

## TownAdmin

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**From:** Matthew R. Serge <MSerge@dwmlaw.com>  
**Sent:** Monday, January 29, 2024 4:10 PM  
**To:** Barry Hantman  
**Subject:** RE: Danville Warrant Article

No problem, Barry. Good luck!

-Matt

**From:** Barry Hantman <[REDACTED]>  
**Sent:** Monday, January 29, 2024 10:46 AM  
**To:** Matthew R. Serge <MSerge@dwmlaw.com>  
**Subject:** Re: Danville Warrant Article

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Matt,

Thank you. I believe the legality of this will come up at Deliberative Session and I appreciate having your input.

Barry

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On 1/29/2024 09:20, Matthew R. Serge wrote:

Hi, Barry. I am just writing to you at this point since this is an attorney-client communication. I have reviewed Bud's e-mail and I agree that the current article, as written, does not comply with state law (RSA 656:40) in that I interpret the law to require the municipality to use a ballot machine for all elections if that is the method the Town has decided to use. I think the key sentence from Bud's email is "Our view is that only if the wording of this article is understood to mean that the decision to use the ballot counting device in Danville is reversed only for the 2024 November 5<sup>th</sup> general election, that every vote on every ballot at that election will be hand counted, would the article be in conformance with RSA 656:40."

As I have stated to Tracy, the Town cannot pick and choose which races are counted by hand and which ones use the machine. Indeed, I have a concern that aside from violating the statute, there is also a possible equal protection issue here since all races are not being counted in the same manner. If the article were to be revised so that all races on the November 5 ballot are counted by hand then I think the article would be lawful, both with respect to RSA 656:40 and the constitution.

-Matt

**From:** Barry Hantman <[REDACTED]>  
**Sent:** Thursday, January 25, 2024 9:43 PM  
**To:** [Orville.Fitch@sos.nh.gov](mailto:Orville.Fitch@sos.nh.gov); Matthew R. Serge <MSerge@dwmlaw.com>

Cc: Chris Tracy <[townclerk@townofdanville.org](mailto:townclerk@townofdanville.org)>; Chuck Underhill <[chuck.underhill@gmail.com](mailto:chuck.underhill@gmail.com)>; David Scanlan <[David.Scanlan@SOS.NH.GOV](mailto:David.Scanlan@SOS.NH.GOV)>  
Subject: Re: Danville Warrant Article

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Bud & Matt,

Thank you for your prior response to my question about the proposed Danville warrant article regarding hand counting of ballots in Danville. I have included your prior responses below.

Based on your responses to my earlier email, the Danville Selectmen have modified the proposed warrant article regarding hand counting of ballots. The warrant article now reads:

*To see if the Town of Danville shall vote to hand count the ballots for the Presidential Election of the United States by hand in the General Election. The official count of the Presidential Election shall be the hand count.*

Based on the new wording, in your opinion, do you believe the revised proposed warrant is compliant or non-compliant with state RSAs? I need you to be very specific in your response as the Selectmen debated whether your initial response (below) indicated compliance or non-compliance with state RSAs. I understand that the final answer regarding compliance or non-compliance with state RSAs may end up being a court decision, but the opinion of the Secretary of State's office and Town Counsel is important for the Town to understand.

Our deliberative session is a week away (Feb 3) so a quick reply is appreciated.

Thank you!

Barry Hantman  
Deputy Moderator  
Town of Danville

**From:** Matthew R. Serge <[MSerge@dwmlaw.com](mailto:MSerge@dwmlaw.com)>  
**Sent:** Thursday, January 4, 2024 4:37 PM  
**To:** Christine Tracy <[ctracy@townofdanville.org](mailto:ctracy@townofdanville.org)>  
**Subject:** RE: Danville Warrant Article

Hi, Tracy. I have reviewed the email string and consulted the applicable statutes. My opinion is that the proposed article, as written, would not be binding if passed. If the Town has adopted the use of voting machines under RSA 656:40 then those are to be used for all elections in the Town. In other words, the Town cannot pick and choose which races are machine counted and which are counted by hand. Indeed, the typical ballot for a general election has many state offices included on it, so this proposed article would call for some offices to be machine counted, while another is hand counted. In addition, I think there is an arguable equal protection claim if the community was to hand count votes for some offices, but not for others.

Attorney Fitch also brings up an important issue concerning the authority of the moderator, and while the Town has the authority to decide how votes are to be counted generally, the moderator is ultimately responsible for the vote counts and announcing the results. Requiring the moderator to oversee multiple ballot counting systems would interfere with his ability to ensure that all votes, for all offices, are counted similarly and accurately.

Please let me know if you have any questions. Thank you.

-Matt

**From:** Christine Tracy <[ctracy@townofdanville.org](mailto:ctracy@townofdanville.org)>

**Sent:** Tuesday, January 2, 2024 4:05 PM

**To:** Matthew R. Serge <[MSerge@dwmlaw.com](mailto:MSerge@dwmlaw.com)>

**Cc:** John Chandler <[john.chandler@townofdanville.org](mailto:john.chandler@townofdanville.org)>

**Subject:** FW: Danville Warrant Article

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Hi Matt,

The Selectmen are putting in a warrant article for the March Town Election regarding "hand counting ballots for the Presidential Election". Barry Hantman had some reservations regarding this warrant article and reached out to the Secretary of State. The bottom of this email is Barry's email to the SOS and the top is the response from them. Please advise, as this will be discussed at deliberative.

*Christine Tracy*

**Danville Town Clerk**

**210 Main St. Danville, NH 03819**

**603-382-8253 ext 2**

**From:** Orville Fitch <[Orville.Fitch@sos.nh.gov](mailto:Orville.Fitch@sos.nh.gov)>  
**Sent:** Tuesday, January 2, 2024 1:54 PM  
**To:** Barry Hantman <[REDACTED]>; David Scanlan  
<[David.Scanlan@SOS.NH.GOV](mailto:David.Scanlan@SOS.NH.GOV)>  
**Cc:** townclerk <[townclerk@townofdanville.org](mailto:townclerk@townofdanville.org)>  
**Subject:** RE: Danville Warrant Article

Moderator Barry Hantman:

The law does not provide an explicit answer to your question. You may want to consult with your town legal counsel and if she or he believes the warrant article, if passed, would be unlawful or would not be binding on how ballots are counted, ask for a written opinion you can share with the voters.

We understand the law to give the moderator authority and responsibility to count all races on a ballot using the same process for all. If the "town" has authorized use of a ballot counting device, absent some failure of the testing or failure of the device at the election, the moderator should use the ballot counting device for all races and questions on all ballots, hand counting only ballots the device is not able to count. For hand counting, the moderator must use a uniform process the moderator is confident will produce accurate results. Unless reconciliation discloses a discrepancy that warrants further counting, once the process defined by the moderator is complete and a result determined the counting is done. A recount can only be done following the statutory process and in the case of a presidential primary the Secretary of State would conduct the recount.

Your town legal counsel should consider whether the article under consideration impermissibly intrudes on discretion placed by the Constitution in the hands of the Moderator.

The New Hampshire Constitution, in part 2, Article 32, assigns responsibility to the moderator to sort and count the votes.

[Art.] 32. [Biennial Meetings, How Warned, Governed, and Conducted; Return of Votes, etc.] The meetings for the choice of governor, council and senators, shall be warned by warrant from the selectmen, and governed by a moderator, who shall, in the presence of the selectmen (whose duty it shall be to attend) in open meeting, receive the votes of all the inhabitants of such towns and wards present, and qualified to vote for senators; and shall, in said meetings, in presence of the said selectmen, and of the town or city clerk, in said meetings, sort and count the said votes, and make a public declaration thereof, with the name of every person voted for, and the number of votes for each person; and the town or city clerk shall make a fair record of the same at large, in the town book, and shall make out a fair attested copy thereof, to be by him sealed up and directed to the secretary of state, within five days following the election, with a superscription expressing the purport thereof.

State law assigns to “the town” the decision on whether to use a ballot counting device at future elections:

**656:40 Adoption.** – The mayor and aldermen of any city or the selectmen of any town, subject to the approval of the ballot law commission, may authorize the use of one or more electronic ballot counting devices for the counting of ballots in such city or town on a trial basis for any regular or special election and pay the expense of such trial from any available funds. The use of such devices so authorized shall be valid for all purposes. Any town, or the mayor and aldermen of any city, may vote to lease or purchase electronic ballot counting devices for the elections held in said town or city. Any town, or the mayor and aldermen of any city, so acting shall notify the secretary of state of the action taken in regard to electronic ballot counting devices; and, after said action, electronic ballot counting devices shall be used in said town or city in accordance with said vote or authorization. If a special state election involving a state representative district occurs in a city or town that has adopted the provisions of RSA 656:40, the secretary of state may prepare and issue paper ballots which shall be used.

We understand the use of the word “town” in a statute like this to mean either the board of selectmen or a vote of the voters at an annual meeting. That said, if either the Board of Selectmen or the Voters at meeting vote to use ballot counting devices, we understand that to mean for all races and questions at all elections. Unless the device breaks down and cannot be restored to service, all races and questions on all ballots are counted by the device. Only ballots the device cannot count are hand counted, and then all races and questions are hand counted using the same process.

Articles rescinding prior approval of use of a ballot counting device have been petitioned, considered, and rejected by voters in a few towns.

Statutes make the Moderator responsible for an accurate count:

**RSA 659:60 Duties of Moderator.** – The moderator, or the moderator pro tempore if the moderator is disqualified under RSA 658:24, shall oversee the counting of votes by other election officers, including the selectmen and the town clerk, and may discharge any other duties relating to the counting of votes.

**RSA 659:61 Votes Counted After Processing of Absentee Ballots.**

– After all absentee ballots have been processed, or processed and counted, as provided in RSA 659:49-55, and after the polls have closed, the election officials, except those disqualified in accordance with RSA 659:58, shall, under the supervision of the moderator, immediately begin counting the votes cast at the election. The moderator may use the assistance of a person appointed by the secretary of state or the attorney general to assist in the completion of the election return forms.

**RSA 659:77 General Neglect by Town or Ward Moderator and Clerk.** –

I. If any moderator shall intentionally neglect to cause an accurate count to be made of the votes cast as required by law, for which no other penalty is provided, he or she shall be guilty of a violation.

...

If the voters at annual meeting direct how the count will occur, dictate a particular process including using different methods for different races on the same ballot, the law would hold the moderator responsible for a process that the moderator does not control. In other contexts the courts have held that when the law makes a specific local official or board responsible for complying with statutory requirements or otherwise with law, the voters cannot intrude on the designated official/board's discretion to fulfill their legal duties. See:

Town selectmen are under no obligation to warn a special meeting if the issue to be considered is prohibited or limited in scope by statute. [Winchester Taxpayers' Ass'n v. Board of Selectmen, 118 N.H. 144, 383 A.2d 1125, 1978 N.H. LEXIS 361 \(N.H. 1978\).](#)

Let us know if you have further questions.

Bud



**Orville B. "Bud" Fitch II**

**General Counsel, Assistant Secretary of State**

New Hampshire Secretary of State

State House Room 204

107 N. Main St.

Concord, New Hampshire 03301

(603) 271-5335

[www.sos.nh.gov](http://www.sos.nh.gov) [bud.fitch@sos.nh.gov](mailto:bud.fitch@sos.nh.gov)



**From:** Barry Hantman <[REDACTED]>

**Sent:** Saturday, December 30, 2023 1:18 PM

**To:** David Scanlan <[David.Scanlan@SOS.NH.GOV](mailto:David.Scanlan@SOS.NH.GOV)>; Orville Fitch <[Orville.Fitch@sos.nh.gov](mailto:Orville.Fitch@sos.nh.gov)>

Cc: Chris Tracy <[townclerk@townofdanville.org](mailto:townclerk@townofdanville.org)>

Subject: Danville Warrant Article

The Town of Danville plans to put the following warrant article on the ballot in March:

**Article 2024-00      Hand Count of Presidential Election Ballots**

*To see if the Town of Danville shall vote to hand count the ballots for the Presidential Election of the United States by hand in the General Election.*

Is this article legal? Can a town vote to be a Handcount Town for only a specific item, i.e., the presidential election, and still use the machine to count all of the other races on the ballot? How do you stop the machine from counting that particular race while still counting all of the other races on the ballot?

If it is legal, are there any specific requirements for how that hand count would need to be conducted? Typically, for recounts, towns go through a rigorous, time consuming, process to accurately recount the ballots with representatives from all parties present, at least 2 people reviewing each ballot, etc. Does this initial hand-count need to follow those same types of rigorous counting procedures or can the town do whatever they choose to do? What does the town need to do if the handcount doesn't match the machine count (assuming the machine will count that race anyway) or the total number of voters (i.e., the hand count grand total is either higher or lower than the number of ballots that the ballot clerks say were distributed)?

Our Town deliberative session is coming up soon so a timely response is appreciated.

Thank you,  
Barry Hantman

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