

testimony from Bruce Cunningham

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(excerpts from www.vermontadvocate.com/dltpay.htm)

S.134 will remove the statute that specifically allows a longstanding unconstitutional practice engaged in by almost every town in Vermont and impacts about 10,000 property tax payers every year.

HIGHLIGHTS

- affects 10% of Vermont property tax payers every year
- § 1674, creating the **8% commission**, was enacted before 1797 (less than 6 years after statehood) – clearly there was no *penalty* intended
- *commission* apparently calculated to pay for about 1-2 hours of work (about 75¢ in 1900)
- elected delinquent tax collectors' *commissions* today: approx. \$100-200 per hour of work needed
- 1919 – 0.5% per month interest enacted – increased many times to adjust for economic conditions – easily amended to assure no loss to towns
- today up to 1% interest allowed for 3 months; 1.5% thereafter (12-18% annualized) – allowing approximately 2X total cost of being late – i.e., net financial gain to town without penalty
- T. 24: § 932;§ 933 – voters/selectboard set compensation for all employees
- Loss of 8% revenue will be more than balanced by changing to reasonable compensation for tax collectors in most towns
- Other towns – small price to pay for justice (probably less than 0.5¢ on the tax rate)
- § 1674 now specifically permits municipal officials to violate the Vermont and US constitutions
- Any penalty is disproportional to the “offense” because: 1. no law has been violated and 2. the town at least breaks even on interest alone
- constitutionality question will not go to court – it is up to the legislature to fix this problem because it was caused by a faulty law – an anachronism with unintended consequences.

Delinquent property tax penalty is clearly unconstitutional:

Note: This issue has not, and likely will not, go to court – it is up to the legislature to resolve this conflict with the Vermont and U.S. constitutions.

- Amendment VIII to the U.S. Constitution: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”
- The Vermont Constitution, Chapter II, ...”§ 39... And all fines shall be proportioned to the offences.”
- The 8% “commission” allowed by Vermont law for delinquent property taxes is perceived as a penalty and is identified by the word “penalty” in articles passed by Vermont towns and “penalties” in state law. It constitutes a “fine” in the context of the constitutions.
- Since the payment of property taxes is strictly a financial transaction, the actual or potential harm of the “offence” against the town for a late payment must be defined in financial terms.
- Annualized interest rate for delinquent taxes is 12% for three months and 18% thereafter with interest charged for any part of a month. **(32 V.S.A. § 5136)**
- Total interest collected on delinquent property taxes averages more than twice the total cost to the towns of collecting the delinquent taxes. The net effect of late payment of property taxes is, therefore, a benefit to the towns rather than harm.
- A “penalty” in the form of a fine of 8% in addition to the interest charged on delinquent property taxes violates both the U.S. and Vermont constitutions because the delinquent taxpayers are being punished for what amounts to an act that benefits rather than harms a town.
- **CONCLUSION** : Since VSA T.32, § 1674 {“The fees and penalties collected by collectors of taxes shall be as follows: ... (2) On all taxes collected after the expiration of the time established in the notice required by section 4772 or 4792 of this title, the collector may charge and collect from the taxpayer a commission of eight percent on the amount of the tax, unless a municipality votes otherwise pursuant to subdivision (3) of this section.”}, in effect specifically allows municipalities to impose an unconstitutional fine, it should be repealed.

THERE IS NO OFFENSE

For any punishable offense in Vermont, it is usually easy to identify a federal or state law or a municipal ordinance that defines a prohibited act and the punishment that is possible for it in the form of a fine or imprisonment or both. For offenses such as local ordinances for parking regulations, there may not be due process in implementing this form of justice, and fines for violation of municipal ordinances are generally limited to \$500.

None of these things appear to be true for what we know as the “8% penalty” for delinquent property taxes.

The current law that establishes this so-called “penalty” has the following language in part:

“Title 32: § 1674. Delinquent tax commission and collection costs

The fees and penalties collected by collectors of taxes shall be as follows: ...

(2) On all taxes collected after the expiration of the time established in the notice required by section 4772 or 4792 of this title, the collector may charge and collect from the taxpayer a commission of eight percent on the amount of the tax, unless a municipality votes otherwise pursuant to subdivision (3) of this section. ...”

The word “penalties” in the introductory phrase was added in 2003, but that word does not appear anywhere else in the body of this law. It clearly applies to the 8% “commission” that virtually everyone now calls a “penalty” because, *de facto*, that’s what it has become and is called in many articles approved at town meetings.

This statute (§ 1674) describes an alternative for compensating the delinquent tax collector for the time spent collecting a tax. It does not define an offense for the taxpayer.

Other laws regarding collection of property taxes define allowed alternatives for the municipality to assure collection of the amount due, but do not define an offensive act for the taxpayer. A maximum interest rate is defined for the principal owed and a process is defined for foreclosing on the debt if it is considered to be in default by selling the property at auction. No taxpayer offense is mentioned, nor is any penalty. An option is prescribed for the taxpayer for paying the taxes due within one year after the tax sale, to cancel the sale, but it is not a penalty – just another option in the collection process.

Not surprisingly, there is no due process for this so-called “8% penalty” because there is no offense defined for prosecution.

Most towns vote on an article at town meeting that describes this 8% commission as a “penalty”. One might think this establishes it as a local ordinance except for the fact that it exceeds the customary \$500 limit for such ordinances for any tax bill of more than \$6,250, and some town officials claim that the article is simply conforming to the state law cited above. Many of those officials still believe that the “8% penalty” is required by state law but that has never been true. It was previously “allowed” and it is now a “may charge”.

There seems to no basis in the language of Vermont’s laws for this common practice. One might expect a court to support the practice on the basis of precedent except for the apparent conflict with section 39 in Chapter 2 of the state constitution

MYTHS AND FACTS ABOUT THE 8% PENALTY

Myth: When some people are late, others have to pay more.

Fact: The interest alone (12-18% annualized) more than covers the net cost of paying late (about 2X). Others actually pay *less* if some taxpayers pay late.

Myth: We need a deterrent for paying late.

Fact: Since the net profit from interest actually benefits the town financially, deterring lateness would actually slightly increase the tax rate for everyone.

Myth: The 8% penalty acts as a deterrent.

Fact: Interviews with on-time and late payers show that the 8% penalty has no significant effect as a deterrent.

Myth: An 8% penalty is allowed by law.

Fact: What the law actually allows is a *commission* of up to 8%. The legislature apparently never intended for there to be a penalty.

The following are my thoughts regarding what I understand to be three concerns of municipal officials (and the VLCT) regarding repeal of the 8% penalty:

HOME RULE: There are many statutory limits to home rule. One example directly related to this issue is the interest rate on overdue taxes – limited to up to 1% per month for three months and 1.5% thereafter. But regardless of statutory limits, municipal actions should never violate the protections provided by Vermont and U.S. constitutions – which is the case for the 8% penalty. In addition, every town should be able to decide how much to pay every person on the town payroll – and every town can do that with one exception: the delinquent-tax collector. A “commission” allowed by statute provides compensation that is not directly related to the services rendered in terms of either hours worked or the nature of the work. This actually denies home rule in setting this compensation, and repeal will restore it. In fact, this bill would erase the current limit for compensation of delinquent-tax collectors and allow towns to pay them even more if they choose to.

LOSS OF A REVENUE SOURCE: First, how much revenue? Overdue taxes are only about 5% of property tax revenue in most towns. Eight percent of five percent is only about 0.4%. In addition, in towns with elected delinquent tax collectors keeping the penalty as a commission, most of the “lost” revenue would be recovered by setting a fair compensation for overpaid tax collectors. This will reduce the net loss to less than 0.1% of property tax revenue. More importantly, because the penalty is unjust to begin with, we should not be collecting it no matter how much it is.

OPPOSITION BY ALMOST ALL DELINQUENT TAX COLLECTORS: There’s no question that repeal of this commission law will allow for fair compensation for tax collectors as determined by voters or select boards. This may result in income reductions for some tax collectors if keeping the penalties as a “commission” provides excessive compensation now. Every protesting tax collector should be asked for an opinion regarding a fair hourly rate for the work done. At least four towns are now paying elected tax collectors between \$11 and \$16 per hour. Electing a tax collector is optional under current law.

Basic facts (which act as deterrents) regarding overdue property taxes:

1. You do not have a choice about whether to pay your property tax – it is only a matter of when
2. As soon as your tax is overdue, the town has the equivalent of a first mortgage on your house and can initiate a tax sale at any time
3. As soon as your tax is overdue, you owe an additional 1% interest for the first month regardless of whether or when you pay the tax during that month
4. The annualized interest rate is 12% for the first three months and 18% thereafter – much higher than the 3.6% that the V.D.F.R. allows for a standard mortgage
5. Your name and the fact that your tax is overdue will appear on the warrant to the tax collector (public information)

The 8% “commission” (penalty) has no deterrent effect for overdue taxes.

Here are a few facts:

1. The penalty was eliminated in Hinesburg nine years ago, and the number of penalties has not changed significantly since then.
2. New Hampshire has no penalty for overdue taxes, and its percentage of overdue taxes is approximately the same as Vermont’s.
3. Most people who are late paying their property tax either forgot to pay them by the due date or had trouble coming up with the cash. The penalty was not a consideration in either circumstance.
4. The most common reasons for paying on time are: it’s the law; the annualized interest rate is 12-18% if you are late; having a lien on your property is something to avoid.
5. Not paying the tax is not an option. The only choice is to pay either before or after the due date. Being overdue is the only thing that is subject to deterrence. The interest alone assures that the town benefits financially if payment is late. Therefore, even if the penalty actually worked as a deterrent (which it does not), it would be deterring taxpayers from doing no harm. A deterrent isn’t even needed.
6. Reductions and elimination of penalties have not caused increased delinquencies.

(Part of the misperception regarding deterrence is related to awareness of the need for and effectiveness of the penalty for overdue *income* taxes. The need is different. It is possible to hide income from the IRS, cheating on your tax return is possible, and there is no automatic lien on your real property if you are unwilling to pay. That’s why the deterrent is needed for income taxes. None of these are true of property tax.)