

# VLCT NEWS

A PUBLICATION OF THE VERMONT LEAGUE OF CITIES & TOWNS

STRENGTHENING VERMONT LOCAL GOVERNMENT

April 2000

## LEAGUE TO OFFER FIRST TRAINING VIA INTERACTIVE TELEVISION

**MAY 25 NEW SELECTBOARD  
TRAINING TO BE BROADCAST AT  
FIVE LOCATIONS AROUND  
VERMONT**

Selectboard members are invited next month to take part in the League's first interactive television training. The VLCT Municipal Law Center will present its popular, annual "New Selectboard Training" workshop via Vermont Interactive Television (VIT) at five VIT sites around the State: Brattleboro, Rutland, St. Albans, St. Johnsbury and Waterbury. The presentation is being co-sponsored by the Central Vermont, Northwest, Rutland and Windham Regional Planning Commissions.

The League is trying this new means of delivering training for the convenience of local officials. Not only is the travel time  
*(Continued on Page Three)*

## KIDS VOTING VERMONT PROGRAM DEBUTS AT TOWN MEETING 2000

Three issues ago the *VLCT News* ran a commentary by Vermont State Senator William Doyle on the emerging crisis of youth apathy vis-à-vis participation in government. (See the January 2000 *VLCT News* article entitled "Citizenship at Risk.") This month we are pleased to report on a new program in Vermont that is designed to teach children about democracy and to get them into the voting booth.

Secretary of State Deborah Markowitz and the volunteer, 18-member Kids Voting Vermont Board of Directors brought this national, nonprofit and nonpartisan program to Vermont late last year. The need is great – according to Kids Voting Vermont statistics, only 26 percent of eligible 18 – 24 year olds in Vermont voted in the 1996 presidential elections, well below the national average of 32 percent.

Last month, on Town Meeting Day, pilot

Kids Voting Vermont programs in Montpelier and St. Albans City welcomed their first student voters to City Hall. The students (over 1,000 are involved in the two districts) prepared for voting by participating in classroom lessons involving mock primaries and caucuses, monitoring primary results from other states, conducting surveys on voter apathy and "registering" to vote in the presidential primary.

The Kids Voting USA organization includes the lessons as part of the K – 12 curriculum it provides to schools participating in its program. Kids Voting USA was founded in 1990 and operates in over 40 other states. The national organization and its state affiliates create partnerships among families, schools, election officials and community leaders in an effort to draw young people into the election process. Research is also conducted to test the program's effectiveness.

In Montpelier, members of the local Kids

*(Continued on Page Nine)*



*Newly appointed Region I Administrator for the federal Environmental Protection Agency (EPA) Mindy Lubber recently met with members of the VLCT Board of Directors. Attending with her were EPA Attorney Carl Dierker and Gerald Potamis, EPA Region I Vermont Coordinator. The group discussed EPA initiatives for communities in New England, including new partnerships with regulated municipalities, and existing regulatory programs.*

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# VLCT BOARD PROFILE

## MEET JANE CHADWICK, SELECTPERSON, TOWN OF DOVER

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The VLCT News is published monthly by the Vermont League of Cities and Towns, a non-profit, nonpartisan organization founded in 1967 to serve the needs and interests of Vermont municipalities. The VLCT News is distributed to all VLCT member towns. Additional subscriptions are available for \$25 to VLCT members and \$63 for non-members. Please contact the League for subscription and advertising information.

The VLCT Board's newest member is Dover selectperson Jane Chadwick. Jane was appointed last month to fill the vacancy created when Winhall selectperson Ted Friedman decided to "retire" from public service after serving the Town of Winhall in various capacities for 26 years.

Jane is just coming up on the end of her first decade of public service to the Town of Dover, and she seems to have really hit her stride. She began in the early 90s as a planning commission member, then served on the zoning board of

adjustment, and last month embarked on her third, two-year selectboard term. Her selectboard tenure has coincided with the development and implementation of Act 60, legislation that propelled Dover into the limelight when it initially refused to pay the Act 60 education property taxes it owed to the State. (Editor's note: As a "sending town" under the Act 60 formula,

Dover collects approximately \$4 million annually in education property taxes for the State, which the State then redistributes to other school districts.)

Act 60 motivated Jane to seek a seat on the VLCT Board and it is "the single event that keeps me on the selectboard," she noted, adding, "Act 60 has been devastating to Dover and we need to see the statewide property tax repealed." Though it is this issue that has galvanized her in recent years, Jane initially volunteered for town office at the behest of friends and neighbors. "They said a reasonable voice was needed in town affairs, and threatened me with torture if I refused," she joked. More seriously, though, she noted her

belief "that everyone in town should take a turn at public service, and should realize that it will take at least a term to learn how to do it." Dover has a particularly tough time finding citizens willing to serve because most of its residents are part-time, seasonal visitors. "We have only about 600 voting age adults who live [year 'round] in Dover," Jane said, "which makes it really hard to find people who can get involved."

Her years on the planning commission and zoning board of adjustment "were helpful

preparation for my selectboard work," she said. "They taught me the basics of the open meeting and public records laws, and Robert's Rules of Order." Her work in local land-use regulations also gave Jane experience with Act 250, the statewide land-use law administered by district environmental commissions. This is another area where Jane has strong feelings about the relationship between local control and

statewide regulation. They stem from an incident several years ago in which Dover granted local permits for the construction of two houses on 250 acres. The project was later rejected by the Act 250 district commission, which deemed it not in compliance with Dover's town plan. "We looked carefully at the project at the local level and found a way that it could satisfy the Town and the applicant," Jane recalled, adding "these decisions from outside agencies make local officials think, 'What am I here for? My work doesn't mean anything.'"

While she works with the VLCT Board to increase Vermont local government's authority and control, Jane is also looking forward to

*(Continued on next page)*





## CHADWICK -

*(Continued from previous page)*

working on a few important local projects with her selectboard. Having just finished formulating the board's goals and objectives for the upcoming year, Jane lists better documentation of board decisions ("We must write down the why's for our decisions, so that in the future, we can consult them before we change policies," she explained.); exploring a town manager form of government; and keeping up with technology as a few of the board's important tasks for the upcoming year. She is proud of the Board's recent work to complete a two-mile recreational trail that connects the Mt. Snow Ski Area with the golf course in town. "We've had a ten-year wait for federal funds on one part of the path, but meanwhile we went ahead and did our local share. It is a great place," she said, "for kids to ride bikes and for Dover citizens to get out and have the chance to walk." And while the board has played a less active role in it, Jane is also proud of Dover's public transportation system. Called the Moover, it is the third largest public transportation system in the State. "It is now expanding out of town," Jane

noted, "and is very useful for folks running errands and kids going to and from after-school sports and other activities."

Jane's family moved to Vermont when she was an infant, and she is a graduate of Wilmington High School and Colgate University. She returned to Vermont after graduating from Colgate, with the intention of working for a year to save money for graduate studies in journalism at Boston University. "But I came home and stayed," she said, and worked first in the hotel industry and later as co-owner of Mt. Snow Motors with her husband. The business, now 11 years old, has nine employees and offers automobile service and plowing and excavation services.

Jane's two stepdaughters are off at college now, leaving her a little more time for her hobbies of snowmobiling, skiing (of course) and boating. She also raises black and chocolate Labrador dogs. On the day of her first VLCT Board meeting Jane was, in fact, wondering what state her energetic labs would leave her house in after her long day in Montpelier.

We at the League hope there were no surprises, and that she will be back for many more Board meetings!

## INTERACTIVE TV -

*(Continued from Page One)*

to one central location avoided, but this training will be offered in the late afternoon and early evening to allow officials who are working during the day a chance to attend. (A boxed dinner is included with registration.)

The workshop program includes sessions on **Responsibilities of Selectboards, Conflict of Interest, and When You Need a Lawyer; Government in the Open - The Open Meeting Law and Public Records; and Ordinance Adoption and Enforcement.** Each session will be presented by an attorney with extensive municipal experience.

If you have never been to a VIT training before, you can expect to be part of a group of 12 - 24 officials who will view the program on a large video monitor. You will be able to see and hear people at the other four sites through the use of video cameras, monitors, and microphones. They will also see and hear you if you choose to speak. The program is on a closed circuit, and will only be broadcast at the five VIT sites.

Registration material was mailed out to all selectboard members earlier this month. Space is limited, so please register early to assure yourself a seat. Also, please allow enough time to register and settle in before the cameras begin to roll at 4:00 p.m.

This workshop is for you! League staff members would love any and all feedback. If this workshop is successful, there will be more offered via Vermont Interactive Television.

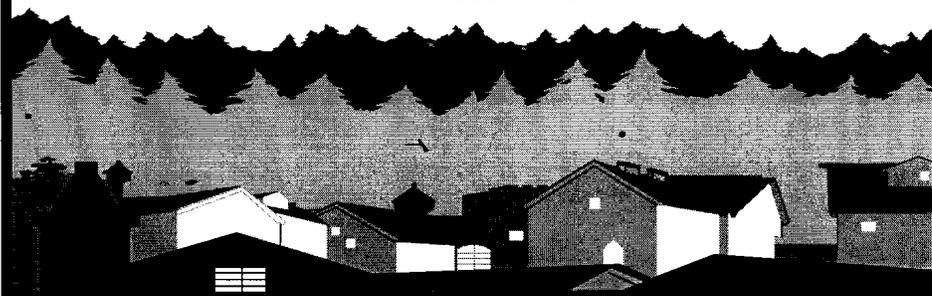
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# NONCOMPLYING STRUCTURES; RADIO FREQUENCY INTERFERENCE; NUDE DANCING

## COURT ALLOWS EXPANSION OF NONCOMPLYING STRUCTURE

A recent Vermont Supreme Court case dealt with the issue of noncomplying structures under zoning regulations. *In re Miserocchi*, No. 99-166 (January 28, 2000). The case involved a barn used as a single-family residence in the Town of Clarendon that violated the setback requirements. Agricultural uses and single-family residences are permitted in the district.

The Miserocchis applied to the Town for a change-of-use permit in order to make their residential use of the barn permanent (the Town previously had imposed a 10-year sunset requirement), and to add skylights and an addition to the rear of the building. After their application was denied at the local level, they appealed to the Environmental Court. That Court denied the application on the basis that residential use within the setback would increase the intensity of the use of the noncomplying part of the barn.

On appeal to the Supreme Court, the Court considered the Clarendon zoning requirements concerning nonconforming uses. Since there were no separate local regulations on noncomplying structures, the regulations on nonconforming uses controlled, even though it was difficult to apply them to structures. (Under the nonconforming use statute, 24 V.S.A. § 4408, noncomplying structures are also viewed as nonconforming uses. *Town of Winhall v. Kushner*, No. 90-410 (Entry Order, May 13, 1991)). Section 280 of the Clarendon zoning regulations provided:

§ 280. Any non-conforming use of structures or land except those specified below may be continued indefinitely, but:

1. Shall not be moved, enlarged, altered, extended, reconstructed or restored (except as provided below).
2. Shall not be changed to another non-conforming use without approval by the Board of Adjustment.
3. Shall not be re-established or restored without approval by the Board of Adjustment

if such use has been changed to, or replaced by a conforming use.

The Supreme Court noted two problems with § 280. First, the Court said, it lacks standards by which the board of adjustment could decide whether to approve a change in nonconforming use. Without standards, the applicant is left uncertain as to what factors will be considered. A decision made without standards is "arbitrary and capricious" and denies the applicant due process of law.

address a change in intensity of use, an increase in intensity of use was not prohibited.

Finally, residential use could not be restricted to the part of the barn that complied with the setback.

The Court noted, "no case has been presented to us that limits a permitted activity to the complying part of a noncomplying structure."

Part of the confusion in this case arose because the local ordinance did not separate

*Several important lessons can be learned from this case. First, zoning regulations must be clear and understandable and they must contain standards for the board to base decisions on. ... Second, if your town wants to prohibit or regulate an increase in intensity of use of a noncomplying structure, your regulations must be clear and specific, and again must contain standards if you require a permit. Finally, you should separate the concepts of nonconforming use and noncomplying structure in your regulations. Clearly set forth the rules and standards that apply to each.*

Secondly, the Court said, § 280:

*appears to prohibit all alterations of non-conforming uses, no matter how minor, but allows the board of adjustment to grant approval routinely for major changes, that is changes from one non-conforming use to another. . . . Indeed, under the plain language of § 280, a non-conforming use cannot be altered at all unless it is changed to another non-conforming use or discontinued and then restored. This construction is simply not rational [emphasis added].*

In other words, § 280 simply did not make sense to the Court. The Court therefore interpreted § 280 to only apply to a change to the nonconforming use. In this case, the nonconformity was the setback of the barn. Since the Miserocchis did not propose to change the setback at all, only to change from one permitted use to another (agricultural to residential), the Court ruled that they did not need any approval to proceed.

The Court also did not find significant the change of intensity of use from agricultural to residential. Since the local regulations did not

the concepts of nonconforming use and noncomplying structure. The Court referred with approval to the Stowe zoning ordinance as one that does separate them. (For a copy of Stowe's two-page section on "non-complying buildings" and "non-conforming uses," contact the Law Center). The Court ex-

*(Continued on next page)*

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## LEGAL CORNER -

(Continued from previous page)

plained why the concepts should be separated:

*This distinction is helpful because rules applying to non-conforming activities often cannot be easily applied to non-complying structures and vice versa. . . . Restrictions that specifically address structures are preferable because they provide clearer guidance to landowners, zoning boards and courts.*

Several important lessons can be learned from this case. First, zoning regulations must be clear and understandable and they must contain *standards* for the board to base decisions on. As the Court noted, requirements without standards – giving broad discretion to the board to deny a particular permit – may deny due process to applicants. For example, if a change from one nonconforming use to another requires zoning board approval, how will the board decide whether to approve it or not? Your bylaws need to specify factors such as increased traffic, visual impacts, etc., etc. that the board must consider. Second, if your town wants to prohibit or regulate an increase in *intensity of use* of a non-complying structure, your regulations must be clear and specific, and again must contain standards if you require a permit. Finally, you should separate the concepts of *nonconforming use* and *noncomplying structure* in your regulations. Clearly set forth the rules and standards that apply to each.

### FEDERAL LAW PREEMPTS LOCAL CONTROL OVER RADIO FREQUENCY

### INTERFERENCE

The federal Second Circuit Court of Appeals recently decided that federal law preempts local regulation of radio frequency interference (RFI) from telecommunications towers. The case from Vermont was entitled *Freeman v. Burlington Broadcasters, Inc.*, No. 97-9141 (2d Cir., Feb. 23, 2000).

In 1986, radio station WIZN and the Charlotte Volunteer Fire & Rescue Services (CVFRS) received a permit from the Charlotte Zoning Board of Adjustment to build and use a telecommunications tower. The permit contained the condition that “any interference with reception in homes in the area because WIZN began broadcasting will be remedied by WIZN.” Eventually, Bell Atlantic NYNEX Mobile also became a user of the tower.

At some point, many Charlotte residents began experiencing serious RFI problems with their household electrical and electronic equipment. The Charlotte zoning administrator issued a notice of permit violation to the tower users in 1996. The users appealed to the zoning board of adjustment which held public hearings and concluded that WIZN had caused continuous and widespread RFI that had “impaired the ability of Charlotte residents to communicate, transact business, and experience the peaceful enjoyment of their homes and property.” Although the board of adjustment found a permit violation, it also concluded that it was without authority to enforce the permit condition, due to preemption by the federal government (i.e., the government’s complete occupation of the field of RFI regulation).

The homeowners and the Town of Charlotte appealed to the Environmental

Court, but while that appeal was pending, the case was removed to federal District Court. At that point, the Town withdrew from the case. The District Court ruled that the Federal Communications Commission (FCC) has sole authority to regulate RFI, and the homeowners appealed to the Second Circuit. On several grounds, the Second Circuit ruled that federal law preempts state and local regulation of RFI. The Court analyzed the Federal Communications Act, FCC regulations, and the legislative history of the 1982 amendments to the Act, all of which supported the conclusion that Congress intended to grant exclusive authority to the FCC to regulate RFI. Even though Congress preserved some local zoning authority over the *placement* of telecommunications towers, the Court concluded that Congress did not repeal the FCC’s exclusive jurisdiction over RFI complaints. The Court therefore affirmed the Charlotte board of adjustment’s decision on the preemption issue.

The Court noted that its decision did not leave the homeowners without a remedy, because federal regulations place a continuing duty on WIZN to resolve RFI problems. It remains to be seen whether this will be an adequate remedy, and whether the FCC will take action if the problems cannot be resolved by WIZN.

Since Second Circuit decisions are binding on Vermont, the lesson of this case is clear: any local regulation that requires tower users to remedy interference problems is unenforceable. If you plan to adopt new telecommunication tower regulations, they should be drafted without such a requirement.

### U.S. SUPREME COURT UPHOLDS LIMITED NUDE DANCING REGULATION

The United States Supreme Court recently handed cities and towns a victory in regulating nude dancing. *City of Erie v. Pap’s A.M.*, No. 98-1161 (March 29, 2000). Pap’s operated a nude dancing establishment in Erie, Pennsylvania. The City enacted an ordinance banning public nudity, where “nudity” was defined very specifically so that the female dancers were required to wear at least “pasties” and a “G-string.” The case reached the Pennsylvania Supreme Court, which decided that the nudity ban violated Pap’s right to freedom of expression under the First Amendment to the U.S. Constitution. Pap’s then appealed to the U.S. Supreme Court.

In analyzing the case, the Court first noted that although being in a “state of nudity” is

(Continued on Page Ten)

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# ASK THE LEAGUE

## JAKE BRAKES; PARKING VIOLATIONS; FAMILY MEMBERS SERVING IN LOCAL OFFICE

### **What are "Jake brakes"? Can the town regulate their use?**

"Jake brakes" are a type of engine compression brake used on heavy duty, diesel-powered trucks. The term, "Jake brake" is actually a registered trademark for the brakes made by the Jacobs Vehicle Systems Company. Therefore, posting signs that specifically prohibit "Jake brakes" may be a violation of trademark law and/or may be considered discriminatory since they would apply only to engine compression brakes made by Jacobs and not to those made by other companies.

Some municipalities have a problem with noisy trucks, and have asked if they can post signs prohibiting the use of engine brakes. The obvious problem with banning any type of brake is the safety issue. Is it wise to prohibit the use of a safety system such as brakes?

The use of any engine compression brake without a muffler or with a defective or "gutted" muffler will create excessive noise. Vermont prohibits the operation of a motor vehicle on a public highway without a serviceable muffler. Any vehicle can be stopped and inspected for a defective muffler. If there is a problem, the driver can be issued a

defective equipment ticket, just as he or she could for a missing taillight.

Federal regulations require that trucks emit less than 80 decibels of noise when they drive by (as measured from 50 feet). Therefore, towns may also adopt noise ordinances with a provision for noisy mufflers. The problem here would be the need for a decibel meter to document actual noise levels.

So, the answer is not to ban "Jake brakes," but instead to address the noise issue as specifically as possible, without compromising safety.

### **Parking along the roadside at a popular local recreation area is creating traffic problems. Our town has no parking ordinance – do we have any other authority to use in dealing with these persons?**

First, on state highways, 23 V.S.A. § 1101(a) prohibits motorists from parking or leaving any vehicle within the main-traveled part of a highway in "no-parking zones" as established by the State Traffic Committee and where designated by signs. Note that under 23 V.S.A. § 1008(a), the Traffic Committee may delegate the authority to regulate parking along state highways to the local legislative body.

Where parking is permitted, subsection (b) of § 1101 requires drivers of parked vehicles to leave the highway unobstructed for the passage of other cars and also to ensure a clear view in both directions. Specific fines for traffic offenses such as this are defined in the state (court) schedule of fines. Your town constable, unless his or her law enforcement authority has been restricted by the voters, has the legal authority under state law to issue a traffic complaint for any violation of § 1101. The summons and complaint form (i.e., "Traffic Complaint") is specified in § 2303. This would be issued for a 'traffic violation' as defined in § 2302, and the case would be heard in the Judicial Bureau as required by § 2305. The constable's authority under §§ 1101 and 1102 is limited to state and local public highways and does not extend to private roads.

Under 23 V.S.A. § 1102, your constable also has the authority to move (or require the driver to move) vehicles parked in violation of § 1101 or that are obstructing traffic or maintenance of the highway. If the selectboard were to adopt an ordinance under 23 V.S.A. § 1753, the vehicle owners could be required to pay towing and storage charges.

*(Continued on next page)*

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## ASK THE LEAGUE -

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Section 1753 states that a local ordinance may authorize "the removal of motor vehicles parked without authorization on publicly or privately-owned land and including . . . public, municipal, or private parking lots, drives and ways." It goes on to say that the charges are to be determined by the selectboard, and that a lien may be imposed against the vehicle and its owner, which may be in addition to any criminal penalty. The reference to "criminal penalty" indicates that if a fine is imposed, violations of the ordinance would be prosecuted in district court.

Since violations of §§ 1101 and 1102 are violations of state law, there is no need for your town selectboard to adopt a resolution repeating the law. However, the selectboard may wish to adopt a resolution allowing parking on all roads provided that the requirements of those sections are met, so as to emphasize the legal requirements and get some local publicity about them. As noted above, the selectboard may also wish to adopt a local "towing" ordinance under § 1753 so that the town could charge for towing. The selectboard need not adopt a separate criminal fine in this ordinance unless it wishes to. The selectboard might also consider adopting a local parking ordinance so that the town could collect fines for parking violations. A local parking ordinance would require signs restricting parking, as stated in 23 V.S.A. § 1008. Under Vermont law, any contested violation of a local parking ordinance would go to district court rather than the Judicial Bureau. 4 V.S.A. §§ 441 and 1102(c); 23

V.S.A. § 2302(a)(4).

As you can see, this is a very complicated area of the law, so do not hesitate to call the VLCT Municipal Law Center if you have questions.

### ***Does Vermont law prohibit a spouse or child of a selectperson from serving as an elected (or appointed) road commissioner in the same municipality?***

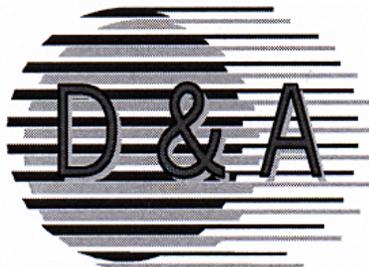
The short answer is no, it does not. The law says that road commissioners are appointed by the selectboard unless the municipality has voted to have the commissioner elected. 17 V.S.A. § 2646(16). The board could even appoint one of its own members. 17 V.S.A. § 2651(a).

In order to qualify for election to the position of road commissioner, the person needs to be a legally-qualified voter of the town, and therefore, a resident. There are no residency requirements for an appointed road commissioner. Vermont law on incompatible offices only states that the road commissioner (or his or her spouse) cannot also be an auditor. 17 V.S.A. § 2647.

Although there is no legal incompatibility in having a relative of the board as road commissioner, the selectboard member and the road commissioner should be mindful that the road commissioner has no independent authority to act, and can only carry out the orders of the board. 19 V.S.A. § 303. The easy part may be in getting the selectboard and road commissioner to agree on the commissioner's job responsibilities and authority. The difficulty arises when there is a disagreement over highway issues, job performance, or salary. At that point there

may be either a real or a perceived conflict of interest on the part of the related selectboard member. In the worst case, the selectboard may want to remove an appointed road commissioner from office. But this can only be done if there is "just cause" and after "due notice" and a hearing. 17 V.S.A. § 2651.

In each of these difficult situations, the related selectboard member would be faced with the decision of whether or not to step down from the board while it works through the disagreement or determines the fate of the commissioner. Although there is a statutory disqualification for interest provision that applies to municipal boards when conducting a quasi-judicial or contested hearing (12 V.S.A. §61), there is not a statutory code of conduct to guide municipal officials. Some municipal governance charters contain codes of ethics. Also, courts have defined a conflict of interest as existing whenever a local official, by reason of a personal interest in the matter, is placed in the situation of temptation to serve his or her own purpose to the detriment of the town. One of the clearest general rules to follow is that if an official (or a close relative of the official) stands to gain financially in a matter, he or she should not take part in the matter. Another good test to determine if a conflict of interest exists is the "appearance of fairness" doctrine. This is a test of whether a disinterested person, having been apprised of a board member's interest in a matter being acted upon, would be reasonably justified in thinking a partiality exists. Some municipal boards have actually adopted their own rules of conduct or codes of ethics to guide them in making this determination. A few sample codes are available through the VLCT Municipal Law Center.



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# LOSS PREVENTION NOTES

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## VLCT PACIF INTRODUCES NEW RISK MANAGEMENT ASSESSMENT PROGRAM (RMAP)

Here at VLCT PACIF, our mission is to provide quality risk management programs to our members. These programs must focus on areas of loss for each of our members and must also address the overall claims history of the PACIF program.

Enter the new VLCT PACIF Risk Management Assessment Program (RMAP). While it is a new program, the RMAP is not an entirely new approach. Instead, it is a fresh look at our overall claims history with an eye toward addressing that history with appropriate loss prevention and wellness services.

The Risk Management Assessment Program (RMAP) involves a thorough review

of all PACIF claim data as well as a thorough review of all claim data for each individual member. Following the review, we will tailor a plan, or a map if you will, of the safety areas that need to be addressed based on the claims data. Most of this work will be done behind the scenes, here at the VLCT office. The end result for VLCT PACIF members will be the specific programs that we will recommend to members to address the areas where actual losses are occurring, especially on a frequent basis. We will use a combination of our existing loss prevention and wellness programs as well as any new programs that we may need to design to meet certain needs.

This "map" will focus our staff efforts on members' needs that are revealed by real claim numbers. Because we expect more than one member to need the same program, we will utilize staff time in the most efficient way possible by providing more regional training sessions. Also, staff will be careful to address claim issues in a way that "makes sense in the real world." Staff will provide training programs that are relevant and pertain to the municipal workplace.

There are no guarantees that this, or any, loss prevention program will provide a quick claim history fix. Embracing loss prevention is a means to attain long-term savings and VLCT PACIF's goal has always been, and will always be, to make safety and loss prevention habit forming among our members.

If you have any questions about RMAP please call Patrick Williams, VLCT Manager, Risk Management Services, at 800/649-7915.

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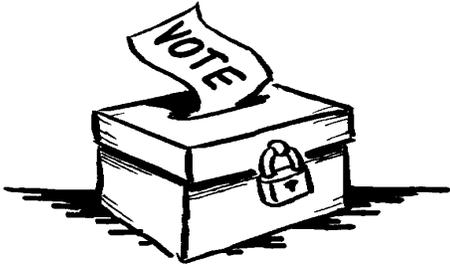


## KIDS VOTING -

*(Continued from Page One)*

Voting group introduced the Kids Voting program into the schools and members of the local Rotary Club set up separate voting booths and acted as ballot clerks on Town Meeting Day. City Clerk Charlotte Hoyt reported that the voting went very smoothly, with a minimum of effort on behalf of City officials. "I was glad to see the kids," she commented.

St. Albans City Clerk Dianna Baraby was also enthusiastic about the program. "It just went terrific and I encourage anyone to use it," she said, adding that the City is planning to welcome student voters again on a local budget vote toward the end of this month. In St. Albans, Mayor Peter Deslaurier coordinates the program, as Mayor and as a teacher in the local school system. The Mayor noted an



overall increase in voter turnout on March 7 that he believes was a result of the program, and Baraby said that she registered 17 new voters "because their kids were after them to vote." High school students set up and ran the student polls with minimal oversight by City officials, Baraby noted, adding, "even the little kids went around by themselves, though some of them did need assistance to read the ballot."

If your community is interested in joining the Kids Voting Vermont program, please call Carolyn Dwyer, Executive Director, at 802/229-6874 or write her at Kids Voting Vermont, Inc., 3 Murray Hill Drive, Montpelier, VT 05602. Communities are encouraged to sign up by June for the program to be in place in time for the November elections. Union school districts should allow extra time to coordinate the program among several communities.

## HOW THEY VOTED...

Just under 500 students voted in the first Kids Voting Vermont elections held last month in Montpelier and St. Albans City. Senator John McCain and Vice-president Gore were the top vote-getters in the elections. In the Republican primary, Senator McCain received 56 percent of the student vote, Governor Bush, 36 percent, Alan Keyes, 4 percent, Steve Forbes, 3 percent, and Gary Bauer, 1 percent. In a closer Democratic primary, Vice-president Gore received 51 percent of the vote to Senator Bill Bradley's 43 percent. Lyndon Larouche had 3 percent of the vote and write-in candidates made up the final 3 percent.

In St. Albans, student voters gave Vice-president Gore a wide margin of victory with 59 percent of the vote to 35 percent for Senator Bradley. And contrary to the adult vote, the students gave a narrow victory to Governor Bush with 47 percent to Senator McCain's 45 percent. In the student question, "Should students be required to wear school uniforms?" 67 percent voted against the measure while 33 percent favored school uniforms.

In Montpelier, students gave resounding support to Senator McCain who received 68 percent of the vote to 25 percent for Governor Bush. Surprisingly, the students voted contrary to the adult vote by giving Senator Bradley a small margin of victory with 49 percent of the vote to 46 percent for Vice-president Gore.

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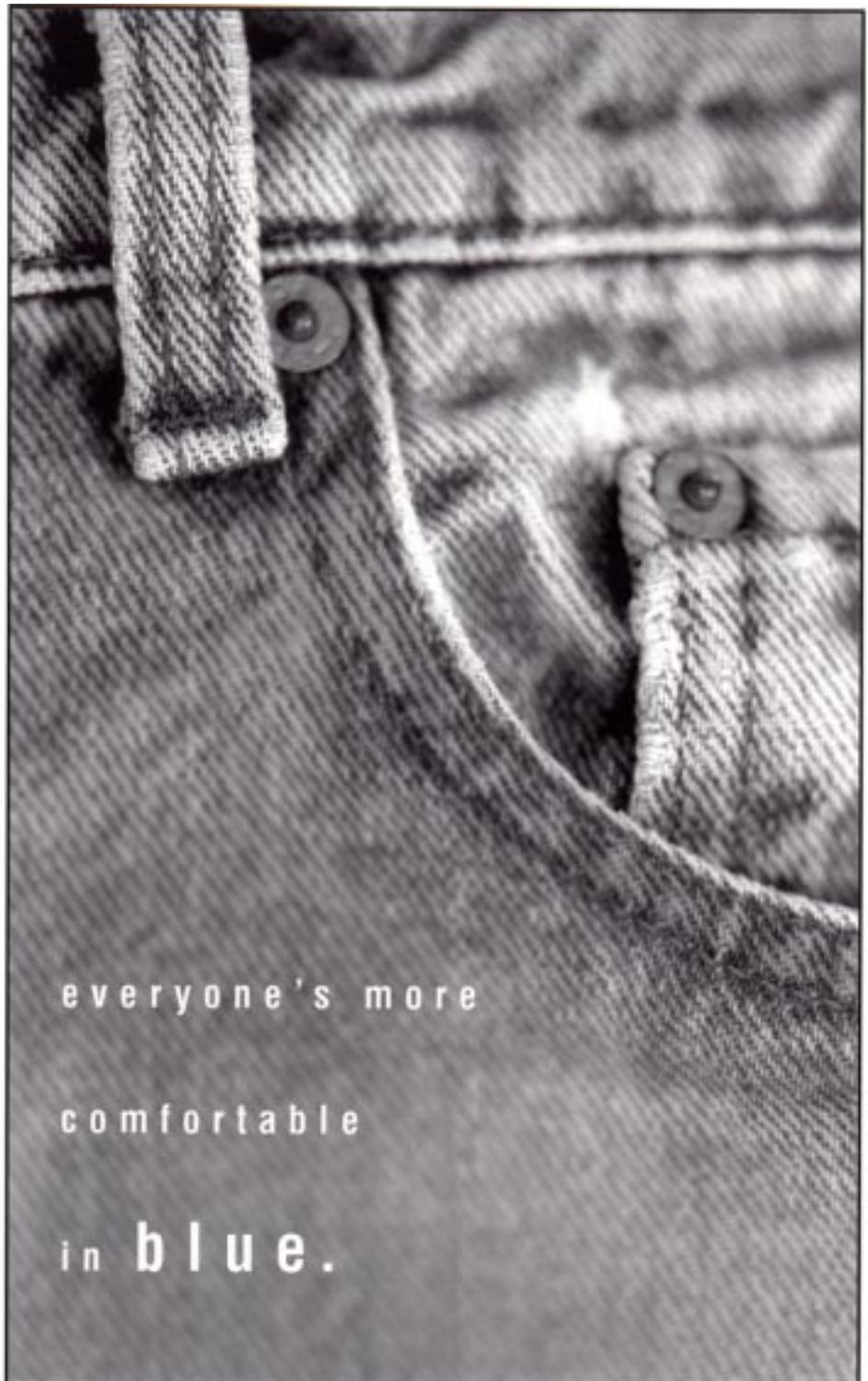
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not expression, nude dancing is expressive conduct and deserves some protection. But the Court then asked whether the Erie regulation was related to the *suppression* of expression, and concluded that it was not. The regulation is “content neutral;” in other words it regulates conduct alone and does not specifically target nudity that contains an erotic message. In fact, the main purpose of the ordinance is to combat the “secondary effects” related to adult entertainment establishments, such as crime and sexually transmitted diseases.

The Court then analyzed whether the ordinance satisfied the four-factor test set out in the case of *United States v. O'Brien*, 391 U.S. 367 (1968), and concluded that it did. The first factor, whether the regulation is within the constitutional power of the government, was satisfied on the basis of Erie’s power to protect public health and safety under its general “police power.” The second factor, whether the regulation furthers an important governmental interest, was satisfied due to the important interests of combating the harmful secondary effects associated with nude dancing. Notably, the Court did not require Erie to provide independent evidence of those secondary effects. It was sufficient that the City had relied on the experience of other cities with nude dancing establishments, as described in court opinions. (Erie also relied on its own findings, namely the fact that the City Council had, at various previous times, found that lewd and immoral activities carried on in public places are detrimental to the public health, safety and welfare.)

The third factor – that the government interest must be unrelated to the suppression of free expression – was satisfied as described above. Finally, the fourth factor, that the restriction must be no greater than what is essential to further the government interest, was satisfied. The ordinance does not require that the dancers be fully clothed, so any incidental impact that it has on the expressive element of nude dancing is very small (“de minimis”).

This decision is welcome news for cities and towns that wish to regulate nudity in adult entertainment establishments. So long as your regulations are “content neutral” and are drafted to deal with secondary effects that you reasonably anticipate to result from those establishments, they should pass constitutional muster.



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# VERMONT EMERGENCY MANAGEMENT DEPARTMENT NEWS AND UPDATES

## EMERGENCY RAPID RESPONSE PLANS (RRPs)

As of early April, 94 RRP's have been submitted to the Vermont Department of Public Safety's Emergency Management Department. Great progress has been made since this program began approximately a year ago. A new procedure for tracking the RRP's has now been developed which includes a certificate recognizing the community's accomplishment. If your community needs help creating an RRP, please contact your regional planning commission.

**Congratulations to the following communities for completing their RRP's:** Albany, Andover, Averill, Avery's Gore, Barnet, Barre City, Barton, Belvidere, Berlin, Bethel, Bridgewater, Brownington, Cabot, Calais, Cambridge, Canaan, Castleton, Cavendish, Charleston, Chelsea, Concord, Coventry, Craftsbury, Danville, Derby, East Haven,

Eden, Elmore, Fairlee, Ferdinand, Franklin, Glover, Grafton, Greensboro, Gilman, Hardwick, Hartford, Highgate, Holland, Huntington, Hyde Park, Irasburg, Jay, Johnson, Kirby, Lewis, Lincoln, Lowell, Lunenburg, Marshfield, Middlesex, Montpelier, Morgan, Morristown, Newark, Newbury, Newport City, Newport Town, Northfield, Norton, Orange, Orwell, Peacham, Plainfield, Plymouth, Putney, Rochester, Rockingham, Rutland City, Sheffield, Springfield, St. Johnsbury, Starksboro, Stowe, Sutton, Troy, Vergennes, Waitsfield, Walden, Wallingford, Warners Grant, Warren, Warren Gore, Washington, Waterford, Waterville, Westfield, Westmore, Wheelock, Williamstown, Windsor, Wolcott, Woodbury, Worcester.

Check out the Dept. of Public Safety's website, [www.dps.state.vt.us](http://www.dps.state.vt.us), for more information on these programs.

## TRANSPORTATION ROAD AND BRIDGE STANDARDS (FORMERLY CODES AND STANDARDS)

Towns will be eligible for mitigation enhancements in the event of a Federal Emergency Management Agency (FEMA) declaration if standards or policies on roads, bridges and culverts (including private driveway culverts) are adopted prior to the event. In Vermont, all seasons are typical months for flooding that can damage local roads. In the event a disaster is declared, towns that have adopted standards will be eligible for additional aid. In the future those towns will benefit from stronger and better repairs that will reduce the damage-repair-damage cycle and save valuable taxpayer dollars.

The Vermont Agency of Transportation's (VTrans) district program is helping Vermont communities adopt standards/policies that will ensure their community receives all the aid to which they are entitled in the next disaster. To date, VTrans has a record of 39 towns which have adopted policies and standards. If you would like more information about this important initiative you can contact your highway district office, regional planning commission or Hank Lambert at the Vermont Local Roads Program.

## TRAINING AND EDUCATION OPPORTUNITIES

VEM is taking the lead on developing a strategy to educate local and state officials on utilizing the Incident Command System (ICS) to manage emergencies. Selectboard members, VTrans district staff, state agency representatives, regional planning commissions, responders, and others will have an opportunity to take the training between June and September at different locations around the State. A shorter executive training session geared for administrators will be available in the fall. Local officials will receive advance notice of this opportunity.

## HAZARD MITIGATION GRANT PROGRAM (HMGP)

There are approximately \$200,000 in HMGP funds available statewide to address those areas that have a history of repetitive damage as a result of natural disasters. Eligible projects include: riverbank stabilization, property acquisitions, and road and bridge improvements. Applications will be sent to all Vermont communities shortly. Angela Magara is the HMGP contact at VEM and can be reached at 800/347-0488.

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# LOCAL ZONING PERMITS AND HAM RADIO ANTENNAS

## FEDERAL GUIDELINES

This area of zoning is one in which municipalities must take both federal and local regulations into account before issuing a permit. Municipal zoning power over ham radio antennas is partially pre-empted by the Federal Communications Commission (FCC), which licenses ham radio operators. In a 1985 ruling (PRB-1, Federal Register 38, 813-16, September 25, 1985), the FCC attempted to explain its role in the regulatory scheme:

*"Few matters coming before us present such a clear dichotomy of viewpoint . . . The cities, counties, local communities and housing associations see an obligation to all of their citizens and try to address their concerns. This is accomplished through regulations, ordinances or covenants oriented towards the health, safety and general welfare of those they regulate. At the opposite poles are the individual amateur operators and their support groups who are troubled by local*

*regulations which may inhibit the use of amateur stations or, in some instances, totally preclude amateur communications."* (PRB-1, 50 Federal Register 38,815, September 25, 1985).

However, the FCC declined to totally preempt local authority, and instead opted to balance the two interests: *"The cornerstone on which we will predicate our decision is that a reasonable accommodation may be made between the two sides."* (PRB-1, 50 Federal Register 38,815, September 25, 1985).

The local zoning issue that most often tests this "reasonable accommodation" requirement is the height of a proposed antenna. If the antenna is not high enough, the amateur radio operator is effectively prevented from operating under the FCC license. But, in PRB-1, the FCC declined to specify a specific height which municipalities must permit. Instead, it issued only general guidelines for municipalities:

*... local regulations which involve the placement, screening or height of*

*antennas based on health, safety, or aesthetic considerations must be crafted to accommodate reasonably amateur radio communications, and to represent the minimum practicable regulation to accomplish the local authority's legitimate purpose."* (PRB-1, 50 Federal Register 38,816, September 25, 1985).

## JUDICIAL GUIDELINES

A review of court decisions provides additional guidance to what will be the "minimum practicable regulation to accomplish the local authority's purpose." Some ordinances, on the surface, are unacceptable. First, it is clear that an outright ban on antennas will not be upheld because it prevents any operation of a ham radio station. Secondly, a specific height limitation also will not be upheld, because it contains no provision for balancing the legitimate interests of the ham radio operator and local zoning and, in light of technical requirements, has the same effect as an outright ban. *Bodony v. Incorporated Village of Sands Point*, 681 F. Supp. 1009 (E.D. N.Y.1987), *Evans v. County Commissioners of Boulder, Colorado*, 752 F. Supp. 973 (D. Colo. 1990).

However, a zoning bylaw that contains a

*(Continued on next page)*

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## HAM RADIO -

(Continued from previous page)

procedure for a ham radio operator to seek a special exception, variance, or conditional use permit will be upheld, if it "provides a sufficient structure for balancing state and federal interests as required by PRB-1." *MacMillan v. City of Rocky River*, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990). The zoning bylaw need not establish a special procedure for ham radio antennas, but a general procedure for obtaining an exception to height limits or permitted uses by applying for a variance or conditional use permit. *Id.*

The crucial step for the municipality is that it actually follows PRB-1 when considering a specific application to construct an antenna. Courts have overturned permit denials when there was evidence of the zoning authority's "obvious lack of understanding of radio communications" and the lack of anything "in the record to indicate that federal interests in amateur radio operation were sufficiently considered." *MacMillan v. City of Rocky River*, 748 F. Supp. 1241, 1248 (N.D. Ohio 1990)

### MUNICIPAL REVIEW

A municipality should request the following information when it receives an application for installation of a ham radio antenna. First, the applicant should provide a copy of their FCC licenses: a station license, required under 47 CFR § 97.5, and the operator license(s) of those who will actually run the station, required under 47 CFR § 97.7. These should describe the intended use of the ham radio station. The municipality should also require the applicant to submit any other documentation that was required by

the FCC. Of special interest to zoning authorities would be an Environmental Assessment. The FCC requires an Environmental Assessment if a facility is located in an officially designated wilderness area or wildlife preserve, is likely to affect an endangered species, or may affect "districts, sites, buildings, structures or objects significant in American history, architecture, archaeology, engineering or culture, that are listed, or are eligible for listing, on the National Register of Historic Places." 47 CFR § 1.1307, as applied to amateur radio stations by 47 CFR § 97.13. The zoning authority should also request technical information on the antenna height required to operate at the licensed frequency at the specific site, and the applicant should note whether a retractable antenna will be used.

### ISSUING THE PERMIT

In its deliberations before issuing a permit, the local zoning authority must keep in mind these federal and judicial guidelines, and the requirements of its own bylaw. One court noted that a zoning authority did "all that PRB-1 requires" by requiring the applicant to establish the following:

(A) The technical and practical necessity for the 70-foot retractable tower;

(B) The minimum height of a structure necessary to provide a technologically practical and feasible facility...

(C) Alternative measures which the council could adopt to preserve the residential character of the neighborhood and prevent aesthetic blight due to the tower while permitting its installation." *Bulchis v. City of Edmunds*, 671 F. Supp. 1270, 1274 (1987).

Another court upheld a zoning board of appeal's denial of an application for special exception when "the ZBA investigated [the radio operator's] request while simultaneously

preserving the aesthetic beauty and safety of the neighborhood by suggesting a restriction of hours of operation, but these attempts at compromise were rejected by [the radio operator.]" *Williams v. City of Columbia*, 906 F. 2d 994 (4<sup>th</sup> Cir. 1990).

More specifically, a municipality can, on a case by case basis, limit operating height to the minimum necessary for the use specified in the FCC license. Requiring use of a retractable antenna, especially when combined with restricting hours of use to the nighttime, can greatly reduce the visual impact of the antenna. *Williams v. City of Columbia*, 906 F. 2d 994 (4<sup>th</sup> Cir. 1990). Retractable antennas also provide greater safety; for example, a seventy-foot high antenna can be retracted to about twenty feet, reducing the damage to neighbors if it is blown over.

If the applicant is unwilling to abide by such conditions, the zoning authority can simply deny the permit. One court upheld such a denial after the applicant refused to compromise by limiting operation to nighttime hours. "The law requires only that the City balance the federally recognized interest in amateur radio communications with local zoning concerns. The fact that [the radio operator] would only be satisfied if that balance results in the City allowing him to build an antenna of whatever height he chooses does not entitle him to relief." *Williams v. City of Columbia*, 906 F. 2d 994 (4<sup>th</sup> Cir. 1990).

For more information on zoning and telecommunications equipment, please contact the VLCT Municipal Law Center at 800/649-7915, e-mail, [info@vlct.org](mailto:info@vlct.org).

(Thank you to Law Center's law clerk, attorney Gil Whittemore, for writing this article. Gil left the Law Center last month to settle in his new home in Weathersfield. He will continue to practice law part-time in Massachusetts and prepare to take the Vermont bar exam in July. Good luck Gil!)

### IN SUMMARY...

1. A zoning ordinance cannot impose a universal height limitation on ham radio antennas, without making provisions for exceptions.
2. A zoning ordinance may impose/apply a height limitation to radio antennas, if a procedure is established for an individual to apply for an exception, variance or conditional permit.
3. When the zoning authority considers such an application, it should attempt to reasonably accommodate the radio operator's interests with those of zoning. It should also ensure that this consideration is well documented.
4. The zoning authority may attempt an accommodation by requiring retractable antennas, limiting hours of operation, and restricting height to that shown to be technically necessary for the type of amateur radio station licensed by the FCC.
5. If an applicant refuses to compromise with the municipality, the application may be denied. The partial federal preemption does not entitle amateur radio operators to erect whatever antenna they desire.

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## LOOKING FOR PLANNING ASSISTANCE? NEW GUIDE LISTS VERMONT PLANNING CONSULTANTS

The VLCT Municipal Law Center and the Vermont Planners Association, with support from the Vermont Department of Housing and Community Affairs, have issued a new "Planning Consultant Brochure."

The booklet is available from VLCT for \$3.00 (order code 225), plus sales tax if applicable. It lists 60 firms or individuals that offer planning and design consulting services to Vermont municipalities, businesses and organizations. The listings are done alphabetically and by specialty. Specialties include: bicycle and pedestrian planning; community development and downtown revitalization; comprehensive planning and growth management; economic planning/assessment; land use planning; mapping/GIS; parks and recreation planning; public participation; resort planning; transportation planning; and zoning and subdivision regulations.

The "Planning Consultant Brochure" is a valuable reference for municipalities. Contact VLCT to order a copy, tel. 800/649-7915.

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IT62G	200	40,310

## Calendar

### Workshop for Municipal Clerks:

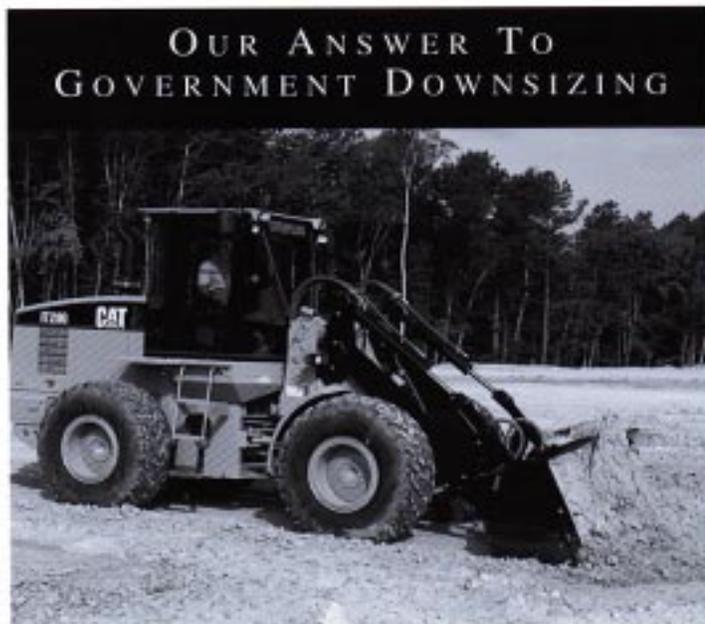
Thursday, May 4, 2000, Suzanna's Restaurant, Berlin. Sponsored by the VLCT Municipal Law Center, this workshop is designed for both new and experienced municipal clerks. The agenda includes a legislative update, a roundtable discussion and sessions on election law and public records issues. Please call VLCT at 800/649-7915 for information.

**Vermont Town and City Management Association Spring Conference:** Thursday and Friday, May 11 and 12, 2000, Middlebury Inn, Middlebury. Vermont town managers and administrators are invited to attend this conference. Sessions will be offered on Critical Incident Stress Management; Act 60; and Syracuse University's Government Performance Project. Also included is the popular Managers' Crackerbarrel and a tour of Middlebury's new wastewater treatment facility. Please call VLCT at 800/649-7915 for information.

**Waste Prevention Forum:** Thursday, May

18, 2000, Vermont Law School, South Royalton. Sponsored by the Vermont Agency of Natural Resources, this forum will discuss waste prevention strategies for Vermont businesses, municipalities and institutions. The forum will feature a national perspective on waste prevention initiatives, a panel discussion and a brainstorming session. For more information, contact Carolyn Grodinsky, ANR Waste Prevention Coordinator, at 802/241-3477.

**New Selectboard Training:** Thursday, May 25, 2000, Vermont Interactive Television sites in Waterbury, Rutland, St. Johnsbury, St. Albans and Brattleboro, 4 p.m. – 8:30 p.m., with a dinner break (dinner provided) from 5:20 p.m. – 5:50 p.m. Co-sponsored by the VLCT Municipal Law Center and the following regional planning commissions: Windham, Rutland, Northwest, and Central Vermont. Please see article elsewhere in this issue or call VLCT at 800/649-7915 for more information.



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**Fire Pumper.** Colchester Fire District #2 has for sale a 1979 Mack Model MB-487 pumper. The unit has a 250 HP turbo diesel with Allison automatic transmission with 25,000 miles. Capacity of 1000 GPM with a 750 gallon tank and Honda generator. The vehicle may be seen at the Malletts Bay Fire Station located at 844 Church Road, Colchester. Vehicle will be sold with no warranty or guarantee written or implied.

Vehicle will be sold **AS IS** and **WHERE IS**. Call Dick Desautels at 802/862-4621 for additional information or to schedule an appointment to see the unit. The District is asking **\$22,900** for the unit.

**Dump Truck.** The Town of Killington has for sale a 1993 Mack RD690P dump truck with a 7 CY body, plow frame, reversible front plow and hydraulic tailgate sander. Asking \$35,000. This like-new truck is available immediately and can be seen or driven at the

Town Garage by appointment. Write or call David Lewis, Town Manager, P.O. Box 429, Killington, VT 05751, tel. 802/422-3241.

## HELP WANTED

**Town Manager.** Colebrook, NH (pop. 2,554) is a northern New Hampshire community, eight miles from the Canadian border, seeking a qualified and experienced professional to manage all aspects of local government. The candidate will be appointed by a three-member Board of Selectmen and should have a Bachelor's degree in Public Policy/Administration or related field with a minimum of three years experience in municipal management or acceptable combination thereof to be determined by the Board. Experience should include financial management, budget presentation, and grant application and administration. Background of effective, successful experience in a similar size, cultural and geographic setting will weigh heavily in candidate selection. Successful candidate will possess ability to interact and communicate effectively with the public, and with elected and appointed officials at all levels of government and business. Colebrook has a \$2 million plus budget including water and sewer departments and a regional Dispatch Center serving 14 plus NH and VT towns. The salary will be negotiable dependent upon qualifications and experience. Reply by letter and resume to Board of Selectmen, 10 Bridge Street, Colebrook, NH 03576 by June 1, 2000.

**Town Administrator.** The Town of Hinesburg, Vermont seeks dynamic self starter for challenging position in southern Chittenden County hub. Selectboard seeks candidate with strong management, organizational and financial skills. Good interpersonal sense and ability to work with the public a must. Project management for infrastructure improvements and skill in representing town interests with state and regional agencies valued. Salary 35,000 +/-, commensurate with experience. College degree and three years + experience preferred. For interesting work in a wonderful community, send resume and 3 letters of reference to: Selectboard, P.O. Box 133, Hinesburg, VT 05461. EOE.

**Town Manager.** St. Johnsbury, Vermont, pop. 8,000, 60 full-time employees, \$6 million budget, 3 collective bargaining units. Bachelor's Degree preferred, plus 5 years experience in related field. Must be a resident of St. Johnsbury within 6 months of hire. Due date extended to May 12, 2000. Applications accepted by mail only. Box 246, St. Johnsbury Ctr., VT 05863.

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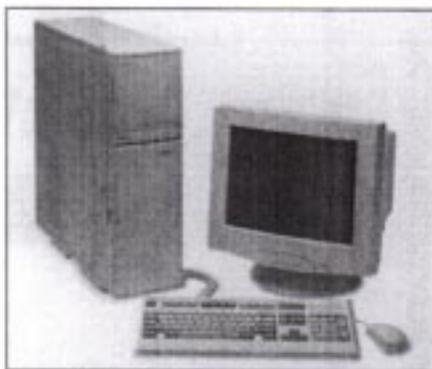
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