

Title 7 Revision Bill Sections for Additional Discussion:

Sec. 2. 7 V.S.A. § 2. Definitions

- Terminal specific gravity issue for discussion by Committee.

Sec. 8. 7 V.S.A. § 63. Importation or Transportation of Alcohol

- Questions about when this provision was adopted and whether penalties have been updated

Sec. 14. 7 V.S.A. § 161. Licenses Voted by Town.

- Which towns are “dry”?

Sec. 28. 7 V.S.A. § 235. Bankruptcy, Death, and Revocation

- What happens when a license goes out of business or is transferred?
- Should certificates of approval be added to section?

Sec. 30. 7 V.S.A. § 236a. Hearing Officer

- Discuss ambiguous language regarding notice provided by hearing officer.

Sec. 33. 7 V.S.A. § 240. Proof of Financial Responsibility

- When was this provision adopted, and what year were the surety amounts last updated?

Sec. 53. 7 V.S.A. § 256. Promotional Tastings for Licensees.

- Discussion of whether the words “off-duty for the rest of the day” needs additional clarification with respect to what “the rest of the day” means.

Sec. 58. 7 V.S.A. § 274. Certificate of Approval for Distribution of Malt or Vinous Beverages

- Discussion of potential Commerce Clause issues.

Sec. 62. 7 V.S.A. § 277. Malt and Vinous Beverage Consumer Shipping License

- Discussion of whether (a) and (b) should be consolidated?

Sec. 67. 7 V.S.A. § 282. Rulemaking

- Discussion of whether this provision requires clarification.

Sec. 70. 7 V.S.A. § 423. Rules

- Discussion of whether this provision requires clarification.

Sec. 76. 7 V.S.A. § 505. Notice to Prohibit Sales to Certain Persons

- Discussion by Committee of whether to repeal or amend following feedback from stakeholders.

Sec. 77. 7 V.S.A. § 506. Record of Notices

- Discussion by Committee of whether to repeal or amend following feedback from stakeholders.

Sec. 80. 7 V.S.A. § 564. Search of Premises without Warrant

- Discussion of potential Constitutional search and seizure issues.

Sec. 87. 7 V.S.A. § 571. Search of Vehicle or Craft without Warrant

- Discussion of potential Constitutional search and seizure issues.

Sec. 106. 7 V.S.A. § 600. Fees of Sheriff, Constable, or Police Officer

- When was this adopted and can the fee provisions be updated by adding a cross-reference or otherwise?

Sec. 111. 7 V.S.A. § 654. Tampering with Samples

- When was this provision adopted and were there any related provisions that have been repealed since then?

Sec. 148. 20 V.S.A. § 1817. Reports of Law Enforcement Officer; Accidents Involving Alcohol

- Discussion of whether to move this section into Title 7.

Questions Related to Date of Enactment:

Sec. 8. 7 V.S.A. § 63. Importation or Transportation of Alcohol

- When was this provision adopted?
 - Added in 1937 Act No. 209, § 1.
 - The current language has been mostly unchanged since 1937. The only non-technical change was the addition of “transportation” to the prohibited acts.
- When was the amount of the fine last updated?
 - 1937. Based on inflation, the \$1,000 is equal to approximately \$16,667 in 2016 dollars.

Sec. 33. 7 V.S.A. § 240. Proof of Financial Responsibility

- When was this provision adopted?
 - Added in 1987 Act No. 103, § 3.
 - Enacted during the session that followed the deadline for raising the drinking age to 21 pursuant to National Minimum Drinking Age Act.
- When were the surety amounts last updated?
 - Surety of \$25,000.00 per occurrence and \$50,000.00 in aggregate per occurrence is unchanged since adoption.
 - With inflation, those amounts are equal to approximately \$52,818.00 and \$105,636.00 in 2016 dollars.

Sec. 106. 7 V.S.A. § 600. Fees of Sheriff, Constable, or Police Officer

- When was this adopted?
 - Adopted in 1934, last updated in 1984, No. 195, § 5(b).
 - Original fee for search adopted in 1934 was \$1.00 and \$.10 per mile. It was amended to \$2.00 and \$.15 per mile in 1935, No. 196, § 95.
 - With inflation, the fees are equal to about \$35.00 and \$2.63 per mile in 2016 dollars.
- Can the fee provisions be updated by adding a cross-reference or otherwise?
 - Could cross reference the mileage provision for State employees in 32 V.S.A. § 1267. Currently \$0.535 per mile.
 - Could not find an analogous section providing fees for search warrants.

Sec. 111. 7 V.S.A. § 654. Tampering with Samples

- When was this provision adopted and were there any related provisions that have been repealed since then?
 - Adopted in 1934.
 - There do not appear to be any directly related sections that have since been repealed.

Potential Commerce Clause Issue in 7 V.S.A. § 274:

Potentially Problematic Language:

(a) The Liquor Control Board may grant to a manufacturer or distributor of malt or vinous beverages **that is not licensed under the provisions of this title** a certificate of approval if the manufacturer or distributor does all of the following: (Emphasis added)

The Commerce Clause and State Alcoholic Beverage Laws:

- Landmark case is *Granholm v. Heald*, 544 U.S. 460 (2005) in which the Supreme Court held that “[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent” but are invalid when they discriminate in favor of the in-state product.
- “It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause.” *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2d Cir. 2009).

Family Winemakers of California v. Jenkins, 592 F.3d 1 (1st Cir. 2010).

- Case challenged a Massachusetts winery law that permitted “small” wineries to use direct shipping to consumers, retailer distribution, and wholesaler distribution simultaneously. “Large” wineries were limited to choosing between direct shipping or wholesaler distribution.
- Court found that the law violated the Commerce clause because:
 - All Massachusetts wineries qualified as a “small” winery, while most out-of-state wineries qualified as “large” wineries.
 - Only 50-100 largest wineries could effectively distribute their wines through wholesale distribution, remaining 537 out-of-state wineries would be forced to choose between only distributing their highest volume wines or losing access to Massachusetts retailers.
 - Because of the disadvantage placed on out-of-state wineries under the Massachusetts law, the Court found that the law violated the Dormant Commerce Clause.

§ 274. Certificate of Approval for Distribution of Malt or Vinous Beverages

- Limits out-of-state manufacturers and distributors to choosing between obtaining retail and consumer shipping licenses and a certificate of approval.
- Because this effectively cuts off one method of entering the Vermont market, the provision likely violates the Dormant Commerce Clause as written.
- Could be amended by repealing the language limiting the certificate of approval only to manufacturers and distributors that are not licensed in Vermont.

Potential Constitutional Issues Related to Title 7 Warrantless Search Provisions

7 V.S.A. §§ 564 and 571

Both the U.S. Constitution and the Vermont Constitution place significant restrictions on warrantless searches.

U.S. Constitution, Amendment IV:

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Vermont Constitution, Chapter I, Article 11:

“That the people have a right to hold themselves, their houses, papers, and possessions, free from search or seizure; and therefore warrants, without oath or affirmation first made, affording sufficient foundation for them, and whereby by any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his, her or their property, not particularly described, are contrary to that right, and ought not to be granted.”

Key points:

- Under the U.S. Constitution, the protections against unreasonable search and seizure extend to any place where an individual has a reasonable expectation of privacy.
- Warrantless searches are unreasonable unless:
 - The search is of a person and the immediate area incident to a lawful arrest;
 - The search occurs under exigent circumstances, such as while providing aid in an emergency, while in “hot pursuit”, or to prevent the destruction of evidence;
 - The search is of objects in plain view;
 - The subject of the search gives consent, i.e. a licensee consents to inspections to ensure compliance with license;
- Additional protection is provided under the Vermont Constitution:
 - Extends protection against warrantless searches to automobiles:
 - Law enforcement officers may not search a vehicle without a warrant once the occupant has been put into police custody, absent a need to protect officers or preserve evidence of a crime. *State v. Birchard*, 2010 VT 57, ¶ 12.
 - There is a greater expectation of privacy for closed containers in a car relative to objects that are in plain view. *Id.* at ¶ 13.
 - Exigent circumstances may exist if the vehicle might be moved or the evidence removed before a warrant can be obtained. *See State v. Trudeau*, 165 Vt. 355, 361–362 (1996)

7 V.S.A. § 564. Search of Premises without Warrant

As proposed for amendment, 7 V.S.A. § 564 provides:

(a) A sheriff, deputy sheriff, constable, police officer, selectboard member, or grand juror **who has information that ~~malt, vinous, and spirituous liquor~~ alcoholic beverages, or alcohol is kept with intent to sell, or is sold contrary to law in a ~~tent, shanty, hut, or place of any kind for selling refreshments in a~~ any kind of public place for selling refreshments, except a ~~dwelling houses~~ house, on or near the ~~ground grounds~~ of a ~~cattle show, agricultural exhibition, military muster, or~~ public occasion of any kind, **shall search such the suspected place without a warrant**. (emphasis added)**

- Requires a warrantless search upon “information that alcoholic beverages, or alcohol is kept with intent to sell, or is sold contrary to law.”
 - On its face, the language of this section raises significant concerns under both the U.S. and Vermont Constitutions.
- Three potential options to address the Constitutional concerns:
 - repeal warrantless search language;
 - amend search language to require a warrant except under exigent circumstances when the officer has probable cause; or
 - amend provision to identify exigent circumstances when an officer that has probable cause may conduct a search without a warrant.

7 V.S.A. § 571. Search of Vehicle or Craft without Warrant

As proposed for amendment 7 V.S.A. § 571 provides:

(a) If a sheriff, deputy sheriff, constable, police officer, ~~the~~ Commissioner of Liquor Control ~~or, an inspector~~ ~~investigator~~ duly acting for the Liquor Control Board, or State Police ~~has reason to believe and does believe,~~ **officer reasonably believes that a person is engaged in the act of unlawfully smuggling, delivering, or transporting, in violation of law, malt or vinous beverages, spirits, fortified wines, alcoholic beverages or alcohol** in any ~~wagon, buggy, automobile, motor~~ vehicle, air or water craft, or other ~~vehicle~~ conveyance, **he or she shall search for and seize without warrant, malt or vinous beverages, spirits, fortified wines, any alcoholic beverages or alcohol found therein in the vehicle, air or water craft, or other conveyance being smuggled, delivered, or transported contrary to law.** (emphasis added)

- Requires a warrantless search and seizure of alcohol and alcoholic beverages that a law enforcement officer reasonably believes are being smuggled, delivered, or transported illegally.
 - Raises concerns under the Vermont Constitution because it does not require probable cause for the search.
 - Additional concerns are raised under the Vermont Constitution because it does not require a warrant to search any sealed containers in the vehicle.
- Three potential options to amend the provision to address Constitutional concerns:
 - Repeal the provision and allow case law to govern searches of vehicles;

- Amend the provision to require probable cause and a warrant for a search absent exigent circumstances; or
- amend provision to identify exigent circumstances when an officer that has probable cause may conduct a search without a warrant.

Examples of Statutory Provisions the Committee May Wish to Consider:

13 V.S.A. § 354(b)(2)–(3). ENFORCEMENT; POSSESSION OF ABUSED ANIMAL; SEARCHES AND SEIZURES; FORFEITURE

* * *

(b) Any humane officer as defined in section 351 of this title may enforce this chapter. As part of an enforcement action, a humane officer may seize an animal being cruelly treated in violation of this chapter.

* * *

(2) Search and seizure using a search warrant. A humane officer having probable cause to believe an animal is being subjected to cruel treatment in violation of this subchapter may apply for a search warrant pursuant to the Vermont Rules of Criminal Procedure to authorize the officer to enter the premises where the animal is kept and seize the animal. The application and affidavit for the search warrant shall be reviewed and authorized by an attorney for the State when sought by an officer other than an enforcement officer defined in 23 V.S.A. § 4(11). A veterinarian licensed to practice in Vermont must accompany the humane officer during the execution of the search warrant.

(3) Seizure without a search warrant. If the humane officer witnesses a situation in which the humane officer determines that an animal's life is in jeopardy and immediate action is required to protect the animal's health or safety, the officer may seize the animal without a warrant. The humane officer shall immediately take an animal seized under this subdivision to a licensed veterinarian for medical attention to stabilize the animal's condition and to assess the health of the animal.

* * *

18 V.S.A. § 4242(b). SEIZURE

* * *

(b) Any property subject to forfeiture under this subchapter may be seized upon process. Seizure without process may be made when:

(1) the seizure is incident to an arrest with probable cause or a search under a valid search warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the State in a forfeiture proceeding under this subchapter; or

(3) the seizure is incident to a valid warrantless search.

* * *

28-A M.R.S.A. § 2211. Power of law enforcement officers to stop vehicles; restrictions

If a law enforcement officer has probable cause to believe that a violation of the liquor laws has taken or is taking place, the officer may, at any time, stop any motor vehicle or other conveyance to arrest or question its operator or occupant or to search the motor vehicle or conveyance.

Miscellaneous Questions:

Sec. 14. 7 V.S.A. § 161. Licenses Voted by Town.

- Which towns are “dry”?
 - Addison, Albany, Corinth Center, Granby, Groton, Lincoln, Pomfret, Marshfield, Monkton, Rupert, Tunbridge, Vershire, Walden, Waterville, Wells, Wolcott and Worcester.

Sec. 30. 7 V.S.A. § 236a. Hearing Officer

- Discuss ambiguous language regarding notice provided by hearing officer.
 - Could be clarified as follows:
 - “At least 10 days prior to a hearing ~~before the board~~, the hearing officer shall give written notice of the time and place of the hearing to all parties in the case and shall indicate either that the hearing will be before the Board or the name and title of the person designated to conduct the hearing.”
 - Would require a change to (c) to clarify that the judgment on the hearing officer’s proposal of decision will be rendered at a hearing of the Board.

Sec. 148. 20 V.S.A. § 1817. Reports of Law Enforcement Officer; Accidents Involving Alcohol

- Currently in a chapter related to general provisions for Department of Public Safety
- However, this provision relates to any law enforcement officer making an inquiry about whether an individual involved in an accident or incident involving alcohol was served at a licensed establishment.