunteer fire departments to provide additional fire protection to the inhabitants;

Jim

James W. Barlow PLC
Vermont Local Government Law
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Plainfield, VT 05667
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12/10/2017 2:53 PM

RE: Charter Committee

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Rob and Sean-Marie:

Billboards -

We are recommending striking what we understand is superfluous language about billboards. Can you both confirm that it is superfluous, and provide us with the statutes that restrict billboards in Vermont?

The Vermont statues restricting billboards are found at 10 V.S.A. Chapter 21. Municipalities also have authority to regulate signs, including billboards, under 24 V.S.A. 4416, 24 V.S.A. 2291(7) and 10 V.S.A. 505.

I concur that the charter provisions addressing billboards are superfluous.

Jim

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From: Robert Plunkett [mailto:rfplunkett@gmail.com]

Sent: Friday, December 1, 2017 4:10 PM

To: James Barlow < iim@vtlocalgovlaw.com >; Sean-Marie N Oller < ollersvt@comcast.net >

Subject: Charter Committee

Jim -

Thanks again for your responses. At our last meeting we finished the page by page review and are now returning to various topics that were tabled for later discussion. I have attached our working document, which contains all of our proposed changes, some of which have been approved by the committee and some that have not.

Input that you have on any of the changes would be welcomed. We have recognized that many of the changes would not be substantive. I intend to inquire of the Legislative Council on whether any of those changes might fit within its revision authority. If you have any insight on this, please let me know.

12/10/2017 3:36 PM

RE: Charter Committee

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Rob and Sean-Marie:

"First Chair" or other such designation -

Are there any towns that have a designated member of the selectboard that either has specified ceremonial duties or some other powers that differ from other members?

Charters for the towns of <u>Colchester</u>, <u>Stowe</u>, <u>Shelburne</u>, <u>Williston</u>, <u>Brattleboro</u>, <u>Milton</u>, <u>Middlebury</u>, <u>Essex</u>, and <u>Springfield</u>, recognize the chair of the selectboard as the "head of the Town government for all ceremonial purposes."

It is very common for a charter to provide for the selectboard chair to preside at all meetings. I do not believe there are any charters providing the selectboard chair (or any other selectboard member) any additional powers or authorities.

Jim

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And we do have some specific questions and requests:

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"First Chair" or other such designation -

Are there any towns that have a designated member of the selectboard that either has specified ceremonial duties or some other powers that differ from other members?

Rob

- (10) To regulate, lease, license, establish rules and fees, and otherwise manage the use of public spaces within the District.
- (11) To plan for the orderly development of the District in cooperation with the Town Planning Commission.
- (12) To do all other things necessary or convenient to carry out the purposes for which this District was created.

509. District Annual budget

The Town Manager or a contractor, hired by the Select Board as provided in paragraph (9) or other person designated by the Select Board shall submit each year an operating budget of anticipated expenditures and revenues to the Select Board for approval for the next fiscal year. In the event the Select Board does not approve the budget as submitted, the Select Board shall return the budget forthwith to the Town Manager with its recommendations for the Town Manager's reconsideration. Appropriations other than from contributions, grants, and income shall be raised solely through District taxes which shall be assessed and collected as a tax on property as provided for in section 515 of this charter. The Select Board may borrow money in anticipation of District taxes.

510. District taxes

- (a) District taxes are charges levied upon the owners of taxable properties located in the District, except for owner occupied residential properties. ing properties used exclusively for residential purposes, which <u>District</u> taxes shall be used to defray the expenses incurred in connection with for the operation, maintenance, and repair of the District.
- (b) The District tax for each property in the District subject to the tax shall be based upon a rate on each \$100.00 of listed value of the property as adjusted under subsection (c) of this section. The tax rate shall be determined by dividing the amount to be raised by taxes, by the total value of the taxable properties on the grand list as adjusted located in the District which are subject to the District tax under this subchapter.
- (c) The District tax shall be set by the Select Board upon approval of the budget by the Select Board and notice in writing thereof shall be given to owners of record as of April 1 of each year of property so assessed, or to their agents or attorneys, stating therein the amount of such District taxes, and such taxes shall be due and payable to the Town Treasurer when normal Town and school taxes are due. The Town Treasurer shall collect unpaid District taxes as provided for the collection of taxes in the charter. District taxes shall be a lien on the properties when assessed and until the tax is paid or the lien is otherwise discharged by operation of law.
- (d) In the case of any property used for both residential and nonresidential purposes within the District as of April 1, the Board of Listers (Board) shall adjust the listed value for the purposes of determining the District tax under this section to exclude the value of that portion of the property used for owner occupied residential purposes. The Board shall determine the adjusted grand list value of the business portion of the property and give notice of the same as provided under 32 V.S.A. chapter 131. Any property owner may file a grievance with the Board and appeal the decision of the Board as provided for under 32 V.S.A. chapter 131; however, the filing of an appeal of the determination of the Board and

Commented [JB7]: In my opinion, this is better language.

Commented [JB8]: These Committee changes are fine.

Commented [JB9]: These Committee changes are fine.

Commented [JB10]: This Committee change is fine.

pendency of the appeal shall not vacate the lien on the property assessed, and the District taxes must be paid and continue to be paid as they become due.

12/4/2017 1:13 PM

RE: ordinances

To Robert Plunkett copy Sean-Marie N Oller oller copy Sean-Marie N Oller oller copy Sean-Marie N Oller oller <a href="mail

Hello Rob, Sean-Marie, and Robert,

Section 702 of the Montpelier charter provides:

The City Council may adopt, amend, repeal, and enforce any bylaw, regulation, or ordinance which it may deem necessary and proper for carrying into execution the powers granted by this chapter and State law or for the wellbeing of the City in accordance with 24 V.S.A. § 2291, as may be amended from time to time.

This is what was proposed by Robert back in August:

In addition to powers otherwise conferred by law, the Select Board is authorized to adopt, amend, repeal and enforce ordinances relating to the health, safety and quality of life of Bennington residents.

The potential difficulty of Robert's language is that the Legislature would be granting the Bennington Select Board all of the authority already given to Vermont municipalities to enact ordinances (i.e., "In addition to the powers otherwise conferred by law..."), plus authority to adopt ordinances in any matter, "...relating to the health, safety and quality of life of Bennington residents" without any limitation.

I don't read Section 702 of the Montpelier charter as a similarly broad grant of authority. Under 702, the Montpelier City Council has authority to enact ordinances under the Montpelier charter and Vermont general statutes, including 24 V.S.A. §2291. The City Council can enact such ordinances "which it may deem necessary and proper" or "for the well-being of the City" within this authority.

In my opinion,, the Town of Chester actually has a broader grant of ordinance adoption authority than Montpeller. Section 301 of the Chester Charter sets out a list of subjects for which the Chester selectboard can adopt ordinances. Section 302 goes on to provide, "Said Town may make, establish, alter, amend, or repeal any other bylaws, rules, and ordinances which it may deem necessary for the well-being of said Town, and not repugnant to the Constitution or laws of the State or the United States."

However, I stand by my original statement: Robert's proposal is, in my opinion, far broader than both Section 702 of the Montpelier charter and Section 302 of the Chester charter. Even under Chester's very broad charter language, the Town's ordinances must be "not repugnant to" (i.e., consistent with) State law.

And I still have a concern that Robert's language may be too broad for the Legislature to accept. Some may see the language as granting Bennington more authority than has been provided other municipalities or authority to adopt any ordinance the Bennington Select Board sees fit, subject only to the constraints of the Federal and State constitutions (i.e., municipal home rule). While I don't personally see this as something improper, I don't know that it would be supported in the state house.

I hope that this helps.

Jim

James W. Barlow PLC Vermont Local Government Law P.O. Box 112 Plainfield, VT 05667 802.274.6439 www.vtlocalgovlaw.com

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From: Robert Plunkett [mailto:rfplunkett@gmail.com]

Sent: Saturday, December 2, 2017 2:33 PM

To: ebehep < ebehep@comcast.net >; James Barlow < jim@vtlocalgovlaw.com >

Cc: Sean-Marie N Oller < ollersvt@comcast.net >

Subject: Re: ordinances

Robert -

I think I have opinion on that one, but to avoid an online meeting (although with only 3 committee members) I will just forward this to Jim for his comments.

Sean-Marie -

Let's put this on the agenda for next week

Jim -

Please comment!

- Rob

On Sat, Dec 2, 2017 at 10:49 AM, ebehep < ebehep@comcast.net > wrote:

hello rob and sean marie.

back in august I suggested eliminating the list of issues for which the select board can establish ordinances and replace the list with this general statement:

In addition to powers otherwise conferred by law, the Select Board is authorized to adopt, amend, repeal and enforce ordinances relating to the health, safety and quality of life of Bennington residents.

you included this in an email to jim barlow asking for his thoughts and you shared those thoughts with the committee in an email in advance of our august twentieth meeting.

jim's comment was:

I would suggest that you talk with your reps about how this might be received in Montpelier. My sense is that "health, safety and quality of life" may be too broad for the Legislature - it is far broader than the ordinance adoption authority granted to any other municipality.

I was just looking at the charter for the City of Montpellier. Regarding ordinances, their charter says:

The City Council may adopt, amend, repeal, and enforce any bylaw, regulation, or ordinance which it may deem necessary and

There is no list of specific issues included in their charter.

I request that you send this language to jim and ask him to reconcile his comment about my language being "too broad" for the legislator with the language in the Montpellier Charter. I 'gave up' trying to make a case for my point of view based solely on jim's comments. if the language in Montpellier's charter causes him to change his opinion, I would like to re-examine this issue.

thanks

robert ebert

Appendix B:
Local Option Tax

VERMONT CITIES AND TOWNS ELIGIBLE TO ENACT LOCAL OPTION TAXES UNDER GENERAL STATE LAW

Troy Greensboro Norton Andover Vergennes ID Orange Athens Groton **Pawlet** Vershire Irasburg Baltimore Peru Victory Isle La Motte Barnard Wardsboro Jamaica Pittsfield Berkshire Warren Berlin Jay Pittsford West Haven Bethel Plymouth Killington, West Windsor Reading Brattleboro Kirby Readsboro Westmore Brighton Landgrove Weston Royalton Londonderry Clarendon Williston Rutland Town Lowell Dorset Ryegate Wilmington Ludlow Dover Windham Sandgate Eden Lunenburg Winhall / Searsburg Maidstone Essex Junction ID Sheffield Woodford Manchester / Essex Town Sheldon Woodstock Fairfax Mendon Springfield Middletown Springs Fairfield Stannard Fayston Morgan Stowe Mt. Tabor Grafton Stratton North Hero Granby

Title 24 VSA 138(a)(3) provides the following:

- (A) the education property tax rate in 1997 was less than \$1.10 per \$100.00 of equalized education property value; or
- (B) the equalized grand list value of personal property, business machinery, inventory, and equipment is at least ten percent of the equalized education grand list as reported in the 1998 Annual Report of the Division of Property Valuation and Review; or
- (C) the combined education tax rate of the municipality will increase by 20 percent or more in fiscal year 1999 or in fiscal year 2000 over the rate of the combined education property tax in the previous fiscal year."

The towns above are listed based on computations done by VLCT based on data from the Vermont Division of Property Valuation and Review. Each listed meets one or more the tests set forth in 24 VSA 138 above.

[&]quot; a local option tax may only be adopted by a municipality in which:

VERMONT LOCAL OPTION TAX REVENUE GENERATION

| | | | | | SALES TAX | × | | | | | | ROC | ROOMS AND MEALS TAX | EALST | TAX | | |
|--|---------------------|------|---------------------------------|----------|--------------|----------|---------------|--------|---------------|------|-------------------|----------|---------------------|----------|--------------|------|---------------|
| | | | | <i>"</i> | | | | | | 8 | FY 14 Retail | | | | | | |
| | Approved via | | FY 14 Retail | Log | Local Option | 70% R | 70% Retained | 30% | 30% Shared | Mea | Meals and Alcohol | Loc | Local Option | 20% | 70% Retained | 30 | 30% Shared |
| Jurisdiction | Charter or Act 60 | | Receipts | Ta | Tax at 1% | 2 | Locally t | hrou | through PILOT | S. | Combined | Ë | Tax at 1% | _ | Locally | thro | through PILOT |
| Vermont total | | s | 5,452,288,409 | \$ 25 | 54,522,884 | \$ 38, | \$ 38,166,019 | \$ 16 | \$ 16,356,865 | \$ | 1,497,635,737 | \$ | 14,976,357 | \$ | 10,483,450 | S | 4,492,907 |
| Burlington | Charter | v | 226,400,959 | w | 2,264,010 | \$ 1,5 | 1,584,807 | ·s | 679,203 | | | s | ı | w | î | 4 | 31 |
| Brattleboro | Act 60 | 8 | | s | ı | s | , | s | ¥ | s | 48,792,091 | s | 487,921 | s | 341,545 | 4 | 146,376 |
| Dover | Act 60 | v | 31,029,752 | \$ | 310,298 | s, | 217,208 | s | 93,089 | s | 28,380,398 | \$ | 283,804 | s | 198,663 | s | 85,141 |
| Killington | Act 60 | 45 | 47,655,380 | \$ | 476,554 | \$ | 333,588 | S | 142,966 | \$ | 48,112,340 | s | 481,123 | S | 336,786 | δ, | 144,337 |
| Manchester | Act 60 | v | 93,299,887 | 43 | 932,999 | s | 623,099 | s | 279,900 | s | 48,172,464 | s. | 481,725 | s | 337,207 | s | 144,517 |
| Middlebury | Charter | 'n | 98,394,131 | s | 983,941 | \$ | 688,759 | ·s | 295,182 | s | 29,966,550 | s | 299,668 | v | 209,766 | w | 89,900 |
| Rutland Town* | Act 60 | v | 103,484,752 | s | 1,034,848 | s | 724,393 | s | 310,454 | s | 57,371,897 | s | 573,719 | s | 401,603 | v | 172,116 |
| South Burlington | Charter | 4 | 323,753,212 | S | 3,237,532 | \$ 2, | 266,272 | Ś | 971,260 | s | 132,166,713 | \$ | 1,321,667 | s | 925,167 | v | 396,500 |
| St. Albans Town | Charter | v | 57,763,515 | Ş | 577,635 | S | 404,345 | s | 173,291 | s | 10,086,843 | s | 100,868 | s | 70,608 | S | 30,261 |
| Stowe | Act 60 | | | s | • | s | ī | ₩ | i | s | 110,526,431 | s | 1,105,264 | S | 773,685 | s | 331,579 |
| Stratton | Act 60 | v | 27,180,659 | S | 271,807 | s | 190,265 | s | 81,542 | s. | 19,661,096 | s | 196,611 | s, | 137,628 | W | 58,983 |
| Williston | Act 60 | v | 383,437,477 | S | 3,834,375 | \$ 2, | 2,684,062 | \$ 1 | ,150,312 | s | 36,801,459 | s | 368,015 | s | 257,610 | s | 110,404 |
| Winhall | Act 60 | s | 5,559,104 | ς, | 55,591 | s | 38,914 | S | 16,677 | s | 5,134,450 | s | 51,345 | s | 35,941 | \$ | 15,403 |
| Wilmington | Act 60 | s | 27,196,124 | S | 271,961 | s | 190,373 | s | 81,588 | s, | 7,642,906 | s | 76,429 | s | 53,500 | s | 22,929 |
| Winooski approved in charter but | | | | | | | | | | | | | | | | | |
| not yet in effect | Charter | ς. | | | | | | | | ٧. | | | | | | | |
| Woodstock | Act 60 | - | | S | 2.65 | s | • | S | • | ₩ | 28,882,753 | s | 288,828 | s | 202,179 | Ś | 86,648 |
| | | | | \$ | × | ţ\$ | | S | | _ | | S | ı | s | ï | s | Ē |
| Colchester (still subject to | | | | | | | | | | | | | | | | | |
| legislative approval) | Charter | ₩. | 328,693,655 | S | 3,286,937 | \$ 2, | 2,300,856 | v | 986,081 | ٠, | 39,593,272 | ₩ | 395,933 | ₩. | 277,153 | ₩. | 118,780 |
| | | | | s | ì | ⇔ | į | ₩. | r | | | ₩. | Ē | v, | ij | s, | i |
| | 2.1 | | | s | ũ | s | ę | S | r | | | s | luis. | S | 90 | S | Ü |
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| Total Local Option w/Colchester | | · | 1.753.848.607 | | 17,538,486 | \$ 12. | | | 5,261,546 | · 40 | 651,291,663 | · vs | 6,512,917 | | 4,559,042 | ٧٠ | 1,953,875 |
| % of State Total with Colchester | | - | 32.17% | | 32.17% | | 32.17% | | 32.17% | 18 | 43.49% | 9 | 43.49% | | 43.49% | | 43.49% |
| | | | (4) | | 8. | | | | | | | | | | | | |
| * Rutland Town Figures not broken out from Rutland City's. | out from Rutland Ci | ty's | Figure is for both, apparently. | h, ap | parently. | | | | | | | | | | | | |

VERMONT OFFICIAL STATE WEBSITE

AGENCY OF ADMINISTRATION

Department of Taxes

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| | SEARCH |

PARTICIPATING MUNICIPALITIES

Local Option Sales Tax

The following municipalities have a 1% local option sales tax:

| TOWN | EFFECTIVE DATE |
|------------------|----------------|
| Brandon | Oct. 2016 |
| Burlington | Jul. 2006 |
| Colchester | Oct. 2015 |
| Dover | Jul. 2007 |
| Killington | Oct. 2008 |
| Manchester | Apr. 1999 |
| Middlebury | Oct, 2008 |
| Rutland Town | Apr. 2009 |
| St. Albans Town | Jul. 2014 |
| South Burlington | Oct. 2007 |
| Stratton | Jul, 2004 |

| EFFECTIVE DATE |
|----------------|
| Jul. 2003 |
| Jul. 2012 |
| Jul. 2010 |
| |

Find towns with local option tax <u>listed by zip code</u> (http://tax.vermont.gov/sites/tax/files/documents/Sales%20%26%20Use%20Tax%20Rate%20Lookup.pdf) or look up sales tax rates for more than 15,000 taxing jurisdictions across the U.S., free, at Avalara (http://salestax.avalara.com/).

Local Option Meals and Rooms Tax, & Alcoholic Beverages Tax

The following municipalities have a 1% local option meals, alcoholic beverages, and rooms tax:

| TOWN | EFFECTIVE DATE |
|-----------------------|---|
| Brandon | Oct. 2016 |
| Brattleboro | Apr. 2007 |
| Colchester | Oct. 2015 |
| Dover | Jul. 2007 |
| Hartford ¹ | Please Note: Collection is effective beginning Oct. 1, 2017 |
| Killington | Oct. 2008 |

| TOWN | EFFECTIVE DATE |
|------------------|----------------|
| Manchester | Apr. 2008 |
| Middlebury | Oct, 2008 |
| Montpelier | Oct. 2016 |
| Rutland Town | Apr. 2009 |
| St. Albans Town | Jul. 2014 |
| South Burlington | Oct. 2007 |
| Stowe | Jul. 2006 |
| Stratton | Jul. 2004 |
| Williston | Jul. 2003 |
| Wilmington | Jul. 2012 |
| Winhall | Jul. 2010 |
| Woodstock | Jul. 2015 |

¹The Town of Hartford includes Quechee, White River Junction, West Hartford, and Wilder.

Please note: The City of Burlington and the City of Rutland administer and collect their own local meals, entertainment, and lodging taxes. If you have a business in Burlington or Rutland City, please contact the city for information on how to pay and remit the tax.

James Barlow <jim@vtlocalgovlaw.com>

11/29/2017 4:17 PM

RE: Charter Committee questions

To Robert Plunkett <rfplunkett@gmail.com> • Sean-Marie N Oller <ollersvt@comcast.net>

Hi Rob and Sean-Marie,

My review of Sections 506-510 is attached. Most of my proposed changes are found in Section 506. For simplicity, I've just worked off the original language in 506.

Let me know if you have any questions.

Jim

James W. Barlow PLC
Vermont Local Government Law
P.O. Box 112
Plainfield, VT 05667
802.274.6439
www.vtlocalgovlaw.com

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From: Robert Plunkett [mailto:rfplunkett@gmail.com]

Sent: Tuesday, November 28, 2017 10:12 AM

To: James Barlow < jim@vtlocalgovlaw.com >; Sean-Marie N Oller < ollersvt@comcast.net >

Subject: Charter Committee questions

Jim -

A number of questions... I had been absent for a few meetings, and missed some older questions, so this might be a long one.

Section 404(h) references 24 V.S.A. 1236(5). What purpose does this serve? Am I correct that this reference just prevents an election of a road commissioner separate from the Town Manager?

Local Option Tax:

Page 2 of the minutes from 10/25 describes our initial conversation on the local option tax. http://benningtonvt.org/wp-content/uploads/2017/07/CRCM102517.pdf
We would like your general comments regarding the tax.

Downtown District:

I have also attached our working document to review Sections 506 to 510 for your comments on (and I am taking this from the minutes since I was not at this meeting) "the renumbering, the repeal, reformatting, intent, and the V.S.A. reference."

These sections were discussed at the 11/8 and 11/15 meetings. http://benningtonvt.org/wp-content/uploads/2017/07/CRCM11817.pdf http://benningtonvt.org/wp-content/uploads/2017/11/CRC111517-1.pdf

Thanks again,

Rob

Charter Sections 506-510 jb 11.29.17.docx (31 KB)

Appendix C: Miscellaneous Documents

Position Title: Town Manager, Bennington, Vermont

Position Code: Senior Management

JOB SUMMARY

The Town Manager is the Chief Executive Officer and the Chief Financial Officer of the Town of Bennington. This position is the highest level management position in Bennington's town government. The Town Manager is appointed by the Bennington Select Board for an indefinite term. The Town Manager is directly responsible to the Select Board and reports to the Select Board. The Town Manager carries out policies adopted by the Select Board and administers all facets of town government as provided by the Town Charter and by law.

The Town Manager is expected to be an active and visible member of the community.

The Town Manager shall have a relevant Bachelor's degree, with at least ten years' experience in the public or private sector. A graduate degree in a related field may be substituted for three years' experience.

DUTIES AND RESPONSIBILITIES

The Town Manager shall:

- Serve as the Chief Executive Officer and carry out the policies established by the Select Board
- Prepare, at the end of each fiscal year, a report to the Select Board on the finances and administrative activities of the town
- To perform any other duties which may be found necessary or appropriate to further the best interests of the Town, including but not limited to duties and responsibilities assigned by the Select Board to which power for such action has been delegated.
- Concurrently with the Select Board shall be responsible for strategic planning for all segments of the Town. In this regard, the Town Manager shall work with the Select Board to develop, and revise from time to time, a strategic plan enumerating specific goals to be achieved for the betterment of Town as well as the time frames in which those goals are to be accomplished.
- Assume responsibility for the operation of all Town government departments, including, but not limited to, the following: Accounting/Finance, Assessors/Listers, Economic & Community Development, Facilities & Grounds, Human Resources, Police and Fire Departments

- Assume exclusive authority to appoint, fix the salaries of, evaluate performance of, discipline, suspend, and/or remove, all officers and employees of the Town government except those elected or appointed by the Select Board, under policies approved by the Select Board.
- When advisable or necessary, due to the Town Manager's absence, delegate to subordinate officers and employees of the Town government, any duties conferred upon the Town Manager
- Prepare an annual budget and be responsible for its administration after adoption; be responsible for the system of accounts
- Prepare, at the end of each fiscal year, a report on the finances and administrative activities of the town
- Assume charge and supervision of all Town buildings and other Town properties and repairs thereon
- Act as the general purchasing agent and keep the Select Board informed of the Town's financial condition and its anticipated needs
- Perform all duties now conferred by law on the Collector of Taxes
- Take individual responsibility for working in a safe manner and adhere to and comply with all Town policies.

The duties listed above are intended only as examples of the various types of work that may be performed. The omission of specific statements or duties does not exclude them from the position if the work is similar, related, or a logical assignment to the position

SKILLS AND EXPERTISE

The Town Manager shall demonstrate:

- The ability to manage employees and supervise departmental functions and work well with groups, both large and small
- Competency and a comfort level with fiscal management and budget development
- The ability to:
 - o Work in an often stressful and changing environment
 - o Think critically, resolve complex issues through reasonable decision-making and conflict resolution
 - o Develop and present complex material, such as projects and initiatives
 - o A high comfort level with speaking in public and writing for publications
- He or she shall have an acceptable and verifiable work history
- The Town Manager shall hold a Vermont Driver's license or be able to obtain one

PHYSICAL REQUIREMENTS-

The physical demands described below are representative of those that must be met by an employee to perform the essential functions of this job successfully. Reasonable accommodations may be made to enable individuals with disabilities to perform these essential functions.

The Town Manager shall be able to:

- Frequently sit and talk or hear
- Occasionally walk; use hands to finger, handle, or feel objects, tools, or controls, and reach with hands and arms
- Occasionally lift and/or move up to 50 lbs
- Use close vision and demonstrate the ability to adjust focus

WORK ENVIRONMENT

The work environment characteristics described herein are representative of those the Town Manager encounters while performing the essential functions of this job. Reasonable accommodations may be made to enable individuals with disabilities to perform the essential functions. The noise level in the work environment is usually moderately quiet.

SELECTION GUIDELINES

A formal application for the position will be required. Selection guidelines include, but may not be limited to, rating of education and experience, oral interview(s), and reference check(s).

This job description does not constitute an employment agreement between the candidate and the employer and is subject to change by the employer as the employer's needs and the requirements of the position change.

The undersigned employee acknowledges that he/she has read and understands this job description, and that the Select Board reviewed the entire job description with the employee.

| Approval: | * | Date: | |
|-----------|--------------|-------|--|
| | Select Board | П | |
| Approval: | <i>r</i> , | Date: | |
| | Employee | | |

K:\Manager\Michele\Wp5\jobdesc\Town Manager Job Description Final Approved by Select Board 091415.docx

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TOWN OF BENNINGTON

Article 1. Authority. Under the authority granted in 24 V.S.A. § 2291(20), the Bennington Select Board hereby adopts the following policy concerning conflicts of interest.

Article 2. Purpose. The purpose of this policy is to preserve the public trust in municipal officials to ensure that no public officer of the municipality will gain a personal or financial advantage from his or her work for the municipality.

Article 3. Application. This policy applies to all public officers as that term is defined below.

Article 4. Definitions. For the purposes of this policy, the following definitions shall apply:

A. Conflict of interest means any of the following:

1. A direct or indirect personal or financial interest of a public officer, his or her spouse, household member, child, stepchild, parent, grandparent, grandchild, sibling, aunt or uncle, brother- or sister-in-law, business associate, or employer or employee in the outcome of a cause, proceeding, application, or any other matter pending before the officer or before the public body in which he or she holds office or is employed.

2. A situation where a public officer has publicly displayed a prejudgment of the merits of a particular quasijudicial proceeding. This shall not apply to a member's particular political views or general opinion on a

given issue.

3. A situation where a public officer has not disclosed ex parte communications with a party in a quasijudicial proceeding.

A "conflict of interest" does not arise for decisions on matters in which the public official has a personal or financial interest when the outcome affects all citizens equally. An example of this is the setting of a tax rate. The impact of the tax rate decision on the public is no greater than the impact on the public official.

- B. Emergency means an imminent threat or peril to the public health, safety, or welfare.
- C. Ex Parte Communication means direct or indirect communication between a member of a public body and any party, party's representative, party's counsel or any person interested in the outcome of a quasi-judicial proceeding, that occurs outside the proceeding and concerns the substance or merits of the proceeding.
- D. Official act or action means any legislative, administrative, or quasi-judicial act performed by any public officer while acting on behalf of the municipality.
- E. Public body means any board, council, commission, or committee of the municipality.
- F. **Public interest** means an interest of the community as a whole, conferred generally upon all residents of the municipality.

TOWN OF BENNINGTON

- G. **Public officer** means a person elected or statutorily-appointed to perform executive, administrative, legislative, or quasi-judicial functions for the municipality. This term does not include any municipal employee. Employees are governed by a separate, specifically designed Conflict of Interest Policy.
- H. **Quasi-judicial proceeding** means a case in which the legal rights of one or more persons who are granted party status are adjudicated, which is conducted in such a way that all parties have 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.

Article 5. Prohibited Conduct.

- A. A public officer shall not participate in any official action if he or she has a conflict of interest in the matter under consideration.
- B. A public officer shall not personally or through any member of his or her household, business associate, employer or employee represent, appear for, or negotiate in a private capacity on behalf of any person or organization in a cause, proceeding, application, or other matter pending before the public body in which the public officer holds office.
- C. A public officer shall not accept gifts or other offerings for personal gain by virtue of his or her public office that are not available to the public in general.
- D. A public officer shall not use resources unavailable to the general public including but not limited to municipal staff time, equipment, supplies, or facilities for private gain or personal purposes.
- **Article 6. Disclosure**. A public officer who has reason to believe that he or she has or may have a conflict of interest in a particular matter shall, prior to participating in any official action on the matter, publicly disclose at a public meeting or public hearing that he or she has an actual or perceived conflict of interest in the matter under consideration and disclose the nature of the actual or perceived conflict of interest. Alternatively, a public officer may request that another public officer recuse him or herself from a matter due to a conflict of interest. ¹
- Article 7. Consideration of Recusal. Once there has been a disclosure of an actual or perceived conflict of interest, other public officers may be afforded an opportunity to ask questions or make comments about the situation. If a previously unknown conflict is discovered during a meeting or hearing conducted by a public body of the municipality, the public body may take evidence pertaining to the conflict and, if appropriate, adjourn to an executive session to address the conflict.

Article 8. Recusal.

A. Recusal of Elected Officers. After taking the actions listed in Articles 6 and 7, an elected public officer should declare whether he or she will recuse and explain the basis for that decision. If the public officer has an actual or perceived conflict of interest but believes that he or she is able to act fairly, objectively, and in

¹ Such request shall not be considered an order for the officer to recuse him or herself.

TOWN OF BENNINGTON

the public interest, in spite of the conflict, he or she shall state why he or she believes that he or she is able to act in the matter fairly, objectively, and in the public interest.²

B. Recusal of Appointed Officers. The failure of an appointed public officer to recuse himself or herself in spite of a conflict of interest may be grounds for removal from office.³

Article 9. Post-Recusal Procedure.

- A. A public officer who has recused himself or herself from serving on a public body in a particular proceeding shall not sit with the public body, deliberate with the public body, or participate in that proceeding as a member of the public body in any capacity, though such member may still participate as a member of the public.
- B. The public body may adjourn the proceedings to a time certain if, after a recusal, it may not be possible to take action through the concurrence of a majority of the total membership of the public body. The public body may then resume the proceeding with sufficient members present.

Article 10. Enforcement.

A. Elected Officers; Progressive Consequences for Failure to Follow the Conflict of Interest Procedures. In cases where an elected public officer has engaged in any of the prohibited conduct listed in Article 5, or has not followed the conflict of interest procedures in Articles 6 through 9, the Bennington Select Board may take progressive action to discipline such elected officer as follows:

1. The chair of the Bennington Select Board may meet informally with the public officer to discuss the possible conflict of interest violation. This shall not take place in situations where the chair and the public officer together constitute a quorum of a public body.

2. The Bennington Select Board may meet to discuss the conduct of the public officer. Executive session may be used for such discussion in accordance with 1 V.S.A. § 313(a) (4). The public officer may request that this meeting occur in public. If appropriate, the Bennington Select Board may admonish the offending public officer in private.

3. If the Bennington Select Board decides that further action is warranted, the Board may admonish the offending public officer at an open meeting and reflect this action in the minutes of the meeting. The public officer shall be given the opportunity to respond to the admonishment.

4. Upon majority vote in an open meeting, the Bennington Select Board may request (but not order) that the offending public officer resign from his or her office.

Certain appointed officials such as a Zoning Administrator and a Town Manager may only be removed for cause and after being afforded with procedural due process protections including notice and a reasonable opportunity to be heard.

Each member of an elected public body is independently elected and answers only to the voters. Therefore, unless there is a local ordinance or charter provision that states otherwise, the remaining members of the body may not force recusal. They may only express their opinion about the subject and/or privately or publicly admonish a fellow member who fails to handle conflicts appropriately.

TOWN OF BENNINGTON

B. Appointed Officers. The Bennington Select Board may choose to follow any of the steps articulated in Article 10A. In addition to or in lieu of any of those steps, the Board may choose to remove an appointed officer from office, subject to state law.

Article 11. Exception. The recusal provisions of Article 8 shall not apply if the Board determines that an emergency exists and that actions of the public body otherwise could not take place. In such a case, a public officer who has reason to believe he or she has a conflict of interest shall disclose such conflict as provided in Article 6.

Article 12. Effective Date. This policy shall become effective immediately ypolits adoption-

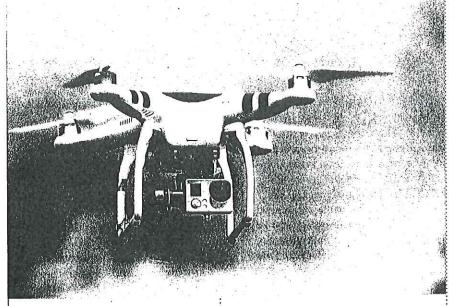
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Signatures:

Date:

Into Uncharted Airspace: Here Come the Drones

By Erich Eiselt, IMLA Assistant General Counsel



In some respects, municipal lawyering bears a similarity to parenting a middle-schooler. Without much of an operating manual, local government attorneys are challenged by constant societal change which cannot be ignored or circumvented. To be sure, other species of legal practice-ERISA, estate planning, bankruptcy, mergers and acquisitions-undergo change, but not with the velocity and constancy of the leading-edge, disruptive, and completely interesting issues continually confronting the local government law practitioner.

So it is that Municipal Lawyer, having recently looked into urban chickens, marijuana, fracking, e-cigarettes, social media, Uber, gay marriage, police body camera's, Airbnb and a stable of other emergent subjects, now explores the brave new world of unmanned aerial vehicles (UAV's), also called unmanned aerial systems (UAS's) and best known as "drones."

The story of UAV's is yet another instance of technology outpacing regulation. The law-whether federal, state or local-is scarcely prepared for the coming onslaught as police, hobbyists, realtors, videographers, naturalists, engineers,

farmers and others prepare to send thousands of camera-bearing, hardly-detectible devices hovering through the air.

Species of drones: Unlike the massive winged avatars deployed in military service which ply the stratosphere bristling with top-secret navigation, reconnaissance mechanisms and lethal weaponry, the drones that municipalities will likely encounter are much less the stuff of rocket science. Some are simple "model airplanes" but most consist of an array of propellers mounted on a geometric frame. Commercially available UAV's can weigh as little as one pound and cost less than \$30. If outfitted with three rotors, they are called "tricopters;" with four rotors (the most common species) they are "quadcopters." More powerful are six-rotored "hexacopters," and when still more lift is needed, an "octocopter" arrayed with eight propellers may be the ticket. As with many of today's gadgets, battery life is an issue-even UAV's priced well into the thousands of dollars are limited to less than 30 minutes of flight time.1

Video capability is enabled by a menu of photographic technologies ranging from elementary cameras to middle-tier GoPro products to sophisticated, super high-acuity offerings from Sony and the like. (To some enthusiasts, the camera

makes the drone: without video capability, the device is just a remote-controlled toy). Aerobatic control and range is governed by software, microprocessors and transducers, and varies widely.

The lightest, lowest-end UAV models . are relatively unsophisticated, being limited to a range of 200 feet or less from the controller. These hobbyist devices are readily available from familiar sources including Amazon (Costco appears to have discontinued the sale of UAV's). But a quick perusal into the cyber-marketplace reveals a much more robust catalogue of drone choices, offering a broad spectrum of power systems, operational agility, flight distance and video resolution. One such vendor, the inventively-named "UAVdronesforsale,com" lists dozens of products. For example, the "Black Ops Tricopter" is offered by a Tokyo-based company and sells for \$150. Constructed of high-impact plastic and featuring carbon-fiber propellers, it weighs less than two pounds. It is described as "An advanced UAS/ Drone / Multicopter platform for FPV Aerial Filming day or night, design from the ground up for everyone."2

Amazon's drone offerings include the "DJI Phantom 3 Professional Quadcopter Drone with 4K UHD Video Camera" available for under \$1300. Manufactured by China's DJI, a leader in the industry, the Phantom 3 features a "UHD video recording with fully stabilized 3-axis gimbal," allowing "live viewing of 720p video (full resolution video is simultaneously recorded on the internal microSD card)." Would-be purchasers are reminded by Amazon of the FAA requirement that "Flying this product is restricted within 15 miles radius (sic) of the White House."³

Other commercially available products are exponentially more capable, weighing up to 55 pounds and priced at \$25,000 or more. These high-end UAV's can carry substantial payloads, execute deft maneuvers, produce highly detailed camera feeds and be controlled over great distances. The Penguin B, a 49-pound, single propeller, airplane-shaped drone manufactured by UAV Factory USA LLC of Irvington, New York (with a subsidiary in Latvia), recently set a record for flying more than 54 consecutive hours. It can haul a payload of nearly nine pounds in addition to fuel. This spring, the company demonstrated

its controller functionality by piloting a Penguin at a European UAV conference from 5,000 miles away.⁴

Who flies drones: The broad spectrum of drone capabilities will attractand in fact necessitate-a spectrum of operators. At the low-end, hobbyists with little training may be able to pilot inexpensive UAV's over local playgrounds. But where the flying machines cost many thousands of dollars and are deployed in difficult, long-distance missions for governmental or commercial customers, formally trained and certified professionals will be required, not only for their skills but because FAA rules demand it. The incipient drone tsunami will accelerate the growth of institutions such as California-based "Drone Universities" which offers a wide menu of UAV training and certifications, stating on its website that the average drone pilot salary is "\$50,000 to \$60,000" and that top earners "can make \$160,000".5

A massive industry: The tri-, quad-, hexa-, octo- and other species of unmanned aircraft and their associated training enterprises add up to a massive and rapidly accelerating commercial juggernaut. Not surprisingly, the industry is already far ahead of the game, with advocacy organizations such as the Association of Unmanned Vehicle Systems International (AUVSI)6 lobbying on Capitol Hill and at statehouses across the country for minimal restrictions on access to the air. AUVSI has projected that over the next decade, the drone business in aggregate will produce some 100,000 jobs in the US, generating over \$80 billion.7 Other market surveys point to similarly meteoric expansion of the US drone economy.8

Pro's and con's: Growth will not be without controversy. On one hand, enthusiasts and industry groups point to the many beneficial uses to which commercially available UAV's can conceivably be put, including locating missing or injured persons in far-away, inhospitable terrain; checking on crops; rushing medical supplies to front-line responders; inspecting or assessing damage to buildings, cell towers, pipelines and other infrastructure; filming movies, sports and newsworthy events; cataloging the spread of wildfires; tracking at-risk

game and wildlife; and so on. Even Amazon hopes to reduce its next-day delivery proposition to a mere 30 minutes from distribution centers using drones that can fly up to 10 miles at below 500 feet of altitude for a new Amazon "Prime Air" service.9

In some cases these purposes are already being served. For some time, AeroVironment Inc. has been operating its "Puma" drone to monitor oil pipelines, infrastructure, roads and wildlife across hundreds of lonely miles in the Arctic, with full authorization from the Federal Aviation Administration (FAA).10 Closer to home, on July 17, 2015 the first FAA-sanctioned commercial drone delivery of medicine took place without a hitch, ferrying 24 packages from the Wise County, Virginia airport to local fairgrounds where a pop-up medical facility serves the economically-stricken coal region one weekend per year.11

On the other hand, risks of unregulated drone use are obvious. The public and law enforcement alike worry about safety and privacy when propeller-hoisted cameras and payloads can fly indiscriminately through the air, potentially colliding with power lines, interfering with other aircraft, or falling on-or looking intospace previously considered private. These concerns are aggravated by incidents such as the saga of the diminutive UAV which recently traversed the Washington DC secret service security perimeter at 1600 Pennsylvania Avenue NW, undetected in the darkness until it crashed on the White House lawn less than a football field away from the President of the United States.

Unseen drones are hardly the biggest problem. Last month, several unauthorized hobbyist UAV's were observed in airspace above a line of blazing semi-trailers and auto's which had been ignited by a massive wildfire that engulfed portions of California's I-5. The rogue drones hindered firefighting helicopters attempting to subdue the inferno.12 (That incident sparked a proposal by California legislators that police and first responders be permitted to jam and disable drones that are interfering in rescue operations, without incurring liability to the UAV's owners.)13 Only days later, national news outlets reported on a Connecticut teenager's video showing a drone equipped with a handgun, clearly firing via remote

control as it flew above private property.14

More likely for the rest of us perhaps is the experience of a suburban Virginia man who heard a whirring sound and looked skyward in time to witness an out-of-control drone smash against the upper level of his split-level home in broad daylight and spiral to the ground nearby—whereupon he confiscated the runaway device, setting off a legal demand from the owner that it be returned. (No charges were filed because Virginia does not yet regulate the use of private drones).¹⁵

The coming drone-driven challenges to government lawyers are manifest, at every level.

Federal Authority: Is a "drone" an "aircraft"? The boundaries of most drone regulation at the state and local level will be largely determined by the FAA. It has repeatedly asserted its preemptive authority over UAV's, with particular scrutiny of for-profit drone activities. Sometimes this has resembled the proverbial atomic bomb where a flyswatter would presumably suffice—if in fact any action was warranted.

A case in point arose in January 2014. Hoping to cash in on the spike in beer consumption during Superbowl season, tiny Minnesota-based Lakemaid craft brewery let fly an innovative television ad campaign. The spot featured an octocopter as it deftly lifted a 12-bottle carton of Lakemaid's "Frosty Winter Lager" prominently displaying the company's mermaid logo, whisked the cargo in a straight line above a frozen lake to a specific ice fishing hut, and placed its alcoholic payload at the doorway for the lucky anglers waiting within. The advertisement was a sensation and immediately took its place among "Best Beer Commercials... Ever" in YouTube parlance.16 Presumably Lakemaid beer sales surged and the mermaid gained in popularity.

But one viewer-the FAA-was singularly unimpressed. Even though no one was injured and no property damaged, the agency straightaway notified Lakemaid that its drone activities were illegal and ordered the brewer to cease any further beer flights. The company complied.

Lakemaid was but one of 13 different entities that received cease and desist orders from the FAA over the past three years for what might have seemed to be innocuous commercial uses of small

Continued on page 28

Drones Cont'd from page 17

drones. The government also grounded Texas EquuSearch, a nonprofit which had been employing UAV's to locate missing people. The communiques, issued by various FAA officials, all followed the same general script, citing an FAA policy prohibiting commercial drone use unless expressly permitted and threatening a \$10,000 fine for violation. B

Not all recipients of the FAA orders took the matter lying down. In 2013, the FAA issued a Proposed Order of Assessment against a Swiss national named Raphael Pirker and his company, Team Blacksheep. The University of Virginia Medical Center had retained a marketing firm which in turn hired Pirker, a well-known drone videographer, to fly a UAV over the university's pastoral Charlottesville campus and obtain promotional footage. He accomplished the task using a Ritewing Zephyr powered glider with a 54-inch wingspan, was paid for his efforts and posted the footage on YouTube. No damage had occurred; regardless, the flight resulted in the FAA assessing Pirker a civil penalty of \$10,000.

Although the agency's Order of Assessment specifically alleged that Pirker had been compensated for his UAV flight (presumably making his flight a "commercial" drone activity), the FAA did not rely upon the fact of compensation for its proposed civil penalty. In fact, they pointed to no federal regulation specifically prohibiting commercial operation of a drone. Rather, the Order was premised completely on the claim that Pirker had flown the UAV "recklessly" by flying "at extremely low altitudes, under personnel bridges, directly over automobiles, and within feet of pedestrians." 19

By reason of the foregoing, you violated the following section(s) of the Federal Aviation Regulations: a. Section 91.13(a) which states that no person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.²⁰

Pirker succeeded in having the matter dismissed. In March 2014, Administrative Law Judge (ALJ) Patrick Geraghty held that small drones (which he referred to as "model aircraft") are not aircraft under the federal definitions; thus the FAA had no jurisdiction over Pirker's flight. He questioned the FAA's expansive assertion of power to regulate UAV's, saying the agency could have employed the same logic to block "a flight in the air of a paper aircraft, or a toy balsa wood glider."²¹

The FAA rapidly appealed the ALJ's decision to the full National Transportation Safety Board (NTSB).

Late in 2014, the NTSB issued its decision, reversing the ALJ. The NTSB held that drones are aircraft as the word is defined under federal law and accordingly are subject to the recklessness regulation. It therefore remanded the matter to the ALJ to decide whether Pirker's flight had been reckless.

As one commentator notes, the NTSB's decision raised as many questions as it answered:

The NTSB's decision was very narrow in one respect: it held that because drones are aircraft, FAR 91.13, the only FAR at issue in the matter, applies to drones. It did not address "commercial use" since that was not addressed by the Judge, and it did not hold that any other FAR applies to drones.

The Board's decision was very broad in another respect: it did not qualify which size drones are aircraft. So both a 1-ounce child's "toy" drone and a 55-pound industrial-sized drone are aircraft, and both are equally subject to FAR 91.13. In fact, given the extremely broad federal definition of aircraft, even paper airplanes are now subject to FAR 91.13. Yes, there is a manufacturer of paper airplane drones.²²

(As for Mr. Pirker, there was ultimately no decision on remand. Judge Geraghty questioned why the FAA had brought these particular charges against a foreign national, given a prior FAA Order which clearly provides that when that a "foreign person" violates the Federal Aviation Regulations (FAA Order 2150.3B (Chapter 6, paragraph 34(a)), the matter should be handled by the "appropriate foreign aviation authority" through the Department of State.)

Pirker settled the matter by paying

\$1,100. He did not admit to any violation. The FAA obtained an NTSB decision that drones are "aircraft" as that term is defined under federal statute, and are subject to a single FAR—91.13 (the recklessness provision.)

Federal Preemption: When/where can drones be operated? Given that drones are "aircraft," they fall within the matrix of three FAA usage categories which govern all aircraft operations. "Public Aircraft Operations" encompass governmental usage; "Civil Operations" are all non-governmental (including commercial) uses; and "Model Aircraft Operations" cover purely recreational drone activities.

Public Operations: "Public Aircraft Operations" are defined under Title 49 U.S.C. § 40102(a)(41) and related provisions. Whether an activity qualifies as public (governmental) aircraft operation is determined on a flight-by-flight basis; the considerations include aircraft ownership, the operator, the purpose of the flight, and the persons on board the aircraft.

In order to qualify for "public aircraft operation" status, the UAV must be owned by, operated by and used for legitimate purposes of a public entity. Qualification is not by right; the qualifying public entity must apply for and receive an FAA Certificate of Waiver or Authorization (COA). The COA is not a blanket authorization. As the FAA website explains, the COA allows qualifying entities "to operate a particular aircraft, for a particular purpose, in a particular area. The COA allows an operator to use a defined block of airspace and includes special safety provisions unique to the proposed operation."²³

The Public Use COA is obtained via the FAA's "COA Online" system. Before the applicant will even be given access to COA Online, it (or its proponent) will be required to provide the FAA with a "declaration letter" from the city, county, or state attorney's office assuring the FAA that the proponent is recognized as a political subdivision of the government of the State under 49 USC § 40102(a)(41)(c) or (d) and that the proponent will operate its unmanned aircraft in accordance with 49 USC § 40125(b) (in other words, not for commercial purposes).²⁴

Once granted, COAs usually have a specific term - up to two years in many cases.

The FAA explains that its goal is to "develop conditions and limitations for UAS operations to ensure they do not jeopardize the safety of other aviation operations" and to establish a level of safety equivalent to that for manned aircraft: "Usually, this entails making sure that the UAS does not operate in a populated area and that the aircraft is observed, either by someone in a manned aircraft or someone on the ground to ensure separation from other aircraft in accordance with right-of-way rules."²⁵

The FAA first issued COA's for public use in 2009; since then hundreds have been granted, to states, municipalities, universities and other public entities. Common public operation uses for which the FAA has issued COA's include law enforcement, firefighting, border patrol, disaster relief, search and rescue, military training and academic research. 21

Civil Operations: All drone activities that are not governmental or purely recreational are categorized as civil aircraft operations. Under this category, encompassing all commercial usage, the FAA affords non-governmental organizations the opportunity to go airborne provided that their drones engender minimal risk while performing compensated activities.

As the FAA website explains, there are two methods of gaining FAA authorization to fly civil (non-governmental) drones. First, the civil operation permit may be obtained via a COA coupled with a "Section 333 Exemption" (Section 333 of the FAA Modernization and Reform Act of 2012 requires pilots and aircraft to be certified; the Exemption can be obtained with the help of numerous law firms and commercial institutions such as "Drone Universities" mentioned at the outset of this article, which charges between \$3,500 and \$6,500 for the service).28 (The FAA notes that "this process may be used to perform commercial operations in lowrisk, controlled environments.")29

Second, applicants may be able to procure a "Special Airworthiness Certificate" (SAC) by describing "how their system is designed, constructed, and manufactured, including engineering processes, software development and control, configuration management, and quality assurance procedures used, along with how and where they intend to fly." If the FAA determines the project does not present an unreasonable safety risk, it will issue a SAC with operating limitations applicable to the particular UAV in question.

Businesses chafe at the lethargic pace with which the FAA has allowed commercial UAV's to operate. However, the agency has gradually increased grants of civil operation exemptions and SAC's to an expanding range of applicants including movie production groups,31 utility companies,32 and surveyors, construction firms and oil industry applicants.33 The FAA claims to have issued over 850 exemptions to date; analysts find that more than 40 percent of these are for aerial photography, with a strong link to real estate uses.34 Typical is DividedSky Aerial Solutions, one of the newest recipients of a commercial use exemption. An eight person Richmond, Virginia start-up with 10 UAV's, DividedSky provides aerial footage, often to the real estate industry, at rates from \$500 to \$5,000 per hour.35

Exemption applications still take an inordinate amount of time to process. A law firm specializing in obtaining civil exemptions recently highlighted its success in receiving an exemption less than four months after the Section 333 application was submitted. On Capitol Hill, lobbyists, industry spokespersons and politicians alike continue to militate for a much less restrictive stance on commercial drone use.

Model Aircraft Operations: Purely recreational use is covered under "model aircraft operations." The FAA does not rigorously regulate such UAV use, instead stating that "Individuals flying for hobby or recreation are strongly encouraged to follow safety guidelines" which include the following:

- Fly below 400 feet and remain clear of surrounding obstacles.
- Keep the aircraft within visual line of sight at all times.
- Remain well clear of and do not interfere with manned aircraft operations.
- Don't fly within 5 miles of an airport unless you contact the airport and control tower before flying.
- · Don't fly near people or stadiums.
- Don't fly an aircraft that weighs more than 55 lbs.
- Don't be careless or reckless with your unmanned aircraft – you could be fined for endangering people or other aircraft.³⁷

Individuals who fly within these parameters do not need federal permission to operate their drones, but any flight outside these parameters (including any non-hobby, non-recreational operation) requires FAA authorization. The agency provides the following example: "[U]sing a UAS to take photos for your personal use is recreational; using the same device to take photographs or videos for compensation or sale to another individual would be considered a non-recreational operation."³⁸

The FAA has partnered with several industry associations to promote "Know Before You Fly," a campaign to educate the public about using unmanned aircraft safely and responsibly; it also provides links to a number of informational pdf's and video's for the hobbyist user.³⁹

Notwithstanding these educational efforts, it seems obvious that, in the absence of mandatory federal regulations, states and localities will have much work to do as hobbyists take to the skies.

The FAA's Public Relations Campaign: Since at least 2007, Congress has been pressuring the FAA to show leadership on the drone issue, with modest results until recently. Understandably, the common (mis)perception has been that very few "consumer drone" regulations exist. Faced with an uninformed constituency, the agency fired back with a manifesto on its website in February 2014, debunking a number of drone misnomers. As the agency put it:

There are a lot of misconceptions and misinformation about unmanned aircraft system (UAS) regulations. Here are some common myths and the corresponding facts.

Myth #1: The FAA doesn't control airspace below 400 feet. Fact—The FAA is responsible for the safety of U.S. airspace from the ground up. This misperception may originate with the idea that manned aircraft generally must stay at least 500 feet above the ground.

Myth #2: Commercial UAS flights are OK if I'm over private property and stay below 400 feet. Fact—The FAA published a Federal Register notice (PDF) in 2007 that Continued on page 30

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clarified the agency's policy: You may not fly a UAS for commercial purposes by claiming that you're operating according to the Model Aircraft guidelines (below 400 feet, 3 miles from an airport, away from populated areas.) Commercial operations are only authorized on a case-by-case basis. A commercial flight requires a certified aircraft, a licensed pilot and operating approval.

Myth #3: Commercial UAS operations are a "gray area" in FAA regulations.

Fact—There are no shades of gray in FAA regulations. Anyone who wants to fly an aircraft—manned or unmanned—in U.S. airspace needs some level of FAA approval. Private sector (civil) users can obtain an experimental airworthiness certificate to conduct research and development, training and flight demonstrations. Commercial UAS operations are limited and require the operator to have certified aircraft and pilots, as well as operating approval.

Flying model aircraft solely for hobby or recreational reasons does not require FAA approval. However, hobbyists are advised to operate their aircraft in accordance with the agency's model aircraft guidelines (see Advisory Circular 91-57). In the FAA Modernization and Reform Act of 2012 (Public Law 112-95, Sec 336), Congress exempted model aircraft from new rules or regulations provided the aircraft are operated "in accordance with a community-based set of safety guidelines and within the programming of a nationwide community-based organization,"

* * * Myth #4: There are too many commercial UAS operations for the FAA to stop.

Fact—The FAA has to prioritize its safety responsibilities, but the agency is monitoring UAS operations closely. Many times, the FAA learns about suspected commercial UAS operations via a complaint from the public or other businesses. The agency occasionally discovers such operations through the news media or postings on internet sites. When the FAA discovers apparent unauthorized UAS operations, the agency has a number of enforcement tools available to address these operations, including a verbal warning, a warning letter, and an order to stop the operation.

* * *

Myth #5: Commercial UAS operations will be OK after September 30, 2015.

Fact—In the 2012 FAA reauthorization legislation, Congress told the FAA to come up with a plan for "safe integration" of UAS by September 30, 2015. Safe integration will be incremental. The agency is still developing regulations, policies and standards that will cover a wide variety of UAS users, and expects to publish a proposed rule for small UAS – under about 55 pounds – later this year. That proposed rule will likely include provisions for commercial operations.

Myth #6: The FAA is lagging behind other countries in approving commercial drones.

Fact – This comparison is flawed. The United States has the busiest, most complex airspace in the world, including many general aviation aircraft that we must consider when planning UAS integration, because those same airplanes and small UAS may occupy the same airspace.

Myth #7: The FAA predicts as many as 30,000 drones by 2030. Fact—That figure is outdated. It was an estimate in the FAA's 2011 Aerospace Forecast. Since then, the agency has refined its prediction to focus on the area of greatest expected growth. The FAA currently estimates as many as 7,500 small commercial UAS may be in use by 2018, assuming the necessary regulations are in place. The number may be updated when the agency publishes the proposed rule on small UAS later this year.⁴⁰

The FAA's proposed rulemaking: In February of this year, the FAA finally

issued its "Small UAS Notice of Proposed Rulemaking." The agency proposes a number of parameters and limitations regarding drones, many of which had been advanced in prior FAA publications. These proposals include:

• The drone must weigh less than 55 pounds (25 kg).

- The drone may be operated only within visual line-of-sight (VLOS) of the operator (no camera or photographic device-other than corrective lenses-can be used to enhance visibility).
- The drone can operate only during daylight hours and only when there is three miles of visibility from the control station.
- The drone may not be flown directly above any person not involved the drone operation.
- The drone may not fly higher than 500 feet or faster than 100 miles per hour.
- The drone operator must be at least 17 years old, must have passed an FAA knowledge examination and be vetted by the Transportation Security Administration (TSA).
- The drone must be maintained and checked for airworthiness prior to each operation.
- The drone must be registered (but an airworthiness certificate is not required).⁴¹

The 60-day public comment period for the Small UAS Notice of Proposed Rulemaking closed on April 15, 2015.

State drone laws: The FAA's sluggish pace and preemptive ambit have not prevented states from acting. Many states have passed UAV laws, even as they operate in a dynamic legal environment while FAA regulations evolve. According to the National Conference of State Legislatures (NCSL), 26 states have developed their own regulatory schemes and in 2015, 45 states have already considered a total of 153 bills related to drones, with 17 states-Arkansas, Florida, Hawaii, Louisiana, Maine, Maryland, Michigan, Mississippi, Nevada, New Hampshire, North Dakota, Oregon, Tennessee, Texas, Utah, Virginia and West Virginia having thus far added new drone provisions.42

These new laws cover a range of subjects:

Law enforcement: States are increasingly focused on limiting, or at least regulating, drone use by law enforcement:

- Maine LD 25 requires that law enforcement agencies receive approval before acquiring drones and sets forth standards for law enforcement's operation of drones, including requiring a warrant before using a drone in criminal investigations except under certain circumstances.⁴³
- Nevada AB 239 restricts the use of drones by law enforcement and public agencies and requires all such drones to be listed in a registry.⁴⁴
- North Dakota HB 1328 limits the use of drones for surveillance purposes.⁴⁵
- Utah HB 296 permits law enforcement to use drones to locate a lost or missing person in an area in which a person has no reasonable expectation of privacy.⁴⁶
- Virginia HB 2125 and SB 1301 require that a law enforcement agency obtain a warrant before using a drone for any purpose, except in limited circumstances.

Hunting: Several new state regulatory schemes prohibit the use of drones to assist in hunting; clearly, UAV's can serve as aboveground "fish-finders," scanning miles of terrain to take the inconvenience and guesswork out of tracking elusive prey-or unauthorized hunters. Legislatures in New Hampshire, -Michigan, Oregon and West Virginia added anti-hunting provisions in 2015:

- New Hampshire SB 222 prohibits UAV use by anglers, trappers and hunters. ⁴⁸
- Michigan SB 55 prohibits using drones to hunt game and Michigan SB 54 forbids drone use to interfere with an individual who is hunting.
- Oregon HB 2534 likewise requires development of rules to prohibit using a UAV for fishing or hunting or impeding an individual who is lawfully fishing or hunting.⁵⁰
- West Virginia HB 2515 prohibits hunting via a drone.⁵¹

Infrastructure: Protection of critical infrastructure is also a focus of the new legislation:

- Arkansas HB 1770 prohibits using drones to photograph or collect information about critical infrastructure without consent.⁵²
- Nevada AB 239 restricts drone use within a certain proximity of airports or critical facilities without permission.⁵³
- Tennessee HB 153 prohibits using a drone to capture an image over certain open-air events and fireworks displays. It also prohibits the use of UAS over the grounds of a correctional facility.⁵⁴
- Texas HB 1481 makes it a Class B misdemeanor to operate drones over critical infrastructure (including refineries, power plants, chemicalmanufacturing plants, ports, trucking terminals, and water-treatment facilities) at less than 400 feet off the ground. 55 Texas HB 3628 directs the Department of Public Safety Director to adopt rules to prohibit or limit drone usage in the state capitol complex. 56

Privacy: Several of the new measures deal with the dangers of drone-enabled intrusion into private spaces:

- Arkansas HB 1349 forbids using a drone for voyeurism.
- Florida SB 766 prohibits drone use to obtain images of private property or the owner, tenant, or occupant of such property without consent where a reasonable expectation of privacy exists.⁵⁷
- Mississippi SB 2022 specifies that use of a UAV for "peeping tom" purposes constitutes a felony.⁵⁸

A Comprehensive Approach: Some of the new provisions above are being grafted into existing state UAV regulatory schemes; others are the first step in a state's nascent drone legislation.

Connecticut is among the states that have devoted significant time and energy to assessing the requirements of new drone laws in light of existing state regulations. Among the findings in the 41-page study by the Connecticut General Assembly entitled "Drone Use Regulation" are:

"Drone," defined: Merely characterizing drones as a subset of "aircraft" may leave open gaps in the law. For example, Connecticut law requires that all "aircraft accidents" be reported to authorities, which makes little sense for a 2-pound quadcopter. Similarly, some provisions regarding use of airports and helipads are inapplicable to drones.⁶⁰

Criminal Use: As is evident from FAA regulations, use of the drone may itself violate federal law, but using a drone to commit crimes implicates state laws. These should be scrutinized to confirm, for example, that a drone could be considered a "dangerous instrument" where appropriate.⁶¹

Weapons: Where laws regulate the presence of weapons in a "vehicle" they may not effectively proscribe weapons on a drone.⁶²

Remote firing: Although current Connecticut law prohibits using "remote devices" to operate firearms, it is not absolutely clear that, except for hunting (which is expressly proscribed) firing from a drone would be covered in all circumstances.63 (In fact, the Connecticut teenager's pistol-toting drone recently shown on YouTube firing over deserted private property would likely be legal under current Connecticut law). Trespass: Generally, criminal trespass involves physical intrusion. Although Supreme Court precedent has held that flying aircraft at 83 feet could have a material negative impact on the property owner,64 the Connecticut study indicates that more specific guidelines are needed: "Without a definition of the upper elevation limits of private property, it would be difficult to argue that a drone had entered the property criminally by flying over it."65 The same might be said for civil trespass.

Municipal drone laws: Municipal drone laws are just beginning to emerge. A search for "unmanned aircraft" in the MuniCode database returns a handful of examples.

In Seattle, rules for police use of drones and the data derived therefrom are covered under "Acquisition and Use of Surveillance Equipment." Frairie du Chien, Wisconsin signed into law a new ordinance on August 4 adding "Use of a Drone" to a range of "Offenses Against State Laws Subject to Forfeiture. In Bonita Springs, Florida "Parks and Recreation" includes a provision allowing the aerial filming of one's own "special event" in municipal parks, subject to several safety standards, and provides for com-

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mercial and delivery uses, subject to city approval. ⁶⁸

Charlottesville, Virginia made news (beyond the *Pirker* matter) when its city council passed the country's first drone resolution in February 2013 in which it "calls on the United States Congress and the General Assembly of the Commonwealth of Virginia to adopt legislation prohibiting information obtained from the domestic use of drones from being introduced into a Federal or State court," and "pledges to abstain from similar uses with city-owned, leased, or borrowed drones."

State Preemption: Obviously any municipal laws regarding governmental or commercial drone use would be largely preempted by federal regulations-and in some case by state law. For example, newly-enacted Maryland SB 370 specifies that only the state can prohibit, restrict, or regulate UAV's, preempting counties and municipalities. To Unless so foreclosed, however, municipalities should have the prerogative to address paramount issues such as voyeurism, First Amendment rights and law enforcement surveillance, each of which is discussed below.

Airborne Voyeurism: An obvious and recurring topic in the drone law discussion is the potential for invasion of privacy. As evidenced in the above list of new state laws, Arkansas, Florida and Mississippi now specifically prohibit using UAV's to peek into private property. In many other jurisdictions, voyeurism, whether at eye level, facilitated by climbing a tree, floating in a balloon or operating a state of the art camera-hauling octocopter, is covered by current "peeping tom" laws. Here, the challenge is not so much in amending laws to add drones to the list of improper voyeuristic vehicles, but in making the existing laws stick.

For example, California's existing privacy laws would seem to cover droneenabled snooping into a private residence:

Except as provided in subdivision (I), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor:

(j) (1) Any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality, including, but not limited to, a periscope, telescope, binoculars, camera, motion picture camera, camcorder, or mobile phone, the interior of a bedroom, bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside. ⁷¹

But the devil is in the details. Penalizing drone-enabled voyeurism-if in fact it is detected at all, given the noise of traffic, air conditioners, sirens and such-is likely to face the same challenges that confront the prosecution of terrestrial peeping. As one enterprising voyeur-defense law firm's site explains:

Like other California "disorderly conduct" crimes, peeping while loitering and invasion of privacy are quite specific and technical in their requirements. Often, the prosecution will be unable to prove one or more required elements of the crime. ⁷²

The site provides a litany of loopholes which may thwart prosecution of a potential voyeurism charge; presumably some of these would be just as viable in defending against airborne peeking as they are for standing outside a back yard bedroom window:

Legal defenses to Penal Code 647(i), peeping while loitering, include (but are not limited to):

- · You weren't on private property;
- · You weren't loitering;
- You had a lawful purpose for being on the property; and
- The building you were peeking into wasn't inhabited.

Depending on the specific charge, legal defenses to Penal Code 647(j), invasion of privacy, include (but are not limited to):

- The alleged victim did not have a reasonable expectation of privacy;
- The alleged victim consented to being photographed or recorded;
- You didn't intend to invade anyone's privacy; and
- You didn't intend to arouse or gratify yourself sexually.⁷³

The firm is helpful enough to provide some instances of questionable behavior that might avoid legal jeopardy.⁷⁴

The victim's reasonable privacy expectations and the perpetrator's intent will no doubt continue to be argued in drone-based voyeurism cases.

First Amendment Implications:

Airborne photography also implicates First Amendment issues. Questions about freedom of expression, journalistic and otherwise, abound. For example, if one has the right to video activity from the ground, why should capturing the same activity from an airborne camera be proscribed?

That question arose earlier this year in a federal court considering *Rivera v. Foley*, no. 3:14 cv00196 (D. Conn. Mar. 23, 2015). Pedro Rivera, a photographer and editor at a Hartford television station, was alerted in February 2014 by his police scanner to a serious traffic accident downtown. He went to the scene and stopped at the perimeter which law enforcement had set up. Wanting a better view, Rivera launched his personal drone. It ascended to a point 150 feet directly above the accident, affording much more compelling photography.

The police officers became aware of the drone. They confronted Rivera, demanded that he cease filming and contacted his employer—with the result that he was suspended from work for one week.

He brought a Section 1983 action against the Hartford Police Department and various officers, alleging violation of his First and Fourth Amendment rights. His Fourth Amendment count failed, given that his drone flight justified a *Terry* stop:

Plaintiff's operation of an unusual and likely unidentified device into a cordoned-off area at the scene of a major motor vehicle accident and ongoing police investigation provides arguable reasonable suspicion that Plaintiff was interfering with police activity.⁷⁵

More significantly, the court's First Amendment analysis found that, although the right to photograph police activity was not clearly established in the Second Circuit (in contrast to the First, Seventh, Ninth and Eleventh), even if such right did exist, there was no precedent suggesting that droneenabled photography was also protected:

[I]n cases where the right to record police activity has been recognized by our sister circuits, it appears that the protected conduct has typically involved using a handheld device to photograph or videotape at a certain distance from, and

without interfering with, the police activity at issue.... By contrast, here Plaintiff directed a flying object into a police-restricted area, where it proceeded to hover over the site of a major motor vehicle accident and the responding officers within it, effectively trespassing onto an active crime scene.... Even if recording police activity were a clearly established right in the Second Circuit, Plaintiff's conduct is beyond the scope of that right as it has been articulated by other circuits.76

Obviously, cameras are able to film from an angle, permitting footage to be gathered from airspace that is not over a "police restricted area." And where the drone is over public airspace, the First Amendment advocates become more vociferous. As Brendan Shulman, a leading "drone-rights" lawyer who represented drone videographers Team Blacksheep and Texas EquuSearch has opined regarding laws that seek to limit airborne photography:

> The Supreme Court has affirmed that there's no expectation of privacy on a photograph taken from the air in places where planes tend to fly. There's a First Amendment right to take a photograph of someone in a public place and that right is enhanced if the picture is for a journalistic purpose. These laws don't seem to have taken that into account and that's where there are grounds to challenge them.77

Fourth Amendment Implications:

Drones are clearly poised to shrink the sanctuary known as "privacy" beyond its alreadylimited boundaries. While drone-enabled voyeurism is an annoyance, implications for expanded search and seizure are even more concerning, given that a search is not likely to be considered "unreasonable" unless it violates a "constitutionally protected expectation of privacy."78 The "expectation of privacy," at least from aerial intrusion, was downsized long ago, when the Supreme Court upheld law enforcement's using the fruits of warrantless overhead surveillance from an altitude as low as 400 feet.

In Florida v. Riley, 488 U.S. 445 (1989), a county sheriff was acting on a tip that a suspect was growing marijuana in a greenhouse on his five-acre rural property. Unable to see the building in question, the officer circled over the premises in a helicopter. The greenhouse was missing two roof panels,

allowing the sheriff to see, with his naked eye, what appeared to be marijuana growing inside. A warrant was procured, and an arrest made.

The trial court had agreed with Riley that the flyover violated his reasonable expectation of privacy. That decision was overturned by Florida's Court of Appeals-which was in turn overturned by the state's highest court, again finding a privacy expectation.

The Supreme Court reversed yet again. "Any member of the public could legally have been flying over Riley's property at 400 feet and could have observed Riley's greenhouse. The police officer did no more."79

With a UAV instead of a helicopter, the potential for further overreach is obvious. Surveillance will be possible from much lower altitudes, whether looking straight down, at an angle or horizontally. It is therefore not surprising that, as noted earlier in this article and as the aforementioned Connecticut General Assembly study confirms, the single greatest subject matter of state and local drone laws is the limitation of use by law enforcement.80

CONCLUSION: The possibilities for beneficial use of drones are seemingly unlimited, and it is virtually certain that UAV deployment, by governments, businesses and hobbyists, will grow exponentially in the near future, transforming society. But critical questions about safety, privacy and constitutionality remain to be answered. Although the FAA has preempted much of what can be done to regulate UAV's, there is still substantial work to be done on the state and local level. Municipal lawyers have a responsibility to understand this new, intrusive technology-and a unique opportunity to play a significant role in crafting local drone laws that provide the right balance between recreational interests, commercial opportunity, law enforcement and the protection of fundamental constitutional rights.

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DRAFT 1.0 of intrusive advancement clause

Where the State Law does not apply and supersede, The Selectboard has power to create and enforce ordinances that deal with intrusive technologies and advancements to provide the right balance between recreational interests, commercial opportunity, law enforcement and the protection of fundamental rights of citizens including the regulation of :

- Vacation rentals such as Airbnb and car services such as Uber
- Unmanned aerial vehicles (drones)
- Marijuana and e-cigarette use
- Police body cameras
- Solar panel installations