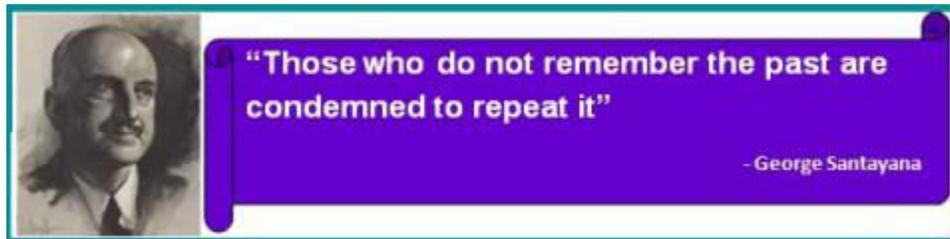


<https://herndonopinion.com/>

RACE TO UN-ACCOUNTABILITY - Gutting the Official Minutes

By

Jasbinder Singh



The 2012-2014 and 2014-2016 Councils, with Lisa Merkel as Mayor, rendered the contents of the official minutes of council meetings totally feckless. Now you will never know what the councilmembers said or did not say and how they made their decisions, unless you jump through many hoops. In the very first meeting of her first term, her council decided to strip the substance out of the official minutes and reverse the long established policy of preparing detailed minutes. Councilmembers, thus, made sure that you would find it difficult if not impossible to hold them accountable. But, there is more at stake here than their accountability. You, your children, future politicians and researchers may never know this past, not easily any way. The quote above, by George Santayana, should perhaps be restated as, "Those who do not or cannot know the past are condemned to repeat it." We are all going to be poorer. This article discusses how and why.

It was a surprise to discover that "(Reduced) Minutes of the Council meetings" were on the Town Council work-session agenda for October 21, 2014 as a "Discussion" item. Official minutes of the Council meetings (the Minutes) were never a matter of contention. Neither the members of the 2010-2012 council nor members of any prior council had ever expressed any dissatisfaction with "too much detail" in the minutes. Apparently, too much detail had been an issue with Mayor Merkel when she became Mayor on July 1, 2012.

The first four sections, A-D discuss how the policy was developed. The format The last two sections, E & F, by using representative examples, illustrate respectively, the drawbacks of the new policy and the benefits of the pre-2012 policy.

<https://herndonopinion.com/2016/05/25/race-to-un-accountability-gutting-the-official-minutes/>

A. POLICY ENACTED BY THE 2012-2014 COUNCIL

Mayor Merkel had put this item up for discussion (and approval) **in the very first council work-session** of her term. The then council approved the new format under which the summary of discussions, required by Section 2.2-3707 of the Code of Virginia, would be reduced, essentially to:

- Members of the public, Mr. Bromberg, Mr. Schneider, & Mr. Downer spoke,
- Councilmembers Singh, Kirby and Wolf spoke

It was not obvious that the new format, in some cases, might not ever mention that a councilmember spoke during the work or public sessions. If council-members debated a public hearing item, their arguments were no longer going to be summarized. In essence, for the purpose of preparing the minutes of the meetings, the council-members who had done their homework, asked questions and debated issues were going to be treated no differently than those who did not ask any questions or debate any issues and/or who did not even listen to the concerns of the public. Minutes prepared under the new format could no longer be used to judge whether a councilmember had knowledge of the subject matter or was catering to the interest of a few. Click the [Proposed Format](#) and notice the absence of details (particularly in Items 5-16) in the example developed by the town staff (by using the June 12, 2012 meeting as an example). Now, take a look at the then- [Current Format](#) and notice the substantive comments included in almost every section particularly comments made by Singh. The new policy and the accompanying new template became effective on July 3, 2012; however, there was so little detail that several members of the 2012-2014 continued to ask the staff to provide more information. Slowly, over time, the staff added more content to the Minutes.

B. RESTATEMENT OF THE REDUCED CONTENT POLICY IN 2014

After a new council was elected in 2014 and a few councilmembers started to ask detailed questions, the Town Manager asked the Town Clerk to bring this matter before the new council to [“restate its concurrence with the reduced public hearing minutes format approved in July 2012.”](#)

Immediately after the Town Clerk finished her presentation on Oct 20, 2014, Councilmember Singh, raised objections to the proposed changes. He opined that the impending change would make it very difficult, if not impossible, to (1) write the kinds of expository articles he had written over the last three years, (2) document the past decision making process, (3) learn from our past mistakes and (4) develop more enlightened policies. After all, the minutes that are official records of the State of Virginia and held in perpetuity by the Library of Virginia, would now become devoid of substance.

May 25, 2016

1. The Mayor's Retort

It was astonishing that such an important change was being made without any public input and suggested to the Mayor **that she should put this issue on the council's agenda for a public hearing**. Notwithstanding the Minutes' importance, the Mayor rather aggressively and without any reflection, asserted,

"WELL, MR. SINGH NOBODY ON THE COUNCIL IS INTERESTED IN DOING THAT"

She did not allow anyone the opportunity to vote on the matter. She did not ask the councilmembers whether they wanted to give additional consideration to the idea. She could have asked me to explain my concerns in more detail, but didn't. With that rather strident pronouncement, she cut off the debate and set the town on a new course – a course in which the Minutes would become feckless.

"RATHER THAN ASPIRING TO EXCELLENCE IN GOVERNMENT, THE MAYOR AND THE TOWN MANAGER HAD CHOSEN TO "RACE TO THE BOTTOM."

It so happens that our former Town Attorney had aided them in their quest for "closing the doors".

2. Town Attorney's Opinion

A few days later, I approached the Town Attorney, Mr. Kaufman, to discuss this matter. I opened the discussion by stating that the Virginian Code 2.2-3707 requires that the minutes contain a **"summary of the discussion"** and that I do not believe the "I spoke, he spoke and she spoke" is a summary of the discussion. (Emphasis added). He replied, "In my legal opinion, it is a summary of the discussion." And, he slammed the door on our discussion!

According to the Advisory Council for the Freedom of Information Act, the phrase "summary of the discussion" has not been litigated and therefore has not been defined definitively. Consequently, while some governments provide a substantial amount of content in their minutes, others provide very little. The details depend on the value a government places on transparency and accountability.

C. UNCONVINCING REASONS FOR JUSTIFYING THE SWITCH

1. Saving Staff Time

The stated reason for the change was to save the cost of the time a staff member who used to prepare the Minutes by listening to the recorded videos of the meetings. According to the Town Clerk, she used to budget 3 hours for every hour of the recorded videos of a public meeting. Assuming that the discussion period of a work session and a public hearing lasts about 4

May 25, 2016

hours (it is actually less), the Town would save about 240 hours of a clerk's time per year (by not preparing the Minutes). The value of savings in dollars would be less than \$12,000 per year. [1]

Such small savings are not persuasive enough to jettison a valuable service that is used to shed light on the functions and decisions of the government. Overtime, the oversight made possible by the detailed minutes, is likely to save millions of dollars. Hence, the "reduced minutes policy" was very shortsighted.

2. Public's Ability to View Videos of the Public Hearings

Another reason for reducing the content was that the Town had implemented a video recording system and that proceedings were on-line for anyone to watch at their convenience. That is true, but:

- The recorded material are not "official records" under the Records Act, and can be destroyed after 7 years. Accordingly, the records may not be available to the public after 7 years
- Even if the records are available in the future, a Town may impose a significant charge to retrieve them and make them available to the public, and
- The change would shift the burden of viewing the videos, finding the relevant material, taking notes and checking their accuracy to an ordinary person. It would be extremely frustrating and discouraging for her/him to go back to the recordings repeatedly while writing his or her report. Further, government officials or stakeholders may increase the public's frustration by questioning the accuracy of their notes.

Thus, contrary to the assertions made by the Town, the public's ability to make meaningful use of the videos including holding our public officials accountable would be highly limited.

D. REAL REASONS FOR MAKING THE SWITCH

We must ask a simple question.

"WHY DID MAYOR MERKEL CONSIDER THE REDUCTION IN THE CONTENTS OF THE MINUTES SO IMPORTANT THAT SHE PUT IT ON THE AGENDA OF THE VERY FIRST MEETING OF HER FIRST TERM (2012-2014)?"

May 25, 2016

In hindsight, it is reasonable to assume that Mayor Merkel and her majority decided to reduce the content of the minutes immediately after the election in May 2012. They are likely to have done so for the following reasons:

- They had an agenda for their term and they were going to vote for its passage, if necessary without any discussion. They were not going to ask questions and they were not going to encourage the minority to ask many questions either. In her first term on the council (2010-2012), as Vice-Mayor, she had strenuously objected to councilmembers asking questions in each and every meeting and had shown an affinity for keeping important items out of the public eye. In her two terms as mayor, she has implemented conforming policies. For example, the length of questions & answers sessions has reduced by as much as 90%. Members of her majority rarely ask questions, much less probing ones. Further, the number of Consent items has increased substantially. It is assumed that all council-members would consent to putting the items on the consent agenda without having the benefit briefings by staff. The Mayor is often visibly displeased whenever certain councilmembers do not give their consent. (see a forthcoming article on this topic)
- The Mayor and her majority were going to reverse or radically change the (Metro Area and DMP) decisions made by the previous councils, and change many practices that had kept the powerbrokers in check and wanted to make it difficult for the public to know the details. (see the related articles on herndonopinion.com)
- It was important for the Mayor to hide her own shortcomings. Without having appropriate and relevant background and experience in public administration disciplines (public finance, civil engineering, planning, traffic engineering, public policy, real estate law & law enforcement etc.) she couldn't have possibly offered policy guidance to the staff and control council discussions. She couldn't afford to look as if she was not in control. Therefore, she made sure that her sidekicks did not ask questions in public. Whenever other council-members started to ask detailed questions, she found ways to shut off the debate quickly. She relied on the Town Manager, longtime operatives as well as developers for ideas and initiatives. Those old ideas ended up in, among other things, the town's purchase of Ashwell's (contaminated) property, the increase in building heights in the downtown, approval of 275 ft high buildings in the Metro Area, and the mayor's unilateral approval of a new development outside the Metro core.

In essence, the real purpose for reducing the content of the Minutes was to make it substantially more difficult for our residents to learn how decisions were being made and **degrade their ability to hold the Mayor and her majority accountable.** [In the fight for a more transparent, open and effective government, the Mayor and her majority had moved not forward, but backward; that is, they had chosen to "race to the bottom".](#)

PART II - A DETAILED COMPARISON OF THE OLD AND THE NEW

A reader does not have to necessarily read the rest of this article, because the changes and possible motivations for making them have already been explained. *However, the benefits of open government are numerous. They vary from preserving our heritage to holding elected officials accountable, to improving our administrative processes.* The change proposed by the Mayor Merkel represented a sharp departure from the past practice of keeping detailed minutes; hence, the Town's past records can be used to articulate the differences. Those interested in exploring the benefits of the old policy and the shortcomings of the new one may continue to read the rest of the article.

E. EXAMPLES OF THE DRAWBACKS OF THE NEW POLICY - Highly Degraded Ability to Hold Public Officials Accountable

Let's take a look at a recent case of *the "Junction Square"* development that is currently under construction at the corner of Elden and Monroe Street. It was discussed in the council work-session on Dec. 2, 2014 and in the public session on Dec. 9, 2014. The following two sections show how selected issues discussed in the two council sessions were summarized in the official minutes of the meetings.

Dec. 2, 2014 Work Session:

The work session was notable for two things: First, in a rare show of independence from the Mayor, Councilmember Wolf spoke passionately about the fact that the proposed development had not provided sufficient parking. The Town Manager responded to Ms. Wolf and several other council-members' concerns about the parking by saying that visitors or patrons would have to park on the streets around the development. [2] **Yet, the official summary does not mention Ms. Wolf by name nor does it indicate that the TM had made any comment about the parking.** Incidentally, in order to not displease the Mayor, Councilmember Wolf made no comment about the inadequacy of parking during the public hearing.

Second, the Director of Community Development, *Lisa Gilleran*, while justifying the financial inability of the developer to underground utilities, made a statement that can be stated as follows: "The staff has applied the rule of proportionality, developed by the US Supreme Court, to this case. It appears to the staff that the applicant cannot afford underground utilities in this case. Even a casual observer of the council understands that the town staff is (a) incapable of understanding Supreme Court cases and (b) does not have the wherewithal to apply the (SC's) rule of proportionality to small or large rezoning cases. **This rather audaciously deceptive statement does not appear in the minutes of the work session.**[3]

December 9, 2014 Public Session

During the public session, my comments had focused on the cost of the development to the town. I had opined that the Town's cost for this development would vary between \$500,000 and \$800,000. My estimate of \$500,000 consisted of \$335,000 for undergrounding utilities and \$160,000 for the town's share of the 12 parking spaces that were going to be a part of the public shared parking program. The estimate of \$800,000 also included the cost of visitor parking spaces that developers had been required to provide under prior regulations. My back-of-the-envelope calculations had shown that it would take 15 to 20 years to recover these costs through the future tax revenue that might be generated by the development. [4]

The summary of the minutes, however, was sanitized. It said, "Councilmember Singh stated, for the record, that the town would pay for a large part of the undergrounding of utilities and the shared parking for this project." **It did not convey his main concern – that the development would impose additional taxes on our residents and businesses.**

In summary, the new and reduced minutes policy prevents us from (a) understanding and changing our administrative processes, (b) holding our representatives accountable, (c) taking action against the town staff when it gives one-sided or biased information to the council, and (d) knowing how even new developments can lower our quality of life or hurt our citizens economically. In short, the new policy represents a major step backward.

AT A TIME WHEN MANY IN THE US ARE STRIVING TO MAKE THEIR GOVERNMENTS
MORE TRANSPARENT, THE TOWN HAS BEOME LESS ENLIGHTENED

F. EXAMPLES OF THE BENEFITS OF THE PRE-2012 POLICY - Ability to Punish or Reward Public Officials

The primary benefit of the pre-2012 policy, under which detailed minutes were prepared, was that it allowed the residents to document how the town staff worked, how councilmembers made their decisions and how they could be held accountable. The following excerpts, taken from the blogposts published since April 2013, articulate the benefits.[5]

1. Ability To Punish Public Officials (When They Make Misleading Statements)

In the case of the cost reimbursement policy for *Friday Night Live!* (FNL), the minutes state that, "Councilmember Wolf stated that she is comfortable making this exception (reduce their payment for the use of Town facilities and Personnel) for FNL, because anything they make

May 25, 2016

beyond expenses is donated back to Town organizations and beneficiaries....” *The minutes show that Councilmember Wolf also stated that “...Friday Night Live! does not retain any money...”*

The analysis of the FNL finances shows that Ms. Wolf’s statement that the FNL does not make any money was false. FNL, one of the many “events” sponsored by the Chamber, actually earns about \$160,000 in profit and contributes this amount to the Chamber’s annual operating revenues.

If they are a part of the written public record, statements, such as these, can be routinely used to hold public officials accountable. Their absence from the official record would make this task much more difficult.

2. Ability to Punish Public Officials (When They Do Not Ask Questions And When They Should)

More often than not, when Councilmembers do not or cannot ask questions, residents should be on a heightened red alert. The following cases show why.

- When *the Shared Parking Program Policy* was being debated in 1994, participating businesses were supposed to pay 60% of the cost of structured parking spaces. However, when the businesses refused to accept the dollar value of their share, the town lowered the cost by about 50% to \$5,445 per space. Most of the spaces in the shared parking program were, therefore, sold for \$3267 per space. **During the public hearing none of the council-members asked any questions.** It is safe to say, nobody wanted the public to take notice of the reduction in the actual cost. The vast majority of the cost (as much as 75%) has now been shifted to the public at large.
- In the case of *the President’s Court development*, the staff had (mis)used the definition of **gross density** to permit the developer to build many more homes than he would have otherwise been allowed to build. *During the public hearings three councilmembers were troubled by the proposed density.* **Councilmember Bruce** stated, “... the property is designated “Neighborhood Conservation”, which means the density should be similar to that of the surrounding properties.” **Mr. DeNoyer** noted, sarcastically, “... it appears the creativity for this proposal is to have as many homes as possible on one piece of land...” While they struggled with the density, no one questioned how the density of the development had been estimated. If the staff had presented the formula for estimating the density, the councilmembers would have found that the staff had applied it incorrectly and made the necessary adjustments.

These examples are not isolated. Case after case shows that such deviations from the regulations were the norm and not the exception. This research demonstrated the need to present deviations from the existing regulations to the council in work sessions or even in public sessions (so that people can understand the process and have faith in it), or, at the start

May 25, 2016

of the evaluation process in order to make it easier for the council to give guidance to the staff. Click [President's Ct.](#) and [Art Space Purchase](#) and [Nash St. Development](#) to view three examples of the minutes kept by the Town prior to July 2012).

3. Ability to Reward Public Officials When They Ask Good Questions

In fact, it proposed to remove all substantive content of the discussions from the minutes. Accordingly, the following comments made by various council-members and members of the public in the past:

- **Private v. Public Street:** In the case of the **President's Court** development, the minutes stated that; "[Councilman De Noyer](#) referred to Section 28-8-8(b) of the Zoning Ordinance which states that, "... every single family dwelling shall have access to a public street. Access may be over land owned by the association of homeowners..." He stated he interprets this statement to mean that, even if the street is constructed and owned by the homeowners association, the street should conform to public street standards."

The *File Review* of the case showed that the permission to construct a private street enabled the developer to eliminate street parking at the site planning stage, but made it difficult for visitors to park near their friends or family members homes. However, **it seems the Town had not learned from the past**, when it approved the Vine Haven and Junction Square developments during the past 4 years. The lack of visitor parking in these developments would lead to (a) the involuntary use of street parking, (b) increased traffic on downtown streets (as visitors or out of town guests drive around to look for spaces) and (c) increased demand for more municipal parking spaces.

- **Substantial Conformity with GDP:** Also in the case of the President's Court development, the minutes show that Vice Mayor Thoesen had asked "...whether a proffer, which stated that the development of the subject property shall be in substantial conformity with the Generalized Development Plan, would preclude the Architectural Review Board's ability to revise items identified on the GDP." The File Review of the case, showed that, after the public session, Mr. DeNoyer asked the staff to explain the standards for complying with the phrase "substantial conformity with the GDP". In spite of Mr. DeNoyer's efforts, the staff had accepted substantial deviations from the GDP.

"Substantial Conformity" issue arose again last year when the Town eliminated the requirement to hold public hearings before approving site plans. I argued unsuccessfully for not giving the staff authority to approve site plans administratively. President's Court case was a strong indication that the staff would come under considerable pressure to change the definition of "substantial conformity" from one case to another. Obviously, the Town had not learned from its own past. (see a forthcoming article)

May 25, 2016

These two excerpts demonstrate how issues such as “private vs. public streets” and “conformity with the GD” can affect the design of new developments. They alert us to the fact that standards for private streets and public streets are different and have important implications for the costs of roads within a development, availability of street parking, size of homes, open space and provision of public services. Thus, the past cases help us understand the steps we need to take to correct past mistakes or make our administrative processes more effective. They help us to reward public officials when they contribute to the betterment of the society and punish them otherwise. Therefore, it came as a surprise when the Town proposed to change the long-established practice of preparing detailed minutes of the public hearings.

If the new minutes format had been in effect in these cases, the minutes of meeting in the President’s Court case could have been summarized as, “ Mr. DeNoyer and Mr. Thoesen spoke” or as Mr. DeNoyer and Mr. Thoesen expressed concerns about private & public streets and conformity to the GDP. Similarly, in the case of FNL, the minutes also would have summarized as “Ms. Wolf spoke” or as “Ms. Wolf mentioned the unprofitability of the FNL.”. Such past summaries, if the new policy had been in effect decades earlier, would not have contained any real substance. They would have forced us to "live in a perpetual infancy" much earlier as articulated in the following quote from George Santayana.

"WHEN EXPERIENCE IS NOT RETAINED ..., INFANCY IS PERPETUAL"

- **George Santayana**

Foot Notes

1. Notice that this estimate of savings is overstated for two reasons: First, the town clerk’s office still has to take down notes during the public sessions and then type them. Even if it takes an hour or so to type the minutes of each public session, this time should be subtracted from the estimated time of 180 hours/year. Second, as always, the town clerk still has to prepare the work session minutes. Savings in time, if any, would be negligible.
2. The developer would have had to reduce the number of townhouse from 15 to perhaps 13 or take additional measures in order to provide much needed parking. This case is yet another example of the futility of the council review of a development at the end of the review and approval process. It is the position of several informed residents that the Council should review the major parameters of a new project at the start of the process.
3. That day, I had waited for other council-members to ask questions, but nobody did. Next morning, I sent an email to the Director (with a copy to the Town Attorney) asking her to (1) provide the copies of the Supreme Court cases in question, (2) explain what this rule of proportionality was and (3) how she had

<https://herndonopinion.com/2016/05/25/race-to-un-accountability-gutting-the-official-minutes/>

May 25, 2016

applied the rule to this case. Rather than wait for the Director to contact me, I called the Town Attorney to explain. After he had read my email, he said the two SC cases referred to by the Director do not apply to the rezoning, and that he had instructed the staff to not even mention them. But, then, what he said surprised me greatly, "If you ever raise any issue regarding the statements made by the Director, I will defend her." Such defense by the Town Attorney has encouraged the staff to mislead the Council boldly in innumerable cases.

4. In earlier regulations, the development would have been required to provide 15 such spaces. The developer would have been forced to provide either garage parking or reduce the number of townhouses to provide additional parking. Because, no visitor parking was mandated, I assumed that the town would eventually place these spaces in some public garage and that the town would spend in excess of \$300,000 to do so. I had estimated that if we assume that a commercial and residential unit would pay \$1,500 in local real estate taxes, then it would take between 14 and 20 years for the town to break even. That is, the Town would suffer from the net cash outflow for a long time. This loss perhaps could be compensated if other new developments with positive net cash flow (for the town) were built as a result of this development (not likely though)
5. Minutes of the past work sessions had been rather skimpy quite often. The minutes of public meetings, however, provided detailed comments by council-members. *Perhaps, the phrase - Those who do not know the past are condemned to repeat it, amply describes my quest to understand and document the past.*