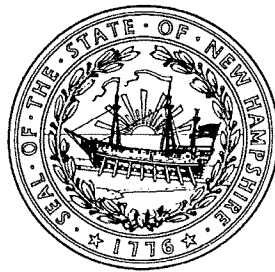


**HANDBOOK FOR**  
**TRUSTEES OF TRUST FUNDS**  
**CEMETERY TRUSTEES**  
**LIBRARY TRUSTEES**



**2015 SESSIONS**

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May 2015

This handbook has been prepared by the Charitable Trusts Unit, Department of Justice, for use by trustees of trust funds, library trustees, cemetery trustees, as well as selectmen, town managers and other interested municipal officials. The purpose of the handbook is to provide a handy reference tool on a variety of issues, including the investment of trust funds, reporting requirements, and New Hampshire cases pertaining to specific municipal trustee issues.

For the past 30 years, the Charitable Trusts Unit, together with the Department of Revenue, has offered annual seminars and workshops to town trustees and other interested officials on the topics covered in this handbook. We hope that this handbook and the annual seminars help municipal trustees throughout the State of New Hampshire in carrying out their duties and administering the trusts which are under their supervision. If you need additional assistance, please feel free to contact Assistant Director Terry Knowles. We would be very pleased to work with you.

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**CONTENTS**

CONTACT INFORMATION ..... 1

SUMMARY OF CHANGES ..... 2

“JOB” DESCRIPTIONS ..... 3

Glossary ..... 3

RSA CHAPTER 31, TRUSTEES OF TRUST FUNDS ..... 5

RSA CHAPTER 32, MUNICIPAL BUDGET LAW ..... 17

RSA CHAPTER 33-A, DISPOSITION OF MUNICIPAL RECORDS ..... 34

RSA CHAPTER 292-B UNIFORM PRUDENT MANAGEMENT OF  
INSTITUTIONAL FUNDS ACT ..... 38

RSA CHAPTER 34, CAPITAL RESERVE FUNDS FOR CITIES..... 39

RSA CHAPTER 35, CAPITAL RESERVE FUNDS OF COUNTIES, TOWNS,  
DISTRICTS, AND WATER DEPARTMENTS..... 45

RSA CHAPTER 202-A, PUBLIC LIBRARIES..... 53

OTHER LIBRARY STATUTES ..... 63

RSA CHAPTER 289, CEMETERIES ..... 64

RSA CHAPTER 290 BURIALS AND DISINTERMENTS ..... 72

RSA 561:1 Distribution Upon Intestacy [Intestacy means the individual died without a  
will] ..... 76

RSA CHAPTER 635 CRIMINAL CODE ..... 78

RSA 485-A:29 SUBMISSION AND APPROVAL OF PLANS AND  
SPECIFICATIONS. – ..... 79

RSA CHAPTER 227-C, PRESERVATION OF STATE HISTORIC RESOURCES ..... 80

RSA CHAPTER 325, EMBALMERS AND FUNERAL DIRECTORS ..... 80

RSA CHAPTER 91-A. ACCESS TO PUBLIC RECORDS AND MEETINGS ..... 82

RIGHT TO KNOW CASE: HAWKINS V. DHHS..... 98

RSA CHAPTER 669, TOWN ELECTIONS ..... 102

RECORD KEEPING BASICS FOR TRUSTEES ..... 103

THE MS-9 AND MS-10 ..... 111

INVESTMENT POLICIES..... 112

    Preparing an Investment Policy..... 113

|   |     |
|---|-----|
| SAMPLE INVESTMENT POLICY STATEMENT AND GUIDELINES FOR THE TOWN OF GRANITEVILLE.....   | 118 |
| THE PRUDENT INVESTOR RULE FOR TRUSTEES OF TRUST FUNDS.....  | 120 |
| Inflation Calculator .....  | 121 |
| SCHOOL AND MINISTERIAL FUNDS .....  | 122 |
| SCHOOL/MINISTERIAL FUND CASE: BAPTIST SOCIETY IN WILTON V. TOWN OF WILTON .....   | 123 |
| LIBRARY TRUSTEE CASE: TOWN OF LITTLETON & A V. TAYLOR .....   | 126 |
| CEMETERY PERPETUAL CARE FUND CASE: OPINION OF THE JUSTICES ....   | 131 |
| CEMETERY PERPETUAL CARE FUND CASE: IN RE BYRNE’S ESTATE .....   | 135 |
| PERPETUAL CARE FUNDS CANNOT BE USED FOR GENERAL CEMETERY MAINTENANCE : TOWN OF BOSCAWEN, ET AL. & V. ACTING ATTORNEY GENERAL .....  | 138 |
| AUTHORITY OF MUNICIPAL TRUSTEE: TUTTLE’S PETITION.....  | 140 |
| APPOINTMENT OF MUNICIPAL TRUSTEES: IN RE: TRUST U/W/O ELMER C. SMITH.....   | 142 |
| CUSTODY OF DISCRIMINATORY TRUSTS: In re CERTAIN SCHOLARSHIP FUNDS.....  | 145 |
| RSA 31:22-A CY PRES OF CEMETERY FUNDS.....  | 161 |
| CHESHIRE COUNTY SUPERIOR COURT ORDER 11/19/1984 <i>TRUSTEES OF TRUST FUNDS OF THE TOWN OF FITZWILLIAM V. DIRECTOR OF CHARITABLE TRUSTS</i> , THE SO-CALLED AMHERST DECISION ..... | 161 |
| CARROLL COUNTY PROBATE COURT ORDER 11/1/2012 <i>TOWN OF MOULTONBOROUGH V. DIRECTOR OF CHARITABLE TRUSTS</i> .....   | 175 |
| STRAFFORD COUNTY PROBATE COURT ORDER 8/15/2007 <i>IN RE ESTATE OF RHODA A. HOGAN</i> .....  | 181 |
| CEMETERY TRUSTEES CASE: BILODEAU V. GREENLAND BOARD OF SELECTMEN .....  | 189 |
| ATTORNEY GENERAL OPINION 1965-16: Authority of Trustees of Trust Funds to administer trust funds .....  | 198 |
| ATTORNEY GENERAL OPINION 1965-40: Trustees’ authority to hold individual investments which are not legal for investment under New Hampshire Statutes .....                        | 199 |
| ATTORNEY GENERAL OPINION 1966-25: Cemetery Perpetual Care Funds .....   | 201 |
| ATTORNEY GENERAL OPINION 1966-2: The “10%” rule applied to Trustees of Trust Funds investment policies .....  | 202 |

SAMPLE LETTER TO GIVE TO DONORS ..... 204  
FREQUENTLY ASKED QUESTIONS FROM MUNICIPAL TRUSTEES..... 205  
OTHER INFORMATION..... 209





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## **SUMMARY OF CHANGES**

Changes in this year's Handbook:

Updated the following statutes:

RSA 31:19-c

RSA 31:22

RSA 31:33

RSA 31:34

RSA 31:38

RSA 32:2

RSA 32:5

RSA 34:16

RSA 35:9-a

RSA 35:12

RSA 202-A:23

RSA 289:2-a

RSA 669:7

Added *Baptist Society of Wilton v. Town of Wilton* re use of school/ministry funds

Added *Bilodeau v. Greenland* re authority over cemetery

## “JOB” DESCRIPTIONS

Municipal trustees – cemetery trustees, library trustees, trustees of trust funds – have very important and varied duties. Our goal is to give you the tools you need to perform your duties legally and understandably. Because municipal trustees hold volunteer positions, it may be helpful to create a description of each trustee’s position and to include a glossary of terms you may encounter during your tenure as a trustee:

**Cemetery Trustees:** Cemetery Trustees are responsible for the care and maintenance of public municipal cemeteries in your town or city, and for any private cemeteries the town has acquired. Cemetery trustees establish bylaws for the care, protection, preservation, and use of public cemeteries, prepare an annual budget, prepare the deeds or right to inter document for cemetery lots, and arrange for appropriate maintenance of cemeteries. Deeds for cemetery lots are signed by the Board of Selectmen, a right to inter document may be signed by the cemetery trustees. Cemetery Trustees do not hold the *principal* of donated cemetery and perpetual care trust funds; this responsibility is given to the Trustees of Trust Funds (TTFs). Cemetery Trustees do prepare vouchers to be submitted to the Trustees of Trust Funds for reimbursement of cemetery care for perpetual care lots and it is therefore important for Cemetery Trustees to work closely with the TTFs.

**Library Trustees:** Library Trustees are responsible for the management of the public library in your town or city. Library trustees prepare and present the annual budget to the appropriate town officials and expend all money raised and appropriated for the library, hire the library director, and adopt bylaws, rules and regulations for the operation of the library. Library Trustees may also hold and invest the principal of trust funds for the benefit of the library, depending upon the wishes of the donor as expressed in the will or trust instrument. Library Trustees work closely with the Trustees of Trust Funds regarding expenditure of those library trust funds held in their custody.

**Trustees of Trust Funds:** Trustees of Trust Funds are the custodian of the town’s perpetual care funds, charitable trusts, private donations, and capital reserve/expendable trust funds. TTFs act in a fiduciary capacity and make the decisions regarding expenditure from these funds based on the wishes of the donor in the case of privately donated funds and release capital reserve funds and expendable trust funds to the appropriate government officials upon request and make the decisions on how these funds are to be invested, based upon the statutes and the investment policy adopted by the Trustees.

## GLOSSARY

**Bonds:** A debt investment in which an investor loans money to an entity (corporate or governmental) that borrows the funds for a defined period of time at a fixed interest rate.

**Common Investment:** One investment for multiple trust funds (example: all perpetual care funds could be invested in one CD – this is a common investment).

Cy pres: A rule in the law of trusts and estates that provides for the modification of charitable purpose as nearly as possible in conformity with the intention of the testator or donor when the original donor intent is illegal, impracticable, or impossible to achieve.

MS-9. The form developed by the Department of Revenue Administration, after consulting with the Charitable Trusts Unit of the Department of Justice, used to report principal and income of all trust funds held by the towns and cities in the State of New Hampshire. The MS-9 is used to itemize each and every trust fund held by municipal trustees of trust funds, reporting the year it was created, the name, purpose, how invested, the amounts of principal including appreciation, and the income earned and spent from each fund during the reporting year.

MS-10. The form developed by the Department of Revenue Administration, after consulting with the Charitable Trusts Unit of the Department of Justice, used to report the common investments for those trust funds that are invested in common. The MS-10 is used to list the name of the each investment (bank accounts, certificates of deposits, stocks, bonds, mutual funds).

Mutual funds: An investment program funded by shareholders that trades in diversified holdings and is professionally managed.

Principal: The principal of a trust consists of the original amount given by the donor increased or decreased by realized capital gains or losses over time. The principal as well as any realized gain of a trust fund is permanently restricted and may not be expended.

Prudent Investor Rule: The duty imposed on a fiduciary to invest and manage the trust's assets as a prudent investor would considering the purposes, terms, distribution requirements, and other circumstances of the trust.

Prudent Man Rule: A legal rule requiring trustees to only make investments in stocks and bonds that a "prudent person" would make. The rule has its origins in an 1830 court decision in Massachusetts, stating that trustees must manage the affairs of others as if they were managing "their own affairs."

Stocks: A type of security that signifies ownership in a corporation.

Trust fund: A variety of assets given to the municipality in trust and intended to provide a public benefit as specified by the donor in his/her will or other trust instrument.

*See also* definitional section in each statute

## **RSA CHAPTER 31, TRUSTEES OF TRUST FUNDS**

### **§ 31:19. In General.**

I. Towns may take and hold in trust gifts, legacies, and devises made to them for the establishment, maintenance, and care of libraries, reading-rooms, schools, and other educational facilities, parks, cemeteries, and burial lots, the planting and care of shade and ornamental trees upon their highways and other public places, and for any other public purpose that is not foreign to their institution or incompatible with the objects of their organization.

II. Towns may authorize the board of selectmen, or town council if there is one, to accept such trusts without further action by the town.

III. Such authority to accept shall continue in effect for one year from the date of town meeting or action by the town council. The authority to accept trusts may be granted for an indefinite period, in which case the warrant article or vote granting such authority shall use the words, "indefinitely" or "until rescinded" or similar language.

Source. GL 49:7; 50:3. PS 40:5. 1901, 83:1. 1907, 70:1. PL 42:18. 1941, 43:1. RL 51:19. RSA 31:19. 1995, 137:1, eff. May 24, 1995

#### *Selected Annotations:*

A bequest to a town to keep in repair forever a family burial lot of the testator in the public cemetery is a trust for a public purpose. Tuttle's Petition, 80 N.H. 36, 112 A. 397 (1921).

### **§ 31:19-a. Trust Funds Created by Towns.**

I. A town may at any annual or special meeting grant and vote such sums of money as it deems necessary to create trust funds for the maintenance and operation of the town; and any other public purpose that is not foreign to the town's institution or incompatible with the objects of its organization. The town may appoint agents to expend any funds in the trust for the purposes of the trust. An annual accounting and report of the activities of the trust shall be presented to the selectmen and published in the annual report.

II. Trust funds created pursuant to this section shall be revocable by majority vote of the legal voters present and voting at any annual meeting, unless the vote creating the trust expressly provides that the trust shall be irrevocable, and upon revocation the trustees of trust funds holding the account for said trust shall pay all the moneys in such fund to the town treasurer.

III. Notwithstanding any other provision of this chapter, any trust fund created under this section shall be subject to the same provisions concerning custody, investment, expenditure, change of purpose, and audit as are reserve funds established under RSA 34:1, 34:1-a, 35:1 or 35:1-c. The legal validity of such a fund properly established shall not be affected by its designation as a "trust," "reserve," "capital reserve," or any other designation.

IV. The local legislative body may authorize the acceptance of privately donated gifts, legacies, and devises to be utilized for the same purposes as a trust fund created under this

section; provided, however, that such gifts, legacies, or devises shall be invested and accounted for separately from, and not commingled with, amounts appropriated under paragraph I, and shall be subject to the custody and investment provisions applicable to trust funds accepted under RSA 31:19.

V. A trust fund created under the provisions of this section that is established for the purpose of maintaining health insurance funds for the benefit of employees and retired employees of any town shall be exempt from the provisions of RSA 35:8 or 34:4, and, when so established, the town may name its own trustees who may expend any funds in the trust for the payment of health claims or health insurance premiums for the benefit of any employees or retired employees of the town. An annual accounting and report of the activities of the trust shall be presented to the selectmen and published in the annual report.

Source. 1983, 264:2. 1991, 231:1. 1993, 176:1, 2, eff. Aug. 8, 1993. 1995, 20:2, 3, eff. June 11, 1995. 1998, 44:1, eff. July 4, 1998.

**Cross References.** Modification or termination of uneconomic trust, see RSA 564-B:4-414.

**§ 31:19-b Deferred Compensation Plan Trusts. –**

I. In this section, "eligible employer" means a governing body of a political subdivision, and any instrumentality whose income is exempt from federal taxation under section 115 of the Internal Revenue Code.

II. All eligible employers are authorized to adopt resolutions establishing deferred compensation plans for their employees under section 457(b) of the Internal Revenue Code; and, further, establishing trusts, custodial accounts, or annuity contracts described in section 401(f) of the Internal Revenue Code to receive all assets and income of deferred compensation plans for the exclusive benefit of employee and retiree participants and their beneficiaries as required by section 457(g) of the Internal Revenue Code.

III. Notwithstanding any other provision of the law to the contrary, all Internal Revenue Code section 457(b) deferred compensation plans adopted and all Internal Revenue Code section 457(g) trusts, accounts, or contracts created by any eligible employer after August 20, 1996, which meet the requirements of this section, are hereby deemed to be qualifying deferred compensation plans under this section.

IV. The eligible employer which establishes a deferred compensation plan trust under section 457(g) of the Internal Revenue Code is hereby authorized to serve as a trustee of such trust and is further authorized to appoint an administrator to administer the deferred compensation plan trust and receive all plan assets and income for such purposes. An administrator may be within or outside the state so long as it administers a deferred compensation plan trust which qualifies as an Internal Revenue Code section 457(b) deferred compensation plan and an Internal Revenue Code section 457(g) trust account or contract. Any appointments made after August 20, 1996 of administrators and investments of plan assets in trusts created by those administrators that meet the requirements of this section are hereby ratified.

V. All amounts deferred under an Internal Revenue Code section 457(b) plan, after a trust has been established, shall be transferred to the trust within a period that is not longer than is reasonably necessary for the proper administration of the accounts of participants. All assets and income held in any deferred compensation plan trust established under this section shall be held, managed, and invested for the exclusive benefit of employee and retiree participants and their beneficiaries and shall not be diverted to any other purpose including any debt or obligation of the eligible employer under state or federal law.

**Source.** 1998, 371:1, eff. June 26, 1998.

**§ 31:19-c Authorization for Municipalities to Establish OPEB Trusts. –**

I. The legislative body of a municipality that created, on or before January 1, 2012, an actuarial liability to pay other post-employment benefits (OPEB) to employees or officers after their termination of service may establish an irrevocable trust to pay those benefits. In this section, the term "other post-employment benefits" means employee benefits other than pensions that are received after employment ends, and may include such medical, disability, or other health benefits, as are covered by Statement No. 45 of the Governmental Accounting Standards Board (GASB). The term "trust" means a trust qualified under GASB Statement No. 43.

II. Deposits to any fund under such a trust and any earnings on those deposits shall be irrevocable and shall be held in trust for the exclusive benefit of retirees and their beneficiaries in accordance with the terms of the plans or programs providing other post-employment benefits, except that funds governed by the trust may be withdrawn for other purposes only when an employer's liability owed to former officers or employees for other post-employment benefits has been satisfied or otherwise eliminated pursuant to subparagraph V(b). The assets of any trust created pursuant to this section or in which a municipality participates pursuant to this section shall be exempt from taxation and execution, attachment, garnishment, or any other process. No public officer, employee, or agency shall divert, use, or authorize the use of such funds for any purpose other than as provided in law for other post-employment benefits covered by the trust and administrative expenses.

III. The trustees of any trust created pursuant to this section shall have the full power to invest, reinvest, and manage the assets of the trust. The trustees shall invest the assets of the trust with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. The trustees shall also diversify such investments so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so. The board of trustees may engage a trust administrator, investment consultants, or other qualified professionals to assist with management and investment of the funds of the trust and may pay for these services out of the funds of the trust.

IV. Trusts created by a municipality pursuant to this section shall be administered by the board of trustees established by the municipality pursuant to RSA 31:22. The accounts of the trustees shall be subject to the auditing and reporting requirements of RSA 31:33. Other provisions of RSA 31:19 through 31:38-a governing trusts shall also apply unless they are contrary to this section.

V. The municipality may withdraw money from the funds of a trust created pursuant to this section only:

(a) As needed to pay other post-employment benefits owed to former officers and employees; or

(b) When all other post-employment benefits liability owed to former officers or employees of the employing entity has been satisfied or otherwise defeased.

**Source.** 2012, 219:1, eff. July 1, 2012.

### **§ 31:20. For Cemeteries.**

Towns shall take and hold in trust gifts, legacies and devises made to them for the care of cemeteries and burial lots when the terms of the gift, legacy or devise do not impose any liability upon the town beyond the amount of the gift, legacy or devise and the income thereof.

**Source.** GL 49:7; 50:3. PS 40:5. 1901, 83:1. 1907, 70:1. PL 42:19. RL 51:20.

#### *Cross References:*

Cy pres application of accumulated excess income from cemetery trust, see RSA 31:22-a.

#### *Selected Annotations:*

Use of income. A proposed amendment to this section which would permit the income accumulation of a particular burial lot trust fund to be used, in the discretion of the trustees, for the general care of the cemetery if the terms of the trust did not otherwise provide and it could reasonably be anticipated that such accumulation would not be required for the care of the particular lot in the foreseeable future, **would unconstitutionally invade** the established cy pres powers of the courts. Opinion of the Justices, 101 N.H. 531, 133 A.2d 792 (1957) (emphasis added).

### **§ 31:21. Funds of Cemetery Associations, etc.**

Towns may receive from cemetery associations or individuals funds for the care of cemeteries or any lot therein, and the income thereof shall be expended by the town in accordance with the terms of the trust or contract under which the funds were received.

**Source.** GL 49:7; 50:3. PS 40:5. 1901, 83:1. 1907, 70:1. PL 42:20. RL 51:21.

### **§ 31:22. Trustees.**

All such trusts shall be administered by a board of 3 trustees, unless a town at an annual or special town meeting votes that such trusts shall be administered by a board of 5 trustees. In towns with a board of 3 trustees, one trustee shall be elected by a ballot at each annual town meeting for a term of 3 years. In towns with a board of 5 trustees the 2 additional trustees shall be appointed initially by the selectmen, one for one year and one for 2 years. Thereafter all



trustees shall be elected by ballot at the annual town meeting to replace those whose terms expire. The term of each trustee shall be 3 years. Vacancies shall be filled by the selectmen for the remainder of the term. The board may recommend to the appointing authority the names of no more than 2 persons who may serve as alternate members on the board. The alternate members shall be appointed to one-year terms. In cities said trustees shall be chosen and hold their office for such term as shall be provided for by city ordinance. Trustees shall organize by electing one of their number bookkeeper, who shall keep the records and books for the trustees, and shall require a voucher before making any disbursement of funds from said trusts.

**Source.** 1915, 162:2. PL 42:21. RL 51:22. 1943, 70:1. 1945, 68:1. 1953, 21:1. RSA 31:22. 1979, 141:1, eff. June 5, 1979. 2014, 70:1, eff. July 26, 2014.

*Cross References:* Surety bond of trustees, see RSA 41:6.

*Selected Annotations:*

The word "administered," as used in this section, would mean to manage, direct or superintend the affairs of the trust. 1 N.H.Op.A.G. 49.

Power of trustees: Authority to administer town trust funds is vested solely in the trustees and income therefrom cannot be turned over to the selectmen for purposes contrary to the judgment of the trustees. 1 N.H.Op.A.G. 49.

*Cited, Drury v. Sleeper*, 84 N.H. 98, 146 A. 645 (1929); *Opinion of the Justices*, 101 N.H. 531, 133 A.2d 792 (1957); *In re Trust u/w/o Smith*, 131 N.H. 396, 553 A.2d 323 (1988).

**§ 31:22-a. Cy Pres, Cemetery Trust Funds.**

Upon petition of a majority of the board of trustees and upon a finding that it is in the public interest, the superior court or the probate court may direct the application of only accumulated excess trust income for the general care, capital improvements to or expansion of the cemetery relative to which the particular trust applies. The court shall determine from the terms of the particular trust whether the excess income accumulation of the particular burial lot trust fund will not be required for the care of the burial lot in the foreseeable future. In determining this requirement the court shall consider:

- I. The financial status of the trust account.
- II. A projection of future interest rates.
- III. A projection of future labor costs necessary to maintain the lot.

Source. 1977, 128:2. 1992, 284:1, eff. Jan. 1, 1993.

**§ 31:23. Single Trustee.**

A town wherein the total book value of trust funds is less than \$15,000, acting under an appropriate article in the warrant for any annual town meeting, may vote that the board shall

consist of one trustee only, in which case said trustee shall be chosen by ballot at the same and each succeeding annual town meeting; and such vote may be rescinded in like manner. All the duties and obligations imposed by law upon a board of trustees shall devolve upon the trustee so chosen; vacancies shall be filled by the selectmen for the remainder of the year; and said trustee shall receive from the town treasury such compensation as the town meeting may determine.

Source. 1945, 85:1. RSA 31:23. 1983, 264:1, eff. Aug. 17, 1983.

**§ 31:24. Trustees; Expenses.**

The expenses of trustees or the trustee provided for in RSA 31:23 shall be charged as incidental town charges.

Source. 1915, 162:5. PL 42:27. 1941, 43:3. RL 51:29. 1945, 85:3. RSA 31:24. 1973, 544:8. 1979, 376:17, eff. Aug. 22, 1979.

**§ 31:25. Custody; Investment.**

The trustees shall have the custody of all trust funds held by their town. Any person who directly or indirectly receives any such trust funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the town depositing or investing such funds. Only securities defined by the bank commissioner, as provided by rules adopted pursuant to RSA 386:57, shall be eligible to be pledged as collateral. The funds shall be invested only in deposits in any federally or state-chartered bank or association authorized to engage in a banking business in this state, or in deposits in any credit union in this state, or in state, county, town, city, school district, water and sewer district bonds and the notes of towns or cities in this state; and such stocks and bonds as are legal for investment by any bank or association chartered by this state to engage in a banking business; and in participation units in the public deposit investment pool established pursuant to RSA 383:22; or in obligations with principal and interest fully guaranteed by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a-1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Deposits in a federally or state-chartered bank or association or credit union shall be made in the name of the town which holds the same as a trust, and it shall appear upon the books thereof as a trust fund. Shares of mutual funds are also permitted if they are registered with the Securities and Exchange Commission, qualified for sale in the state of New Hampshire in accordance with the New Hampshire uniform securities act of the New Hampshire secretary of state's office, and which have in their prospectus a stated investment policy which is consistent with the investment policy adopted by the trustees of trust funds in accordance with this chapter, and when so invested, the trustees shall not be liable for the loss thereof. The trustees may retain investments as received from donors, until the maturity thereof. The trustees shall formally adopt an investment policy for all investments made by them or by their agents for any trust funds in their custody in conformance with the provisions of applicable statutes. Such investment policy

shall be reviewed and confirmed at least annually. A copy of the investment policy shall be filed with the attorney general.

Source. 1915, 162:3. 1917, 75:1; 171:1. PL 42:22. 1929, 100:1. 1933, 46:1. 1939, 72:11. 1941, 21:1. RL 51:23. RSA 31:25. 1969, 447:1. 1992, 24:2, II, eff. April 3, 1992. 1996, 209:4, eff. Aug. 9, 1996. 1997, 181:1, eff. Aug. 16, 1997. 2001, 54:1, eff. Jan. 1, 2002. 2007, 164:1, eff. Aug. 17, 2007.

**§ 31:25-a. Retention of Nonlegal Securities.**

Any security which at the time of its purchase under RSA 31:25 constituted a legal investment for any bank or association chartered by this state to engage in a banking business or for trustees of trust funds under the laws and conditions then existing may be retained notwithstanding the fact that, because of changes in the law relating to legal investments or because of conditions arising subsequent to the purchase of such security, its purchase might not then be legal; provided, however, that no such security that is not a prudent investment under the circumstances existing at the time of its retention and thereafter may be retained by the trustees; and provided further, that the aggregate total of the market value of all securities retained under this section shall not exceed 20 percent of the total market value of all the investments held by the trustees.

Source. 1983, 118:1, eff. May 25, 1983. 1997, 181:2, eff. Aug. 16, 1997. 2001, 54:2, eff. Jan. 1, 2002.

**§ 31:25-b. Prudent Investment Defined.**

For purposes of RSA 31:25-a, a prudent investment is one which a prudent man would purchase for his own investment having primarily in view the preservation of the principal and the amount and regularity of the income to be derived therefrom.

Source. 1983, 118:1, eff. May 25, 1983.

**§ 31:25-c. Report to the Attorney General.**

The trustees shall report annually to the attorney general any securities retained under the provisions of RSA 31:25-a, which shall appear as an addendum to the annual report required to be filed under RSA 31:38.

Source. 1983, 118:1, eff. May 25, 1983.

**§ 31:25-d Application of Prudent Investor Rule.**

The trustees of trust funds may manage and invest such funds in accordance with the prudent investor rule under RSA 564-B:9-901--RSA 564-B:9-906 without regard to the investment limitations of RSA 31:25 and RSA 31:25-a, provided, however, the trustees of trust funds:

I. Notify the attorney general in writing of their decision to invest according to the prudent investor rule; and

II. Hire or employ the trust department of a bank or a brokerage firm to provide investment advice and assistance under RSA 31:38-a, III.

Source. 2008, 264:1, eff. Aug. 25, 2008.

### **§ 31:26. Investments by Single Trustee.**

In towns which have chosen a single trustee of trust funds such funds shall be invested only by deposit in any federally or state-chartered bank or association authorized to engage in a banking business in this state, or in state, county, town, city, school district, water and sewer district bonds and the notes of towns or cities in this state and when so invested the trustee shall not be liable for the loss thereof; and in any common trust fund established by the New Hampshire Charitable Foundation in accordance with RSA 292:23; or in obligations fully guaranteed as to principal and interest by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U. S.C. section 80a-1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. Deposits in a federally or state-chartered bank or association shall be made in the name of the town which holds the same as a trust, and it shall appear upon the books thereof as a trust fund. Any person who directly or indirectly receives any such trust funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the town depositing or investing such funds. Only securities defined by the bank commissioner as provided by rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. The trustee may retain investments as received from donors until the maturity thereof.

Source. 1945, 85:2. RSA 31:26. 1969, 447:2. 1992, 24:2, III, eff. April 3, 1992. 2001, 54:3, eff. Jan. 1, 2002. 2007, 347:2, eff. Sept. 14, 2007.

### **§ 31:27. Collective Investments.**

Notwithstanding any statute or rule of law to the contrary, town and city trustees of trust funds may establish, maintain and operate one or more common trust funds, in which may be combined money and property belonging to the various trusts in their care, for the purpose of facilitating investments, providing diversification and obtaining reasonable income; provided however, that said common trust funds shall be limited to the investments authorized in RSA 31:25; provided further, that not more than \$10,000, or more than 10 percent of the fund whichever is greater, of any town or city common trust funds shall be invested under RSA 31:25 in the obligations of any one corporation or organization, excepting deposits in any federally or state-chartered bank or association authorized to engage in a banking business in this state, in credit unions in this state, or in obligations of the United States and of the state of New Hampshire and its subdivisions; or in participation units in the public deposit investment pool

established pursuant to RSA 383:22, or in shares of open ended mutual funds selected by the trustees for investment under RSA 31:25, and provided further, that the participating contributory interests of said trusts are properly evidenced by appropriate bookkeeping entries showing on an annual basis the capital contribution of and the profits and income allocable to each trust.

Source. 1951, 227:1, par. 31-a. RSA 31:27. 1959, 253:1. 1969, 447:3. 1992, 24:2, IV, eff. April 3, 1992. 1997, 181:3, eff. Aug. 16, 1997. 2001, 54:4, eff. Jan. 1, 2002.

**§ 31:28. Exception.**

The provisions of RSA 31:27 shall not apply where the instrument creating the particular trust specifically prohibits collective investments or where such investment shall violate any specific court order made in any particular trust.

Source. 1951, 227:1, par. 31-c, eff. Aug. 29, 1951.

**§ 31:29. Contributions and Withdrawals.**

Contribution to any common trust fund shall be made on the basis of its market value at the time such contribution is recorded in the books of the trustees. The withdrawal of a particular trust fund from any common trust fund shall be made proportionately on the basis of the market value of said common trust fund at the time such withdrawal is recorded in the books of the trustees.

Source. 1951, 227:1, par. 31-b, eff. Aug. 29, 1951.

**§ 31:30. Liberal Construction of Provisions.**

The provisions of RSA 31:25, 31:27-29, and 31:38 shall be construed liberally to effectuate the purposes stated in RSA 31:27.

Source. 1951, 227:1, par. 31-e, eff. Aug. 29, 1951.

**§ 31:31. Trust Funds for Districts.**

Except where otherwise specifically provided in the charter of a city or by special act of the legislature whenever a gift, legacy or devise shall be made in trust to a school district, village district or any subdivision of a town and accepted by it, the same shall be held in custody and administered by the trustees of trust funds of such town or in case of districts embracing 2 or more towns by the trustees of trust funds of that town which the voters of said district may elect. The governing body of any such district or subdivision shall expend such district or subdivision trust funds, or the income thereof to be expended, consistently with the terms of the trust. The provisions of RSA 31:32 shall not apply to expenditures of district or subdivision trust funds.

Source. 1941, 43:2. RL 51:24.

**§ 31:32. Expenditures.**

Trust funds, or the income thereof, to be expended, shall be paid to trustees or agents of the town established to carry out the objects designated by such trusts, and, if there be no such trustees or agents, then such expenditures shall be made by the full board of town trustees.

Source. 1915, 162:3. 1919, 96:1. PL 42:23. RL 51:25.

**§ 31:33. Audit and Publication of Reports of Trustees.**

I. The accounts of the trustees shall be audited annually by the auditor of the town, the securities shall be exhibited to the auditor, and he shall certify the facts found by his audit and the list of all securities held. The trustees shall submit to the auditor a detailed statement of the securities held by them and the particular trust to which they belong, and exhibit to him a statement of all receipts and expenditures with proper vouchers.

II. The legislative body of a town may authorize the printing of the reports of the trustees and of the auditor in summary form rather than in full detail in the annual town report.

III. In a year in which a town accepts gifts, legacies and devises for any trust created, the trustees and auditor shall print the names of the donors and the value of such gifts, legacies and devises at the time of donation in the annual town report.

Source. 1915, 162:3. PL 42:24. RL 51:26. RSA 31:33. 1975, 78:1. 1977, 45:1, eff. June 11, 1977.

**§ 31:34. Records.**

The trustees shall keep a record of all trusts in a record book or maintained in electronic format, which shall be open to the inspection of all persons in their town.

Source. 1915, 162:3. PL 42:25. RL 51:27. 2014, 32:1, eff. July 26, 2014

**§ 31:35. Compensation of Bookkeeper.**

The bookkeeper of the trustees shall receive such compensation as the town meeting may determine.

Source. 1915, 162:4. PL 42:26. RL 51:28. 1948, 70:2. 1953, 21:2. RSA 31:35. 1983, 264:3, eff. Aug. 17, 1983.

**§ 31:36. Deposits.**

Deposits in any federally or state-chartered bank or association or any credit union shall be made in the name of the town which holds the same in trust, and it shall appear upon the book thereof that the same is a trust fund.

Source. 1915, 162:7. PL 42:28. RL 51:30. 2001, 54:5, eff. Jan. 1, 2002.

**§ 31:37. Payment by Towns.**

Each town shall pay over to the trustees the full amount of its trust funds.

Source. 1915, 162:6. PL 42:29. RL 51:31.

**§ 31:38. Reports.**

A copy of the reports required of the town and city trustees and of the auditor thereof shall be filed annually with the attorney general, the department of revenue administration, and with the governing body of the town or city.

Source. 1951, 227:1, par. 31-d, eff. Aug. 29, 1951. 2014, 32:2, eff. July 26, 2014.

**§ 31:38-a. Professional Banking and Brokerage Assistance.**

I. The provisions of RSA 31:19 through 31:38 as amended shall remain in full force and effect. This section is intended only to provide help to trustees covered by this subdivision by enabling them to have professional banking and brokerage assistance in the performance of their duties as trustees.

II. "Bank" as used in this section means a savings bank, national bank or trust company in this state, any building and loan association or cooperative bank, incorporated and doing business under the laws of this state or any federal savings and loan association located and doing business in this state.

II-a. "Brokerage firm" in this section means a firm registered under the securities law effecting transactions in securities for the accounts of others.

II-b. "Portfolio management department" in this section means the department of a brokerage firm responsible for investment management of client accounts.

II-c. "Investment advisor" in this section means a qualified investment advisory firm registered with the appropriate regulatory authorities. Such firm may or may not be associated with a brokerage firm as defined in paragraph II-a.

III. Any trustee or trustees of trust funds authorized by this chapter may hire or employ the trust department or departments of a bank or banks or a brokerage firm to assist in the management and investment of trust fund resources or to provide bookkeeping services in connection therewith or to do both. They may also place securities in the nominee name of a trust department or departments or a brokerage firm to facilitate transfers for such securities. Trust fund records maintained by any bank or brokerage firm must be available at all times for examination by local auditors, by independent accountants or auditors retained by a municipality, or by the auditors of the department of revenue administration; and such records shall be municipal records and property. In employing such trust departments, portfolio management departments, or investment advisors, the trustees may enter into contracts or agreements delegating the management of such trust funds to those departments subject to investment

guidelines adopted by the trustees under applicable statutes and subject to at least quarterly review and approval of such management by the trustees.

IV. Any expenses incurred pursuant to paragraph III of this section by a trustee or trustees of trust funds authorized by this chapter shall be charges against the trust funds involved and shall be identified and reported in the annual report of the trustee or trustees as expenditures out of trust funds made pursuant to RSA 31:38-a, III.

Source. 1977, 214:1. 1983, 107:1, eff. July 23, 1983; 264:4, eff. Aug. 17, 1983. 1996, 209:5-7, eff. Aug. 9, 1996.

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**§ 31:104 Liability of Municipal Executives. –**

Notwithstanding any provisions of law to the contrary, no member of the governing board of any municipal corporation or political subdivision, no member of any other board, commission, or bureau of any municipal corporation or political subdivision created or existing pursuant to a statute or charter, and no chief executive officer of such municipal corporation or political subdivision, including but not limited to city councilors and aldermen, selectmen, county convention members, members of boards of adjustment, members of planning boards, school board members, mayors, city managers, town managers, county commissioners, regional planning commissioners, town and city health officers, overseers of public welfare, and school superintendents shall be held liable for civil damages for any vote, resolution, or decision made by said person acting in his or her official capacity in good faith and within the scope of his or her authority.

Source. 1973, 595:1. 1991, 72:1, eff. July 12, 1991. 2008, 96:1, eff. Jan. 1, 2009. 2010, 214:1, eff. Jan. 1, 2011.

**§ 31:105 Indemnification for Damages. –**

A city, town, county, village district or precinct, school district, chartered public school, school administrative unit, or any other municipal corporation or political subdivision may by a vote of the governing body indemnify and save harmless for loss or damage occurring after said vote any person employed by it and any member or officer of its governing board, administrative staff or agencies including but not limited to selectmen, school board members, chartered public school trustees, city councilors and aldermen, town and city managers, regional planning commissioners, town and city health officers, overseers of public welfare, and superintendents of schools from personal financial loss and expense including reasonable legal fees and costs, if any, arising out of any claim, demand, suit, or judgment by reason of negligence or other act resulting in accidental injury to a person or accidental damage to or destruction of property if the indemnified person at the time of the accident resulting in the injury, damage, or destruction was acting in the scope of employment or office.

Source. 1973, 595:1. 1991, 72:2. 1995, 260:2, eff. July 1, 1995. 2008, 354:1, eff. Sept. 5, 2008. 2010, 214:2, eff. Jan. 1, 2011.



## **RSA CHAPTER 32, MUNICIPAL BUDGET LAW<sup>1</sup>**

### **§ 32:1 Statement of Purpose.**

The purpose of this chapter is to clarify the law as it existed under former RSA 32. A town or district may establish a municipal budget committee to assist its voters in the prudent appropriation of public funds. The budget committee, in those municipalities which establish one, is intended to have budgetary authority analogous to that of a legislative appropriations committee. It is the legislature's further purpose to establish uniformity in the manner of appropriating and spending public funds in all municipal subdivisions to which this chapter applies, including those towns, school districts and village districts which do not operate with budget committees, and have not before had much statutory guidance.

Source. 1993, 332:1, eff. Aug. 28, 1993.

### **§ 32:2 Application.**

RSA 32:1-13, shall apply to all towns, school districts, cooperative school districts, village districts, municipal economic development and revitalization districts created under RSA 162-K, and any other municipal entities, including those created pursuant to RSA 53-A or 53-B, which adopt their budgets at an annual meeting of their voters, except RSA 32:5-b, which shall apply only in those towns or districts adopting that section pursuant to RSA 32:5-c. RSA 32:14-23, concerning budget committees, shall apply only in those towns or districts adopting that subdivision pursuant to RSA 32:14, I, and shall apply automatically in school districts or village districts located wholly within towns adopting that subdivision.

**Source.** 1993, 332:1, eff. Aug. 28, 1993. 2011, 234:5, eff. July 5, 2011. 2012, 186:3, eff. June 11, 2012.

### **§ 32:3 Definitions.**

In this chapter:

I. "Appropriate" means to set apart from the public revenue of a municipality a certain sum for a specified purpose and to authorize the expenditure of that sum for that purpose.

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<sup>1</sup> The Department of Revenue Administration offers training seminars on the Budget Law. Contact information is found on page 1 of this Handbook.

II. "Appropriation" means an amount of money appropriated for a specified purpose by the legislative body.

III. "Budget" means a statement of recommended appropriations and anticipated revenues submitted to the legislative body by the budget committee, or the governing body if there is no budget committee, as an attachment to, and as part of the warrant for, an annual or special meeting.

IV. "District" includes a school district, cooperative school district, village district, district created pursuant to RSA 53-A or 53-B, or municipal economic development and revitalization district created pursuant to RSA 162-K.

V. "Purpose" means a goal or aim to be accomplished through the expenditure of public funds. In addition, as used in RSA 32:8 and RSA 32:10, I(e), concerning the limitation on expenditures, a line on the budget form posted with the warrant, or form submitted to the department of revenue administration, or an appropriation contained in a special warrant article, shall be considered a single "purpose."

VI. "Special warrant article" means any article in the warrant for an annual or special meeting which proposes an appropriation by the meeting and which:

(a) Is submitted by petition; or

(b) Calls for an appropriation of an amount to be raised by the issuance of bonds or notes pursuant to RSA 33; or

(c) Calls for an appropriation to or from a separate fund created pursuant to statute, including but not limited to a capital reserve fund under RSA 35, or trust fund under RSA 31:19-a; or

(d) Is designated in the warrant, by the governing body, as a special warrant article, or as a nonlapsing or nontransferable appropriation; or

(e) Calls for an appropriation of an amount for a capital project under RSA 32:7-a.

**Source.** 1993, 332:1, eff. Aug. 28, 1993. 1996, 214:1, eff. Aug. 9, 1996. 2003, 95:1, eff. Aug. 5, 2003. 2012, 181:1, eff. Aug. 10, 2012; 186:4, eff. June 11, 2012. 2013, 109:1, eff. Aug. 23, 2013.

#### **§ 32:4 Estimate of Expenditures and Revenues.**

All municipal officers, administrative officials and department heads, including officers of such self-sustaining departments as water, sewer, and electric departments, shall prepare statements of estimated expenditures and revenues for the ensuing fiscal year, and shall submit such statements to their respective governing bodies, at such times and in such detail as the governing body may require.

**Source.** 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:5 Budget Preparation.**

I. The governing body, or the budget committee if there is one, shall hold at least one public hearing on each budget, not later than 25 days before each annual or special meeting, public notice of which shall be given at least 7 days in advance, and after the conclusion of public testimony shall finalize the budget to be submitted to the legislative body. One or more supplemental public hearings may be held at any time before the annual or special meeting, subject to the 7-day notice requirement. If the first hearing or any supplemental hearing is recessed to a later date or time, additional notice shall not be required for a supplemental session if the date, time, and place of the supplemental session are made known at the original hearing. Public hearings on bonds and notes in excess of \$100,000 shall be held in accordance with RSA 33:8-a, I. Days shall be counted in accordance with RSA 21:35.

II. All purposes and amounts of appropriations to be included in the budget or special warrant articles shall be disclosed or discussed at the final hearing. The governing body or budget committee shall not thereafter insert, in any budget column or special warrant article, an additional amount or purpose of appropriation which was not disclosed or discussed at that hearing, without first holding one or more public hearings on supplemental budget requests for town or district expenditures.

**III. All appropriations recommended shall be stipulated on a "gross" basis, showing anticipated revenues from all sources, including grants, gifts, bequests, and bond issues, which shall be shown as offsetting revenues to appropriations affected. The budget shall be prepared according to rules adopted by the commissioner of revenue administration under RSA 541-A, relative to the required forms and information to be submitted for recommended appropriations and anticipated revenues for each town or district.**

IV. Budget forms for the annual meeting shall include, in the section showing recommended appropriations, comparative columns indicating at least the following information:

(a) Appropriations voted by the previous annual meeting.

(b) Actual expenditures made pursuant to those appropriations, or in those towns and districts which hold annual meetings prior to the close of the current fiscal year, actual expenditures for the most recently completed fiscal year.

(c) All appropriations, including appropriations contained in special warrant articles, recommended by the governing body.

(d) If there is a budget committee, all the appropriations, including appropriations contained in special warrant articles, recommended by the budget committee.

V. When any purpose of appropriation, submitted by a governing body or by petition, appears in the warrant as part of a special warrant article:

(a) The article shall contain a notation of whether or not that appropriation is recommended by the governing body, and, if there is a budget committee, a notation of whether or not it is recommended by the budget committee;

(b) If the article is amended at the first session of the meeting in an official ballot referendum municipality, the governing body and the budget committee, if one exists, may revise its recommendation on the amended version of the special warrant article and the revised recommendation shall appear on the ballot for the second session of the meeting provided, however, that the 10 percent limitation on expenditures provided for in RSA 32:18 shall be calculated based upon the initial recommendations of the budget committee;

(c) Defects or deficiencies in these notations shall not affect the legal validity of any appropriation otherwise lawfully made; and

(d) All appropriations made under special warrant articles shall be subject to the hearing requirements of paragraphs I and II of this section.

V-a. The legislative body of any town, school district, or village district may vote to require that all votes by an advisory budget committee, a town, school district, or village district budget committee, and the governing body or, in towns, school districts, or village districts without a budget committee, all votes of the governing body relative to budget items or any warrant articles shall be recorded votes and the numerical tally of any such vote shall be printed in the town, school district, or village district warrant next to the affected warrant article. Unless the legislative body has voted otherwise, if a town or school district has not voted to require such tallies to be printed in the town or school district warrant next to the affected warrant article, the governing body may do so on its own initiative.

V-b. Any town may vote to require that the annual budget and all special warrant articles having a tax impact, as determined by the governing body, shall contain a notation stating the estimated tax impact of the article. The determination of the estimated tax impact shall be subject to approval by the governing body.

VI. Upon completion of the budgets, an original of each budget and of each recommendation upon special warrant articles, signed by a quorum of the governing body, or of the budget committee, if any, shall be placed on file with the town or district clerk. A certified copy shall be forwarded by the chair of the budget committee, if any, or otherwise by the chair of the governing body, to the commissioner of revenue administration pursuant to RSA 21-J:34.

VII. (a) The governing body shall post certified copies of the budget with the warrant for the meeting. The operating budget warrant article shall contain the amount as recommended by the budget committee if there is one. In the case of towns, the budget shall also be printed in the town report made available to the legislative body at least one week before the date of the annual meeting. A school district or village district may vote, under an article inserted in the warrant, to require the district to print its budget in an annual report made available to the district's voters at least one week before the date of the annual meeting. Such district report may be separate or may be combined with the annual report of the town or towns within which the district is located.

(b) The governing body in official ballot referenda jurisdictions operating under RSA 40:13 shall post certified copies of the default budget form or any amended default budget form with the proposed operating budget and the warrant.

(c) If the operating budget warrant article is amended at the first session of the meeting in an official ballot referendum jurisdiction operating under RSA 40:13, the governing body and the budget committee, if one exists, may each vote on whether to recommend the amended article, and the recommendation or recommendations shall appear on the ballot for the second session of the meeting.

VIII. The procedural requirements of this section shall apply to any special meeting called to raise or appropriate funds, or to reduce or rescind any appropriation previously made, provided, however, that any budget form used may be prepared locally. Such a form or the applicable warrant article shall, at a minimum, show the request by the governing body or petitioners, the recommendation of the budget committee, if any, and the sources of anticipated offsetting revenue, other than taxes, if any.

IX. If the budget committee fails to deliver a budget prepared in accordance with this section, the governing body shall post its proposed budget with a notarized statement indicating that the budget is being posted pursuant to this paragraph in lieu of the budget committee's proposed budget. This alternative budget shall then be the basis for the application of the provisions of this chapter.

**Source.** 1993, 332:1, eff. Aug. 28, 1993. 1996, 214:2, eff. Aug. 9, 1996. 1997, 41:1, eff. July 11, 1997. 2001, 71:2, eff. July 1, 2001. 2002, 61:1, eff. June 25, 2002. 2004, 68:1, eff. July 6, 2004; 219:2, eff. Aug. 10, 2004; 238:5, eff. June 15, 2004; 238:12, eff. Aug. 10, 2004 at 12:01 a.m. 2007, 305:1, eff. Sept. 11, 2007. 2009, 2:1, eff. Feb. 20, 2009. 2010, 90:1, eff. July 24, 2010. 2012, 6:1, eff. May 21, 2012; 217:1, eff. July 1, 2013. 2014, 190:7, eff. Sept. 9, 2014

### **§ 32:5-a Presentation of Negotiated Cost Items at the Annual Meeting**

Cost items, as defined under RSA 273-A:1, IV, shall be presented to the annual town or district meeting in accordance with the procedures established under RSA 32:5. For submission to the legislative body of the annual meeting, cost items must be finalized by the date prescribed in RSA 39:3 for towns and by the date prescribed in RSA 197:6 for school districts. Cost items not negotiated in time to meet these dates may be submitted to the legislative body pursuant to the provisions of RSA 31:5 for towns and RSA 197:3 for school districts.

Source. 1996, 214:3, eff. Aug. 9, 1996.

### **§ 32:5-b Local Tax Cap.**

Upon adoption under RSA 32:5-c, the following shall apply:

I. In a town or district that has adopted this section, the estimated amount of local taxes to be raised for the fiscal year, as shown on the budget certified by the governing body or the budget committee and posted with the warrant for the annual meeting pursuant to RSA 32:5, shall not exceed the local taxes raised for the prior year, as shown on the same budget and adjusted as provided in paragraph I-a, by more than the tax cap authorized when this section was adopted.

I-a. If the local taxes raised for the prior year were reduced by any fund balance brought forward from previous years, the amount of such reduction shall be added back and included in the amount to which the tax cap is applied under paragraph I.

II. The tax cap shall be either a fixed dollar amount or a fixed percentage applied to the amount of local taxes raised by the town or district for the prior fiscal year as reported to the department of revenue administration, subject to adjustment as provided in paragraph I-a.

III. The legislative body may override the cap by the usual procedures applicable to annual meetings and deliberative sessions of the legislative body. The provisions of this section shall not limit the legislative body's authority to increase or decrease the amount of any appropriation or the total amount of all appropriations.

**Source.** 2011, 234:6, eff. July 5, 2011. 2013, 58:1, eff. Aug. 5, 2013.

### **§ 32:5-c Adoption of Local Tax Cap.**

I. The provisions of RSA 32:5-b may be adopted by any local political subdivision of the state whose legislative body raises and appropriates funds through an annual meeting. A 3/5 majority of those voting on the question shall be required to adopt the provisions of RSA 32:5-b. Only votes in the affirmative or negative shall be included in the calculation of the 3/5 majority.

II. The question shall be placed on the warrant of the annual meeting by the governing body or by petition under the procedures set out in RSA 39:3 or RSA 197:6.

III. A public hearing shall be held by the local governing body on the question at least 15 days, but not more than 30 days, before the question is to be voted on. In multi-town districts, a public hearing shall be held in each town embraced by the district, none of which shall be held on the same day. Notice of the hearing shall be posted in at least 2 public places in the town and at least 2 public places in each town of multi-town districts, and published in a newspaper of general circulation at least 7 days prior to the date of the hearing.

IV. The wording of the question shall be: "Shall we adopt the provisions of RSA 32:5-b, and implement a tax cap whereby the governing body (or budget committee) shall not submit a recommended budget that increases the amount to be raised by local taxes, based on the prior fiscal year's actual amount of local taxes raised, by more than \_\_\_\_\_ (insert either a fixed dollar amount or a fixed percentage)?"

V. Voting on the question shall be by ballot, but the question shall not be placed on the official ballot used to elect officers, except in the case of a legislative body that uses an official ballot form of meeting under RSA 40:13 or under a charter adopted pursuant to RSA 49-D. Polls shall remain open and ballots shall be accepted by the moderator for a period of not less than one hour following the completion of discussion on the question. If a 3/5 majority of those voting on the question vote "yes," RSA 32:5-b shall apply within the local political subdivision beginning with the following fiscal year and for all subsequent years until it is rescinded as provided in paragraph VI.

VI. Any local political subdivision which has adopted RSA 32:5-b may consider rescinding its action in the manner described in paragraphs I through V. The wording of the question shall be: "Shall we rescind the provisions of RSA 32:5-b, known as the tax cap, as adopted by the (local subdivision) on (date of adoption), so that there will no longer be a limit on increases to the recommended budget in the amount to be raised by local taxes?" A 3/5 majority of those voting on the question shall be required to rescind the provisions of this section, except in the case of repeal by charter enactment under RSA 49-D. Only votes in the affirmative or negative shall be included in the calculation of the 3/5 majority.

Source. 2011, 234:6, eff. July 5, 2011.

### **§ 32:6 Appropriations Only at Annual or Special Meeting.**

All appropriations in municipalities subject to this chapter shall be made by vote of the legislative body of the municipality at an annual or special meeting. No such meeting shall appropriate any money for any purpose unless that purpose appears in the budget or in a special warrant article, provided, however, that the legislative body may vote to appropriate more than, or less than, the amount recommended for such purpose in the budget or warrant, except as provided in RSA 32:18, unless the municipality has voted to override the 10 percent limitation as provided in RSA 32:18-a.

Source. 1993, 332:1, eff. Aug. 28, 1993. 2000, 193:2, eff. July 29, 2000.

### **§ 32:6-a Continuation of Grant-Funded Programs.**

[Repealed by 2004, 232:1, eff. June 11, 2004.]

### **§ 32:7 Lapse of Appropriations.**

Annual meeting appropriations shall cover anticipated expenditures for one fiscal year. All appropriations shall lapse at the end of the fiscal year and any unexpended portion thereof shall not be expended without further appropriation, unless:

I. The amount has, prior to the end of that fiscal year, become encumbered by a legally-enforceable obligation, created by contract or otherwise, to any person for the expenditure of that amount; or

II. The amount is legally placed in any nonlapsing fund properly created pursuant to statute, including but not limited to a capital reserve fund under RSA 35, or a town-created trust fund under RSA 31:19-a; or

III. The amount is to be raised, in whole or in part, through the issuance of bonds or notes pursuant to RSA 33, in which case the appropriation, unless rescinded, shall not lapse until the fulfillment of the purpose or completion of the project being financed by the bonds or notes; or

IV. The amount is appropriated from moneys anticipated to be received from a state, federal or other governmental or private grant, in which case the appropriation shall remain

nonlapsing for as long as the money remains available under the rules or practice of the granting entity; or

V. The amount is appropriated under a special warrant article, in which case the local governing body may, at any properly noticed meeting held prior to the end of the fiscal year for which the appropriation is made, vote to treat that appropriation as encumbered for a maximum of one additional fiscal year; or

VI. The amount is appropriated under a special warrant article and is explicitly designated in the article and by vote of the meeting as nonlapsing, in which case the meeting shall designate the time at which the appropriation shall lapse, which in no case shall be later than 5 years after the end of the fiscal year for which the appropriation is made.

Source. 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:7-a Appropriations for Capital Projects. –**

In addition to any other appropriation authority, and notwithstanding any other provisions of law, at any annual meeting the legislative body may, by the affirmative vote of 2/3 of those present and voting, or by the affirmative vote of 3/5 of those voting on the question in a town or district that has adopted the official ballot referendum form of meeting, appropriate funds for a term beyond one fiscal year, but not to exceed 5 fiscal years, as follows:

I. The appropriation shall be only for an identified project, as described in the article authorizing the appropriation, for which it would be lawful to issue a bond or note under RSA 33:3 or RSA 33:3-c.

II. The article authorizing the appropriation shall state the term of years of the appropriation, the total amount of the appropriation, and the amount to be appropriated in each year of the term.

III. For each year after the first year, the amount designated for that year as provided in paragraph II shall be deemed appropriated without further vote by the legislative body, unless the appropriation is rescinded as provided in paragraph VI. In a town or district that has adopted the official ballot referendum form of meeting, the amount designated for each year shall be included in the default budget for that year.

IV. If the amount appropriated for any year is not spent during the year, the unexpended amount shall not lapse, but shall be available for expenditure in a subsequent year during the term; provided that all unexpended amounts shall lapse at the end of the term.

V. The approval of an appropriation under this section shall not constitute the establishment of a capital reserve fund, and any amounts appropriated shall not be deposited into such a fund.



VI. Prior to the expiration of the term, the legislative body may, at any annual meeting, rescind the appropriation by an affirmative vote of a majority of those voting on the question. Upon rescission, any unexpended amount shall lapse immediately.

**Source.** 2013, 109:2, eff. Aug. 23, 2013.

**§ 32:8 Limitation on Expenditures.**

No board of selectmen, school board, village district commissioners or any other officer, employee, or agency of the municipality acting as such shall pay or agree to pay any money, or incur any liability involving the expenditure of any money, for any purpose in excess of the amount appropriated by the legislative body for that purpose, or for any purpose for which no appropriation has been made, except as provided in RSA 32:9-11.

**Source.** 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:9 Exception.**

Money may be spent to pay a judgment against the town or district, without an appropriation.

**Source.** 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:10 Transfer of Appropriations.**

I. If changes arise during the year following the annual meeting that make it necessary to expend more than the amount appropriated for a specific purpose, the governing body may transfer to that appropriation an unexpended balance remaining in some other appropriation, provided, however, that:

(a) The total amount spent shall not exceed the total amount appropriated at the town or district meeting.

(b) Records shall be kept by the governing body, such that the budget committee, if any, or any citizen requesting such records pursuant to RSA 91-A:4, may ascertain the purposes of appropriations to which, and from which, amounts have been transferred; provided, however, that neither the budget committee nor other citizens shall have any authority to dispute or challenge the discretion of the governing body in making such transfers.

(c) A statement comparing all legislative body appropriations against all expenditures shall be deemed adequate for purposes of the records required by subparagraph (b), so long as every expenditure has been properly authorized and properly classified and entered and any expenditures exceeding the original legislative appropriations are offset by unexpended balances remaining in other appropriations, in which case the governing body shall not be required to designate the specific source of each transfer.

(d) Any amount appropriated at the meeting under a special warrant article may be used only for the purpose specified in that article and shall not be transferred.

(e) The town or district meeting may vote separately on individual purposes of appropriation contained within any warrant article or budget, but such a separate vote shall not affect the governing body's legal authority to transfer appropriations, provided, however, that if the meeting deletes a purpose, or reduces the amount appropriated for that purpose to zero or does not approve an appropriation contained in a separate article, that purpose or article shall be deemed one for which no appropriation is made, and no amount shall be transferred to or expended for such purpose.

II. As used in RSA 32:10, I(a)-(d), concerning transfers of appropriations and records thereof, "purpose" refers, in addition to its meaning in RSA 32:3, V, to individual line items in whatever detailed budget or chart of accounts is regularly used by the municipality. The general wording of a vote adopting a budget or portion of a budget shall not be considered a "purpose" to which an amount may be transferred. The definition of "purpose" as used in RSA 32:10, I(e) shall be the definition of "purpose" under RSA 32:3, V.

**Source.** 1993, 332:1, eff. Aug. 28, 1993. 1996, 214:4, eff. Aug. 9, 1996. 2004, 113:1, eff. July 16, 2004.

### **§ 32:11 Emergency Expenditures and Overexpenditures.**

When an unusual circumstance arises during the year which makes it necessary to expend money in excess of an appropriation which may result in an overexpenditure of the total amount appropriated for all purposes at the meeting or when no appropriation has been made, the selectmen or village district commissioners, upon application to the commissioner of revenue administration or the school board upon application to the commissioner of education, may be given authority to make such expenditure, provided that:

I. Such application shall be made prior to the making of such expenditure. No such authority shall be granted until a majority of the budget committee, if any, has approved the application in writing. If there is no budget committee, the governing body shall hold a public hearing on the request, with notice as provided in RSA 91-A:2.

II. The commissioner of revenue administration or the commissioner of education may accept and approve an application after an expenditure if caused by a sudden or unexpected emergency, in which case paragraph I shall not apply.

III. Neither the commissioner of revenue administration nor the commissioner of education shall approve such an expenditure unless the governing body designates the source of revenue to be used. Neither commissioner shall have the authority to increase the town or district's tax rate in order to fund such an expenditure.

IV. When applying to the commissioner of education for such authority, the school board shall send a copy of such application to the department of revenue administration. The commissioner of education, when granting authority to the school board, shall notify, in writing, the commissioner of revenue administration of any and all authorizations given to school boards for emergency expenditures or overexpenditures, and the revenue source for funding such expenditures.

V. Notwithstanding paragraphs I through IV, if the legislative body has by warrant article established a contingency fund in the annual budget for the purpose of unanticipated expenses, the board of selectmen may expend funds from such account to meet the costs of such expenses.

**Source.** 1993, 332:1, eff. Aug. 28, 1993. 1996, 214:5, eff. Aug. 9, 1996. 1999, 140:1, eff. Aug. 24, 1999. 2013, 115:1, eff. Aug. 24, 2013

**§ 32:11-a Actual Expenditures for Special Education Programs and Services.**

Each school district shall provide in its annual report an accounting of actual expenditures by the district for special education programs and services for the previous 2 fiscal years. Such accounting shall include offsetting revenues from all sources, including but not limited to, reimbursements from state funds, federal funds, or medicaid funds, private or other health insurance coverage, transferred special education moneys received from another school district, and any other special education resources received by the district.

Source. 1999, 180:1, eff. Aug. 30, 1999.

**§ 32:12 Penalty.**

Any person or persons violating the provisions of this subdivision shall be subject to removal from office on proper petition brought before the superior court. Such petition shall take precedence over other actions pending in the court and shall be heard and decided as speedily as possible.

Source. 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:13 Contracts; Expenditures Prior to Meeting.**

I. This subdivision shall not be construed to imply that a local legislative body, through its actions on appropriations, has the authority to nullify a prior contractual obligation of the municipality, when such obligation is not contingent upon such appropriations and is otherwise valid under the New Hampshire law of municipal contracts, or to nullify any other binding state or federal legal obligation which supersedes the authority of the local legislative body.

II. This subdivision shall not be construed to affect the authority of the local governing body, in towns with a March annual meeting and a January through December fiscal year, to make expenditures between January 1 and the date a budget is adopted which are reasonable in light of prior year's appropriations and expenditures for the same purposes during the same time period.

Source. 1993, 332:1, eff. Aug. 28, 1993. 1997, 318:2, eff. Aug. 22, 1997. 2001, 71:3, eff. July 1, 2001.

**§ 32:14 Adoption.**

I. This subdivision may be adopted:

(a) By any town with a town meeting form of government, including those with a budgetary town meeting, official ballot town meeting, or representative town meeting pursuant to RSA 49-D:3, II, II-a, and III, or by a town with an official ballot town council form of government under which part or all of the annual town operating budget is voted upon by official ballot;

(b) By a cooperative school district, in accordance with RSA 195:12-a;

(c) By any village district, or district created under RSA 53-A or 53-B, which adopts its budget at an annual meeting of its voters, and which is located in more than one municipality; or

(d) By any school district or village district which adopts its budget at an annual meeting of its voters, but which lies wholly within a municipality that lacks authority to adopt this subdivision.

II. This subdivision may be adopted by a majority vote of those present and voting, under an article in the warrant for the annual meeting, inserted by the governing body or by petition.

III. Voting shall be by ballot, but the question shall not be placed on the official ballot used to elect officers. Polls shall remain open and ballots shall be accepted by the moderator for a period of not less than one hour following the completion of discussion on the question.

IV. If the vote is favorable, the town or district shall at that same meeting vote, by ballot or other means, determine the number of members-at-large, as provided in RSA 32:15, I, and whether they shall be elected or appointed by the moderator.

V. A town or district which has adopted this subdivision may rescind its adoption in the manner described in paragraphs II and III.

Source. 1993, 332:1, eff. Aug. 28, 1993. 2008, 243:3, eff. Aug. 23, 2008.

**§ 32:15 Budget Committee Membership.**

I. The budget committee shall consist of:

(a) Three to 12 members-at-large, who may be either elected or appointed by the moderator, as the town or district adopting the provisions of this subdivision shall by vote determine, who shall serve staggered terms of 3 years; and

(b) One member of the governing body of the municipality and, if the municipality is a town, one member of the school board of each school district wholly within the town and one member of each village district wholly within the town, all of whom shall be appointed by their respective boards to serve for a term of one year and until their successors are qualified. Each such member may be represented by an alternate member designated by the respective board, who shall, when sitting, have the same authority as the regular member.

II. If the meeting decides that members-at-large are to be appointed, the staggering of terms shall begin that same year, with 1/3 of such members chosen to hold office for one year,

1/3 for 2 years, and 1/3 for 3 years, and each year thereafter 1/3 shall be chosen for terms of 3 years and until their successors are appointed and qualified. If the number of members-at-large is not divisible by 3, the division shall be as even as possible over the 3 years. All such appointments shall be made within 30 days after the annual meeting.

III. If the meeting decides members-at-large are to be elected, the meeting shall either elect the initial members for one-year terms by means other than by official ballot, or shall authorize the moderator to appoint members to serve until the next annual meeting, as provided in RSA 669:17. Elections for staggered terms, as described in paragraph II, shall not begin until that next annual meeting, and shall be by official ballot if the municipality has adopted the official ballot system, as set forth in RSA 669.

IV. A town or district which has adopted this subdivision may vote at any subsequent annual meeting to change the number or manner of selection of its members-at-large. No such change shall take effect until the annual meeting following the meeting at which the change was adopted.

V. No selectman, town manager, member of the school board, village district commissioner, full-time employee, or part-time department head of the town, school district or village district or other associated agency shall serve as a member-at-large. Every member-at-large shall be domiciled in the town or district adopting this subdivision and shall cease to hold office immediately upon ceasing to be so domiciled.

VI. One of the members-at-large shall be elected by the budget committee as chair. The committee may elect other officers as it sees fit. A member-at-large shall cease to hold office immediately upon missing 4 consecutive scheduled or announced meetings of which that member received reasonable notice, without being excused by the chair.

VII. In municipalities where members-at-large are appointed, the chair shall notify the moderator immediately upon the occurrence of any vacancy in the membership-at-large, and the vacancy shall be filled by appointment by the moderator within 5 days of such notification, otherwise by the budget committee. In municipalities where members-at-large are elected, vacancies shall be filled by appointment by the budget committee. Persons appointed to fill vacancies shall serve until the next annual meeting at which time a successor shall be elected or appointed to either fill the unexpired term or start a new term, as the case may be.

Source. 1993, 332:1, eff. Aug. 28, 1993. 1998, 141:1, 2, eff. Aug. 7, 1998.

### **§ 32:16 Duties and Authority of the Budget Committee.**

In any town which has adopted the provisions of this subdivision, the budget committee shall have the following duties and responsibilities:

I. To prepare the budget as provided in RSA 32:5, and if authorized under RSA 40:14-b, a default budget under RSA 40:13, IX(b) for submission to each annual or special meeting of the voters of the municipality, and, if the municipality is a town, the budgets of any school district or village district wholly within the town, unless the warrant for such meeting does not propose any appropriation.

II. To confer with the governing body or bodies and with other officers, department heads and other officials, relative to estimated costs, revenues anticipated, and services performed to the extent deemed necessary by the budget committee. It shall be the duty of all such officers and other persons to furnish such pertinent information to the budget committee.

III. To conduct the public hearings required under RSA 32:5, I.

IV. To forward copies of the final budgets to the clerk or clerks, as required by RSA 32:5, VI, and, in addition, to deliver 2 copies of such budgets and recommendations upon special warrant articles to the respective governing body or bodies at least 20 days before the date set for the annual or special meeting, to be posted with the warrant.

Source. 1993, 332:1, eff. Aug. 28, 1993. 2004, 219:4, eff. Aug. 10, 2004.

### **§ 32:17 Duties of Governing Body and Other Officials.**

The governing bodies of municipalities adopting this subdivision, or of districts which are wholly within towns adopting this subdivision, shall review the statements submitted to them under RSA 32:4 and shall submit their own recommendations to the budget committee, together with all information necessary for the preparation of the annual budget, including each purpose for which an appropriation is sought and each item of anticipated revenue, at such time as the budget committee shall fix. In the case of a special meeting calling for the appropriation of money, the governing body shall submit such information not later than 5 days prior to the required public hearing. Department heads and other officers shall submit their departmental statements of estimated expenditures and receipts to the budget committee, if requested.

Source. 1993, 332:1, eff. Aug. 28, 1993.

### **§ 32:18 Limitation of Appropriations.**

In any municipality electing this subdivision, or any district wholly within a town electing this subdivision, the total amount appropriated at any annual meeting shall not exceed by more than 10 percent the total amount recommended by the budget committee for such meeting. In official ballot referendum municipalities, the recommendation of the budget committee made for the first session of the meeting shall be used for determining the 10 percent limitation. These totals shall include appropriations contained in special warrant articles. Money may be raised and appropriated for purposes included in the budget or in the warrant and not recommended by the budget committee, but not to an amount which would increase the total appropriations by more than the 10 percent allowed under this paragraph. The 10 percent increase allowable under this paragraph shall be computed on the total amount recommended by the budget committee less that part of any appropriation item which constitutes fixed charges. Fixed charges shall include appropriations for:

I. Bonds, and all interest and principal payments thereon.

II. Notes, except tax anticipation notes, and all interest and principal payments thereon.

III. Mandatory assessments imposed on towns by the county, state or federal governments.

Source. 1993, 332:1, eff. Aug. 28, 1993. 2004, 68:2, eff. July 6, 2004.

**§ 32:18-a Legislative Body Override of Limitation of Appropriations.**

I. Notwithstanding any other provision of law, in any municipality electing this subdivision, or any district wholly within a town electing this subdivision, if a bond request is not recommended in its entirety by the budget committee, the governing body of such municipality, after a majority vote by the governing body of the municipality in favor of the bond request at a duly posted meeting, shall place the bond request on the warrant.

II. The legislative body of any municipality described in RSA 32:18-a, I, may approve a bond request despite the 10 percent limitation provided in RSA 32:18 in the following manner:

(a) The governing body shall place the following statement at the beginning of the warrant article for such bond request: "Passage of this article shall override the 10 percent limitation imposed on this appropriation due to the non-recommendation of the budget committee." Immediately below the bond request on the warrant shall be displayed (1) the recommendation of the governing body and (2) the recommendation of the budget committee, as included in the budget forms for the annual meeting pursuant to RSA 32:5, IV.

(b) If those voting "Yes" on the bond request satisfy the requirements of RSA 33:8, the bond request is thereby approved.

III. If the bond request is approved pursuant to RSA 32:18-a, the governing body of such municipality shall forward a copy of the minutes of the duly posted meeting described in RSA 32:18-a, I to the commissioner of the department of revenue administration.

Source. 2000, 193:1, eff. July 29, 2000

**§ 32:19 Collective Bargaining Agreements.**

Whenever items or portions of items in a proposed budget constitute appropriations, the purpose of which is to implement cost items of a collective bargaining agreement negotiated pursuant to RSA 273-A, either previously ratified or concurrently being submitted for ratification by the legislative body, or the purpose of which is to implement the recommendations of a neutral party in the case of a dispute, as provided in RSA 273-A:12, such items shall be submitted to the budget committee and considered in its budget preparation. Such appropriations shall be submitted to the legislative body and shall include a statement of the governing body's recommendation and a separate statement of the budget committee's recommendation. If such appropriations were not recommended by the budget committee, then such appropriations shall be exempt from the 10 percent limitation set forth in RSA 32:18. The failure of the budget committee to recommend any portion of such appropriations shall not be deemed an unfair labor practice under RSA 273-A.

Source. 1993, 332:1, eff. Aug. 28, 1993. 2001, 71:4, eff. July 1, 2001.

**§ 32:19-a Presentation of Negotiated Cost Items at the Annual Meeting.**

Cost items, as defined under RSA 273-A:1, IV, shall be presented to the annual town or district meeting in accordance with the procedures established under RSA 32:5. For submission to the legislative body of the annual meeting, cost items must be finalized by the date prescribed in RSA 39:3 for towns and by the date prescribed in RSA 197:6 for school districts. Cost items not negotiated in time to meet these dates may be submitted to the legislative body pursuant to the provisions of RSA 31:5 for towns and RSA 197:3 for school districts.

Source. 1996, 214:6, eff. Aug. 9, 1996.

**§ 32:20 At Special Meetings.**

So long as the provisions of this subdivision remain in force in any municipality, no appropriation shall be made at any special meeting for any purpose not approved by the budget committee, unless it is within the allowable 10 percent increase if RSA 32:18 has been adopted, except as provided in RSA 32:19 or 32:18-a.

Source. 1993, 332:1, eff. Aug. 28, 1993. 2000, 193:3, eff. July 29, 2000

**§ 32:21 Exceptions.**

In cases where the town or a district wholly within the town has been ordered by the department of environmental services, under the provisions of RSA 147, 485 or 485-A, to install, enlarge or improve waterworks or to install, enlarge or improve sewerage, sewage, or waste treatment facilities, the 10 percent limitation of RSA 32:18 and 20, shall not apply.

Source. 1993, 332:1, eff. Aug. 28, 1993. 1996, 228:108, eff. July 1, 1996.

**§ 32:22 Review of Expenditures.**

Upon request by the budget committee, the governing body of the town or district, or the town manager or other administrative official, shall forthwith submit to the budget committee a comparative statement of all appropriations and all expenditures by them made in such detail as the budget committee may require. The budget committee shall meet periodically to review such statements. The provisions of this section shall not be construed to mean that the budget committee, or any member of the committee, shall have any authority to dispute or challenge the discretion of other officials over current town or district expenditures, except as provided in RSA 32:23.

Source. 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:23 Initiation of Removal Proceedings.**

Upon receipt of the reports provided for by RSA 32:22, the budget committee shall examine the same promptly, and if it shall be found that the governing body or town manager have failed to comply with the provisions of this chapter concerning expenditures, a majority of



the committee, at the expense of the municipality, may petition the superior court for removal as provided in RSA 32:12.

Source. 1993, 332:1, eff. Aug. 28, 1993.

**§ 32:24 Other Committees.**

Nothing in this subdivision shall prevent a municipality or school administrative unit from establishing advisory budget or finance committees, with such duties and powers as the municipality or school administrative unit sees fit, but no such committee's recommendations shall have any limiting effect on appropriations, as set forth in RSA 32:18, unless all the procedures in this subdivision are followed.

Source. 1993, 332:1, eff. Aug. 28, 1993. 1996, 98:1, eff. July 1, 1996.

**§ 32:25 Biennial Budget; Authorization.**

Any city, town, unincorporated town, unorganized place, school district, village district, or county may budget receipts and expenditures, raise and appropriate revenues, and assess taxes on a biennial budget basis consisting of one distinct 24-month fiscal year or 2 distinct 12-month fiscal years. The governing body may allow for the carry over of funds from the first fiscal year of the biennium to the second.

Source. 1998, 54:1, eff. April 1, 1998. 2006, 148:1, eff. July 21, 2006.

**§ 32:26 Procedure for Adoption.**

Any city, town, unincorporated town, unorganized place, school district, village district, or county may adopt the provisions of RSA 32:25 relative to a biennial budget in the normal manner used in the political subdivision for acts of the local legislative body.

Source. 1998, 54:1, eff. April 1, 1998.

**RSA CHAPTER 33-A, DISPOSITION OF MUNICIPAL RECORDS**

(selected sections only)

**§ 33-A:3-a Disposition and Retention Schedule.** – The municipal records identified below shall be retained, at a minimum, as follows:

\* \* \*

VII. Annual reports, town warrants, meeting and deliberative session minutes in towns that have adopted official ballot voting; permanently.

VIII. Archives: permanently.

\* \* \*

X. Bank deposit slips and statements: 6 years.

\* \* \*

XII. Bonds and continuation certificates: expiration of bond plus 2 years.

XIII. Budget committee-drafts: until superseded.

XIV. Budgets: permanently.

\* \* \*

XVIII. Capital projects and fixed assets that require accountability after completion: life of project or purchase.

XIX. Cash receipt and disbursement book: 6 years after last entry, or until audited.

XX. Checks: 6 years.

\* \* \*

XXIII. Contracts-completed awards, including request for purchase, bids, and awards: life of project or purchase.

XXIV. Contracts-unsuccessful bids: completion of project plus one year.

XXV. Correspondence by and to municipality-administrative records: minimum of one year.

XXVI. Correspondence by and to municipality-policy and program records: follow retention requirement for the record to which it refers.

XXVII. Correspondence by and to municipality-transitory: retain as needed for reference.

\* \* \*

XXX. Deed grantee/grantor listing from registry, or copies of deeds: discard after being updated and replaced with a new document.

\* \* \*

XLIII. Federal form 1099s and W-2s: 7 years.

XLIV. Federal form 941: 7 years.

XLV. Federal form W-1: 4 years.

\* \* \*

XLVII. Grants, supporting documentation: follow grantor's requirements.

XLVIII. Grievances: expiration of appeal period.

\* \* \*

XLIX. Health-complaints: expiration of appeal period.

\* \* \*

LIV. Insurance policies: permanently.

LV. Intent to cut trees or bushes: 3 years.

LVI. Intergovernmental agreements: end of agreement plus 3 years.

LVII. Investigations-fire: permanently.

LVIII. Invoice, assessors: permanently.

LIX. Invoices and bills: until audited plus one year.

LX. Job applications-successful: retirement or termination plus 50 years.

LXI. Job applications-unsuccessful: current year plus 3 years.

LXII. Labor-public employees labor relations board actions and decisions: permanently.

LXIII. Labor union negotiations: permanently or until contract is replaced with a new contract.

LXIV. Ledger and journal entry records: until audited plus one year.

LXV. Legal actions against the municipality: permanently.

LXVI. Library:

(a) Registration cards: current year plus one year.

(b) User records: not retained; confidential pursuant to RSA 201-D:11.

\* \* \*

LXXX. Meeting minutes, tape recordings: keep until written record is approved at meeting. As soon as minutes are approved, either reuse the tape or dispose of the tape.

LXXXI. Minutes of boards and committees: permanently.

LXXXII. Minutes of town meeting/council: permanently.

LXXXIII. Minutes, selectmen's: permanently.

\* \* \*

LXXXIX. Notes, bonds, and municipal bond coupons-cancelled: until paid and audited plus one year.

XC. Notes, bonds, and municipal bond coupon register: permanently.

\* \* \*

XCIII. Payrolls: until audited plus one year.

\* \* \*

XCVI. Personnel files: retirement or termination plus 50 years.

\* \* \*

CXIV. Property tax exemption applications: transfer of property plus one year.

CXV. Records management forms for transfer of records to storage: permanently.

\* \* \*

CXXXVII. Time cards: 4 years.

CXXXVIII. Trust fund minutes, quarterly reports, and bank statements: permanently.

\* \* \*

CXLII. Vouchers and treasurers receipts: until audited plus one year.

**Source.** 2005, 187:3, eff. Aug. 29, 2005. 2006, 119:2-5, eff. May 12, 2006. 2010, 172:1-3, eff. Aug. 16, 2010; 191:1, eff. Aug. 20, 2010. 2012, 113:1, eff. May 31, 2012; 284:13, eff. Sept. 1, 2015. 2014, 319:1, eff. Sept. 30, 2014.

**RSA CHAPTER 292-B UNIFORM PRUDENT MANAGEMENT OF  
INSTITUTIONAL FUNDS ACT**

(Selected Section Only)

**§ 292-B:2. Definitions.**

V. "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(a) Program-related assets;

(b) A fund held for an institution by a trustee that is not an institution;

(c) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund; or

(d) A fund held by a town or other municipality under RSA 31:19, RSA 202-A:23, or a fund created by a town or other municipality under RSA 31:19-a.

VI. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

VII. "Program-related asset" means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

VIII. "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

**Source.** 2008, 75:1, eff. July 1, 2008. (Emphasis added)

***WHAT DOES THIS MEAN?***

**THE CAPITAL GAINS ON RESTRICTED TRUST FUND PRINCIPAL MAY NOT BE  
EXPENDED BY THE TRUSTEES.**

## **RSA CHAPTER 34, CAPITAL RESERVE FUNDS FOR CITIES**

### **§ 34:1. Establishment of Reserves Authorized.**

Any city may raise and appropriate money as provided by RSA 34:2, from any source other than money given to the city for charitable purposes, for the establishment of a capital reserve fund for the financing of all or part of the cost of:

- I. The construction, reconstruction, or acquisition of a specific capital improvement, or the acquisition of a specific item or of specific items of equipment;
- II. The construction, reconstruction, or acquisition of a type of capital improvement or the acquisition of a type of equipment;
- III. A reappraisal by appraisers of the department of revenue administration or such other appraisers, appraisal firms or corporations approved by the commissioner of revenue administration, of the real estate in such city for tax assessment purposes;
- IV. The acquisition of land;
- V. The acquisition of a tax map of such city;
- VI. Municipal and regional transportation improvement projects including engineering, right-of-way acquisition and construction costs of transportation facilities, and for operating and capital costs for public transportation; or
- VII. The repayment of bonded debt issued for the purpose specified in the fund, in conformance with existing Internal Revenue Service rules.

Source. 1949, 181:1. RSA 34:1. 1973, 51:1. 1977, 588:45. 1985, 285:1, eff. Aug. 10, 1985. 1998, 4:2, eff. May 17, 1998. 2000, 224:2, eff. July 31, 2000. 2007, 178:1, eff. Aug. 17, 2007.

### **§ 34:1-a. Non-Capital Reserve Funds Authorized.**

Any city may establish a reserve fund for the maintenance and operation of a specific public facility or type of facility, a specific item or type of equipment, or for any other distinctly-stated, specific public purpose that is not foreign to its institution or incompatible with the objects of its organization. Such funds shall be subject to all provisions and limitations of this chapter as are applicable to capital reserve funds. The legal validity of such a fund properly established shall not be affected by its designation as a "trust," "reserve," "capital reserve," or any other designation.

Source. 1995, 20:4, eff. June 11, 1995.

### **§ 34:2. Hearing.**

The authority granted by RSA 34:1 shall be exercised by the city council only after a public hearing on the annual budget as required by RSA 44:10, and by the adoption of a capital

improvement budget and program. The public notice of said hearing shall include a statement distinctly stating the purposes for which such reserve is to be established.

Source. 1949, 181:2, eff. May 3, 1949.

**§ 34:3. Payments into Fund.**

I. There may be paid into any such capital reserve fund such amounts as may from time to time be raised and appropriated therefor, from any source other than money given to the city for charitable purposes, within the limits as provided in RSA 34:4.

II. The city council may also by a favorable vote of 3/4 of its members, transfer to such fund after a public hearing with notice as provided in RSA 34:2, not more than 1/2 of its unencumbered surplus funds remaining on hand at the end of the fiscal year, within the limits as provided in RSA 34:4.

Source. 1949, 181:3, eff. May 3, 1949. RSA 34:3. 2000, 224:3, eff. July 31, 2000.

**§ 34:4. Limitations on Appropriations.**

No city shall raise and appropriate or transfer from any of its unencumbered surplus funds in any one year for such reserves a total amount in excess of 1/4 of one percent of the last assessed valuation of the city.

Source. 1949, 181:4, eff. May 3, 1949.

**§ 34:5. Investment.**

The moneys in such fund shall be kept in a separate account and not intermingled with the other funds of the city. Said capital reserve fund shall be invested only by deposit in some savings bank or in the savings department of a national bank or trust company, or in the shares of a cooperative bank, building and loan association, or federal savings and loan association, in this state or in bonds or notes of this state, in such stocks and bonds as are legal for investment by New Hampshire savings banks, or in participation units in the public deposit investment pool established pursuant to RSA 383:22, or in obligations with principal and interest fully guaranteed by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a-1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. When so invested in good faith the trustees hereinafter named shall not be liable for the loss of such moneys. Any interest earned or capital gains realized on the moneys so invested shall accrue to and become a part of the fund. Deposits in banks shall be made in the name of the city, and it shall appear upon the book thereof that the same is a capital reserve fund. Any person who directly or indirectly receives any such funds or moneys for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment, an option to have such funds secured by collateral having a value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the city. Only securities defined by the bank



commissioner in rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. The trustees shall formally adopt an investment policy for all investments made by them or by their agents for any trust funds in their custody in conformance with the provisions of applicable statutes. The trustees shall review and confirm the investment policy at least annually. A copy of the investment policy shall be filed with the attorney general.

Source. 1949, 181:5. RSA 34:5. 1965, 174:1. 1991, 268:6; 383:3. 1995, 20:5, eff. June 11, 1995. 1996, 209:8, eff. Aug. 9, 1996. 2007, 164:2, eff. Aug. 17, 2007.

#### **§ 34:6. Trustees of Funds.**

The trustees of trust funds of the city shall have custody of all capital reserves. Said trustees shall give bond in such amount and in such form as the city council or board of aldermen shall prescribe, and any trustee who shall make payment of income or principal from any such capital reserve fund before the approval of his bond in writing by the city council or board of aldermen shall be personally liable to the city for any loss resulting from such payment, to be recovered by the city at the suit of any citizen. The expenses of said trustees in said capacity and the expense of their bonds shall be charged as incidental city charges.

Source. 1949, 181:6, eff. May 3, 1949.

#### **§ 34:7. Payments from Surplus.**

Whenever the city councils have voted in accordance with RSA 34:3 to transfer any accumulated surplus to the capital reserve fund, the city clerk shall forward immediately to the city treasurer a certified copy of said vote; and the city treasurer on receipt of said copy shall transfer immediately to the trustees of trust funds of said city the amount specified in said vote.

Source. 1949, 181:7, eff. May 3, 1949.

#### **§ 34:8. Transfer of Sums Appropriated.**

Whenever the city councils legally vote to raise and appropriate any sum for the capital reserve fund, the same duties shall devolve upon the city clerk and city treasurer, as specified in RSA 34:7, except that said sum must be transferred on or before the end of the fiscal year in which said vote is made.

Source. 1949, 181:8, eff. May 3, 1949.

#### **§ 34:9. Penalty for Failure to Perform.**

Any of the above officers who shall fail to perform the duties above set forth shall be guilty of a violation for every week said failure shall continue.

Source. 1949, 181:9. RSA 34:9. 1973, 531:8, eff. at 11:59 p.m., Oct. 31, 1973.

*Cross References:*

Classification of crimes, see RSA 625:9.

**§ 34:10. Expenditures.**

I. The trustees of trust funds holding said capital reserve funds in trust, as hereinbefore provided, shall hold the same until such time as the city councils shall name agents of the city to carry out the objects designated by the city councils as prescribed by RSA 34:2. Expenditures from said capital reserve funds shall be made only for or in connection with the purposes for which said fund was established, or as amended as provided by RSA 34:11.

II. Notwithstanding the prohibition of debt retirement fund establishment in RSA 33:2, capital reserve funds may be used for multiple payments under a financing agreement for the purpose for which the capital reserve was established. If the financing agreement is a lease purchase agreement, the lease purchase agreement may not contain an "escape clause" or a "non-appropriation clause."

Source. 1949, 181:10, eff. May 3, 1949. 2007, 178:2, eff. Aug. 17, 2007.

**§ 34:11. Change of Purpose.**

After the purpose for which a capital reserve fund is established has been determined, no change shall be made in the purpose for which said fund may be expended unless and until such change has been authorized by a favorable vote of 3/4 of all members of the city councils or board of aldermen, for a specific capital improvement or specific item or type of equipment and such change shall be made only after a public hearing held pursuant to notice as provided in RSA 34:2.

Source. 1949, 181:11, eff. May 3, 1949.

**§ 34:11-a. Discontinuing Fund.**

The authority granted by RSA 34:1 may be discontinued by the city council only after a public hearing. The public notice of such hearing shall include a statement distinctly stating the reasons for which such reserve is to be discontinued. If such fund is discontinued, the trustees of trust funds holding the account for such fund shall pay all the moneys in such fund if any, to the city treasury as applicable.

Source. 1995, 137:2, eff. May 24, 1995.

**§ 34:12. Audit; Records.**

The accounts of the trustees of trust funds holding the capital reserve funds shall be audited annually by the city auditor, the securities shall be exhibited to said auditor, and said auditor shall certify the facts found by the audit and the list of all securities held. Said trustees holding said funds shall keep a record of all such capital reserve funds in a record book, which shall be open to public inspection.

Source. 1949, 181:12, eff. May 3, 1949.

**§ 34:13. Disbursements.**

No person holding in custody such capital reserve fund shall make any payment of income or principal or authorize the same to be done except in accordance with the provisions hereof. Whoever violates the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

Source. 1949, 181:13. RSA 34:13. 1973, 529:4, eff. at 11:59 p.m., Oct. 31, 1973.

**§ 34:14. Definition.**

Where the words "trustees of trust funds" are used herein they shall be construed to mean the board in any city which is charged, by the city charter, with duties of town trustees of trust funds.

Source. 1949, 181:14, eff. May 3, 1949.

**§ 34:15. Application of Chapter.**

The provisions of any city charter inconsistent with the provisions hereof are hereby repealed to the extent of such inconsistency.

Source. 1949, 181:15, eff. May 3, 1949.

**§ 34:16 Professional Banking or Brokerage Assistance. –**

I. Any trustee or trustees of trust funds having custody of capital reserve funds authorized by this chapter may contract with the trust department or departments of a bank, a brokerage firm, a portfolio management department, or investment advisor in the same manner and for the same purposes as described in RSA 31:38-a, III. They may also place securities in the nominee name of a trust department or departments of a bank a brokerage firm, a portfolio management department, or investment advisor to facilitate transfers for such securities. Capital reserve fund records maintained by any bank, brokerage firm, portfolio management department, or investment advisor shall be available at all times for examination by local auditors, by independent accountants or auditors retained by a municipality, or by the auditors of the department of revenue administration; and such records shall be municipal records and property. In employing such trust departments of banks, brokerage firms, portfolio management departments, or investment advisors, the trustees may enter into contracts or agreements delegating the management of such capital reserve funds to those departments or brokerage firms subject to investment guidelines adopted by the trustees under applicable statutes and subject to at least quarterly review and approval of such management by the trustees. For purposes of this section, the terms "bank," "brokerage firm," "portfolio management department," and "investment advisor" shall have the definitions set forth in RSA 31:38-a.

II. The governing body may authorize the trustees of trust funds to charge any expenses incurred pursuant to paragraph I against the capital reserve funds involved, and such authority

shall remain in effect until rescinded by the governing body. No vote by the governing body to rescind such authority shall occur within 5 years of the original adoption of such article. Any professional banking and brokerage fees incurred shall be reported in the annual report of the trustees of trust funds as expenditures out of capital reserve funds.

**Source.** 2014, 32:4, eff. July 26, 2014.

**RSA CHAPTER 35, CAPITAL RESERVE FUNDS OF COUNTIES,  
TOWNS, DISTRICTS, AND WATER DEPARTMENTS**

**§ 35:1. Establishment of Reserves Authorized.**

Any town, school district, village district, or county, as provided by RSA 35:3 may raise and appropriate money for the establishment of a capital reserve fund for the financing of all or part of the cost of:

I. The construction, reconstruction or acquisition of a specific capital improvement, or the acquisition of a specific item or specific items of equipment; or

II. The construction, reconstruction, or acquisition of a type of capital improvement or the acquisition of a type of equipment; or

III. A reappraisal by appraisers of the department of revenue administration or such other appraisers, appraisal firms or corporations approved by the commissioner of revenue administration, of the real estate in such town for tax assessment purposes; or

III-a. The acquisition of land; or

IV. The acquisition of a tax map of said town; or

V. Extraordinary legal fees and expenses related to present or foreseeable litigation involving the town or its officers and employees; or

VI. Municipal and regional transportation improvement projects including engineering, right-of-way acquisition and construction costs of transportation facilities, and for operating and capital costs for public transportation.

Source. 1943, 160:1. RSA 35:1. 1973, 51:2. 1983, 42:2. 1985, 285:2, eff. Aug. 10, 1985. 1998, 4:3, eff. May 17, 1998.

**§ 35:1-a. Reserve Fund in Anticipation of New Fiscal Year.**

Any county, city or town may establish a reserve fund in anticipation of the optional fiscal year pursuant to RSA 31:94-a through 94-d.

Source. 1973, 96:1, eff. June 23, 1973.

**§ 35:1-b. Reserve Fund for Education of Persons with Disabilities.**

Any school district may establish a reserve fund under RSA 35:1 to meet the expenses of educating children with disabilities.

Source. 1983, 106:1. 1990, 140:2, III, X, eff. June 18, 1990. 2008, 274:31, eff. July 1, 2008

**§ 35:1-c. Non-Capital Reserve Funds Authorized.**

Any town, school district, county, or village district may establish a reserve fund for the maintenance and operation of a specific public facility or type of facility, a specific item or type of equipment, or for any other distinctly-stated, specific public purpose that is not foreign to its institution or incompatible with the objects of its organization. Such funds shall be subject to all provisions and limitations of this chapter as are applicable to capital reserve funds. The legal validity of such a fund properly established shall not be affected by its designation as a "trust," "reserve," "capital reserve," or any other designation.

Source. 1995, 20:6, eff. June 11, 1995.

**§ 35:2. Custody of School District Reserves.**

Whenever any capital reserve of a school district is established the same shall be held in custody by the trustees of trust funds of the town wherein the school district lies or, in case of school district embracing 2 or more towns, by the trustees of trust funds of that town which the voters of the school district may elect.

Source. 1947, 8:2, eff. Feb. 26, 1947.

**§ 35:3. Meetings.**

Except as provided in RSA 35:7, the authority granted by RSA 35:1 shall be exercised only by a majority vote of the legal voters present and voting at an annual or special meeting in the case of a town, school district, or village district. The warrant for a town, school district, or village district meeting, to consider the establishment or discontinuance of such a reserve, shall include an article distinctly stating the purposes for which such reserve is to be established or was established as appropriate. In the case of a county, the authority granted in RSA 35:1 shall be exercised by a majority vote of the county delegation after a public hearing on the budget as required by RSA 24:23, RSA 24:13-c, IV, or RSA 24:14-a. The public notice of such hearing shall include a statement distinctly stating the purpose for which such reserve is to be established.

Source. 1943, 160:2. RSA 35:3. 1977, 287:2. 1991, 167:1, eff. July 26, 1991.

**§ 35:4. Exception.**

The authority hereby granted shall not be exercised by any city, except as may be necessary in connection with the authority granted by RSA 35:7.

Source. 1943, 160:3, eff. May 5, 1943.

**§ 35:5. Payments into Fund.**

There may be paid into any such capital reserve fund, except as provided in RSA 35:7, such amounts as may from time to time be raised and appropriated therefor, from any source other than money given to the town, district, or county for charitable purposes. Such amounts shall be within the limits as provided in RSA 35:8, and any such town, district or county may also vote to transfer to said fund, under a proper article in the warrant in the case of a town or district, any of its unencumbered surplus funds remaining on hand at the end of any fiscal year.

Source. 1943, 160:4, eff. May 5, 1943. 2000, 224:4, eff. July 31, 2000.

**§ 35:6. Funds Received in Eminent Domain Proceedings.**

Any town, school district, village district or county which may receive funds from the United States or any agency thereof in eminent domain proceedings for the taking of its property or other public facilities or in settlement for such taking or of claims for damages to its property or other public facilities, may vote to use said funds, under a proper article in the warrant in the case of a town, school district or village district or by vote of the county delegation in the case of a county, to establish a capital reserve fund under this chapter. Funds so received shall not be subject to restriction as to investments prescribed in RSA 35:9 and may be invested in the same manner as trust funds under RSA 31:25. Funds so received may, if so voted, be used to retire existing indebtedness as well as for the purposes specified in RSA 35:1. In cases in which the United States or any agency thereof shall acquire a flowage easement in highways or bridges under the jurisdiction of a town, the town, if it votes to establish a capital reserve fund out of the funds received therefor from the United States or any agency thereof, may use such fund not only for capital improvements and capital expenditures as provided in RSA 35:1, but also for the maintenance, repair and reconstruction of the particular highways and bridges in which easements have been acquired or of such highways and bridges as may be provided in substitution therefor.

Source. 1947, 91:1. 1951, 106:1, eff. May 11, 1951.

**§ 35:7. Water Departments.**

Any water works or sewer department of a city or town, organized by general law or special act of the legislature and financed principally by water or sewer rentals, may, by unanimous vote of the body charged with the administration thereof, whether the local governing body, water board, or a board of water or sewer commissioners, establish a capital reserve fund for said department for the purposes as provided in RSA 35:1. Such reserve shall be established only from surplus from water or sewer rentals and no part thereof shall be made from appropriations by said city or town.

Source. 1943, 160:5. 1994, 95:1, eff. July 8, 1994.

**§ 35:8. Limitations on Appropriations.**

No town, school district, or village district shall raise and appropriate in any one year for such reserve an amount in excess of 1/2 of one percent of the last base valuation for debt limit

computed pursuant to RSA 33:4-b of said town or district; no county shall raise and appropriate for such reserve an amount in excess of 1/100 of one percent of the last base valuation for debt limit computed pursuant to RSA 33:4-b for all municipalities included in said county.

Source. 1943, 160:6. 1945, 35:2. RSA 35:8. 1993, 176:6, eff. Aug. 8, 1993.

### **§ 35:9. Investment.**

Each capital reserve fund shall be maintained separately on the books of the town. The assets of such funds may be pooled in order to invest in a broader range of investments to maximize growth and mitigate risk. Said capital reserve funds shall be invested only in deposits in any federally or state-chartered bank or association authorized to engage in a banking business in this state, or in bonds or notes of this state, in such stocks and bonds as are legal for investment by banks and associations chartered by this state to engage in a banking business, or in participation units in the public deposit investment pool established pursuant to RSA 383:22, or in obligations with principal and interest fully guaranteed by the United States government. The obligations may be held directly or in the form of securities of or other interests in any open-end or closed-end management-type investment company or investment trust registered under 15 U.S.C. section 80a-1 et seq., if the portfolio of the investment company or investment trust is limited to such obligations and repurchase agreements fully collateralized by such obligations. When so invested the trustees hereinafter named shall not be liable for the loss thereof. Any interest earned or capital gains realized on the moneys so invested shall accrue to and become a part of the individual funds on a pro rata basis. Deposits in federally or state-chartered banks and associations shall be made in the name of the town, district, or county which holds the same as a reserve, and it shall appear upon the books thereof that the same is a capital reserve fund. Any person who directly or indirectly receives any such capital reserve funds for deposit or for investment in securities of any kind shall, prior to acceptance of such funds, make available at the time of such deposit or investment an option to have such funds secured by collateral having a value at least equal to the amount of such funds. Such collateral shall be segregated for the exclusive benefit of the town, school district, village district, or county depositing or investing such funds. Only securities defined by the bank commissioner as provided by rules adopted pursuant to RSA 386:57 shall be eligible to be pledged as collateral. The trustees shall formally adopt an investment policy for all investments made by them or by their agents for any trust funds in their custody in conformance with the provisions of applicable statutes. The trustees shall review and confirm the investment policy at least annually. A copy of the investment policy shall be filed with the attorney general.

Source. 1943, 160:7. RSA 35:9. 1961, 136:8. 1991, 268:7; 383:4. 1995, 20:7, eff. June 11, 1995. 1996, 209:9, eff. Aug. 9, 1996. 2001, 54:6, eff. Jan. 1, 2002. 2007, 164:3, eff. Aug. 17, 2007. 2010, 52:1, eff. July 17, 2010.

### **§ 35:9-a Professional Banking or Brokerage Assistance. –**

I. Any trustee or trustees of trust funds having custody of capital reserve funds authorized by this chapter may contract with the trust department or departments of a bank, a brokerage firm, a portfolio management department, or investment advisor in the same manner and for the same purposes as described in RSA 31:38-a, III. They may also place securities in the nominee



name of a trust department of a bank, or departments, a brokerage firm, a portfolio management department, or investment advisor, to facilitate transfers for such securities. Capital reserve fund records maintained by any bank, brokerage firm, portfolio management department, or investment advisor shall be available at all times for examination by local auditors, by independent accountants or auditors retained by a municipality, or by the auditors of the department of revenue administration; and such records shall be municipal records and property. In employing such trust departments of banks, brokerage firms, portfolio management departments, or investment advisor, the trustees may enter into contracts or agreements delegating the management of such capital reserve funds to those departments or brokerage firms subject to investment guidelines adopted by the trustees under applicable statutes and subject to at least quarterly review and approval of such management by the trustees. For purposes of this section, the terms "bank," "brokerage firm," "portfolio management department" and "investment advisor" shall have the definitions set forth in RSA 31:38-a.

II. The town meeting may adopt an article authorizing the trustees of trust funds, without further action of the town meeting, to charge any expenses incurred pursuant to paragraph I against the capital reserve funds involved. Such authority shall remain in effect until rescinded by a vote of the town meeting. No vote by the town to rescind such authority shall occur within 5 years of the original adoption of such article. In a town that has a town council, such authority may be granted by the town council and shall remain in effect until rescinded by the town council. No vote by the town council to rescind such authority shall occur within 5 years of the original adoption of such article. Any professional banking and brokerage fees incurred shall be reported in the annual report of the trustees of trust funds as expenditures out of capital reserve funds.

**Source.** 2014, 32:5, eff. July 26, 2014

### **§ 35:10. Trustees of Funds.**

The trustees of trust funds of a town or city shall have custody of any capital reserve of a town, district or water departments therein, the trustees of trust funds as provided in RSA 35:2 shall have custody of such capital reserve of a school district, and the county treasurer of a county shall have custody of any capital reserve of his county. Said trustees or treasurer shall give bond in such amount and in such form as the commissioner of revenue administration shall prescribe, and any such trustee or treasurer who shall make any payment of income or principal from any such capital reserve fund before the approval of his bond in writing by the commissioner of revenue administration shall be personally liable to the town, district, department or county for any loss resulting from such payment, to be recovered for the town, district, department or county at the suit of any citizen. The expenses of said trustees or treasurer in said capacity and the expense of their bonds shall be charged as incidental town, district, department or county charges.

**Source.** 1943, 160:8. RSA 35:10. 1973, 544:8, eff. Sept. 1, 1973.

**§ 35:11. Payments From Surplus.**

Whenever any town shall have voted to transfer any accumulated surplus to the capital reserve fund, the town clerk shall forward to the board of selectmen and to the town treasurer, within 10 days of the adoption of such vote, a certified copy of the same. The selectmen shall then draw an order on the town treasurer for the amount of surplus set forth in said vote. The town treasurer shall on receipt of the order immediately transfer to the trustees of trust funds of the town the amount specified in the order, or in the case of an optional fiscal year town, within 10 days of the determination of surplus following the close of the fiscal year.

Source. 1947, 91:2, par. 8a. RSA 35:11. 1993, 176:7, eff. Aug. 8, 1993.

**§ 35:12. Appropriation.**

Whenever the vote of the town is to appropriate any sum for the capital reserve fund, the same duties shall devolve upon the town clerk, selectmen, and town treasurer, as specified in RSA 35:11, except that the order must be drawn, and the sum transferred on or before December 15 following the vote, or, in the case of an optional fiscal year town, after July 1, but no later than June 15, of the fiscal year for which the sum was appropriated.

Source. 1947, 91:2, par. 8b. RSA 35:12. 1993, 176:8, eff. Aug. 8, 1993. 2000, 224:5, eff. July 31, 2000. 2014, 32:3, eff. July 26, 2014.

**§ 35:13. School or Village District.**

When a capital reserve fund is established by a school or village district, the same duties shall devolve upon the clerk of the school or village district, the members of the school board or the commissioners of the village district, the treasurer of the school district or the treasurer of the village district, as are prescribed in RSA 35:11 and 35:12 for the corresponding town officers.

Source. 1947, 91:2, par. 8c, eff. April 15, 1947.

**§ 35:14. Penalty.**

Any of the above officers failing to perform the duties above set forth, shall be guilty of a violation for every week said failure shall continue.

Source. 1947, 91:2, par. 8d. RSA 35:14. 1973, 531:9, eff. at 11:59 p.m., Oct. 31, 1973.

**§ 35:15. Expenditures.**

I. Persons holding said capital reserve funds in trust, as provided in this chapter, shall hold the same until such time as the town, district or county shall have voted to withdraw funds from such capital reserve fund or shall have named agents of the town, district or county to carry out the objects designated by the town, district or county, in the manner prescribed by RSA 35:3.

II. Expenditures from any fund established for the acquisition of land pursuant to RSA 35:1 shall be made only as authorized:

(a) By a majority vote of the legal voters present and voting at an annual or special meeting, in the case of a town, school district or village district, or by majority vote of the county delegation, in the case of a county, or

(b) By the selectmen, appointed as agents pursuant to RSA 41:14-a, provided that the selectmen shall not have authority to expend any sum in excess of the amount contained in any capital reserve account created for the purchase of land other than any grant moneys which may be received.

III. (a) Notwithstanding the prohibition of debt retirement fund establishment in RSA 33:2, capital reserve funds may be used for multiple payments under a financing agreement for the purpose for which the capital reserve was established. If the financing agreement is a lease/purchase agreement the following shall apply:

(1) The lease/purchase agreement does not contain an "escape clause" or "non-appropriation clause"; and

(2) The lease/purchase agreement has been ratified by the legislative body by a vote by ballot of 2/3 of all the voters present and voting at an annual or special meeting.

(b) If agents have been named according to RSA 35:15, then no further vote is required to disburse funds following the initial vote which ratified the financing agreement.

IV. In the case of a water works or sewer department, as provided in RSA 35:7, the governing body, water board, or the water or sewer commissioners if any, shall determine when expenditures from said reserve shall be made.

V. In all cases, expenditures from a capital reserve fund shall be made only for or in connection with the purposes for which said fund was established or as amended as provided in RSA 35:16

Source. 1943, 160:9. RSA 35:15. 1985, 285:3. 1991, 167:2. 1994, 95:2, eff. July 8, 1994. 1998, 43:1, eff. July 4, 1998. 2001, 187:1, eff. Sept. 3, 2001. 2007, 178:3, eff. Aug. 17, 2007.

### **§ 35:16. Change of Purpose.**

After the purpose for which a capital reserve fund is established has been determined, no change shall be made in the purpose for which said fund may be expended unless and until such change has been authorized by a vote of 2/3 of all the voters present and voting at an annual town or district meeting, in the case of a town or district, or by vote of 2/3 of the entire membership of a county delegation, in case of a county, or by unanimous vote of the water board or commissioners of the water department, in the case of a water works department, as provided in RSA 35:7.

Source. 1943, 160:10, eff. May 5, 1943.

**§ 35:16-a. Discontinuing Fund.**

Any town, school district, village district or county which has established a capital reserve fund pursuant to the provisions of this chapter may, as provided by RSA 35:3, vote to discontinue such capital reserve fund. If such fund is discontinued, the trustees of the trust fund holding the account for said fund shall pay all the monies in such fund to the town, district or county treasury as applicable.

Source. 1977, 287:1, eff. Aug. 26, 1977.

**§ 35:17. Audit; Records.**

The accounts of the persons holding capital reserve funds shall be audited annually by the auditor of the town, in the case of a town, district, or water works department, or by the commissioner of revenue administration, in the case of a county, the securities shall be exhibited to said auditor or commissioner, and said auditor or commissioner shall certify the facts found by the audit and the list of all securities held. Said persons holding said funds shall keep a record of all such capital reserve funds in a record book, which shall be open to the inspection of all persons of their town, district, or county respectively.

Source. 1943, 160:11. RSA 35:17. 1973, 544:8, eff. Sept. 1, 1973.

**§ 35:18. Disbursements.**

No person holding in custody such capital reserve fund shall make any payment of income or principal or authorize the same to be done except in accordance with the provisions hereof. Whoever violates the provisions of this section shall be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person.

Source. 1943, 160:12. RSA 35:18. 1973, 529:5, eff. at 11:59 p.m., Oct. 31, 1973.

## **RSA CHAPTER 202-A, PUBLIC LIBRARIES**

### **§ 202-A:1. Declaration of Policy.**

Mindful that, as the constitution declares, "knowledge and learning, generally diffused through a community" are "essential to the preservation of a free government" the legislature recognizes its duty to encourage the people of New Hampshire to extend their education during and beyond the years of formal education. To this end, it hereby declares that the public library is a valuable supplement to the formal system of free public education and as such deserves adequate financial support from government at all levels.

Source. 1963, 46:1, eff. July 1, 1963.

### **§ 202-A:2. Definitions.**

As used in this chapter the following words shall be construed as follows unless the context clearly requires otherwise:

I. "Public library" shall mean every library which receives regular financial support, at least annually, from public or private sources and which provides regular and currently useful library service to the public without charge. The words may be construed to include reference and circulating libraries, reading rooms and museums regularly open to the public.

II. "Library trustees" shall mean the governing board of a public library.

Source. 1891, 62:3, 4, 5. 1917, 59:1. PL 10:50. RL 15:50. RSA 202:1. 1963, 46:1, eff. July 1, 1963.

### **§ 202-A:3. Establishment.**

Any town may establish a public library by majority vote at any duly warned town meeting. Any town may vote in the same manner to accept a public library which has been provided, in whole or in part, by private donation or bequest and may accept any bequest, devise or donation for the establishment, maintenance and support of such a library. The powers herein granted to a town may be exercised by a city by vote of the city council.

Source. 1963, 46:1, eff. July 1, 1963.

### **§ 202-A:3-a Records and Meetings Subject to Right-to-Know Law.**

A public library established or accepted by a town or city shall be deemed a "public agency," and the library trustees a "public body," for purposes of RSA 91-A, and they shall be subject to all applicable provisions of that chapter; provided, however, that any books, documents, records, or other information maintained by a public library that is exempted or protected from disclosure by other provisions of law shall not be subject to disclosure under RSA 91-A.

Source. 2012, 96:1, eff. July 28, 2012.

**§ 202-A:4. Maintenance.**

Any city or town having a public library shall annually raise and appropriate a sum of money sufficient to provide and maintain adequate public library service therein or to supplement funds otherwise provided.

Source. 1895, 118:1-8. 1917, 59:1. PL 10:51. 1927, 82:2. 1933, 60:1. RL 15:51. RSA 202:2. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:4-a. Cooperatives.**

Any public library may join library cooperatives consisting of public libraries, or of public and other than public libraries including school, college and university, and special libraries. Towns are authorized to raise and appropriate sufficient money for participation in cooperatives.

Source. 1981, 499:4, eff. Aug. 28, 1981.

**§ 202-A:4-b. Contracts for Services.**

Any town may contract with another town or city, or with an institution or other organization, for any library service. If a town meeting votes to enter into such a contract, the town shall raise and appropriate sufficient money to carry out the contract.

Source. 1981, 499:4, eff. Aug. 28, 1981.

**§ 202-A:4-c Trustees' Authority to Accept and Expend Gifts.**

I. Notwithstanding any other provision of law to the contrary, any town at an annual meeting may adopt an article authorizing indefinitely until specific rescission of such authority, the public library trustees to apply for, accept and expend, without further action by the town meeting, unanticipated money from the state, federal or other governmental unit or a private source which becomes available during the fiscal year. The following shall apply:

(a) Such warrant article to be voted on shall read: "Shall the town accept the provisions of RSA 202-A:4-c providing that any town at an annual meeting may adopt an article authorizing indefinitely, until specific rescission of such authority, the public library trustees to apply for, accept and expend, without further action by the town meeting, unanticipated money from a state, federal or other governmental unit or a private source which becomes available during the fiscal year?"

(b) If a majority of voters voting on the question vote in the affirmative, the proposed warrant article shall be in effect in accordance with the terms of the article until such time as the town meeting votes to rescind its vote.

II. Such money shall be used only for legal purposes for which a town may appropriate money.

III. (a) For unanticipated moneys in the amount of \$5,000 or more, the public library trustees shall hold a prior public hearing on the action to be taken. Notice of the time, place, and subject of such hearing shall be published in a newspaper of general circulation in the relevant municipality at least 7 days before the hearing is held.

(b) The public library trustees may establish the amount of unanticipated funds required for notice under this subparagraph, provided such amount is less than \$5,000. For unanticipated moneys in an amount less than \$5,000, the public library trustees shall post notice of the moneys in the agenda, if any, and shall include notice in the minutes of the public library trustees meeting in which such moneys are discussed. The acceptance of unanticipated moneys under this subparagraph shall be made in public session of any regular public library trustees meeting.

IV. Action to be taken under this section shall:

(a) Not require the expenditure of other town funds except those funds lawfully appropriated for the same purpose; and

(b) Be exempt from all provisions of RSA 32, relative to limitations and expenditures of town moneys.

Source. 1991, 31:1. 1993, 176:16, eff. Aug. 8, 1993. 2005, 188:3, eff. Aug. 29, 2005.

#### **§ 202-A:4-d. Acceptance of Personal Property Donated to Libraries.**

I. Any town at an annual meeting may adopt an article authorizing the public library trustees to accept gifts of personal property, other than money, which may be offered to the library for any public purpose, and such authorization shall remain in effect until rescinded by a vote of town meeting.

II. The warrant article may require that, prior to the acceptance of any gift valued at over \$5,000, the public library trustees shall hold a public hearing on the proposed acceptance.

III. No acceptance of any personal property under the authority of this section shall be deemed to bind the town or the library trustees to raise, appropriate, or expend any public funds for the operation, maintenance, repair, or replacement of such personal property.

Source. 1996, 33:1, eff. June 23, 1996.

#### **§ 202-A:5. Status.**

Every public library shall remain forever free to the use of every resident of the town wherein it is located.

Source. 1891, 62:3, 4, 5. 1917, 59:1. PL 10:50. RL 15:50. RSA 202:1. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:6. Library Trustees; Election; Alternates.**

The library trustees shall have the entire custody and management of the public library and of all the property of the town relating thereto, including appropriations held pursuant to RSA 202-A:11, III, but excepting trust funds held by the town. Any town having a public library shall, at a duly warned town meeting, elect a board of library trustees consisting of any odd number of persons which the town may decide to elect. Such trustees shall serve staggered 3-year terms or until their successors are elected and qualified. There may be no more than 3 alternates as provided in RSA 202-A:10.

Source. 1917, 59:1. PL 10:52. RL 15:55. RSA 202:6. 1963, 46:1. 1987, 89:1, eff. July 5, 1987. 2000, 9:2, eff. April 16, 2000.

**§ 202-A:7. Special Provisions.**

In any town where a public library has been acquired by the town, in whole or in part, by donation or bequest containing other conditions or provisions for the election of its trustees or other governing board, which conditions have been agreed to by vote of the town and which conditions do not provide for a representative of the public, a special library trustee, to represent the public, shall be elected by the town for a 3-year term. Said special trustee shall act with the other trustees.

Source. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:8. City Trustees.**

The trustees of a public library in a city shall be elected as provided in the city charter. In case of trustees of a city library acquired by a city in whole or in part, by donation or bequest containing other conditions or provisions for the election or appointment of trustees, which conditions do not provide for a representative of the public on the board, the city council shall elect to said board a public trustee for a 3-year term.

Source. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:9. Eligibility.**

[Repealed 1979, 410:2, XX, eff. July 1, 1979.]

Annotations

Former RSA 202-A:9, which was derived from 1917, 59:1; PL 10:53; RL 15:56; RSA 202:7; 1963, 46:1; and 1973, 72:17, related to eligibility for election as a library trustee. See now RSA 669:6.

**§ 202-A:10. Library Trustees; Vacancies; Alternates.**

Vacancies occurring on any board of library trustees in a town shall be filled as provided in RSA 669:75. A vacancy occurring among the publicly elected members of the board of library



trustees of a city library shall be filled by the city council or other appropriate appointing authority within 2 months of the notice by the remaining members of the board of trustees. The board of library trustees may recommend to the appointing authority names of persons for appointment to vacancies on expired terms. The board of library trustees may recommend to the appointing authority the names of no more than 3 persons who may serve as alternate members on the board when elected members of the board are unable to attend a board meeting. The alternate members shall be appointed to one-year terms.

Source. 1917, 59:1. PL 10:55. RL 15:58. RSA 202:9. 1963, 46:1. 1979, 410:19, eff. July 1, 1979. 2000, 9:3, eff. April 16, 2000.

### **§ 202-A:11. Powers and Duties.**

Except in those cities where other provision has been made by general or special act of the legislature, the library trustees of every public library in the state shall:

I. Adopt bylaws, rules and regulations for its own transaction of business and for the government of the library;

II. Prepare an annual budget indicating what support and maintenance of the free public library will be required out of public funds for submission to the appropriate agency of the municipality. A separate budget request shall be submitted for new construction, capital improvements of existing library property;

III. Expend all moneys raised and appropriated by the town or city for library purposes and shall direct that such moneys be paid over by the town or city treasurer pursuant to a payment schedule as agreed to by the library trustees and the selectmen or city council. All money received from fines and payments for lost or damaged books or for the support of a library in another city or town under contract to furnish library service to such town or city, shall be used for general repairs and upgrading, and for the purchase of books, supplies and income-generating equipment, shall be held in a nonlapsing separate fund and shall be in addition to the appropriation;

IV. Expend income from all trust funds for library purposes for the support and maintenance of the public library in said town or city in accordance with the conditions of each donation or bequest accepted by the town or city;

V. Appoint a librarian who shall not be a trustee and, in consultation with the librarian, all other employees of the library and determine their compensation and other terms of employment unless, in the cities, other provision is made in the city charter or ordinances.

Source. 1917, 59:1. 1919, 35:1. PL 10:56. 1927, 82:4. 1933, 60:3. RL 15:59. 1943, 90:2. RSA 202:10. 1963, 46:1. 1983, 272:1, eff. Aug. 17, 1983. 2000, 9:4, eff. April 16, 2000.

### **§ 202-A:11-a. Use of Additional Funds.**

All money received from a library's income-generating equipment shall be retained by the library in a nonlapsing fund and used for general repairs and upgrading and for the purchase

of books, supplies and income-generating equipment if approved by the town or city in which the library is located in accordance with RSA 202-A:11-b.

Source. 1983, 272:2, eff. Aug. 17, 1983.

**§ 202-A:11-b. Procedure for Adoption.**

I. A town desiring to permit its library to retain money received from its income-generating equipment under RSA 202-A:11-a may have the question placed on the warrant for a town meeting at which town officers are elected in the manner provided in RSA 39:3. Such question shall be presented for voter approval in the following manner:

(a) A public hearing shall be held by the board of selectmen at least 15 but not more than 30 days before the date the question is to be voted. Notice of the hearing shall be posted in 2 public places in the town and published in a newspaper of general circulation at least 7 days prior to the hearing.

(b) For a town which has an official ballot for the election of town officers, the officer who prepares the ballot shall place the question on such official ballot as it appears in subparagraph (d).

(c) For a town which does not have an official ballot for the election of town officers, the clerk shall prepare a ballot in the form as provided in subparagraph (d).

(d) The wording on the ballot shall be as follows: "Shall we permit the public library to retain all money it receives from its income-generating equipment to be used for general repairs and upgrading and for the purchase of books, supplies and income-generating equipment?"

(e) Upon the ballot containing the question shall be printed the word "Yes" with a square near it at the right hand of the question; and immediately below the word "Yes" shall be printed the word "No" with a square near it at the right hand of the question. The voter desiring to vote upon the question shall make a cross in the square of the voter's choice. If no cross is made in a square beside the question, the ballot shall not be counted on the question.

II. A city desiring to permit its library to retain money received from its income-generating equipment under RSA 202-A:11-a may have the question placed on the official ballot for any regular municipal election for the election of city officers upon a vote of the city council or upon submission of a petition signed by 5 percent of the registered voters of the city to the city council. Such question shall be presented to the voters in the following manner:

(a) A public hearing shall be held by the city council at least 15 but not more than 30 days before the date the question is to be voted. Notice of the hearing shall be posted in 2 public places in the city and published in a newspaper of general circulation at least 7 days prior to the hearing.

(b) The question shall be placed on the official ballot by the city clerk with the wording and in the form provided for in paragraph I(d).

III. Upon approval of the question by a majority of those voting on the question, the provisions of RSA 202-A:11-a shall be deemed to have been adopted.

IV. If after adoption of the provisions of RSA 202-A:11-a, any town or city desires to rescind its adoption, it may do so by referendum pursuant to paragraphs I or II by changing the wording in the question on the referendum.

Source. 1983, 272:2, eff. Aug. 17, 1983. 1996, 33:2, eff. June 23, 1996.

### **§ 202-A:12. Annual Reports.**

Every library regularly open to the public, or to some portion of the public, with or without limitations, whether its ownership is vested in the town, in a corporation, in an organization or association, or in individuals, shall make a written report to the town or city at the conclusion of each fiscal year of (a) all receipts from whatever sources, (b) all expenditures, (c) all property in the trustees' care and custody, including a statement and explanation of any unexpended balance of money they may have, (d) and any bequests or donations they may have received and are holding in behalf of the town, with such recommendations in reference to the same as they may deem necessary for the town to consider, (e) the total number of books and other materials and the number added by gift, purchase and otherwise; the number lost or withdrawn, (f) the number of borrowers and readers and a statement of the use of the property of the library in furthering the educational requirements of the municipality and such other information and suggestions as may seem desirable, (g) submit a similar report to the state librarian at such time and on such forms as the commissioner of cultural resources may require.

Source. 1917, 59:1. PL 10:57. RL 15:60. RSA 202:11. 1963, 46:1. 1990, 73:1, eff. June 5, 1990. 1998, 363:3, eff. Aug. 25, 1998.

### **§ 202-A:12-a. Trust Fund Annual Reports.**

Any public library holding funds in trust shall report to the office of the attorney general, annually at the conclusion of each fiscal year, the information required by RSA 202-A:12(a) through (d).

Source. 1986, 74:1, eff. July 11, 1986.

### **§ 202-A:13. Discretionary Powers.**

The library trustees shall also have the following powers:

I. To authorize the payment from library funds for the necessary expenses of library staff members attending library courses and meetings for professional advancement;

II. To extend the privileges and use of the library to nonresidents upon such terms and conditions as they may prescribe;

III. To deposit library funds for the purchase of books and related materials with the state treasurer to secure economies through pooling of purchasing with the state library. Such funds so

deposited shall be held by the state treasurer in a separate account to be paid out upon orders of the state library. The state library shall have no control over the selection of items to be purchased by public libraries.

Source. 1917, 59:1. 1919, 35:1. PL 10:56. 1927, 82:4. 1933, 60:3. RL 15:59. 1943, 90:2. RSA 202:10. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:14. Compensation of Trustees.**

No trustee of any public library shall receive any compensation for any services rendered as such trustee, unless compensation is stipulated in the terms of the bequest or gift establishing the library. Trustees may be reimbursed, however, for necessary travel expenses to attend professional meetings.

Source. 1933, 60:4. RL 15:61. RSA 202:12. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:15. Public Librarian; Qualification and Tenure.**

The librarian shall have education of sufficient breadth and depth to give leadership in the use of books and related materials. The librarian shall be appointed by the board of library trustees for a term of office agreed to at the time of employment and until a successor is appointed and qualified.

Source. 1963, 46:1, eff. July 1, 1963. 1996, 33:3, eff. June 23, 1996.

**§ 202-A:16. Powers and Duties.**

In addition to any other duties which the librarian may be delegated from time to time, the public librarian shall:

- I. Serve as the administrative officer of the public library;
- II. Recommend to the board of library trustees the appointment of all employees.

Source. 1963, 46:1, eff. July 1, 1963. 1996, 33:4, eff. June 23, 1996.

**§ 202-A:17. Employees; Removal.**

No employee of a public library shall be discharged or removed from office except by the library trustees for malfeasance, misfeasance, or inefficiency in office, or incapacity or unfitness to perform the employee's duties. Prior to the discharge or removal of any such employee, a statement of the grounds and reasons therefor shall be prepared by the library trustees, and signed by a majority of the board, and notice thereof shall be given to the employee not less than 15 days nor more than 30 days prior to the effective date of such discharge or removal. Upon receipt of said notice and within 30 days thereafter, but not otherwise, the employee may request a public hearing. If such request is made, the library trustees shall hold a public hearing on such discharge or removal. The hearing shall be held not more than 30 days after receipt of the request for the hearing, and if the trustees, upon due hearing, shall find good cause for discharge or

removal of the employee, they shall order the employee's discharge or removal from office. There shall be no change in salary of such employee during the proceedings for discharge or removal nor until the final effective date of the order for discharge or removal. The provisions of this section shall apply to the employees of any public library except in a case where the city or town has personnel rules and regulations which apply to such employees and which make provision for a public hearing in the case of such discharge or removal.

Source. 1955, 18:1. RSA 202:10-a. 1963, 46:1, eff. July 1, 1963. 1996, 33:5, eff. June 23, 1996.

**§ 202-A:18. Discontinuance of Library.**

Any town now maintaining a public library established by expenditure of town funds may by majority vote at a regular town meeting discontinue said library. In case of such discontinuance, the library property of the town may be loaned or disposed of by the library trustees, subject to the approval of the commissioner of cultural resources. The provisions of this section shall not apply in cases where a public library has been acquired by the town in whole or in part by donation or bequest.

Source. 1933, 60:2. RL 15:54. RSA 202:5. 1963, 46:1. 1985, 268:41. 1990, 73:1, eff. June 5, 1990. 1998, 363:3, eff. Aug. 25, 1998.

**§ 202-A:19. Defunct Libraries.**

When a public library in any town shall, as such, cease to function, all books or other property given by the state for the use of said library or purchased with state funds shall be returned to the state by the selectmen of said town, delivery to be made to the commissioner of cultural resources, who shall have the power to retain, sell, distribute, or otherwise dispose of such returned books or property as in its judgment seems wise.

Source. 1917, 59:1. PL 10:58. 1927, 82:5. RL 15:62. RSA 202:13. 1963, 46:1. 1990, 73:1, eff. June 5, 1990. 1998, 363:3, eff. Aug. 25, 1998.

**§ 202-A:20. Custody of Publications.**

Any town clerk, board of selectmen, or others having custody of the books, pamphlets, and public documents that have been sent to the towns by the departments of state government may, with consent of the librarian, transfer these publications to the public library, upon condition that they be included in the catalogues of the library and be made accessible to the public.

Source. 1913, 48:1. PL 10:60. RL 15:64. RSA 202:15. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:21. Penalties.**

Any town or library official violating any of the provisions of this chapter shall be guilty of a misdemeanor.

Source. 1917, 59:1. PL 10:61. RL 15:65. RSA 202:16. 1963, 46:1. 1973, 529:38, eff. at 11:59 P.M., Oct. 31, 1973.

**§ 202-A:22. Custody and Control of Trust Funds.**

Trust funds given to towns and cities for the use of a public library shall be held in the custody and under the management of the trustees of trust funds. The entire income from such funds shall be paid over to the library trustees. Payment of such income shall be made by the trustees of trust funds to the library trustees as the same is received.

Source. 1917, 59:1. 1919, 35:1. PL 10:56. 1927, 82:4. 1933, 60:3. RL 15:59. 1943, 90:2. RSA 202:10. 1963, 46:1, eff. July 1, 1963.

**§ 202-A:23. Exceptions.**

Nothing in this chapter shall preclude the library trustees from accepting, receiving, investing, and administering directly any trust funds and donations when so specified by the donor. Library trustees administering and investing such special funds shall be governed by the provisions of RSA 31:25, RSA 31:25-d, and RSA 41:6.

Source. 1963, 46:1. 1983, 264:5. 1991, 31:2, eff. June 18, 1991. 2014, 32:6, eff. July 26, 2014.

**§ 202-A:24. Offenses Against Libraries.**

Any person who shall wilfully or maliciously deface, damage or destroy any property belonging to or in the care of any gallery or museum or any state, public, school, college, or other institutional library, shall be guilty of a misdemeanor. Any such person shall forfeit to or for the use of such library, gallery, or museum, 3 times the amount of the damage sustained, to be recovered in an action in the superior court.

Source. 1959, 60:1. RSA 572:42-a. 1973, 529:128; 532:11, eff. Nov. 1, 1973.

**§ 202-A:25. Detaining Books.**

Any person who willfully detains any book, newspaper, magazine, manuscript, pamphlet, publication, recording, film, or other property belonging to or in the care of any gallery or museum of any state, public, school, college, or other institutional library, may be given written notice to return it, which shall bear upon its face a copy of this section, mailed by certified mail to such person's last address or delivered by a person designated by the lawful custodian of such property; and if such person shall thereafter willfully and knowingly fail to return such property within 15 days after such notice, the person shall be guilty of a violation.

Source. 1959, 60:1. RSA 572:42-b. 1973, 532:11, eff. Nov. 1, 1973. 1996, 33:6, eff. June 23, 1996.

## **OTHER LIBRARY STATUTES**

### **§ 201-D:11 Library User Records; Confidentiality. –**

I. Library records which contain the names or other personal identifying information regarding the users of public or other than public libraries shall be confidential and shall not be disclosed except as provided in paragraph II. Such records include, but are not limited to, library, information system, and archival records related to the circulation and use of library materials or services, including records of materials that have been viewed or stored in electronic form.

II. Records described in paragraph I may be disclosed to the extent necessary for the proper operation of such libraries and shall be disclosed upon request by or consent of the user or pursuant to subpoena, court order, or where otherwise required by statute.

III. Nothing in this section shall be construed to prohibit any library from releasing statistical information and other data regarding the circulation or use of library materials provided, however, that the identity of the users of such library materials shall be considered confidential and shall not be disclosed to the general public except as provided in paragraph II.

Source. 1989, 184:3, eff. July 21, 1989. 2009, 273:1, eff. July 29, 2009.

## **RSA CHAPTER 289, CEMETERIES**

### **§ 289:1. Definitions.**

In this chapter, unless the context clearly requires otherwise:

I. "Burial ground" means a private family or religious institution's cemetery, mausoleum, or columbarium on private property and not available for use by the public. For purposes of this paragraph, the term "family" shall mean members of the immediate family and any individuals related by blood or marriage or civil union to members of the immediate family.

II. "Burial space" means a lot in any cemetery, mausoleum, or columbarium as designed and intended for the interment of a human body, bodies, or remains, but presently not used for such purpose.

III. "Cemetery" means any cemetery owned, managed, or controlled by any municipality within this state or owned and managed by any nonprofit cemetery corporation chartered by the state. Mausoleums and columbariums shall be included within the term "cemetery."

IV. "Cemetery association" means a nonprofit cemetery corporation, the voting members of which are the owners of burial spaces in the cemetery owned and operated by the association.

V. "Cemetery corporation" means a nonprofit corporation organized for the purpose of operating a cemetery.

VI. "Cemetery trustees" means town cemetery trustees elected pursuant to the provisions contained in this chapter.

VII. "Corporate officer" means the elected or appointed managing officer of a nonprofit corporation established to operate a cemetery for public interment.

VIII. "Owner" means any person or persons owning or possessing the privilege, license, or right of interment in any burial space, as determined under RSA 290:24.

Source. 1994, 318:2, eff. Aug. 7, 1994. 2000, 95:1, eff. Apr. 27, 2000. 2008, 319:1, eff. Aug. 31, 2008.

### **§ 289:2. Municipality to Provide.**

Every municipality shall provide one or more suitable cemeteries for the interment of deceased persons within its boundaries, which shall be subject to such regulations as the municipality may establish. In the absence of regulations established by vote of the legislative body, the cemetery trustees may establish such regulations pursuant to RSA 289:7, I(a). The operation and maintenance of all cemeteries owned and maintained by the municipality shall be in the charge of the cemetery trustees.

Source. 1994, 318:2, eff. Aug. 7, 1994.



**§ 289:2-a Funds Received from Sale of Cemetery Lots. –**

Upon the sale of cemetery lots, the legislative body may, at any annual or special meeting, vote to determine whether funds received from such sale shall be deposited in the general fund of the town as a sale of town property or deposited with the trustees of trust fund for the maintenance of cemeteries under RSA 31:19-a.

**Source.** 2014, 71:1, eff. May 27, 2014.

**§ 289:3. Location.**

All cemeteries and burial grounds shall be laid out in accordance with the following requirements:

I. No cemetery shall be laid out within 100 feet of any dwelling house, schoolhouse or school lot, store or other place of business without the consent of the owner of the same, nor within 50 feet of a known source of water or the right of way of any classification of state highway. Existing cemeteries which are not in compliance with the above set-back requirements may be enlarged, provided that no portion of the enlargement is located any closer to the above-listed buildings, water sources or highways than the existing cemetery, and provided further that no such enlargement shall be located within 50 feet of any classification of state highway.

II. Burials on private property, not in an established burial ground, shall comply with local zoning regulations. In the absence of such regulations, such burial sites shall comply with the requirements in paragraph I. The location of the burial site shall be recorded in the deed to the property upon transfer of the property to another person.

III. New construction, excavation, or building in the area of a known burial site or within the boundaries of an established burial ground or cemetery shall comply with local zoning regulations concerning burial sites, burial grounds or cemeteries, whether or not such burial site or burial ground was properly recorded in the deed to the property. In the absence of such regulations, no new construction, excavation, or building shall be conducted within 25 feet of a known burial site or within 25 feet of the boundaries of an established burial ground or cemetery, whether or not such burial site or burial ground was properly recorded in the deed to the property, except when such construction, excavation, or building is necessary for the construction of an essential service, as approved by the governing body of a municipality in concurrence with the cemetery trustees, or in the case of a state highway, by the commissioner of the department of transportation in concurrence with the cemetery trustees.

IV. Nothing in this section shall be construed to conflict with RSA 290, local ordinances, or cemetery rules concerning burials and disinterments of human remains.

**Source.** 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:4. Maintenance.**

Every municipality shall raise and appropriate sufficient funds, by taxation or otherwise, to provide for the suitable care and maintenance of the municipal public cemeteries within its

boundaries which are not otherwise provided for by an alternative funding source. Every municipality may raise and appropriate annually a sufficient sum to provide for the suitable care and maintenance of deserted burial grounds and cemeteries which have been declared abandoned in accordance with RSA 289:19-21.

Source. 1994, 318:2, eff. Aug. 7, 1994. 2012, 4:1, eff. May 11, 2012

**§ 289:5. Cemetery Records.**

The corporate officer or designee of a cemetery corporation or town cemetery trustees charged with the responsibility of operation and administration of any cemetery under their control shall keep a record of every burial showing the date of burial and name of the person buried, when these particulars can be obtained, and the lot, plot, or part of such plot or lot, in which the burial was made. Such records shall also be kept of every private burial site within a municipality by the owner of the land containing the burial site, and a copy of the information shall be supplied to the cemetery trustees who will maintain the municipal records of such sites. A copy of such record, duly certified, shall be furnished to any person on demand and payment of a fee established in compliance with RSA 91-A:4. The location of each cemetery and private burial site may be annotated on the municipal tax map.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:6. Cemetery Trustees.**

I. Every municipality shall elect a board of cemetery trustees consisting of 3 members, unless a town at an annual or special town meeting votes that the board shall consist of 5 members. In the initial election of cemetery trustees, they shall be elected by ballot at an annual town meeting. One shall be elected for a one-year term, one for a 2-year term and one for a 3-year term. In towns with a board of 5 trustees the 2 additional trustees shall be appointed by the selectmen, one for one year and one for 2 years. Subsequent trustees shall be elected by ballot at the annual town meeting to replace those whose terms expire. The term of each trustee shall be 3 years. Vacancies shall be filled by the selectmen for the remainder of the term. In cities the trustees shall be chosen and hold their office for such term as shall be provided by city ordinance. Trustees shall organize by electing one of their number chairperson and another bookkeeper, who shall keep the records and books of the trustees, and shall issue vouchers as necessary for funds to be expended. The chairperson and the bookkeeper may be the same member.

II. Any town that has the town manager form of government may vote to not have cemetery trustees by delegating all of the duties and responsibilities of cemetery trustees to the town manager, as specified in RSA 289. This option may be adopted by a vote of the town meeting. The warrant article question to be voted shall be: "Shall we discontinue the board of cemetery trustees by delegating their duties and responsibilities to the town manager?" If the majority votes in the affirmative, then the discontinuance shall take effect 90 days after adoption.

II-a. (a) Any town, with a traditional town meeting form of government, may adopt by a vote of the town meeting to have the board of selectmen serve for the term of elected office as the cemetery trustees. The warrant article to be voted shall be:

"Shall we delegate the duties and responsibilities of the cemetery trustees to the board of selectmen?"

(b) If the majority vote in the affirmative then the delegation shall take effect 90 days after adoption and shall continue until rescinded by vote of the town meeting.

III. At any subsequent town meeting, the town may vote to reinstate the board of cemetery trustees. A new board of cemetery trustees shall be elected at the town meeting next following the vote to reinstate the board of cemetery trustees.

IV. Any town that has a municipal charter form of government may specify in its charter the procedure to be utilized for the election or appointment of cemetery trustees. Such procedure shall be adopted under the provisions of RSA 49-B.

Source. 1994, 318:2, eff. Aug. 7, 1994. 1995, 62:1, 2, eff. July 8, 1995.

#### **§ 289:7. Powers and Duties.**

I. Except in those municipalities in which other provisions have been made by a general or special act of the legislature, all cemetery trustees in the state shall:

(a) Adopt bylaws and regulations for their transaction of business and for the establishment and management of all municipal cemeteries within their responsibility.

(b) Prepare an annual budget indicating what support and maintenance of the municipal public cemeteries will be required out of public funds for submission to the appropriate agency of the municipality. A separate budget request shall be submitted for planning and establishment of a new public cemetery and for capital improvements or expansion of an existing public cemetery.

(c) Expend all moneys raised and appropriated by the municipality for cemetery purposes. Such funds shall be maintained in the general fund and paid in the same manner that funds of other municipal departments are paid.

(d) Expend income from all trust funds for cemetery purposes in accordance with the conditions of each donation or bequest accepted by the municipality. Such trust funds shall be held in the custody and under the management of the trustees of trust funds. The trust income shall be transferred to the cemetery trustees by the trustees of trust funds in response to vouchers executed by the cemetery trustees, if the requested funds are available. Such trust fund income shall not be commingled with the moneys raised and appropriated by the municipality.

(e) Prepare deeds of cemetery lots for the governing body to sign.

II. Cemetery trustees may appoint a cemetery custodian or sexton who shall not be a trustee and who shall be responsible to the cemetery trustees for supervising work done in the cemeteries.

Source. 1994, 318:2, eff. Aug. 7, 1994. 1995, 62:3, eff. July 8, 1995.

**§ 289:8. Enforcement.**

Any person designated as a cemetery trustee failing to comply with the provisions of RSA 289:7 shall be guilty of a violation. Any other person who violates this chapter or any regulation established under the authority of this chapter shall be guilty of a violation.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:9. Use of Trust Funds.**

Cemetery corporations and the trust fund trustees of municipalities may take and hold funds in trust, and may apply the income of the trust to the improvement, watering, or embellishment of the cemetery, or to the care, preservation, or embellishment of any lot or its appurtenances.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:10. Investments.**

Cemetery corporations holding funds in trust as provided in RSA 289:9 may establish, maintain, and operate common trust funds as provided in RSA 31:27-30.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:11. Accounting.**

Whenever any cemetery corporation shall take and hold trust funds according to the provisions of RSA 289:9, such corporation shall keep in its books an account of all funds received and held by it in the same manner as required of municipalities, and the account of any such fund shall be open to inspection by any person having an interest in the proper administration of the trust.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:12. Reports.**

A copy of the annual financial report of such corporations shall be filed with the attorney general, unless otherwise required by law to file such a report with any town, city, county, or state agency.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:13. Cemetery Association Termination.**

Any cemetery laid out by an individual or corporation and located within the municipality, in which all lots have been sold and for the care of which trust funds are held by the municipality, may be deeded to the municipality with no implied financial liability to the municipality for the maintenance of the cemetery over and above the trust fund income, provided the municipality votes to accept such cemetery transfer. Municipalities may raise and appropriate

additional funds for the care of such cemeteries. Upon the transfer of the title to the cemetery, the municipal cemetery trustees shall have the sole management responsibility for the cemetery.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:14. Right of Way to Private Burial Ground.**

Any person wishing to have a temporary right of entry over private land in order to enter a private burial ground enclosure to which there is no public right of way may apply in writing to the selectmen of a town or the mayor of a city stating the reason for such request, which may include the maintenance, repair, and preservation of the burial ground, and the period of time for which such right is to be exercised. The applicant shall also notify in writing the owner or occupier of the land over which the right of way is desired and obtain the written permission of the owner. The selectmen or mayor, in the exercise of discretion and in consultation with the cemetery trustees, may issue a permit for such temporary right of entry designating the particular place where the land may be crossed. The owner or occupier of the land may recommend the place of crossing which, if reasonable, shall be the place designated by the selectmen or mayor. The person exercising the right of entry shall complete the work on the cemetery and restore the right of way to its original condition, if it is disturbed.

Source. 1994, 318:2, eff. Aug. 7, 1994. 2011, 97:1, eff. Jan. 1, 2012

**§ 289:14-a Maintenance, Repair, and Preservation of Burial Grounds.**

I. Any person or organization interested in caring for a burial ground which has not been maintained and the owner of which is unknown, or whose present address is unknown, may petition the selectmen, town council, mayor, or cemetery trustees for permission to clean, maintain, restore, and preserve that burial ground at the person's or organization's own expense. Upon approval of this petition on any conditions deemed appropriate, including the permission of the owner of the surrounding property, the selectmen, town council, mayor, or cemetery trustees shall require the person or organization to place an advertisement in a local newspaper providing notice that the burial ground is to be entered and that work is to be done, and notifying persons with a property interest in this burial ground who have objections to come forward by a date certain.

II. A petition under paragraph I may be granted notwithstanding the fact that the burial ground has not been declared abandoned pursuant to the procedure in RSA 289:20.

III. Any city, town, or public body shall be immune from civil liability in any action brought on the basis of any act or omission by any person who voluntarily and without compensation undertakes to maintain or to repair any burying ground.

IV. No private landowner permitting access over his or her property to a burial ground for the purpose of voluntary maintenance or repair of the burial ground shall be held civilly liable for any breach of duty resulting in injury to the person or damage to the property of those seeking to repair or maintain the cemetery.

V. After approval and notice required under RSA 635:6, II, any marker, gate, or other material removed for repair shall be stored and kept safely in a manner determined by the selectmen, town council, mayor, or cemetery trustees. Upon approval of the selectmen, town council, mayor, or cemetery trustees, a marker, gate, or other material deemed to be at risk of irreparable damage or loss may be placed permanently in a safe facility and the fact of its removal or replacement made visible in the cemetery or in public records.

Source. 2011, 97:2, eff. Jan. 1, 2012.

**§ 289:15. Discontinuance.**

Whenever there is a public necessity for the discontinuance of any municipal cemetery and the removal of the remains of persons buried in such cemetery, the cemetery may be discontinued by a 3/4 vote of the legal voters present and voting at any town meeting held for the purpose, or by 3/4 of each board of the city councils present and voting.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:16. Reinterment.**

The governing body may, at the expense of the municipality, disinter all the remains of persons buried in such cemetery and reinter the same in the unoccupied part of another cemetery within the municipality, such reinterment to be in the place designated by the nearest surviving relatives of the deceased persons or, in the absence of such surviving relative, by the cemetery trustees. Such removal and reinterment shall be done prudently and with proper care and attention.

Source. 1994, 318:2, eff. Aug. 7, 1994.

Cross References: Exception to permit requirement for interment and disinterment of bodies, see RSA 290:5.

**§ 289:17. Removal of Monuments.**

The monuments, gravestones, and other appurtenances attached to the graves shall be carefully removed and properly set up at the place of reinterment with as little injury as the nature of the case will admit. In case of injury to any monument, gravestone, or appurtenance, the damages shall be assessed by the governing body in the same manner and with the same right of appeal as in the case of alteration of the grade of highways.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:18. Forfeiture Procedures.**

I. Whenever a burial space or spaces in any cemetery subject to the provisions of this subdivision have remained unused for a period of 50 years, and the owner has not improved such space or spaces by causing a monument, gravestone, or other permanent appurtenance to be placed on the burial space, the person, corporate manager, or cemetery trustees having

jurisdiction over such cemetery may institute proceedings for the termination and forfeiture of the rights and interests of such owner. All purchase contracts for burial spaces executed after August 7, 1994, shall include a notice that this procedure may be invoked in the future.

II. Whenever such person, corporate manager, or board of trustees determines that the conditions stated in paragraph I have been met, then they may send to the owner a notice of the intent to terminate and forfeit the owner's rights, served on the owner personally by a competent person or sent by certified mail with return receipt requested to the owner's last known address.

III. When the owner receives the forfeiture notice, the owner may notify the cemetery management of continued intent to use the space, in which case this procedure shall be cancelled, or the owner may return the space to the cemetery and receive in compensation the same amount the owner paid for the space, less any portion of the original purchase price that was specified for inclusion in a perpetual care trust fund.

IV. If no response is received from the owner for 60 days, the cemetery management may advertise in a paper of local distribution for information regarding the present whereabouts of the owner. If information is forthcoming, the notification process shall be repeated using the new address information. If no information is received, the original purchase contract may be voided and the space sold to a new owner. Any owner contacting the cemetery management after the space has been resold shall be reimbursed the amount he originally paid, including the portion set aside for perpetual care.

Source. 1994, 318:2, eff. Aug. 7, 1994.

#### **§ 289:19. Neglected Burial Ground.**

Whenever a burial ground within the boundaries of the town has been neglected for a period of 20 years or more, the municipality may declare it abandoned for purposes of preservation, maintenance or restoration.

Source. 1994, 318:2, eff. Aug. 7, 1994.

#### **§ 289:20. Procedure.**

To declare a burial ground abandoned:

I. The municipality shall place an advertisement in at least one newspaper having general distribution in the municipality and surrounding area. The advertisement shall state the intent of the municipality, identifying the burial ground by name, if known, and by names and dates of the oldest stones in the burial ground, with a request for any direct descendent to contact the town selectmen's office, the town manager, or mayor, as applicable. If the burial ground contains no stones with legible inscriptions, the site may be identified by a detailed description of its location.

II. Not less than 60 days nor more than 90 days after the notice of the intent has been published, the notice shall be read at a regularly scheduled selectmen's meeting or in the case of a city, a city council meeting.

III. If any descendants were located and grant permission, or if no descendants were located, then, after a public hearing, the municipality may declare the burial ground abandoned by a majority vote of the selectmen or city councilmen present and voting.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:21. Rights and Responsibilities.**

Any burial ground declared abandoned under these provisions shall become a municipal cemetery for management purposes and shall be managed by the cemetery trustees, who shall assume all the authorization and rights of natural lineal descendants.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:22. Stone Rubbings.**

No person shall make gravestone rubbings in any municipal cemetery or burial ground without first obtaining the written permission of the town selectmen or the mayor of a city or designee. Before granting such permission, the selectmen or mayor will ascertain to the best of their ability that the person making the request knows the proper precautions to be taken and the proper materials to be used for this activity. The town selectmen or city mayor or their designee shall notify the cemetery trustees of the request and its disposition. Any person who violates the provisions of this section shall be guilty of a misdemeanor.

Source. 1994, 318:2, eff. Aug. 7, 1994.

**§ 289:23. Other Unauthorized Acts.**

All other unauthorized conduct under RSA 635:6 and 635:7 regarding the abuse of cemeteries shall be penalized as provided in RSA 635:8.

Source. 1994, 318:2, eff. Aug. 7, 1994.

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**RSA CHAPTER 290 BURIALS AND DISINTERMENTS**

**Selected Sections**

**§ 290:16 Definitions. –**

In this subdivision:

I. “At-need funeral arrangements” means funeral arrangements made after death.

II. “Custody and control” means the right to make all decisions, consistent with applicable laws, regarding the handling of a dead body, including but not limited to possession, at-need funeral arrangements, final disposition, and disinterment.



III. "Estranged" means living in separate residences and having a relationship characterized by hostility or indifference.

IV. "Next-of-kin" means a person having the following relationship to the subject, in the following order of priority:

- (a) The spouse.
- (b) An adult son or daughter.
- (c) A parent.
- (d) An adult brother or sister.
- (e) An adult grandchild.
- (f) An adult niece or nephew who is the child of a brother or sister.
- (g) A maternal grandparent.
- (h) A paternal grandparent.
- (i) An adult aunt or uncle.
- (j) An adult first cousin.
- (k) Any other adult relative in descending order of blood relationship.

V. "Subject" means the person whose remains are placed in the custody and control of another person pursuant to this section.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:17 Custody and Control Generally. –**

The custody and control of the remains of deceased residents of this state are governed by the following provisions:

I. If the subject has designated a person to have custody and control in a written and signed document, custody and control belong to that person. The person designated by the subject shall be entitled to no compensation or reimbursement of expenses related to the custody and control of the subject's body.

I-a. If the subject has designated a person on a United States Department of Defense Record of Emergency Data (DD Form 93), custody and control belong to that person if the decedent died while serving in the United States armed forces and executed the DD Form 93, or its successor form. II. If the subject has not left a written signed document designating a person to have custody and control, or if the person designated by the subject refuses custody and control, custody and control belong to the next of kin.

III. If the next of kin is 2 or more persons with the same relationship to the subject, the majority of the next of kin have custody and control. If the next of kin cannot, by majority vote, make a decision regarding the subject's remains, the court shall make the decision upon petition under RSA 290:19, IV.

IV. If the next of kin or person designated by the subject under paragraph I is missing and cannot be located using reasonable efforts, the missing person shall lose custody and control and custody and control shall pass to the next in order of priority.

V. If the next of kin holding custody and control will not cooperate with the funeral director in making arrangements, the next of kin shall lose custody and control after 3 days of noncooperation and custody and control shall pass to the next in order of priority.

VI. If the individual holding custody and control of the subject is arrested for criminally causing the death of the subject, custody and control shall pass to the next in order of priority.

VII. If no person is designated by the subject to have custody and control and no next of kin can be located using reasonable efforts, the funeral director holding custody of the body shall retain custody and control of the body for purposes of carrying out the disposition of the body.

VIII. A funeral director acting in good faith may rely upon representations made by individuals claiming to have custody and control of the subject.

Source. 1996, 283:18. 1999, 62:10, eff. Jan. 1, 2000. 2011, 48:1, eff. July 8, 2011. 2012, 16:1, eff. June 22, 2012.

**§ 290:18 Estranged Spouse. –**

Notwithstanding RSA 290:17, if the surviving spouse and the subject were estranged at the time of death, the spouse shall not have custody and control of the subject's remains. In this case, custody and control belong to the next of kin following the spouse.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:19 Court Determination. –**

Notwithstanding other provisions of this subdivision, the court of probate for the residence of the deceased may award custody and control to the person determined by the court most fit and appropriate to carry out the responsibilities of custody and control, and may make decisions regarding the subject's remains if those having custody and control cannot agree. The following provisions apply to court determinations under this section:

I. Before the subject's death, the subject or subject's legal representative may file a petition regarding custody and control of the subject's remains.

II. A relative of the subject may file such a petition.

III. A person who claims and establishes through evidence that person has or had a closer personal relationship to the subject than the next of kin may file a petition, if that person lived with the subject and was not in the employ of the subject or the subject's family.

IV. If the next of kin is 2 or more persons with the same relationship to the subject, and the next of kin cannot, by majority vote, make a decision regarding the subject's remains, 2 or more persons who have custody or control or a funeral director may file a petition asking the court to make a determination in the matter. The court shall consider the following in making its determination:

(a) The reasonableness and practicality of the proposed arrangement.

(b) The degree of the personal relationship between the subject and each of the 2 or more persons with custody and control.

(c) The desires of the person or persons who are ready, able and willing to pay the costs of the arrangements.

(d) The convenience and needs of other family and friends wishing to pay respects.

(e) The expressed written desires of the subject.

(f) The degree to which the arrangements would allow maximum participation by all wishing to pay respect.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:20 Wishes of Subject. –**

If the subject has left written and signed instructions regarding funeral arrangements and disposal of the subject's remains, the person having custody and control shall abide by those wishes to the extent that the subject paid for those arrangements in advance or left resources for the purpose of carrying out those wishes.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:21 Effect of Payment by Others. –**

Except to the degree it must be considered by the court under RSA 290:19, IV, the fact that a person other than the subject has paid or agreed to pay for all or part of arrangements does not give that person a greater right to custody and control than that person would otherwise have.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:22 Authority of Personal Representative. –**

The personal representative of the estate of the subject does not, by virtue of being the personal representative, have a greater right to custody and control than the person would otherwise have.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:23 Immunity. –**

A party who, in good faith, acts upon the instructions of the party having custody and control is not liable for having carried out those instructions.

Source. 1996, 283:18, eff. Jan. 1, 1997.

**§ 290:24. Ownership of Cemetery Plots or Burial Spaces.**

The ownership of a cemetery plot or burial space, as defined under RSA 289:1, II, shall be governed by the following provisions:

I. If the deceased has designated a person to assume ownership of the cemetery lot or burial space in a written and signed document, ownership passes to that person, subject to the regulations established under RSA 289:2.

II. If the deceased has not designated a person to assume ownership of the cemetery lot or burial space in a written and signed document, ownership shall be determined under the provisions of RSA 561:1 and RSA 289:2.

III. Notwithstanding other provisions of this subdivision, when the ownership of a cemetery plot or burial space is unclear or in dispute, the court of probate for the residence of the deceased may, upon receipt of a petition filed by the next of kin or other interested party, render a determination regarding ownership of the cemetery plot or burial space in compliance with applicable law, including any regulations established by the municipality or cemetery trustees under RSA 289:2.

Source. 2000, 95:2, eff. April 27, 2000. 2001, 9:1, eff. Jan. 1, 2002.

**RSA 561:1 DISTRIBUTION UPON INTESTACY [INTESTACY MEANS THE  
INDIVIDUAL DIED WITHOUT A WILL]**

**§ 561:1 Distribution Upon Intestacy. –**

The real estate and personal estate of every person deceased, not devised or bequeathed, subject to any homestead right, and liable to be sold by license from the court of probate in cases provided by law, and personally remaining in the hands of the administrator on settlement of his or her account, shall descend or be distributed by decree of the probate court:

I. If the deceased is survived by a spouse, the spouse shall receive:

(a) If there is no surviving issue or parent of the decedent, the entire intestate estate;

(b) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, and there are no other issue of the surviving spouse who survive the decedent, the first \$250,000, plus 1/2 of the balance;

(c) If there are no surviving issue of the decedent but the decedent is survived by a parent or parents, the first \$250,000, plus 3/4 of the balance of the intestate estate;

(d) If there are surviving issue of the decedent all of whom are issue of the surviving spouse also, and the surviving spouse has one or more surviving issue who are not the issue of the decedent, the first \$150,000, plus 1/2 of the balance of the intestate estate;

(e) If there are surviving issue of the decedent one or more of whom are not issue of the surviving spouse, the first \$100,000, plus 1/2 of the intestate estate.

II. The part of the intestate estate not passing to the surviving spouse under paragraph I, or the entire intestate estate if there is no surviving spouse, passes as follows:

(a) To the issue of the decedent equally if they are all of the same degree of kinship to the decedent, but if of unequal degree, then those of more remote degree take by representation.

(b) If there are no surviving issue, to the decedent's parent or parents equally.

(c) If there are no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation.

(d) If there are no surviving issue, parent or issue of a parent but the decedent is survived by one or more grandparents, one half of the estate passes to the paternal grandparents if both survive or to the surviving paternal grandparent if one paternal grandparent is deceased and the other half passes to the maternal grandparents in the same manner; or if only one grandparent survives, such grandparent shall receive the entire estate.

(e) If there are no surviving issue, parent, issue of a parent, or grandparent but there are issue of the decedent's grandparent who survive, one half of the estate passes to the issue of the paternal grandparent who are not beyond the fourth degree of kinship to the decedent and said issue shall take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation, and the other half passes to the issue of the maternal grandparent who are not beyond the fourth degree of kinship and said issue shall take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation; provided, however, that if there are no issue of the decedent's grandparent within the fourth degree of kinship to the decedent on either the paternal or maternal side, the entire estate passes to the issue on the other side who are not beyond the fourth degree of kinship to the decedent and said issue shall take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree those of more remote degree take by representation.

(f) No portion of a decedent's intestate estate shall pass to any person who is of the fifth or greater degree of kinship to the decedent.

(g) If there is no taker under the provisions of this section, the intestate estate passes to the state of New Hampshire.

III. All determinations of survivorship shall be made in accordance with the provisions of RSA 563.

Source. RS 166:1. CS 176:1. GS 184:1. GL 203:1. PS 196:1. 1903, 74:1. PL 307:1. RL 360:1. RSA 561:1. 1971, 179:26. 1973, 293:1. 1974, 18:2, eff. April 2, 1974 at 12:00 a.m. 1998, 155:9, eff. July 8, 1998. 2003, 47:1, eff. Jan. 1, 2004.

## **RSA CHAPTER 635 CRIMINAL CODE**

### **Selected Sections**

#### **§ 635:6. Interference With Cemetery or Burial Ground.**

I. No person, without the written authorization of the owner of a burial plot, or the lineal descendant of the deceased, if such owner or lineal descendant is known, or the written authorization of the governing board of the municipality in which the burial plot lies, if the owner or lineal descendant is unknown, shall:

(a) Purposely or knowingly destroy, mutilate, injure or remove any tomb, monument, gravestone, marker, or other structure, or any portion or fragment thereof, placed or designed for a memorial of the dead, or any fence, railing, gate, curb, or plot delineator or other enclosure for the burial of the dead.

(b) Purposely or knowingly disturb the contents of any tomb or grave in any cemetery or burial ground.

II. The governing board of the municipality in which the burial plot lies shall not grant approval for the removal or disturbance of a tomb, monument, gravestone, marker, or plot delineator without first giving 30 days' notice, along with a report of the full circumstances, to the division of historical resources, that such approval has been requested. The governing board of the municipality shall maintain a record of the date, circumstances, and disposition of the request for removal or disturbance.

Source. 1987, 107:1, eff. May 6, 1987.

#### **§ 635:7. Unlawful Possession or Sale of Gravestones and Gravesite Items.**

No person shall possess or sell, offer for sale or attempt to sell, or transfer or dispose of any monument, gravestone, marker, or other structure, or any portion or fragment thereof, placed or designed for a memorial of the dead, or any fence, railing, gate, plot delineator, or curb, knowing or having reasonable cause to know that it has been unlawfully removed from a cemetery or burial ground.

Source. 1987, 107:1, eff. May 6, 1987.

**§ 635:8. Penalties.**

Any person who is convicted of an offense under RSA 635:6 or 635:7 shall be guilty of a class B felony, and shall be ordered by the court to make restitution for damages resulting from the offense and for replacement of removed items.

Source. 1987, 107:1, eff. May 6, 1987.

**RSA 485-A:29 SUBMISSION AND APPROVAL OF PLANS AND SPECIFICATIONS. –**

I. Any person proposing either to subdivide land, except as provided in RSA 485-A:33, or to construct a sewage or waste disposal system, shall submit 2 copies of such locally approved plans as are required by the local planning board or other local body having authority for the approval of any such subdivision of land, which is subject to department approval, and 2 copies of plans and specifications for any sewage or waste disposal systems which will be constructed on any subdivision or lot for approval in accordance with the requirements of the department as provided in this paragraph. In the event that such subdivision plans which receive final local approval differ from the plans which are reviewed by the department, the person proposing the subdivision shall resubmit those plans to the department for reapproval. The planning board or other local body having final local approval authority shall submit one copy of such plans which receive final local approval to the department for informational purposes within 30 days of granting such final approval. The department shall adopt rules, pursuant to RSA 541-A, relative to the submission of plans and specifications as necessary to effect the purposes of this subdivision. The rules shall specify when and where the plans and specifications are to be submitted, what details, data and information are to be contained in the plans and specifications, including the location of known burial sites or cemeteries within or adjacent to the property on which the proposed sewage or waste disposal system is to be located, what tests are to be required, what standards, guidelines, procedures, and criteria are to be applied and followed in constructing any sewage or waste disposal system, and other related matters. The rules shall also establish the methodology and review process for approval of innovative/alternative wastewater treatment systems and for approval of a plan for operation, maintenance, and financial responsibility for such operations. For any part or parts of the subdivisions where construction or waste disposal is not contemplated, only the lot lines, property boundaries drawn to scale, and general soil and related data shall be required. The constructed sewage or waste disposal systems shall be in strict accordance with approved plans, and the facilities shall not be covered or placed in operation without final inspection and approval by an authorized agent of the department. All inspections by the department shall be accomplished within 7 business days after receipt of written notification from the builder that the system is ready for inspection. Plans and specifications need not be submitted for subdivision approval for subdivisions consisting of the division of a tract or parcel of land exclusively in lots of 5 or more acres in area. The presence of hydric soils on lots of 5 or more acres in area shall be insufficient, without additional supporting data, to classify these lots as wetlands, or to make such lots unsuitable for sewage or waste disposal systems designed for poorly drained soils. This exemption in no way relieves any person from responsibility for obtaining approval under this chapter for construction of

individual or other sewage or waste disposal systems or both in any exempted lots. In such cases, it shall be the responsibility of the subdivider to provide to the lot purchasers satisfactory assurance as the purchasers may require at the time of sale that lots sold shall be adequate to support individual sewage or waste disposal systems or both in accordance with rules adopted by the department and the requirements of this subdivision.

II. Permitted designers of subsurface sewage disposal systems shall obtain the registry of deeds volume and page numbers for each lot that relates to the septic system application and provide them to the department. The department shall develop and approve an outline of brief instructions for the periodic maintenance, care and proper usage of waste disposal systems, including a warning of the potential public health hazard and pollution of public and private water supplies and surface water of the state from improperly maintained sewage and waste disposal systems.

**III. The department shall not approve any plan which will cause a violation of the setback requirements in RSA 289:3, III.**

**Source.** 1989, 339:1. 1991, 379:2. 1993, 172:5. 1994, 198:1. 1995, 93:1. 1996, 228:106, eff. July 1, 1996; 233:9, eff. July 1, 2000. 2006, 87:1, 2, eff. July 4, 2006. (emphasis supplied)

**RSA CHAPTER 227-C, PRESERVATION OF STATE HISTORIC RESOURCES**

**Selected Sections**

**§ 227-C:8-i Prohibited Acts.** – No person shall:

I. Knowingly acquire any human remains removed from unmarked burials in New Hampshire after January 1, 1987, except in accordance with the provisions of this chapter;

II. Knowingly exhibit any human remains acquired from unmarked burials in New Hampshire;

III. Knowingly sell any human remains; or

IV. Knowingly retain human remains acquired from unmarked burials in New Hampshire after January 1, 1987, for scientific analysis beyond a period of time provided for such analysis pursuant to the provisions of RSA 227-C:8-d through 8-f, with the exception of those remains curated under the provisions of RSA 227-C:8-g.

**Source.** 1986, 80:10, eff. Jan. 1, 1987. 2009, 156:1, eff. Sept. 6, 2009.

**RSA CHAPTER 325, EMBALMERS AND FUNERAL DIRECTORS**

**Prearranged Funerals or Burial Plans**

**§ 325:48 Employment Prohibited.** – No person holding a license under this chapter shall be employed as a funeral home, funeral establishment, funeral director or embalmer by a cemetery,



cemetery association, or cemetery corporation, nor shall such person own or control a cemetery, cemetery association, or cemetery corporation. This section shall not prohibit such person from (1) serving as an officer, director, or trustee of a cemetery, cemetery association or cemetery corporation without pay or for a salary not exceeding \$500 per year or (2) employment by a cemetery, cemetery association or cemetery corporation in capacities other than that of a funeral home, funeral establishment, funeral director or embalmer, or (3) taking bodies out of a grave or transferring such bodies to other graves.

**Source.** 1971, 332:1. 1986, 191:5, eff. July 28, 1986.

**RSA CHAPTER 91-A. ACCESS TO PUBLIC RECORDS AND MEETINGS**

The "Right to Know" Law

**§ 91-A:1. Preamble.**

Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.

Source. 1967, 251:1. 1971, 327:1. 1977, 540:1, eff. Sept. 13, 1977.

*Selected Annotations:*

Amendments--1977. Amended section generally

--1971. Amended section generally

**§ 91-A:1-a. Definitions.**

In this chapter:

I. ""Advisory committee" means any committee, council, commission, or other like body whose primary purpose is to consider an issue or issues designated by the appointing authority so as to provide such authority with advice or recommendations concerning the formulation of any public policy or legislation that may be promoted, modified, or opposed by such authority.

II. ""Governmental proceedings" means the transaction of any functions affecting any or all citizens of the state by a public body.

III. ""Governmental records" means any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function. Without limiting the foregoing, the term ""governmental records" includes any written communication or other information, whether in paper, electronic, or other physical form, received by a quorum or majority of a public body in furtherance of its official function, whether at a meeting or outside a meeting of the body. The term ""governmental records" shall also include the term ""public records."

IV. ""Information" means knowledge, opinions, facts, or data of any kind and in whatever physical form kept or maintained, including, but not limited to, written, aural, visual, electronic, or other physical form.

V. ""Public agency" means any agency, authority, department, or office of the state or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision.

VI. ""Public body" means any of the following:

(a) The general court including executive sessions of committees; and including any advisory committee established by the general court.

(b) The executive council and the governor with the executive council; including any advisory committee established by the governor by executive order or by the executive council.

(c) Any board or commission of any state agency or authority, including the board of trustees of the university system of New Hampshire and any committee, advisory or otherwise, established by such entities.

(d) Any legislative body, governing body, board, commission, committee, agency, or authority of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision, or any committee, subcommittee, or subordinate body thereof, or advisory committee thereto.

(e) Any corporation that has as its sole member the state of New Hampshire, any county, town, municipal corporation, school district, school administrative unit, village district, or other political subdivision, and that is determined by the Internal Revenue Service to be a tax exempt organization pursuant to section 501(c)(3) of the Internal Revenue Code.

Source. 1977, 540:2. 1986, 83:2. 1989, 274:1. 1995, 260:4, eff. July 1, 1995. 2001, 223:1, eff. Jan. 1, 2002. 2008, 278:3, eff. July 1, 2008 at 12:01 a.m.; 303:3, eff. July 1, 2008; 303:8, eff. Sept. 5, 2008 at 12:01 a.m.; 354:1, eff. Sept. 5, 2008

#### *Annotations*

Amendments--1995. Paragraph IV: Inserted "school administrative unit, charter school" following "school district".

--1989. Paragraph II: Added "and the governor with the governor's council" at the end of the paragraph.

--1986. Paragraph III: Added "including the board of trustees of the university system of New Hampshire" following "authority".

### **§ 91-A:2. Meetings Open to Public.**

I. For the purpose of this chapter, a "meeting" means the convening of a quorum of the membership of a public body, as defined in RSA 91-A:1-a, VI, or the majority of the members of such public body if the rules of that body define "quorum" as more than a majority of its members, whether in person, by means of telephone or electronic communication, or in any other manner such that all participating members are able to communicate with each other contemporaneously, subject to the provisions set forth in RSA 91-A:2, III, for the purpose of discussing or acting upon a matter or matters over which the public body has supervision, control, jurisdiction, or advisory power. A chance, social, or other encounter not convened for the purpose of discussing or acting upon such matters shall not constitute a meeting if no decisions are made regarding such matters. "Meeting" shall also not include:

(a) Strategy or negotiations with respect to collective bargaining;

(b) Consultation with legal counsel;

(c) A caucus consisting of elected members of a public body of the same political party who were elected on a partisan basis at a state general election or elected on a partisan basis by a town or city which has adopted a partisan ballot system pursuant to RSA 669:12 or RSA 44:2; or

(d) Circulation of draft documents which, when finalized, are intended only to formalize decisions previously made in a meeting; provided, that nothing in this subparagraph shall be construed to alter or affect the application of any other section of RSA 91-A to such documents or related communications.

II. Subject to the provisions of RSA 91-A:3, all meetings, whether held in person, by means of telephone or electronic communication, or in any other manner, shall be open to the public. Except for town meetings, school district meetings, and elections, no vote while in open session may be taken by secret ballot. Any person shall be permitted to use recording devices, including, but not limited to, tape recorders, cameras, and videotape equipment, at such meetings. Minutes of all such meetings, including names of members, persons appearing before the public bodies, and a brief description of the subject matter discussed and final decisions, shall be promptly recorded and open to public inspection not more than 5 business days after the meeting, except as provided in RSA 91-A:6, and shall be treated as permanent records of any public body, or any subordinate body thereof, without exception. Except in an emergency or when there is a meeting of a legislative committee, a notice of the time and place of each such meeting, including a nonpublic session, shall be posted in 2 appropriate places one of which may be the public body's Internet website, if such exists, or shall be printed in a newspaper of general circulation in the city or town at least 24 hours, excluding Sundays and legal holidays, prior to such meetings. An emergency shall mean a situation where immediate undelayed action is deemed to be imperative by the chairman or presiding officer of the public body, who shall post a notice of the time and place of such meeting as soon as practicable, and shall employ whatever further means are reasonably available to inform the public that a meeting is to be held. The minutes of the meeting shall clearly spell out the need for the emergency meeting. When a meeting of a legislative committee is held, publication made pursuant to the rules of the house of representatives or the senate, whichever rules are appropriate, shall be sufficient notice. If the charter of any city or town or guidelines or rules of order of any public body require a broader public access to official meetings and records than herein described, such charter provisions or guidelines or rules of order shall take precedence over the requirements of this chapter. For the purposes of this paragraph, a business day means the hours of 8 a.m. to 5 p.m. on Monday through Friday, excluding national and state holidays.

III. A public body may, but is not required to, allow one or more members of the body to participate in a meeting by electronic or other means of communication for the benefit of the public and the governing body, subject to the provisions of this paragraph.

(a) A member of the public body may participate in a meeting other than by attendance in person at the location of the meeting only when such attendance is not reasonably practical. Any

reason that such attendance is not reasonably practical shall be stated in the minutes of the meeting.

(b) Except in an emergency, a quorum of the public body shall be physically present at the location specified in the meeting notice as the location of the meeting. For purposes of this subparagraph, an "emergency" means that immediate action is imperative and the physical presence of a quorum is not reasonably practical within the period of time requiring action. The determination that an emergency exists shall be made by the chairman or presiding officer of the public body, and the facts upon which that determination is based shall be included in the minutes of the meeting.

(c) Each part of a meeting required to be open to the public shall be audible or otherwise discernable to the public at the location specified in the meeting notice as the location of the meeting. Each member participating electronically or otherwise must be able to simultaneously hear each other and speak to each other during the meeting, and shall be audible or otherwise discernable to the public in attendance at the meeting's location. Any member participating in such fashion shall identify the persons present in the location from which the member is participating. No meeting shall be conducted by electronic mail or any other form of communication that does not permit the public to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice.

(d) Any meeting held pursuant to the terms of this paragraph shall comply with all of the requirements of this chapter relating to public meetings, and shall not circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

(e) A member participating in a meeting by the means described in this paragraph is deemed to be present at the meeting for purposes of voting. All votes taken during such a meeting shall be by roll call vote.

Source. 1967, 251:1. 1969, 482:1. 1971, 327:2. 1975, 383:1. 1977, 540:3. 1983, 279:1. 1986, 83:3. 1991, 217:2, eff. Jan. 1, 1992. 2003, 287:7, eff. July 18, 2003. 2007, 59:2, eff. July 31, 2007. 2008, 278:2, eff. July 1, 2008 at 12:01 a.m.; 303:4, eff. July 1, 2008.

#### *Annotations*

Amendments--1991. Paragraph II: Substituted "a nonpublic" for "an executive" preceding "session" in the fifth sentence.

--1986. Paragraph I: Added the second sentence.

Paragraph II: Inserted "or the senate, whichever rules are appropriate" following "house of representatives" in the eighth sentence and made other minor stylistic changes.

--1983. Paragraph II: Substituted "144" for "72" following "inspection within" and deleted "of this chapter" following "91-A:6" in the fourth sentence.

--1977. Deleted "the" preceding "public" in the section catchline, designated existing provisions of the section as par. II, added the second sentence of that paragraph, and added par. I.

--1975. Added the second sentence.

--1971. Inserted "or when there is a meeting of a legislative committee" following "emergency" and substituted "Sundays" for "Sunday" following "excluding" in the third sentence and added the fifth sentence.

--1969. Amended section generally

**§ 91-A:2-a Communications Outside Meetings.**

I. Unless exempted from the definition of ""meeting" under RSA 91-A:2, I, public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III.

II. Communications outside a meeting, including, but not limited to, sequential communications among members of a public body, shall not be used to circumvent the spirit and purpose of this chapter as expressed in RSA 91-A:1.

Source. 2008, 303:4, eff. July 1, 2008.

**§ 91-A:3 Nonpublic Sessions. –**

I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.

II. Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open

meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed against the public body or any subdivision thereof, or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.

(f) Consideration of applications by the adult parole board under RSA 651-A.

(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county correctional facilities by county correctional superintendents or their designees.

(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.

(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

Source. 1967, 251:1. 1969, 482:2. 1971, 327:3. 1977, 540:4. 1983, 184:1. 1986, 83:4. 1991, 217:3. 1992, 34:1, 2. 1993, 46:1, eff. June 7, 1993; 335:16, eff. June 29, 1993. 2002, 222:2, 3,

eff. Jan. 1, 2003. 2004, 42:1, eff. Jan. 1, 2005. 2008, 303:4, eff. July 1, 2008. 2010, 206:1, eff. June 22, 2010.

*Annotations*

Amendments--1993. Paragraph II(g): Added by ch. 46.

Paragraph II(h): Added by ch. 335.

--1992. Paragraph II: Substituted "(1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted" for "requests an open meeting" at the end of subpar. (a) and inserted "real or personal" preceding "property" in subpar. (d).

--1991. Amended section generally

--1986. Paragraph II: Added the second sentence in the introductory paragraph and added subpars. (e) and (f).

--1983. Paragraph II: Rewrote the introductory paragraph and deleted subpar. (e).

--1977. Amended section generally

--1971. Paragraph II(e): Added.

--1969. Paragraph I: Amended section generally

**§ 91-A:4 Minutes and Records Available for Public Inspection. –**

I. Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5. In this section, "to copy" means the reproduction of original records by whatever method, including but not limited to photography, photostatic copy, printing, or electronic or tape recording.

I-a. Records of any payment made to an employee of any public body or agency listed in RSA 91-A:1-a, VI(a)-(d), or to the employee's agent or designee, upon the resignation, discharge, or retirement of the employee, paid in addition to regular salary and accrued vacation, sick, or other leave, shall immediately be made available without alteration for public inspection. All records of payments shall be available for public inspection notwithstanding that the matter may have been considered or acted upon in nonpublic session pursuant to RSA 91-A:3.

II. After the completion of a meeting of a public body, every citizen, during the regular or business hours of such public body, and on the regular business premises of such public body, has the right to inspect all notes, materials, tapes, or other sources used for compiling the minutes



of such meetings, and to make memoranda or abstracts or to copy such notes, materials, tapes, or sources inspected, except as otherwise prohibited by statute or RSA 91-A:5.

III. Each public body or agency shall keep and maintain all governmental records in its custody at its regular office or place of business in an accessible place and, if there is no such office or place of business, the governmental records pertaining to such public body or agency shall be kept in an office of the political subdivision in which such public body or agency is located or, in the case of a state agency, in an office designated by the secretary of state.

III-a. Governmental records created or maintained in electronic form shall be kept and maintained for the same retention or archival periods as their paper counterparts. Governmental records in electronic form kept and maintained beyond the applicable retention or archival period shall remain accessible and available in accordance with RSA 91-A:4, III. Methods that may be used to keep and maintain governmental records in electronic form may include, but are not limited to, copying to microfilm or paper or to durable electronic media using standard or common file formats.

III-b. A governmental record in electronic form shall no longer be subject to disclosure pursuant to this section after it has been initially and legally deleted. For purposes of this paragraph, a record in electronic form shall be considered to have been deleted only if it is no longer readily accessible to the public body or agency itself. The mere transfer of an electronic record to a readily accessible "deleted items" folder or similar location on a computer shall not constitute deletion of the record.

IV. Each public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files when such records are immediately available for such release. If a public body or agency is unable to make a governmental record available for immediate inspection and copying, it shall, within 5 business days of request, make such record available, deny the request in writing with reasons, or furnish written acknowledgment of the receipt of the request and a statement of the time reasonably necessary to determine whether the request shall be granted or denied. If a computer, photocopying machine, or other device maintained for use by a public body or agency is used by the public body or agency to copy the governmental record requested, the person requesting the copy may be charged the actual cost of providing the copy, which cost may be collected by the public body or agency. Nothing in this section shall exempt any person from paying fees otherwise established by law for obtaining copies of governmental records or documents, but if such fee is established for the copy, no additional costs or fees shall be charged.

V. In the same manner as set forth in RSA 91-A:4, IV, any public body or agency which maintains governmental records in electronic format may, in lieu of providing original records, copy governmental records requested to electronic media using standard or common file formats in a manner that does not reveal information which is confidential under this chapter or any other law. If copying to electronic media is not reasonably practicable, or if the person or entity requesting access requests a different method, the public body or agency may provide a printout of governmental records requested, or may use any other means reasonably calculated to comply with the request in light of the purpose of this chapter as expressed in RSA 91-A:1. Access to

work papers, personnel data, and other confidential information under RSA 91-A:5, IV shall not be provided.

VI. Every agreement to settle a lawsuit against a governmental unit, threatened lawsuit, or other claim, entered into by any political subdivision or its insurer, shall be kept on file at the municipal clerk's office and made available for public inspection for a period of no less than 10 years from the date of settlement.

VII. Nothing in this chapter shall be construed to require a public body or agency to compile, cross-reference, or assemble information into a form in which it is not already kept or reported by that body or agency.

Source. 1967, 251:1. 1983, 279:2. 1986, 83:5. 1997, 90:2, eff. Aug. 2, 1997. 2001, 223:2, eff. Jan. 1, 2002. 2004, 246:2, eff. Aug. 14, 2004. 2008, 303:4, eff. July 1, 2008. 2009, 299:1, eff. Sept. 29, 2009.

### **§ 91-A:5 Exemptions. –**

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils.

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

Source. 1967, 251:1. 1986, 83:6. 1989, 184:2. 1990, 134:1. 1993, 79:1. 2002, 222:4. 2004, 147:5; 246:3, 4. 2008, 303:4, eff. July 1, 2008. 2013, 261:9, eff. July 1, 2013.

#### *Annotations*

Amendments--1993. Paragraph V: Added.

--1990. Paragraph IV: Inserted "videotape sale or rental" following "library user" in the first sentence.

--1989. Paragraph IV: Inserted "library user" following "welfare" in the first sentence.

--1986. Paragraph IV: Amended section generally

Purpose of 1989 amendment. 1989, 184:1, eff. July 21, 1989, provided: "The Access to Public Records and Meetings Law, RSA 91-A, or Right-to-Know Law, does not include a definition of what constitutes a public record. The New Hampshire supreme court has applied a balancing test to determine whether a record is public by weighing the benefits of disclosure to the public versus the benefits of nondisclosure. By weighing the benefits of allowing disclosure of library user records against the benefits of denial of disclosure, the general court has determined that the benefits of nondisclosure clearly prevail. This act, therefore, exempts library user records from RSA 91-A to ensure that the individual's right to privacy regarding the nature of the library materials used by the individual is not invaded. To protect the right to privacy of all New Hampshire citizens, both public and other than public library records are protected."

#### **§ 91-A:5-a Limited Purpose Release.**

Records from non-public sessions under RSA 91-A:3, II(i) or that are exempt under RSA 91-A:5, VI may be released to local or state safety officials. Records released under this section shall be marked "limited purpose release" and shall not be redisclosed by the recipient.

Source. 2002, 222:5, eff. Jan. 1, 2003.

#### **§ 91-A:6. Employment Security.**

This chapter shall apply to RSA 282-A, relative to employment security; however, in addition to the exemptions under RSA 91-A:5, the provisions of RSA 282-A:117-123 shall also apply; this provision shall be administered and construed in the spirit of that section, and the exemptions from the provisions of this chapter shall include anything exempt from public

inspection under RSA 282-A:117-123 together with all records and data developed from RSA 282-A:117-123.

Source. 1967, 251:1. 1981, 576:5, eff. July 1, 1981.

*Annotations*

Amendments--1981. Amended section generally

Revision note. Pursuant to 1981, 408:9, substituted "RSA 282-A" for "RSA 282" and "RSA 282-A:117-123" for "RSA 282(9)(M)"

Substituted a semicolon for a comma following "shall also apply" to correct a grammatical error.

**§ 91-A:7. Violation.**

Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief. In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar. Such a petitioner may appear with or without counsel. The petition shall be deemed sufficient if it states facts constituting a violation of this chapter, and may be filed by the petitioner or his or her counsel with the clerk of court or any justice thereof. Thereupon the clerk of court or any justice shall order service by copy of the petition on the person or persons charged. When any justice shall find that time probably is of the essence, he or she may order notice by any reasonable means, and he or she shall have authority to issue an order ex parte when he or she shall reasonably deem such an order necessary to insure compliance with the provisions of this chapter.

Source. 1967, 251:1. 1977, 540:5, eff. Sept. 13, 1977. 2008, 303:5, eff. July 1, 2008

*Annotations*

Amendments--1977. Added the third through sixth sentences.

**§ 91-A:8. Remedies.**

I. If any public body or public agency or officer, employee, or other official thereof, violates any provisions of this chapter, such public body or public agency shall be liable for reasonable attorney's fees and costs incurred in a lawsuit under this chapter, provided that the court finds that such lawsuit was necessary in order to enforce compliance with the provisions of this chapter or to address a purposeful violation of this chapter. Fees shall not be awarded unless the court finds that the public body, public agency, or person knew or should have known that the conduct engaged in was in violation of this chapter or if the parties, by agreement, provide that no such fees shall be paid.

II. The court may award attorney's fees to a public body or public agency or employee or member thereof, for having to defend against a lawsuit under the provisions of this chapter, when the court finds that the lawsuit is in bad faith, frivolous, unjust, vexatious, wanton, or oppressive.

III. The court may invalidate an action of a public body or public agency taken at a meeting held in violation of the provisions of this chapter, if the circumstances justify such invalidation.

IV. If the court finds that an officer, employee, or other official of a public body or public agency has violated any provision of this chapter in bad faith, the court shall impose against such person a civil penalty of not less than \$250 and not more than \$2,000. Upon such finding, such person or persons may also be required to reimburse the public body or public agency for any attorney's fees or costs it paid pursuant to paragraph I. If the person is an officer, employee, or official of the state or of an agency or body of the state, the penalty shall be deposited in the general fund. If the person is an officer, employee, or official of a political subdivision of the state or of an agency or body of a political subdivision of the state, the penalty shall be payable to the political subdivision.

V. The court may also enjoin future violations of this chapter, and may require any officer, employee, or other official of a public body or public agency found to have violated the provisions of this chapter to undergo appropriate remedial training, at such person or person's expense.

Source. 1973, 113:1. 1977, 540:6. 1986, 83:7, eff. Jan. 1, 1987. 2001, 289:3, eff. July 17, 2001. 2008, 303:6, eff. July 1, 2008. 2012, 206:1, eff. Jan. 1, 2013

*Annotations*

Amendments--1986. Designated the existing provisions of the section as par. I, rewrote that paragraph, and added pars. II and III.

--1977. Amended section generally.

**§ 91-A:9 Destruction of Certain Information Prohibited.**

A person is guilty of a misdemeanor who knowingly destroys any information with the purpose to prevent such information from being inspected or disclosed in response to a request under this chapter. If a request for inspection is denied on the grounds that the information is exempt under this chapter, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

Source. 2002, 175:1. eff. Jan 1, 2003

**§ 91-A:10 Release of Statistical Tables and Limited Data Sets for Research.**

I. In this subdivision:

(a) "Agency" means each state board, commission, department, institution, officer or other state official or group.

(b) "Agency head" means the head of any governmental agency which is responsible for the collection and use of any data on persons or summary data.

(c) "Cell size" means the count of individuals that share a set of characteristics contained in a statistical table.

(d) "Data set" means a collection of personal information on one or more individuals, whether in electronic or manual files.

(e) "Direct identifiers" means:

(1) Names.

(2) Postal address information other than town or city, state, and zip code.

(3) Telephone and fax numbers.

(4) Electronic mail addresses.

(5) Social security numbers.

(6) Certificate and license numbers.

(7) Vehicle identifiers and serial numbers, including license plate numbers.

(8) Personal Internet IP addresses and URLs.

(9) Biometric identifiers, including finger and voice prints.

(10) Personal photographic images.

(f) "Individual" means a human being, alive or dead, who is the subject of personal information and includes the individual's legal or other authorized representative.

(g) "Limited data set" means a data set from which all direct identifiers have been removed or blanked.

(h) "Personal information" means information relating to an individual that is reported to the state or is derived from any interaction between the state and an individual and which:

(1) Contains direct identifiers.

(2) Is under the control of the state.

(i) "Provided by law" means use and disclosure as permitted or required by New Hampshire state law governing programs or activities undertaken by the state or its agencies, or required by federal law.

(j) "Public record" means records available to any person without restriction.

(k) "State" means the state of New Hampshire, its agencies or instrumentalities.

(I) "Statistical table" means single or multi-variate counts based on the personal information contained in a data set and which does not include any direct identifiers.

II. Except as otherwise provided by law, upon request an agency shall release limited data sets and statistical tables with any cell size more than 0 and less than 5 contained in agency files to requestors for the purposes of research under the following conditions:

(a) The requestor submits a written application that contains:

(1) The following information about the principal investigator in charge of the research:

(A) name, address, and phone number;

(B) organizational affiliation;

(C) professional qualification; and

(D) name and phone number of principal investigator's contact person, if any.

(2) The names and qualifications of additional research staff, if any, who will have access to the data.

(3) A research protocol which shall contain:

(A) a summary of background, purposes, and origin of the research;

(B) a statement of the general problem or issue to be addressed by the research;

(C) the research design and methodology including either the topics of exploratory research or the specific research hypotheses to be tested;

(D) the procedures that will be followed to maintain the confidentiality of any data or copies of records provided to the investigator; and

(E) the intended research completion date.

(4) The following information about the data or statistical tables being requested:

(A) general types of information;

(B) time period of the data or statistical tables;

(C) specific data items or fields of information required, if applicable;

(D) medium in which the data or statistical tables are to be supplied; and

(E) any special format or layout of data requested by the principal investigator.

(b) The requestor signs a "Data Use Agreement" signed by the principal investigator that contains the following:

(1) Agreement not to use or further disclose the information to any person or organization other than as described in the application and as permitted by the Data Use Agreement without the written consent of the agency.

(2) Agreement not to use or further disclose the information as otherwise required by law.

(3) Agreement not to seek to ascertain the identity of individuals revealed in the limited data set and/or statistical tables.

(4) Agreement not to publish or make public the content of cells in statistical tables in which the cell size is more than 0 and less than 5 unless:

(A) otherwise provided by law; or

(B) the information is a public record.

(5) Agreement to report to the agency any use or disclosure of the information contrary to the agreement of which the principal investigator becomes aware.

(6) A date on which the data set and/or statistical tables will be returned to the agency and/or all copies in the possession of the requestor will be destroyed.

III. The agency head shall release limited data sets and statistical tables and sign the Data Use Agreement on behalf of the state when:

(a) The application submitted is complete.

(b) Adequate measures to ensure the confidentiality of any person are documented.

(c) The investigator and research staff are qualified as indicated by:

(1) Documentation of training and previous research, including prior publications; and

(2) Affiliation with a university, private research organization, medical center, state agency, or other institution which will provide sufficient research resources.

(d) There is no other state law, federal law, or federal regulation prohibiting release of the requested information.

IV. Within 10 days of a receipt of written application, the agency head, or designee, shall respond to the request. Whenever the agency head denies release of requested information, the agency head shall send the requestor a letter identifying the specific criteria which are the basis of the denial. Should release be denied due to other law, the letter shall identify the specific state law, federal law, or federal regulation prohibiting the release. Otherwise the agency head shall provide the requested data or set a date on which the data shall be provided.



V. Any person violating any provision of a signed Data Use Agreement shall be guilty of a violation.

VI. Nothing in this section shall exempt any requestor from paying fees otherwise established by law for obtaining copies of limited data sets or statistical tables. Such fees shall be based on the cost of providing the copy in the format requested. The agency head shall provide the requestor with a written description of the basis for the fee.

Source. 2003, 292:2, eff. July 18, 2003.

**RIGHT TO KNOW CASE:**  
**HAWKINS V. DHHS**

**NOTICE:** This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the opinion goes to press. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <http://www.state.nh.us/courts/supreme.htm>

**THE SUPREME COURT OF NEW HAMPSHIRE**

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Rockingham

No. 2000-012

CASSANDRA HAWKINS

v.

NEW HAMPSHIRE DEPARTMENT OF HEALTH AND HUMAN SERVICES

December 31, 2001

New Hampshire Legal Assistance, of Portsmouth and Manchester (Kay E. Drought and Kenneth J. Barnes on the brief, and Ms. Drought orally), for the plaintiff.

Philip T. McLaughlin, attorney general (Mary E. Schwarzer, assistant attorney general, on the brief and orally), for the defendant.

Malloy & Sullivan, P.C., of Manchester (Gregory V. Sullivan on the brief), for Union Leader Corporation, as amicus curiae.

Orr & Reno, P.A., of Concord (James P. Bassett on the brief), for Keene Publishing Corporation, as amicus curiae.

BROCK, C.J. The plaintiff, Cassandra Hawkins, appeals a Superior Court (Coffey, J.) order dismissing her petition for declaratory and injunctive relief under the Right-to-Know Law, RSA ch. 91-A (2001 & Supp. 2001), seeking access to certain records kept by the defendant, New Hampshire Department of Health and Human Services (HHS). We vacate and remand.

In 1998, the plaintiff's counsel, on behalf of the plaintiff and other families, requested HHS to make available records of dental services provided to New Hampshire Medicaid recipients under

the age of twenty-one and of Medicaid reimbursement payments made to their dental healthcare providers from 1993 to 1998. The plaintiff asserted that the purpose for obtaining this information was to evaluate HHS' compliance with federal Medicaid law regarding dental services for recipients under twenty-one. In response to the plaintiff's request, HHS provided "pre-formatted" tabular summary reports. The plaintiff claims these reports were unresponsive to her request because most of the data provided did not distinguish between recipients by age and the few records specific to individuals under twenty-one offered no information regarding the dental services provided to them.

In 1999, the plaintiff filed a petition for declaratory and injunctive relief requesting access to the aforementioned records pursuant to RSA chapter 91-A. In her petition, the plaintiff requested the court to find that under RSA chapter 91-A: (1) the data sought were public records subject to disclosure; (2) HHS could be required to copy onto tapes the requested computer data; and (3) the plaintiff was required to pay only for the actual cost of the tape itself. HHS argued that the information was stored in the Medicaid claims processing system as "input data," which are discrete bits of information, and therefore did not constitute existing documents subject to disclosure under RSA 91-A:4. HHS asserted before the trial court that none of its programs was capable of generating the information in the format requested. In addition, the agency contended that the plaintiff was required to pre-pay for the cost to create the documents.

The plaintiff moved to compel production of the data. HHS then moved to dismiss the plaintiff's petition. The superior court granted HHS' motion, concluding:

The plaintiff here does not simply seek a copy of a particular government document, but rather asks the Court to order the defendant to create a new document to meet her request. The cost of creating an entirely new data manipulation program, assembling the diverse pieces of data, and encrypting or removing any confidential information would exceed \$10,000, by the defendant's estimate. As a matter of law, RSA Chapter 91-A does not intend such a result.

This appeal followed.

On appeal, the plaintiff argues the trial court erred in granting HHS' motion to dismiss because: (1) HHS admitted that it possessed the "input data" requested; (2) the data constituted public records under RSA 91-A:4; and (3) the court considered the alleged cost of compliance in determining whether the data constituted public records under RSA 91-A:4.

"[I]n ruling upon a motion to dismiss, the trial court must determine whether the allegations contained in the plaintiff's pleadings sufficiently establish a basis upon which relief may be granted." Provencher v. Buzzell-Plourde Assoc., 142 N.H. 848, 852-53 (1998). In making this determination, the court should assume the truth of the plaintiff's well-pleaded allegations of fact and construe all reasonable inferences from them most favorably to the plaintiff. Hacking v. Town of Belmont, 143 N.H. 546, 549 (1999).

The trial court's interpretation of a statute is a question of law, which we review de novo. Fichtner v. Pittsley, 146 N.H. \_\_\_, \_\_\_, 774 A.2d 1239, 1241 (2001). The starting point in any statutory interpretation case is the language of the statute itself. Kaplan v. Booth Creek Ski Group, 146 N.H. \_\_\_, \_\_ (decided November 20, 2001). Where the language of a particular statutory provision is at issue, "we will focus on the statute as a whole, not on isolated words or phrases." Snow v. American Morgan Horse Assoc., 141 N.H. 467, 471 (1996).

The information the plaintiff is requesting is derived from Medicaid claims received by HHS, either in hard copy or electronic form. HHS argues that the information does not constitute a public record because the unlinked electronic information is not already part of an existing document. RSA 91-A:4, V provides:

In the same manner as set forth in RSA 91-A:4, IV, any body or agency which maintains its records in a computer storage system may, in lieu of providing original documents, provide a printout of any record reasonably described and which the agency has the capacity to produce in a manner that does not reveal information which is confidential under this chapter or any other law.

(Emphasis added.)

We have previously considered whether information stored on a computer tape is a "public record" within the meaning of RSA 91-A:4. In Menge v. Manchester, 113 N.H. 533, 537 (1973), we recognized that a duplicate of a computerized tape of field record cards compiled by the City of Manchester for real estate tax assessment purposes was a public record. Likewise, a Medicaid claim form does not lose its status as a public record simply because it is stored within a computer system.

To the extent the plaintiff's request is for copies of the individual Medicaid claims, it does not require that HHS create new records. RSA chapter 91-A does not require HHS to compile data into a format specifically requested by a person seeking information under the statute. It does, however, require that public records received by HHS be maintained in a manner that makes them available to the public. See RSA 91-A:4, III-V. The trial court correctly ruled that HHS was not required to create a new document. However, to the extent that the plaintiff requests the Medicaid claims compiled in their original form, we remand for further proceedings.

The next issue is whether under RSA chapter 91-A cost is a factor that may be considered in determining whether information is a public record. In its analysis determining that the requested information was not a public record, the trial court used cost as a factor. Under RSA 91-A:5, cost is not listed as an exemption to disclosure of otherwise public information. In addition, in RSA 91-A:4, IV, where cost is addressed directly, it is not contemplated as a factor that could prohibit disclosure. The statute provides:

If a photocopying machine or other device maintained for use by a body or agency is used by the body or agency to copy the public record or document requested, the person requesting the copy may

be charged the actual cost of providing the copy, which cost may be collected by the body or agency.

RSA 91-A:4, IV. Therefore, we find that cost is not a factor in determining whether the information is a public record.

We do not reach the question of who bears the burden of paying for the cost of producing the information requested, because the issue is not ripe for our review.

The issues in this case foreshadow the serious problems that requests for public records will engender in the future as a result of computer technology. Unless the legislature addresses the nature of computerized information and the extent to which the public will be provided access to stored data, we will be called upon to establish accessibility on a case-by-case basis. It is our hope that the legislature will promptly examine the Right-to-Know Law in the context of advancing computer technology.

Vacated and remanded.

BRODERICK, NADEAU, DALIANIS and DUGGAN, JJ., concurred.

## **RSA CHAPTER 669, TOWN ELECTIONS**

(Selected sections)

### **§ 669:6 Qualification of Officers.**

Unless otherwise provided by law, no person shall hold an elective town office who does not have his domicile within the town.

Source. 1979, 410:1, eff. July 1, 1979.

### **§ 669:7 Incompatibility of Offices.**

I. No person shall at the same time hold any 2 of the following offices: selectman, treasurer, moderator, trustee of trust funds, collector of taxes, auditor and highway agent. No person shall at the same time hold any 2 of the following offices: town treasurer, moderator, trustee of trust funds, selectman and head of the town's police department on full-time duty. No person shall at the same time hold the offices of town treasurer and town clerk. No full-time town employee shall at the same time hold the office of selectman. No official handling funds of a town shall at the same time hold the office of auditor. No selectman, moderator, town clerk or inspector of elections shall at the same time serve as a supervisor of the checklist. No selectman, town manager, school board member except a cooperative school board member, full-time town, village district, school district except a cooperative school district, or other associated agency employee or village district commissioner shall at the same time serve as a budget committee member-at-large under RSA 32.

I-a. No person shall at the same time file a declaration of candidacy for any 2 or more elected offices that are incompatible under paragraph I.

II. The provisions of paragraph I refer to the actual holding of office, and are not to be construed to prevent the transfer between offices of information obtained in the regular conduct of business nor to prevent the personnel in any office from furnishing clerical assistance to any other office.

Source. 1979, 410:1. 1981, 282:3. 1983, 132:1. 1993, 123:1. 2000, 308:3, eff. June 21, 2000. 2014, 99:1, eff. Aug. 10, 2014

### **§ 669:8 Incompatibility of Offices; Town Manager.**

The town manager, during the time that he or she holds such appointment, may be manager of a district or precinct located wholly or mainly within the same town and may be elected or appointed to any municipal office in such town or included district or precinct that would be subject to his or her supervision if occupied by another incumbent; but he or she shall hold no other elected or appointed public office of the town except justice of the peace or notary public except as provided in RSA 37:9 and RSA 37:16.

Source. 1979, 410:1, eff. July 1, 1979. 2004, 55:2, eff. July 2, 2004.

## **RECORD KEEPING BASICS FOR TRUSTEES**

*Accurate records are important in carrying out the duties of the office, providing an audit trail, and insuring that future trustees will know from whom the trust funds were received, the purpose for which they were given and how and where those funds are invested.*

### **1. CASH RECEIPTS JOURNAL**

The Cash Receipts Journal is a listing of all cash and checks received, in chronological order, assigned to the appropriate category. The columns in the journal should be labeled to correspond with the different types of trusts administered by the trustees (cemetery, library, etc.), capital reserve funds, and any other funds received by the trustees during the year. There should also be included a column for interest and dividends. As you receive money, cash or checks, enter each receipt noting the date, the source of the money, and the proper category. See the example which follows on the next page.

### **2. FORM V or Spreadsheet Program (optional)**

Form V is an individual record of each trust fund held in the custody of the trustees. It includes the name of the fund, the name of the original donor, the date of creation of the fund, the purpose of the fund and the original principal amount. The form further serves as an ongoing record of the activity of the trust fund including changes to principal, income received, income expended, and income remaining at the end of the period. If the Form V ledger is kept up to date then the trustees should in a position to prepare the state form MS-9 directly from these sheets at the end of the calendar or fiscal year. See the examples of Form V which follow. Many trustees have replaced the Form V with computerized spreadsheets. If you utilize a spreadsheet program make sure you print a copy of these documents for the Trustees' permanent records.

### **3. BANK STATEMENTS, IRS 1099 FORMS, DIVIDEND STATEMENTS, CANCELLED CHECKS, VOUCHERS**

All monthly or quarterly statements from banking institutions should be reviewed, checked against entries in the journal, reconciled, and filed carefully.

IRS 1099 forms are issued annually to investors and savers by investment companies and banking institutions. These forms list the total amount of dividends or interest paid to investors and savers during the calendar year. Trustees should use these forms to reconcile their records making sure that all dividends and income have been properly accounted for and credited to the proper trust accounts. If the 1099 form shows backup withholding the trustees should immediately contact the investment company or banking institution to insure that the proper tax identification number is being utilized on all records.

Monthly checking statements should be reconciled on a regular basis to eliminate errors. Cancelled checks should be filed and retained by the trustees.

Vouchers will be discussed in detail later but it is important to keep these forms with the trustees' records. The vouchers provide an audit trail if a question arises regarding payment by the trustees and verification of the payment is required.

## **Proxies**

If the Trustees of Trust Funds invest in stocks they may receive proxy ballots for the shares held. Investopedia defines proxies as:

“Shareholders are encouraged to vote by proxy so that ownership interests are fully represented even if shareholders are unable to attend the company's annual meetings in person.

The proxy discloses important information about issues to be discussed at an annual meeting, lists the qualifications of management and board members, serves as a ballot for elections to the board of directors, lists the largest shareholders of a company's stock and provides detailed information about executive compensation.”

Trustees should develop a policy regarding when and how to vote by proxy.



CASH RECEIPTS JOURNAL EXAMPLE

| DATE   | CHECK NUMBER, NAME OF DONOR/BANK, ETC. | TRUST FUNDS |       |          | TRUST FUND INCOME |  |
|--------|--|-------------|-------|----------|-------------------|--|
|        |  | CEMETERY    | OTHER | INTEREST | DIVIDENDS         |  |
| Jan-91 | Ames, check #00123                     | 100         |       |          |                   |  |
| Jan-91 | Boyd, check #00252                     | 200         |       |          |                   |  |
| Jan-91 | Carr, check #02345                     | 500         |       |          |                   |  |
| Jan-91 | Dwight, cash received                  | 200         |       |          |                   |  |
| Jan-91 | Early, check #22456                    | 50          |       |          |                   |  |
| Jan-91 | Fox, check #90875                      | 100         |       |          |                   |  |
| Jan-91 | Gove, check #90834                     | 100         |       |          |                   |  |
| Jan-91 | Hines, check #88829                    | 150         |       |          |                   |  |
| Jan-91 | Iris, cash received                    | 200         |       |          |                   |  |
| Jan-91 | Jones, check #87643                    | 100         |       |          |                   |  |
| Jan-91 | Kovak, check #90876                    | 100         |       |          |                   |  |
| Jan-91 | Lambert, check #90006                  | 200         |       |          |                   |  |
| Dec-91 | Big Bucks Savings Bank                 |             |       |          |                   |  |
|        | CD#033016397                           |             |       |          |                   |  |
|        | Check #023-78856                       |             |       | 200      |                   |  |





## STEP BY STEP INSTRUCTIONS FOR PRO-RATING THE INCOME OF COMMON TRUST FUNDS

**Step 1.** Identify the individual trust funds by name and the principal dollar amount of each individual trust fund contained in the common trust fund.

**Step 2.** Once each has been identified, divide each individual trust fund principal amount by the total amount of the common trust fund to obtain the percentage of participation. This is done as follows:

**% = PRINCIPAL OF INDIVIDUAL TRUST FUND divided by TOTAL**

AMOUNT OF COMMON FUND

IF TOTAL PRINCIPAL IN COMMON TRUST FUND IS \$2,000.00

\$500.00 divided by common fund total of \$2,000 = 25%

\$200.00 divided by common fund total of \$2,000 = 10%

\$100.00 divided by common fund total of \$2,000 = 5%

\$ 50.00 divided by common fund total of \$2,000 = 2.5%

**STEP 3.** Calculate the **total** amount of **income** earned by the common trust fund in which the individual trust is located. Multiply this total by the **percentage of participation** of each individual fund to determine the dollar amount of income to be attributed to that individual trust fund. This is done as follows:

IF TOTAL INCOME FOR COMMON TRUST FUND IS \$200.00

A \$500.00 fund receives 25% of the income or \$50.00

A \$200.00 fund receives 10% of the income or \$20.00

A \$100.00 fund receives 5% of the income or \$10.00

A \$ 50.00 fund receives 2.5% of the income or \$5.00

**STEP 4.** Enter the principal and income figures for each fund on Form V or other record kept by trustees on the fund.

**NOTE:** Only those municipalities which have **COMMON** investments are required to file form MS-10. If the town or city has individual bank accounts for each trust then only MS-9 need be filed with the State.

**CEMETERY PERPETUAL CARE FUNDS**

|         |          |
|---------|----------|
| AMES    | \$100.00 |
| BOYD    | 200.00   |
| CARR    | 500.00   |
| DWIGHT  | 200.00   |
| EARLY   | 50.00    |
| FOX     | 100.00   |
| GOVE    | 100.00   |
| HINES   | 150.00   |
| IRIS    | 200.00   |
| JONES   | 100.00   |
| KOVAK   | 100.00   |
| LAMBERT | 200.00   |

**TOTAL: \$2,000.00**

**Figuring % of Each Fund in Common Investment:**

**% = Principal divided by the Total**

$$\text{\$500} \div \text{\$2,000} = 25\%$$

$$\text{\$200} \div \text{\$2,000} = 10\%$$

$$\text{\$100} \div \text{\$2,000} = 5\%$$

$$\text{\$ 50} \div \text{\$2,000} = 2.5\%$$

| <b>COMMON TRUST 1</b>             |                |             |                 |
|-----------------------------------|----------------|-------------|-----------------|
| <b>TOTAL INCOME FOR THE YEAR:</b> |                |             | <b>\$200.00</b> |
| <b>AMES</b>                       | <b>\$100</b>   | <b>5%</b>   | <b>\$10</b>     |
| <b>BOYD</b>                       | <b>\$200</b>   | <b>10%</b>  | <b>\$20</b>     |
| <b>CARR</b>                       | <b>\$500</b>   | <b>25%</b>  | <b>\$50</b>     |
| <b>DWIGHT</b>                     | <b>\$200</b>   | <b>10%</b>  | <b>\$20</b>     |
| <b>EARLY</b>                      | <b>\$ 50</b>   | <b>2.5%</b> | <b>\$ 5</b>     |
| <b>FOX</b>                        | <b>\$100</b>   | <b>5%</b>   | <b>\$10</b>     |
| <b>GOVE</b>                       | <b>\$100</b>   | <b>5%</b>   | <b>\$10</b>     |
| <b>HINES</b>                      | <b>\$150</b>   | <b>7.5%</b> | <b>\$15</b>     |
| <b>IRIS</b>                       | <b>\$200</b>   | <b>10%</b>  | <b>\$20</b>     |
| <b>JONES</b>                      | <b>\$100</b>   | <b>5%</b>   | <b>\$10</b>     |
| <b>KOVAK</b>                      | <b>\$100</b>   | <b>5%</b>   | <b>\$10</b>     |
| <b>LAMBERT</b>                    | <b>\$200</b>   | <b>10%</b>  | <b>\$20</b>     |
| <b>TOTALS:</b>                    | <b>\$2,000</b> |             | <b>\$200</b>    |

**THE MS-9 AND MS-10**

Instructions for the MS-9 and MS-10 report forms can be found on the Department of Revenue Administration's website at <http://www.revenue.nh.gov/forms>. The Department has launched an on-line, fillable form for use by the towns and cities. A copy of this form should still be sent to the Department of Justice.

Any questions regarding the use of this form should be directed to the Department of Revenue Administration.

Please see the instructions contained in the 2015 Handout booklet.

## **INVESTMENT POLICIES**

Trustees of Trust Funds and Library Trustees (those who hold the principal of their trust funds) must adopt an investment policy and review it annually pursuant to the applicable provisions of RSA 31:25, RSA 34:5 (cities), RSA 35:9 (towns) RSA 202-A:23 (libraries). A copy of this policy must be filed with the Attorney General.

Investment policies can be as simple or as detailed as the trustees wish. Each investment policy is individually tailored according to Trustees' goals and objectives, one size does not fit all. Following this page is an article written by former State Treasurer Michael Ablowich and a sample of a very simple investment policy drafted by CTU Assistant Director Terry Knowles.



*This article appeared in NH Bar Journal December 1996 and is reproduced here with permission from the author*

## PREPARING AN INVESTMENT POLICY

By Michael Ablowich

During the 1995 legislative session, House Bill 417 was introduced that would have given municipalities a broader choice of investment management options for financial assets. The bill was referred to committee and reintroduced and passed in the 1996 session with added provisions requiring municipalities to adopt and implement investment policies for certain funds for which public officials act as a fiduciary. These funds include local operating (general) funds, capital reserve funds and trust funds.

The adoption of an investment policy is a prudent and advisable action for an oversight group to take. The bill is a mandate for municipalities to take actions that should have already been taken by any public officials who act as a fiduciary for any funds under their supervision. The purpose of this article is to outline the basic information that should be contained within an investment policy for adoption by municipalities or any other organizations with fiduciary responsibilities. While nonprofit organizations are not covered under this recent bill, the information contained in this article may also be relevant to these groups. It should be noted that this is merely an outline and the views expressed by the author are his own, not a legal interpretation of any RSA and not to be interpreted as official policy of the State of New Hampshire or the State Treasury Department.

### **What is an investment policy?**

An investment policy is a statement about the monies for which you act as a fiduciary, how you intend them to be managed and what controls should be placed on them. It is the guidelines by which fiduciaries expect their goals and objectives for a particular financial asset to be met. The investment policy should also reference the applicable RSA's that govern the investment of the particular funds. An investment policy is not meant to absolve fiduciaries of the decision making process or provide unchecked power to an investment manager to make decisions on behalf of fiduciaries.

The overriding themes in an investment policy should be safety, liquidity and yield. Each decision making juncture in investing any public funds can be made within the context of these three terms. Safety is preserving the value of principal. Liquidity is the ability to turn an investment into cash without significant loss of principal. Yield is the return expected for a particular investment. The choice of an investment objective for a particular fund and the eventual choice of the types of securities used to meet these objectives will be driven by a need for safety of the funds, the ability to use the funds when needed (liquidity) and the return expected given the safety and liquidity of the investment.

## **Why is an investment policy important?**

As a public official there is a need to insure that the proper controls are placed on the management of assets, particularly cash and investments. A well written investment policy is your statement as a public official or group of officials about those controls over public monies. An investment policy should also act as a guide within which to frame decisions made by either the fiduciaries or the person hired by the fiduciaries to manage those financial assets.

## **Elements of an Investment Policy**

An investment policy can be divided into seven basic components: 1) Purpose, 2) Investment Objective, 3) Investment Authority, 4) Responsibilities, 5) Approved Investments, 6) Constraints, and 7) Reporting.

### **Purpose**

It is important to clearly identify the funds that will be covered under an investment policy. The trust documents, RSA's or resolutions of ruling bodies should be referenced as a means of differentiating between different classifications of funds. This is especially important when funds may be commingled in larger investment accounts. The purpose of the fund or interpretation of the trust documents that establish them should also be included.

It is also important to specifically identify the types of funds involved. For example, if the monies are classified as trust funds, they should be further identified as expendable or nonexpendable. The classification of nonexpendable versus expendable trusts or capital reserve versus agency funds is important to understand the accounting procedures and treatments used in each case as well as the appropriate RSA's that may govern the allowable menus of investment choices.

### **Investment Objective**

A clear statement should be made about the goals of investing particular funds: For example, the trust fund is to be invested to insure that the purchasing power of the principal is maintained, while providing a level of income sufficient to support the programs intended to be financed under the terms of the trust document. The ensuing sections of the policy should support the investment objective.

### **Investment Authority**

The individual or individuals with fiduciary responsibility for carrying out the terms of the trust or safeguarding the monies should be identified. Generally, trustees of trust funds or treasurers may be charged through the RSA with the fiduciary responsibility for the vast majority of municipal monies. It is, however, likely that other groups may have responsibility for overseeing the investment of public funds. For example, local housing authorities or economic development councils may have monies in their possession which may not be large, but still need the same attention that larger pools of monies require. While these other groups are not affected under the new legislation, there would appear to be a prudent and practical reason for adopting

an investment policy for all funds under their control for the same reasons that the use of investment policies at the local municipal level of important.

### **Responsibilities**

As a practical matter, trustees of trust funds or treasurers may employ individuals that execute the day to day operations of managing public monies. Those individuals and the powers delegated to them should be clearly identified. For example, an investment manager may be permitted to use mutual funds as an investment vehicle. However, the trustees of trust funds will have final approval over the use of particular mutual funds at the request of the manager. Similarly, an investment manager may be delegated with the sole responsibility of buying and selling individual securities, but may have restrictions as to the total number or dollar volume of transactions within a particular time frame. The identification of specific responsibilities is important to insure that those individuals with fiduciary responsibility understand the power conveyed to their employees to make decisions on their behalf. This delegation of power is not meant to absolve fiduciaries of responsibility for investment decisions, but rather to insure that, for those powers delegated, appropriate controls are in place.

### **Approved Investments**

The choice of approved investments will be based on the categories permissible under the RSA's for particular types of funds and the objective of the funds. Based on historical rates of return for different asset classes and rates of inflation, an equity component may be appropriate for an investment program to allow a portion of a fund to appreciate faster than the rate of inflation and preserve the purchasing power of any income generated. In theory, these gains can be allocated periodically to income producing assets to continually increase the amount of income generated by a particular fund. Public officials need to determine the types of equity investments which may be appropriate. While there are a number of different types of equity investment options from aggressive growth or small cap stocks to blue chip stocks, the investment policy should specify the types of stocks they are comfortable with given the objective. For example, stocks, in general, may be an approved investment, so long as they are blue chip or large cap stocks, that may be held in the fund as individual stocks or through a mutual fund with an investment strategy that includes similar types of stocks.

Each type of investment should be included in this section with a brief description of the limitations of the particular type. For example, bonds may be appropriate only if they are issued by the federal government, one of its agencies or by companies whose debt is rated AAA or better. There are certainly more investment types than stocks and bonds and some mention should be made of those other types (money market funds, certificates of deposit, repurchase agreements, etc.) if their use is to be permitted.

### **Constraints**

Once the approved investments are outlined, the allowable amounts of each should be determined. The allowable amounts may be defined in total dollars or as percentage of the total monies invested. For example, fifty percent of the fund may be invested in stocks and fifty percent in bonds and cash. Defining the constraints in percentage terms will permit more

flexibility for the portfolio of securities to be adjusted from time to time as securities change in price. The constraints may include, for example a plus or minus ten percent of the targeted value, since this will allow for variance given monthly changes in market value which will invariably occur. It may also be advisable to further breakdown the asset allocations. For example, fifty percent may be permitted in stock with up to ten percent invested in aggressive growth stocks or fifty percent on bonds with up to twenty percent in other than U.S. Government obligations. In the constraints section there may also need to be some discussion of maximums permitted in any one issuer of stocks or bonds. For example, no more than five percent of stocks may be in any one company or twenty-five percent in any single mutual fund.

Bonds are perceived as fairly low risk investments. However, a thirty year treasury bond is riskier than a five year treasury bond because of the variability in the price of the bond over its life. To properly manage this particular risk associated with investing in bonds, the investment policy should include a limit on the maximum maturities of individual fixed income securities and also a weighted average maturity of the total portion of the portfolio allocated to bonds. For example, bonds are permitted up to fifty percent for the portfolio with a weighted average maturity of less than ten years, with no single maturity longer than fifteen years.

## **Reporting**

The reporting may be the most important part of an investment policy, especially if the fiduciaries hire others to execute the investment objectives on their behalf. In this section the type and frequency of financial statements should be addressed. In addition to periodic reports with a list of investments, their costs, current values and transaction history; other routine reports should document compliance with the investment policy (constraints, use of approved investments, etc.). The format of any reporting should be determined by the fiduciaries with input from their investment manager or other employees.

Performance standards (benchmarks) for the fund as well as the frequency of performance review should also be outlined in this section. Setting benchmarks, commensurate with the investment objectives, to evaluate performance is important to insure financial goals are being met. For example, the benchmark may be that the fund grows at a rate greater than the Standard and Poor's 500 stock index. Charting the fund's performance against a benchmark is especially critical in evaluating the performance of an investment manager hired by fiduciaries.

## **Summary**

The establishment of an investment policy is the basis for proper management of public funds. Writing an investment policy forces public officials to think through their role as fiduciaries and how they can meet the intent of the law or a trust document in the most prudent manner possible. An investment policy also can be the source document for delivering instructions to a contracted individual or an employee whose job it may be to make investment decisions for a fiduciary. Many public officials, especially those at the local level, may serve on a part-time or volunteer basis and are required to act in a fiduciary role. These fiduciaries may or may not have the resources to explore all the issues related to the investment of public funds. For such officials, preparing an investment policy is the first step to insuring that they have the tools to excel in their important role as a guardian of public funds.

#### ABOUT THE AUTHOR

Michael Ablowich is the former Deputy Treasurer for the State of New Hampshire responsible for Investments and Debt Management.

**SAMPLE INVESTMENT POLICY STATEMENT AND  
GUIDELINES FOR THE TOWN OF GRANITEVILLE**

**PRESENTED BY THE ATTORNEY GENERAL'S OFFICE  
CHARITABLE TRUSTS UNIT**

GENERAL

The overall portfolio should be managed in accordance with the Prudent Man or Prudent Person rule. The definition of prudence is based on RSA 31:25-b as follows:

“a prudent investment is one which a prudent man would purchase for his own investment having primarily in view the preservation of the principal and the amount and regularity of the income to be derived therefrom.”

The investment guidelines that follow provide direction as to our risk tolerance and general preferences. This Investment Policy will be reviewed at least annually as required by New Hampshire laws.

THE INVESTMENT OBJECTIVE

The investment objective for this account is “Income Only.” This objective is consistent with our emphasis on current income and our desire for modest growth of principal from appreciation. The objective dictates an asset allocation utilizing a combination of cash equivalents, fixed income securities, and equities.

ASSET ALLOCATION

The asset allocation decision is the single most important factor in determining the performance of the total portfolio. The current asset allocation guideline is as follows:

|                            |     |
|----------------------------|-----|
| Cash and cash equivalents: | 10% |
| Fixed Income:              | 70% |
| Equities:                  | 20% |

FIXED INCOME

The fixed income portion of the portfolio should be managed as follows: The average maturity of the debt securities should not exceed ten years nor should the average duration exceed five years. All fixed income security purchases shall have a minimum quality rating of “A” by either Mergent Bond Record (formerly Moody’s Investor Services), or Standard and Poor’s Corporation. Concentrations in any one issuer shall not exceed ten percent except in obligations of the United States and/or of the State of New Hampshire and its subdivisions.

COMMON STOCKS

The equity investments should be in companies that have a proven record of earnings’ growth, strong fundamental sand good valuations. The majority of the equity position should be in larger

capitalization companies (stocks that have a market capitalization of over \$15 billion), with only a small percentage devoted to mid cap (stocks with a market capitalization between \$1 and \$15 billion dollars) and small cap (stocks that have less than \$1 billion in market capitalization). The equity portion of the portfolio must be broadly diversified. At the highest level, the maximum exposure to any one industry sector should not exceed twenty-five percent. At the security level, the purchase of a single security should not exceed five percent of the equity portion of the portfolio. The maximum exposure to any one name, because of price appreciation, should not exceed ten percent of the equities.

#### PERFORMANCE MANAGEMENT

The performance results should be reviewed on a year-to-date, one, three, and five year basis. For comparison purposes, the equity performance should be compared to the Standard and Poor (or S&P) and the Lehman Government/Corporate Index.

#### MEETINGS

The trustees should meet to review their portfolio at least four times a year. During the meeting the trustees should review the Investment Policy and, if necessary, make changes where appropriate. As part of the review the trustees should discuss the investment objective, asset allocation, performance, diversification, and general compliance with guidelines. In addition the information presented to reflect “where we were,” “where are we now,” and “where are we going.”

## **THE PRUDENT INVESTOR RULE FOR TRUSTEES OF TRUST FUNDS**

The 2008 law gives trustees a choice: Prudent Man or Prudent Investor standard of investing:

**31:25-d Application of Prudent Investor Rule.** – The trustees of trust funds may manage and invest such funds in accordance with the prudent investor rule under RSA 564-B:9-901--RSA 564-B:9-906 without regard to the investment limitations of RSA 31:25 and RSA 31:25-a, provided, however, the trustees of trust funds:

I. Notify the attorney general in writing of their decision to invest according to the prudent investor rule; **and**

II. Hire or employ the trust department of a bank or a brokerage firm to provide investment advice and assistance under RSA 31:38-a, III.

| <b>To Which Funds<br/>Does the New Law Apply?</b>         |     |
|---|-----|
| Privately Donated Funds;<br>cemetery perpetual care funds | Yes |
| Capital Reserve Funds                                     | No  |
| General Fund Trusts created<br>under RSA 31:19-a          | No  |

4/12/2010 Attorney General 5

Although the investment standard has changed the Trustees of Trust Funds cannot adopt the provisions of the Uniform Prudent Management of Institutional Funds Act (RSA 292-B) nor can the trustees appropriate for expenditure any of the realized or unrealized gains on permanently restricted principal.



This prohibition is in full force and effect as applied to the new law

•Example: John Smith gave the Town of Graniteville \$50,000 (principal amount) in 1954 the income to be used for the benefit of the citizens of the town in the discretion of the Selectmen.

•By 2006 the \$50,000 has grown to \$65,000 in principal.

–TRUSTEES OF TRUST FUNDS CANNOT SPEND THE \$15,000 CAPITAL GAIN, EVER. It remains permanently restricted.

•So why should trustees try to grow the principal if it can't be spent?

Answer: -If Trustees invest the funds in their custody to produce income only the effects of inflation will erode the purchasing power of the principal thereby reducing the amount of income in the future

Using the U.S. Inflation Calculator: <http://www.usinflationcalculator.com/>

it is easy to determine the loss in the value of purchasing power over time when an amount is adjusted for inflation. If Mrs. Smith bequeaths \$10,000 to the Town of X in 1960, the income to be used for the maintenance of Smith Memorial Park, and the Trustees invest the \$10,000 for income only, in 2012 the \$10,000, if invested to preserve purchasing power, could have appreciated to a value of \$77,565.54.

| Inflation Calculator              |   |
|-----------------------------------|---|
| If in                             | <input type="text" value="1960"/> (enter year)  |
| I purchased an item for \$        | <input type="text" value="10,000.00"/>          |
| then in                           | <input type="text" value="2012"/> (enter year*) |
| that same <b>item</b> would cost: | <input type="text" value="\$77,565.54"/>        |
| Cumulative rate of inflation:     | <input type="text" value="675.7%"/>             |

## **SCHOOL AND MINISTERIAL FUNDS**

Trustees of Trust Funds sometimes find they have custody of two types of funds – “School Funds” and “Ministerial Funds” for which no paperwork exists. The following excerpt taken from the 1916 Hanover Town Report provides a good explanation for each of these funds.

The origins of the School funds and Ministerial funds date back to the early days and the process for the incorporation of towns in New Hampshire. It was customary in the charters granted by the Province of New Hampshire to provide that one proprietary share of the total landmass of the township should be reserved “for the benefit of a school in said town”. Other shares were also reserved for the first settled minister. So in the original charters of many of the older towns in New Hampshire parcels of land were set aside specifically for schools and for the attracting of a minister. Over the years many of the school lots were either sold or leased and the proceeds placed into trust “for the use of the schools in said town” and became known as the School Funds. Similarly the lots reserved for ministers were sold and the proceeds placed into trust “for the benefit of churches” and became known as the Ministerial Funds.

In modern times the income from the School Fund is used for educational purposes while the income from the Ministerial Fund is divided among the religious institutions in the town.

**SCHOOL/MINISTERIAL FUND CASE: BAPTIST SOCIETY IN  
WILTON V. TOWN OF WILTON**

2 N.H. 508

*Where in the grant of a township, there was a lot of land reserved "for the ministry", and afterwards the inhabitants of the town sold the lot so reserved, and put the proceeds of the sale at interest, as a fund for the support of a minister. It was held that the fund was the property of the town, and that a part of the inhabitants incorporated as a religious society could not recover of the town any part of the said interest to be applied to the support a minister of said society.*

Assumpsit for \$300 money had a received. The cause was tried here at April term, 1821, upon the general issue, when it appears in evidence, that on the 16<sup>th</sup> June, 1749, the Masonian proprietors granted to *Thomas Read* and forty-five other persons, a tract of land five miles square, which was then already laid out into lots, and the lots for each grantee respectively ascertained. In this grant there was a reservation as follows: "one share for the first settled minister, and one for the ministry, and one for the school there forever, which said three shares and lots shall be the same as drawn and already entered on the schedule and plan annexed to said grant."

The share reserved for the ministry as aforesaid, contained three lots, viz. lot No. 17 in the second range, lot No. 9 in the first range, and lot No. 8, in the eighth range. The said grantees immediately took possession of the share reserved for the ministry, and applied the profits of it to the living of teachers of the Christian religion. In 1763, the inhabitants and grantees of the said tract of land, granted the use and income of the three lots aforesaid, to the Rev. *Jonathan Livermore*, as part compensation for public instruction in religion, and he settled there and became their minister.

On the 2d January, 1765, the said inhabitants were incorporated as a town by the name of Wilton, and the town, after Mr. *Livermore* ceased to be their minister, continued to apply the lots to the use of the ministry, until the year 1803, when the said three lots were sold by the town, and the proceeds, amounting to \$2,500, set apart as a fund, and the interest has been annually received by the town, and expended in procuring public religious instruction.

Until the year 1813, there was only one religious society in Wilton, and that was a congregational society. On the 25<sup>th</sup> June, 1813, a part of the inhabitants of Wilton were incorporated as a religious society, by the name of the Baptist Society in Wilton. The members of this society were duly organized as a corporation, and having settled a minister of the denomination of christians, called Baptists, before the commencement of this action, demanded of the town of Wilton their share of the interest of the said fund, to be applied in the support of their said teacher. At the time the plaintiffs were incorporated, the members of the corporation paid about one eighth part of the taxes raised in the town of Wilton.

Upon these facts the court directed a nonsuit to be entered, subject to the opinion of the court upon the above case.

RICHARDSON, C.J. It seems always to have been understood in this state, that lands originally reserved in the respective towns for the use of the ministry, were the property of the towns; and lands of this description have always been occupied, and sold, and transferred by the respective towns claiming them as the absolute property of the towns.

In Massachusetts, provision has been made by law to preserve and render more effectual grants and donations to charitable and pious uses. *Col. & Prov. Laws 605, & Mass. Statute of Feb. 20, 1786—2 Mass. Rep. 500—7 do. 444—10 do. 93.—12 do. 285.—14 do. 333.—15 do. 464.* There the ministers of the several protestant churches are sole corporations, capable of taking in succession any parsonage land, and no alienation made by any minister of any such land is valid, any longer than he continues minister, unless such alienation be made with the consent of his town; and an alienation of the parsonage by the town is void. But in this state no such provision has been made by law. A settled minister has no interest in the parsonage lots belonging to the town where he is settled, unless by contract with the town.

A general opinion seems to have prevailed in this state, that the lots reserved by the proprietors of townships for the ministry and for schools, were intended to aid the first inhabitants in educating their children, and in procuring religious instruction, and thus to induce individuals to become inhabitants of the town. That those lots were intended as an absolute gift to the inhabitants of the towns, to be applied to those purposes at their discretion; and that, in fact, they were not intended to be vested in the towns in trust, to apply the rents and profits to those objects; but were, in truth, given as a temporary aid to the first inhabitants. It is certain that the towns have always claimed and exercised the right of selling and conveying the lots reserved for the ministry and for schools, at their pleasure, and we are not aware that this right has ever been called in question. Belknap, in his history of this state, vol. 3, p. 244, says, "it has been a common practice in all the grants of townships which have been made, either by the crown or the Masonian proprietors, to reserve one share, equal to that of any other grantee, for the first settled minister, as his own right, besides a parsonage lot. This has proved a great encouragement to the settlement of ministers in the new towns."

The manner in which these reservations were made, gave some countenance to the general opinion that prevailed on the subject. The reservation in this case was "one share for the first settled minister, and one for the ministry, and one for the school there forever." No doubt was ever entertained that the first settled minister became the absolute owner of his share in fee simple, free from all trusts, and it was not very unnatural that towns should suppose that they were the owners of the other two shares in the same manner.

It is also worthy of remark, that until the statute of 1819, cap. 76, was passed, we had no public act creating parishes, and defining their powers. All parishes, before that time were created by private acts. The power given to towns to raise money for the support of the ministry, was given among other powers merely municipal, in the act for regulating towns. No provision was made by law to preserve any trust supposed to exist in these reservations, and indeed until the passage of the statute of 1821, cap. 6, we had no court possessing proper powers to remedy breaches of trusts in such cases.

Whether these reservations might not have been considered originally as trusts, which towns were bound to apply specifically to their intended objects, it is unnecessary now to inquire. It is

enough that the inhabitants of our towns have generally viewed them in a different light, and have acted accordingly, and that they cannot now be viewed as trusts, without great public inconvenience. If we should now decide these reservations to be trusts, and hold towns to a specific performance of the trust, it would lead to endless litigation and expense, without any essential service to the cause of religion or education. It would be much better in every point of view, to compel by a general law, every town in the state to raise a fund for the use of the ministry and for schools, than to attempt, through the medium of courts of justice, to collect the “disjecta membra” of these reservations, and convert them into funds for those purposes.

The first inhabitants of this country considered the settlement of ministers and the establishing of schools as matters of the highest importance. In general, those who first settled in the new townships were poor, and we have no doubt that these reservations were intended to aid those who went into the new towns. They were like the advancements which a parent makes to his children, to enable them to set out in the world. It was not intended that the towns should hold the reservations in trust, to apply them specifically to those purposes, but they were absolute gifts, intended merely to augment the ability of the inhabitants to procure instruction for themselves and their children.

If this be a correct view of these reservations, the present action cannot be maintained. The land sold belonged to the town of Wilton, and the money arising from the sale is the property of the town, and not the property of individuals. It is perfectly clear that individuals belonging to a town cannot by any action whatever recover a share of the funds of the town, to be applied to their own separate use. And we are of opinion that if this were a trust fund, the law would be the same. The reservation was general, “for the ministry,” leaving the management of the trust to the discretion of the town. If the town then apply the fund to the hiring of a minister, whom a majority approve, can we say that the fund is misapplied? When a minister is settled in a town, all may have the benefit of his teaching if they choose, and if they cannot conscientiously hear them, it is their misfortune. Individuals may think that if they had their share of the fund, they would lay it out more to their own profit; but the donation was not to individuals, but to a corporation, and to be laid out agreeably to the will of the corporation. It is the misfortune of these plaintiffs that they are a minority in the town of Wilton; but should the time ever arrive when the members of this society shall constitute a majority of the town of Wilton, this fund will be unquestionably at their disposal, and they may apply it in such manner as they may think best.

*Judgment for the defendants.*

**LIBRARY TRUSTEE CASE:**

**TOWN OF LITTLETON & A V. TAYLOR**

Town of Littleton & a.

vs.

Kathryn Taylor

No. 93-250

SUPREME COURT OF NEW HAMPSHIRE

138 N.H. 419, 640 A.2d 780

April 12, 1994

HEADNOTE

1. Appeal and Error--Dismissal of Complaint--Standards for Review

Trial court's dismissal of declaratory judgment petition regarding legality of defendant's simultaneous employment as librarian and service as town selectman would not be disturbed absent an abuse of discretion or a finding that the decision was unsupported by evidence or legally erroneous.

2. Public Employees--Rights, Powers and Duties--Conflicts of Interest

Trial court did not err in finding that defendant was a full-time employee of town's public library, but not of town, and consequently defendant's simultaneous employment as librarian and service as town selectman did not violate statute; managerial and fiscal control over both librarian and library was vested in library's board of trustees, not in town. RSA 202-A:6, :11, 669:7.

3. Public Employees--Rights, Powers and Duties--Conflicts of Interest

Common law doctrine of incompatibility of offices bars an individual from holding two offices when one office is subordinate to the other, as governmental checks and balances are eliminated because individual is reviewing his or her own work.

4. Public Employees--Rights, Powers and Duties--Conflicts of Interest

Defendant's simultaneous employment as librarian and service as town selectman was not precluded by common law doctrine of incompatibility of offices, since defendant, as librarian, was not subordinate to town's board of selectmen or town manager, and defendant's public declaration that she would abstain, as selectman, from voting to fill vacancy in library board would defuse possible conflict of interest. RSA 202-A:10, :15.

## 5. Attorneys--Fees--Recovery

In reviewing trial court's denial of attorney's fees, court will defer to trial court's decision and will not overturn it absent an abuse of discretion.

## 6. Attorneys--Fees--Recovery

Defendant who successfully defended against declaratory judgment petition in order to retain her official, elected position as town selectman was entitled to recover attorney's fees from town, where petition essentially placed her in same position as if a quo warranto proceeding had been brought against her, and defendant not only vindicated her own right to hold office of selectman, but also conferred substantial benefit on town.

## COUNSEL

Moulton, Samaha, Vaughan & Foley, P.A., of Littleton (Stephen U. Samaha on the brief and orally), for the plaintiff, Town of Littleton.

Douglas & Douglas, of Concord (Charles G. Douglas, III and Susanna L. Giombetti on the brief, and Mr. Douglas orally), for the intervenors, Eddy L. Moore, Ferne J. Foster, Jr., and Kenneth E. Curran.

Stebbins, Bradley, Wood & Harvey, PA , of Hanover (David H. Bradley on the brief and orally), for the defendant.

## JUDGES

JOHNSON, J., DID NOT SIT; THE OTHERS CONCURRED.

AUTHOR: BROCK

## OPINION

Three taxpayers (the intervenors) from the Town of Littleton (the town) appeal an order of the Superior Court (Morrill , J.) dismissing the town's petition for declaratory judgment. The intervenors argue that RSA 669:7 (1986) and the common law doctrine of incompatibility of offices precludes the defendant's simultaneous employment as librarian and service as town selectman. The defendant cross-appeals an order of the Superior Court (Morrill , J.) { \*421 } denying her motion for attorney's fees. The defendant argues that she should be awarded attorney's fees under the "public trust" theory set forth in *Silva v. Botsch*, 121 N.H. 1041, 1043, 437 A.2d 313, 314 (1981). We affirm the order concerning declaratory judgment, reverse the order concerning attorney's fees, and remand.

The defendant, Kathryn Taylor, was appointed librarian of the Littleton Public Library (the library) by the Littleton Board of Library Trustees (the board) pursuant to RSA 202-A:11, V (1989). Twelve years later, she was elected to the office of town selectman for a three-year term and took office. The next day, the town's two other selectmen petitioned in the name of the town for declaratory judgment and injunctive relief. The town sought both a judgment as to whether

the defendant's simultaneous employment as librarian and service as town selectman violated RSA 669:7, and an injunction against her participation as selectman until the issue was resolved. The two selectmen asserted neutrality on the issue, and three town residents intervened in order to protect the interests of the town's taxpayers. All parties submitted an agreed statement of facts. The court dismissed the town's petition, holding that the defendant had not violated the statute as she was not a full-time employee of the town. The court denied the defendant's motion for reimbursement of her legal fees incurred in defending the action.

[1] We will not disturb the trial court's ruling absent an abuse of discretion or a finding that the decision is unsupported by the evidence or legally erroneous. *In re Kearsarge Regional School District*, 138 N.H. 211, 214, 636 A.2d 1033, 1035 (1994).

The intervenors argue that the defendant's simultaneous employment as librarian and service as town selectman violate RSA 669:7. The statute reads, in pertinent part: "No full-time town employee shall at the same time hold the office of selectman."

The trial court found that the defendant "is not a full-time employee of the Town. She is a full-time employee of the Town Library." Consequently, we first determine if the trial court erred in finding that the defendant is a full-time employee of the library.

In determining whether an employer-employee relationship exists, we consider factors such as managerial and fiscal control. *Samaha v. Grafton County*, 126 N.H. 583, 586, 493 A.2d 1207, 1210 (1985). The characteristics of the defendant's employment were enumerated in the parties' agreed statement of facts. Those facts are consistent with the trial court's determination that the defendant was an employee of the library and not of the town. They provide ample evidence of the library board's managerial and fiscal control over the { \*422 } librarian and the town's lack thereof. For example, the board appoints the librarian, determines compensation and other terms of employment, and has the exclusive power to discharge or remove the librarian from office. RSA 202-A:11, V, :17 (1989). Neither the town's board of selectmen nor the town manager has any authority to assign duties to, to supervise the work of, or to remove the librarian. In contrast, public employees of the town are appointed and removed by the town manager, who also sets their compensation. RSA 37:6, II (1988); P. Loughlin, 13 New Hampshire Practice, Local Government Law § 383, at 260 (1990). We find no error in the trial court's conclusion that the defendant is a full-time employee of the library. See *Samaha*, 126 N.H. at 586, 493 A.2d at 1210.

The intervenors argue that the trial court's order is "confusing" and "legally erroneous" because it stated that the defendant was "the full-time public librarian for the Town," but that she "is not a full-time employee of the Town." Any confusion on the intervenors' part stems from their erroneous assumption that employment as librarian of a public library in a town automatically equates to employment by that town. A "public library" is defined as a library "which provides regular and currently useful library service to the public without charge," and which receives regular financial support from public sources, such as a town, or private sources. See RSA 202-A:2, I (1989). Further, a "public library" is "every library regularly open to the public, or to some portion of the public, with or without limitations, . . . whether its ownership is vested in the town, in a corporation, in an organized association, or in individuals." RSA 41:21 (1991).



The intervenors' argument ignores the trial court's specific finding that the library "is a separate and distinct entity" from the town. The Littleton Public Library was established pursuant to a contract between Andrew Carnegie and the town in 1902. Carnegie donated funds to construct the library building in return for the town's pledge to provide continuing financial support. The Littleton Board of Library Trustees is the governing board of the library. RSA 202-A:2, II (1989). The publicly elected board is vested with the entire custody and management of the library and of all the property of the town relating thereto, except trust funds held by the town. RSA 202-A:6 (1989). The board has adopted and maintained bylaws which govern the library. RSA 202-A:11, I (1989).

[2] The library budget is funded by both town taxes and private sources. The board determines how to expend, and has the power to expend, all funds provided to the library. RSA 202-A:11, II-IV (1989). { \*423 } Most important, the town has no power to discontinue the library. RSA 202-A:18 (1989 & Supp. 1993). We find no error in the trial court's finding that the defendant's employment as librarian of the Littleton Public Library does not equate to employment by the Town of Littleton. Cf. *Jaskola v. City of Manchester*, 134 N.H. 45, 49, 587 A.2d 256, 258 (1991). Consequently, the defendant's simultaneous employment as librarian and service as town selectman do not violate the statute. See *Tappan v. Shaw*, 113 N.H. 353, 354-55, 306 A.2d 762, 763 (1973).

[3] The intervenors also argue that the common law doctrine of incompatibility of offices precludes the defendant from simultaneous employment as librarian and service as town selectman. We disagree. The doctrine bars an individual from holding two offices when one office is subordinate to the other, as the governmental checks and balances are eliminated because an individual is reviewing his or her own work. Loughlin, *supra* § 622, at 420. We have held that membership on a school district's prudential committee (officers of the school district) was incompatible with the position of auditor of that same school district. *Cotton v. Phillips*, 56 N.H. 220, 223 (1875). Prudential committee members administered the affairs of the school district, took custody of and disbursed the money apportioned to the district, and made contracts with school teachers. The auditors examined the accounts and vouchers of the prudential committee and reported their findings. The two offices were incompatible as an auditor sat in judgment on the acts of the prudential committee, and could conceal a misappropriation of funds from the district. *Id.*

We have also held that the position of school teacher in a city school district was not incompatible with the office of city councilman, where the school district hired the teacher and determined teacher salaries, and the general management and control of the public schools was vested in the school board and not the city council. *Tappan v. Shaw*, 113 N.H. at 354-55, 306 A.2d at 763. As noted above, the defendant librarian is not subordinate to the town's board of selectmen or the town manager. The library board of trustees appoints the librarian, determines her salary, and is vested with the management and control of the library.

[4] It is true that the town's board of selectmen fills a vacancy in the office of library trustee by appointment. RSA 202-A:10 (1989); RSA 669:75 (1986). The doctrine of conflict of interest, however, is not equivalent to that of incompatibility of offices. Loughlin *supra*. The defendant has publicly declared that she would abstain, as { \*424 } selectman, from voting to fill a vacancy in the library board, should one occur. Such abstention would defuse that possible

conflict of interest. Although the city charter does not appear in the text of *Tappan*, selected sections of it are a part of the record in this case. We note that the city council in *Tappan* was also charged with filling any vacancy in the offices of the school board. We hold that the defendant's simultaneous employment as librarian and service as town selectman do not violate the common law doctrine of incompatibility of offices.

On her cross-appeal, the defendant argues that the town should pay her attorney's fees under the "public trust" theory set forth in *Silva v. Botsch*, 121 N.H. 1041, 1043, 437 A.2d 313, 314 (1981). The town argues that attorney's fees are not appropriate in this case because the town's petition did not seek the defendant's removal as selectman, and because the defendant did not initiate the litigation. The town also argues that if attorney's fees are awarded, the intervenors should pay them and not the town.

[5] In reviewing the trial court's denial of the defendant's motion for attorney's fees, we defer to the trial court's decision and will not overturn it absent an abuse of discretion. *Maguire v. Merrimack Mut. Ins. Co.*, 133 N.H. 51, 54-56, 573 A.2d 451, 453-54 (1990). Although the general rule is that each party pays his or her own attorney's fees, the legislature and judiciary have created a number of flexibly applied exceptions. *Irwin Marine, Inc. v. Blizzard, Inc.*, 126 N.H. 271, 276, 490 A.2d 786, 790-91 (1985). The legislature has provided that both State and county officials who successfully resist removal may obtain costs and attorney's fees. *Foster v. Town of Hudson*, 122 N.H. 150, 151, 441 A.2d 1183, 1184 (1982); see RSA 4:1, IV (1988); RSA 28:10-a, IV (1988). We have held that local officials should have the same privilege. *Foster*, 122 N.H. at 151, 441 A.2d at 1184.

[ 6 ] This petition for declaratory judgment, brought after the defendant had already taken office as selectman, essentially placed her in the same position as if a quo warranto proceeding had been brought against her. See *Attorney-General v. Marston*, 66 N.H. 485, 486-87, 22 A. 560, 561 (1891). She defended against the petition in order to retain her official, elected position as selectman. Therefore, we hold that the defendant is entitled to an award of attorney's fees. See *Silva*, 121 N.H. at 1045, 437 A.2d at 315; *Foster*, 122 N.H. at 152, 441 A.2d at 1184. We further find it appropriate under these circumstances to require the town to pay the defendant's attorney's fees. As a public trustee elected to administer municipal affairs, the { \*425 } defendant not only vindicated her own right to hold the office of selectman, but also conferred a substantial benefit on the town she serves. See *Irwin Marine, Inc.*, 126 N.H. at 276, 490 A.2d at 791.

We reverse the trial court's denial of the defendant's motion for attorney's fees and remand for a determination as to the reasonable amount of attorney's fees that she should receive from the town.

#### DISPOSITION

Affirmed in part; reversed in part; remanded.

**CEMETERY PERPETUAL CARE FUND CASE:**  
**OPINION OF THE JUSTICES**

101 N.H. 531, 133 A.2d 792

Supreme Court of New Hampshire.

Submitted June 7, 1957.

Answer Returned June 28, 1957.

Summary: A question was propounded by the House of Representatives to the Justices of the Supreme Court relating to the constitutionality of proposed statutory amendment authorizing use of income accumulation of a particular burial lot trust fund for general care of cemetery, subject to specified conditions. The Justices of the Supreme Court were of the opinion that such legislation would be an unconstitutional invasion of established equitable powers of the courts in violation of Const. P. 1, art. 37.

Headnotes/Key Citations Omitted

Ernest R. D'Amours, Manchester, Director of Charitable Trusts, for the bill.

The following resolution adopted by the House of Representatives on May 28, 1957, was filed in this court on May 29, 1957:

‘Resolved, That the opinion of the Justices of the Supreme Court be respectfully requested upon the constitutionality of the provisions of Senate Bill No. 117, An act relative to cemetery trust funds.

‘Further resolved, That the Speaker transmit a copy of Senate Bill No. 117 to the Clerk of the Supreme Court for consideration by said court.

‘Further resolved, That pending receipt of such opinion from the Supreme Court, Senate Bill No. 117 be laid upon the table.’

The following answer was returned:

To the House of Representatives:

The undersigned Justices of the Supreme Court submit the following opinion with respect to the constitutionality of Senate Bill No. 117 entitled ‘An Act relative to cemetery trust funds.’

Towns are authorized by statute to hold in trust ‘gifts, legacies and devises made to them for the care of cemeteries and burial lots when the terms of the gift legacy or devise do not impose any liability upon the town beyond the amount of the gift, legacy or devise and the income thereof.’ RSA 31:20. Towns may likewise receive funds from cemetery associations \*\*794 or individuals for the care of cemeteries or lots, ‘and the income thereof shall be expended by the town in accordance with the terms of the trust or contract under which the funds were received.’ RSA 31:21.

Senate Bill No. 117 would amend § 20, supra, by adding to the section a provision that ‘the income accumulation of a particular burial lot trust fund \* \* \* may be used for the general care of the cemetery where said lot is located’ subject to three qualifications: (1) that the terms of the trust do not otherwise provide; (2) that it can be reasonably anticipated that the income accumulation of the fund will not be required for the care of the particular lot in the foreseeable future; and (3) that if the income of a fund so used shall at any time become insufficient for the care of the particular lot, the town shall appropriate the funds necessary to maintain the lot. Since the bill provides no procedure for establishing whether the first two conditions are met with respect to a particular trust, it appears to be intended that diversion of the surplus income shall be made at the discretion of the trustees charged by statute with administration of such trusts. RSA 31:22-38.

The law is well established that trusts for the perpetual care of cemeteries and cemetery lots are valid charitable trusts. *In re Byrne’s Estate*, 98 N.H. 300, 100 A.2d 157, 47 A.L.R.2d 591; *Webster v. Sughrow*, 69 N.H. 380, 45 A. 139, 48 L.R.A. 100; *Tuttle’s Petition*, 80 N.H. 36, 112 A. 397. See annotation, 47 A.L.R.2d 596, 615. Equally well established is the proposition that the administration of charitable trusts falls within the jurisdiction of courts of equity, which have unquestioned authority in appropriate circumstances to permit departure from the literal terms of such a trust by exercise of the power of *cy pres*. *Drury v. Sleeper*, 84 N.H. 98, 146 A. 645. The courts will exercise this power, however, only when the purpose for which the fund was established cannot be carried out, and diversion of the income to some other purpose can be found to fall within the general intent of the donor expressed in the instrument establishing the trust. *Trustees of Pittsfield Academy v. Attorney General*, 95 N.H. 51, 57 A.2d 161; *Petition of Rochester Trust Co.*, 94 N.H. 207, 49 A.2d 922; *Town of Boscaawen v. Acting Attorney General*, 93 N.H. 444, 445, 43 A.2d 780, and cases cited. If the trust instrument discloses no general charitable intent, as distinguished from the particular purpose for which the gift was made, the trust will fail, and its assets will be held by the trustee subject to a resulting trust in favor of the donor or his estate. See *Clark v. Campbell*, 82 N.H. 281, 288, 133 A. 166, 45 A.L.R. 1433; *First Universalist Society of Bath v. Swett*, 148 Me. 142, 90 A.2d 812; IV Scott on Trusts (2d ed.) §§. 413, 432.

The power of courts of equity to administer charitable trusts *cy pres* is so firmly established and so frequently resorted to, that the authority of the Legislature with respect to the disposition of charitable trust funds has not been much mooted. Prior to the establishment of American jurisprudence, the English Crown was endowed with prerogative power with respect to the disposition of funds left for charity in cases where the particular use intended was not specified or if specified was illegal. Authorities in the field of trusts have expressed the view that the prerogative power of the Crown has no place in our jurisprudence. IV Scott on Trusts (2d ed.) §§. 399.1, 399.5. In the Restatement of the Law, Trusts, § 399 comment e, it is said: ‘The prerogative power does not exist in the United States; it cannot be exercised even by the legislature, although the legislature can enact general rules as to the extent and the exercise of the judicial power of the court to apply *cy pres* property which is given for charitable purposes.’

We are aware of no instance in which the exercise of prerogative power by the courts has been thought necessary or proper in New Hampshire. In *French v. Lawrence*, 76 N.H. 234, 81 A.705, a will before the court designated the particular object which the testator desired to promote, and his purpose was legal. Hence it was found unnecessary to consider whether the

court had jurisdiction of causes involving bequests for unspecified charitable purposes, or seeking diversion of funds from an illegal purpose to one which would be legal. See also, *Haynes v. Carr*, 70 N.H. 463, 465, 481, 49 A. 638.

The authority of the Legislature in such matters has been said to be limited to the enactment of 'general rules as to the extent and the exercise of the judicial power of the court' (Restatement of the Law of Trusts, supra); and the legislative power to 'control the administration of charitable trusts already created' is considered to be 'limited by provisions of the federal and state constitutions.' IV Scott on Trusts, supra, § 399.5. Consistently with these principles, the Supreme Judicial Court of Massachusetts when called upon for an advisory opinion concerning a series of legislative bills relating to transfer or disposition of assets of certain charitable trusts, advised the Senate of that Commonwealth that while the Legislature might 'enact general laws respecting the regulation of charitable trusts,' such trusts 'held upon trusts expressed in writing or necessarily implied from the nature of the transaction, constitute obligations which ought to be enforced and held sacred under the Constitution.' The court continued: 'It is not within the power of the Legislature to terminate a charitable trust, to change its administration upon grounds of expediency, or to seek to control its disposition under the doctrine of *cy pres*. \* \* \* Determination of the uses to which shall be devoted trusts no longer susceptible of execution according to their foundation is a well recognized branch of chancery jurisdiction \* \* \* respecting which there is constant resort to the judicial courts for decision.' *Opinion of the Justices to the Senate*, 237 Mass. 613, 617, 618, 131 N.E.31, 32. See also, *Bridgeport Public Library & Reading Room v. Burroughs Home*, 85 Conn. 309, 310, 82 A.582; IV Scott on Trusts, supra, § 367.3.

In *Town of Boscawen v. Acting Attorney General*, 93 N.H. 444, 43 A.2d 780, supra, the town invoked the *cy pres* powers of the court, seeking authority to expend for the general care of a cemetery in that town the surplus income of a fund held in trust for the care of a particular lot in the cemetery. After reviewing the circumstances of the fund, and the purpose of the testatrix in establishing the trust, the court held that exercise of the power of *cy pres* would not be appropriate.

Senate Bill No. 117, if enacted into law, would permit use of the trust estate involved in *Town of Boscawen v. Acting Attorney General*, supra, for the purposes for which the court there concluded, under established legal principles, that it might not lawfully be used. In effect the bill would be an exercise of what amounts to a legislative power of *cy pres* with respect to all cemetery trusts having surplus income, without regard to established principles of law relating to the use of such funds, or the terms of the trusts so long as they did not expressly forbid the use.

We are of the opinion that this may not constitutionally be done by the Legislature. Such a course would seem to be an invasion of established equitable powers of the courts, and hence in violation of the Constitution, Part I, Art. 37th. In essence the bill proposes to 'abolish the judicial function with respect to a subject essentially judicial in its nature \* \* \* and substitutes for that judicial function a legislative determination \* \* \*.' *Worcester County National Bank*, 263 Mass. 444, 162 N.E. 217. This the Constitution does not permit. Art. 37th, supra; *Opinion of the Court*, 4 N.H. 565, 572-573. See note, 101 U.Pa.L.Rev. 1087. See also, *Town of Greenville v. Town of Mason*, 53 N.H. 515, 518.

We therefore conclude that Senate Bill No. 117, if enacted into law, would be unconstitutional. So far as the purposes of the bill may be otherwise accomplished, this must be done through the courts by the application of established principles of law to the circumstances of particular trusts, as was sought to be done in *Town of Boscawen v. Acting Attorney General*, supra.

LAURENCE I. DUNCAN  
AMOS N. BLANDIN, Jr.  
EDWARD J. LAMPRON  
STEPHEN M. WHEELER  
Justices.

Whatever are the constitutional infirmities of the pending bill relating to cemetery trusts, I wish to add the observation that the Legislature representing a sovereign state may have more residual power over charitable grants, gifts and trusts-even though strictly it may not be a prerogative power of *cy pres*-than the broad language of the advisory opinion of my colleagues indicates. *Opinion of the Justices*, 81 N.H. 573, 577-584, 128 A.812; IV Scott, Trusts, § 381, p. 2742 (1956); Annotation 40 A.L.R.2d 556, 561; *Trustees of Newcastle Common v. Gordy*, 33 Del.Ch. 334, 93 A.2d 509, 40 A.L.R.2d 544; *Late Corporation of the Church of Jesus Christ of L. D. S. v. United States*, 136 U.S. 1, 10 S.Ct. 792, 34 L.3d 478. Since that problem can be more advantageously considered and decided in a specific case rather than in an advisory opinion, it is preferable to make a final decision in a case which presents the problem concretely.

FRANK R. KENISON  
Chief Justice.

**CEMETERY PERPETUAL CARE FUND CASE:**  
**IN RE BYRNE'S ESTATE**

SUPREME COURT OF NEW HAMPSHIRE

98 N.H. 300, 100 A.2d 157, 47 A.L.R.2d 591 (1953)

October 30, 1953

(Keynotes omitted)

GOODNOW, Justice.

Questions of law which may be certified to this court by a probate court under Laws 1947, c. 90, are those as to which instructions are desired by that court in order that it may make a 'proper decision of matters duly before it in proceedings coming within its statutory jurisdiction.' *In re Estate of Gay*, 97 N.H. 102, 105, 81 A.2d 841, 843. In so far as any questions so certified seek instructions as to the numerous matters which may arise in the 'settlement and final distribution of estates of deceased persons', R.L. c. 346, § 3, or are concerned with such specific matters as the distribution of 'personal estate bequeathed by a testator', R.L. c. 360, § 7, they involve matters within the statutory jurisdiction of that court. *In re Harrington's Estate*, 97 N.H. 184, 185, 84 A.2d 173; *In re Mooney's Estate*, 97 N.H. 187, 84 A.2d 175; *In re Grondin Estate*, N.H., 100 A.2d 160. Such matters are 'duly before' the probate court not only when a final account or a petition for a decree of distribution has been filed but also when it appears that a proper decision by that court will presently be required in regard thereto which cannot be made without instructions from this court. To the extent that the opinion in *In re Estate of Gay*, *supra*, more strictly limits the questions which may be so certified, it is overruled.

This is not intended to suggest that jurisdiction has been conferred upon probate courts to give advice or instructions upon petitions of fiduciaries, which come within the jurisdiction of the Superior Court. *Duncan v. Bigelow*, 96 N.H. 216, 218, 72 A.2d 497; *Rockwell v. Dow*, 85 N.H. 58, 154 A. 229.

The first question certified in this case concerns the validity of the trust sought to be established by the residuary clause of the will. Since it is apparent from the language of the will that there is no ascertainable beneficiary capable of coming into court and claiming its benefits, the validity of the trust depends upon a determination of whether 'the erection of a tomb on my family lot' is such a purpose as to qualify the trust as a charitable one. *Clark v. Campbell*, 82 N.H. 281, 282, 133 A. 166, 45 A.L.R. 1433; *Tunis v. Dole*, 97 N.H. 420, 424, 89 A.2d 760. We are of the opinion that in the circumstances of this case, the erection of a tomb such as the testatrix intended at the location specified would accomplish no public benefit and that the provisions of the residuary clause of the will failed to create a trust.

A tomb is defined as 'a house, chamber or vault, formed wholly or partly in the earth or entirely above ground, for the reception of the dead.' Webster's New International Dictionary, Second Edition. While the structure described by this word alone might simply be a cement vault buried in the lot such as would be permitted by the cemetery officials in this case, it can be fairly

concluded from her directions that it be erected on the lot and the discretion granted to the trustee as to choice of material and architecture that the testatrix intended that the tomb for which she provided should be at least partly above ground and should serve not only as a place of burial for herself but as a monument to herself and her family.

A gift made with a direction that it be applied to the erection of such a tomb or monument does not ordinarily create a charitable trust. Restatement of Trusts, § 374, comment h. The public interest in the sightly appearance of cemeteries is served by a gift in trust for the perpetual care of a lot therein and such a gift has long been recognized in this state as a charitable one. *Webster v. Sughrow*, 69 N.H. 380, 381, 45 A. 139, 48 L.R.A. 100. On the other hand, a gift to be applied to the erection of a tomb or monument, while formerly thought to serve some slight public purpose, see *Smart v. Durham*, 77 N.H. 56, 58, 86 A. 821, is not at this time of such social interest to the community as to qualify as charitable unless the structure to be erected would confer some public benefit as it would if it became a part of the fabric of a church or commemorated some notable person. Our statute permitting the erection of 'suitable monuments' by executors or administrators at 'reasonable expense' R.L. c. 353, § 21, does not establish a gift in trust for such a purpose as one of benefit to the community as a whole. No public purpose would be served by the erection of the tomb provided for in the case at bar.

When the intention of a testator to establish a trust for a non-charitable purpose is not effective, the donee is not permitted to keep the fund for his own benefit but, if he is not authorized to apply the property beyond the period of the rule against perpetuities, he may either apply it to the designated purpose, unless such a use of the fund would be capricious, or surrender it to the estate of the testator. Restatement of Trusts, § 418. Neither the question of whether this power could be exercised by a substitute when the named donee predeceases the testator, as in the case at bar, nor the issue of capriciousness is presented here, however, since the decision of the cemetery officials refusing permission for the erection of a tomb on the lot in question has made any use of the fund for that purpose impossible. Under these circumstances, the fund remains in the estate of the testatrix. The will made no provision for the disposition of the residue of the estate in the event that the erection of such a tomb as the testatrix intended should be impossible and the residue passes as intestate property. *Burpee v. Pickard*, 94 N.H. 307, 308, 52 A.2d 286.

The extent to which the administrator may expend the property of the estate which would otherwise become a part of the residue is limited by statute. The use of a concrete vault such as would be permitted in this case by the cemetery officials has become a commonplace element of expense in providing for a decent and permanent burial. An expenditure by the administrator for such a purpose could properly be charged as a funeral expense under the provisions of R.L. c. 353, § 19, subd. II. *Bell v. Briggs*, 63 N.H. 592, 593, 4 A. 702. It is also provided by statute that administrators of estates actually solvent 'may erect suitable monuments at the graves of the testators or intestates, and the reasonable expense thereof shall be allowed them on settlement of their accounts.' R.L. c. 353, § 21. Guided as to its suitability and the reasonableness of the expense by 'the amount of property left by the testator \* \* \* his position and standing, \* \* \* the location of the monument' as well as any other pertinent circumstances, the administrator may erect a suitable monument on the lot of the testatrix. *Reynolds v. Jones*, 78 N.H. 84, 88, 97 A. 557, 559.



The probate court is advised that the residue clause does not create a trust; that the authority of the administrator to make expenditures for a burial vault and monument is the same as that ordinarily possessed by an administrator under the statutes; and that the balance of the residue of the estate should be distributed as intestate property.

Case discharged.

All concurred.

**PERPETUAL CARE FUNDS CANNOT BE USED FOR GENERAL  
CEMETERY MAINTENANCE :**  
**TOWN OF BOSCAWEN, ET AL. & V. ACTING ATTORNEY  
GENERAL**

93 N.H. 444, 43 A.2d 780

June 28, 1945.

Rehearing Denied Sept. 4, 1945.

Transferred from Superior Court, Merrimack County; Tobin, Judge.

Petition by the Town of Boscawen and others against the Acting Attorney General for advice concerning the use of income of cemetery trust funds. Transferred to the Supreme Court by trial court.

Case discharged.

Summary: Petition, by the plaintiff town and the trustees of its trust funds for advice concerning the use of the income of certain cemetery trust funds. All questions of law raised by the petition and answer were transferred, without either hearing on the merits or rulings of law, by Tobin, J. The substance of the facts set forth in the pleadings and admitted by the answer appears in the opinion.

Headnotes/Key Citations Omitted

Willoughby A. Colby, of Concord, for plaintiffs.

Ernest R. D'Amours, Asst. Atty. Gen., for defendant.

PAGE, Justice.

The material facts pleaded in relation to the principal cemetery trust fund indicate that Marilla M. Rines, who died in 1907 bequeathed to the town of Boscawen the sum of \$1,000, 'the income thereof to be used to defray the expense of putting the lot, in which lie the remains of my late husband and other members of his family, in suitable and proper condition, and take care thereof and preserve the same in suitable and proper condition.' The income and expenditures therefrom in each year since the acceptance of the trust by the town are set forth in the petition.

From the figures we derive the fact that in the first year of the trust the rate of income was four per cent, while in recent years it has been only two per cent. The expenditures averaged \$26 a year for the first five years, while in the last five years the average was \$35. During the first five-year period there were very unusual expenses in 1911, but no such expenditure in the last five years increases the average of \$35. These figures are consistent with the common knowledge that during the period of the trust, savings bank dividend rates have been at least cut in two, while labor costs have increased markedly. This trend is fully apparent during the years from 1930 to 1943, inclusive, when the payments exceeded the income by \$121.12.

Analyzing the figures further, it appears that the unexpended income at the end of 1943 (\$432.32) has been almost steadily reduced since 1929, when the accumulation stood at \$619.69. This maximum accumulation was apparently built up by returns in the years 1910 to 1915, inclusive, that ranged annually from about seven and a half per cent to approximately fourteen per cent, also by a thoroughly abnormal yield in 1929 of over seventeen per cent. There is no evidence that any of these large annual accretions will ever be matched, or even approached in the future.

In this situation, the plaintiffs desire to use the accumulated income for general purposes in other parts of the cemetery in which the Rines lot is situated. They assume that the accumulation will never be required for the Rines lot, and argue that the suggested use is a proper application of the cy pres doctrine. That doctrine is applied where the particular purpose of the creator of a trust is 'impracticable' of operation (*Second, etc., Society v. First, etc., Society*, 14 N.H. 315, 330; *Adams v. Page*, 76 N.H. 96, 97, 79 A. 837), or where it 'cannot take effect' (*Edgerly v. Barker*, 66 N.H. 434, 467, 31 A. 900, 912, 28 L.R.A. 328; *Gagnon v. Wellman*, 78 N.H. 327, 328, 99 A. 786), or where it is 'impracticable, if not impossible' (*Keene v. Eastman*, 75 N.H. 191, 193, 72 A. 213, 214).

The purpose clearly expressed by Mrs. Rines is that the income shall be used for the care of the Rines lot; nothing else is even suggested. Even though it appears vaguely that 'a certain portion' of the income of her fund has heretofore been diverted 'to improve the general appearance of the Plains Cemetery,' we have no means of ascertaining how much that indefinite amount has reduced the accumulation of income. On the other hand, the facts before us indicate clear tendencies that could sustain the belief that the accumulation may well disappear at some time in the future, even if applied solely to the particular purpose of the testatrix, with the result that a probable annual income of \$20 on \$1,000 would then be no more than sufficient, if even sufficient, for normal care of the Rines lot and the more than normal demands that seem in the past to have arisen periodically. In any event, the facts presented by the pleadings are far from showing the impossibility, or even the impracticability, of using the accumulated and future current income, as the testatrix desired, on the Rines lot and nothing else.

The town has also accumulated income of \$800 in forty-nine other cemetery trust funds which it desires to expend 'by cutting the grass and weeds over the entire cemetery at least once a year, by straightening certain headstones, by pruning shrubs and trees and by repairing and grading driveways, funds for doing which are now lacking.' No facts are alleged to show the provisions of the several trusts, or the impossibility or impracticability of devoting the accumulated income and future accretions to the purposes prescribed by the donors. The present lack of funds for general cemetery purposes affords no shadow of claim for a right to make the diversion sought for. If the expenditures proposed are desirable, the town has the means to provide for them under the taxing power. R.L. c. 51, § 4(XV).

Case discharged.

MARBLE, C. J., was absent; the others concurred.

**AUTHORITY OF MUNICIPAL TRUSTEE:**  
**TUTTLE'S PETITION**

Tuttle's Petition

SUPREME COURT OF NEW HAMPSHIRE

80 N.H. 155, 114 A.867 (1921)

(Keynotes omitted)

PARSONS, C. J.

The fundamental proposition upon which the motion is based is that, if the fund given to the town is more than is required to keep the burial lot in proper repair, the balance is estate undisposed of by the will which falls to the heir at law. This question may be conveniently examined without stopping to consider whether it can be raised by the procedure which has been adopted. It may be conceded that if the fund is larger than necessary, or if in time there is an excess which cannot be used for the specific purpose expressed in the will, a trust in the excess would result for the benefit of the person entitled, and that if no disposition of such excess is made by the will the heir at law will be entitled thereto. But the will leaves none of the testator's estate undisposed of. All the residue is given to the town upon a condition. This language has been held to create a trust as to so much of the fund as is required to execute it. As to the balance, if there be any, the will gives the same to the town free from this express trust. The heir contended when the case was before the court that, if the bequest was held to be a gift to the town, the gift failed because the town had no power to accept it. The case was disposed of upon the ground that the will created a trust which the town was authorized to execute, and as there was no evidence tending to establish the amount of the trust fund was excessive, the question the heir now seeks to raise was not discussed. The testator intended the town should have the money, and that the heir, Griffiths, should not have it. This purpose must be carried into effect unless illegal or impossible of execution. It is not suggested that the gift of money to a town is an illegal act. It is conceded that a gift to a town for a specified public purpose within town corporate power is legal. The execution of the gift is not impossible if the town has power to hold property for the purpose for which it was given. "Towns may purchase and hold real and personal estate for the public uses of the inhabitants." P. S. c. 40, § 1. The statute is express authority for the holding of property for the public uses of the town. If a gift to a town for a specific public use is valid, it is not rendered invalid because the town is not required to devote it to a particular use but may apply it to any public use. The gift to the town without specifying any particular purpose must have been intended for any of the uses for which the town was authorized to hold property. There is nothing in the language of the will except the condition as to keeping the burial lot in repair that suggests that the gift was for other than public uses. The questions arising under this stipulation have been disposed of. There is nothing further upon which to found the suggestion that the fund may have been given upon a private trust. *Gloucester v. Osborne*, 1 H. L. Cas. 272; 3 Hare, 131, cited by counsel, is not in point.

The statute cannot be construed as authorizing towns to hold only such property as they have acquired by bargain and sale without doing violence to the ordinary use of language.

Technically all property is acquired by purchase which is not acquired by descent. Not only when a man acquires an estate by buying it for a good or valuable consideration, but also when it is given or devised to him, he acquires it by purchase. Bouv. Law Dict. 2 Bl. Com. \*241. If the town acquired the property by engaging to perform the condition, it would be an acquisition by bargain and sale. It is equally so if the acquisition is made by consenting to act as trustee of the fund to keep the burial lot in repair. Upon the narrow construction of the statute claimed, the acceptance of the gift is within statutory town corporate power.

The power of towns in this state to take and hold property by direct gift, conveyance, or devise is asserted in *Sargent v. Cornish*, 54 N. H. 18, 21, and has never since been questioned.

"Municipal and public corporations may be the objects of public and private bounty. This is reasonable and just. They are in law clothed with the power of individuality. They are placed by law under various obligations and duties. Legacies of personal property, devises of real property and gifts of either species of property directly to the corporation and for its own use and benefit, intended to and which have the effect to ease them of their obligations or lighten the burdens of their citizens are valid in law in the absence of restraining or disabling statutes." 2 Dill. Mun. Corp. (2d Ed.) § 436.

The money, if any, not required to execute the trust, is a valid gift to the town, and the heir at law has no interest therein.

What has been said will probably be sufficient to end the litigation. To avoid misapprehension the question of procedure is referred to. The case was presented here upon facts sent up from the superior court and decided. The court properly applied *Tucker v. Lowe*, 79 N. H. 259, 107 Atl. 641, in refusing to go into a trial of fact after the case had been finally decided. The application for a rehearing with leave for an amendment suggested in that case as an avenue of relief is not here applicable, because it is not claimed there was any error in the transfer of the case. Nothing was done in the superior court which was incorrectly or insufficiently reported. The heir's remedy is not an amendment of the case transferred, but a new trial to enable him to present evidence which he did not bring forward at the first trial. If he makes a case within the statute, the superior court upon trial of the essential issues can grant him a further trial. P. S. c. 230, § 1. *Ela v. Ela*, 72 N. H. 216, 217, 55 Atl. 358. But a petition for a new trial will not be granted unless it is established that a different result will probably be reached. *McGinley v. Railroad Co.*, 79 N. H. 320, 109 Atl. 715. As the order directing the payment of the money will not be affected if the fact of excess is found as claimed, a new trial cannot be granted.

Motion denied.

All concurred.

**APPOINTMENT OF MUNICIPAL TRUSTEES:**  
**IN RE: TRUST U/W/O ELMER C. SMITH**

SUPREME COURT OF NEW HAMPSHIRE

131 N.H. 396, 553 A.2d 323  
(1988)

(Keynotes omitted)

Stephen E. Merrill, Atty. Gen. (William B. Cullimore, Director of Charitable Trusts, on the brief), for intervenor, the Director of Charitable Trusts.

Cooper, Hall, Whittum & Shillaber P.C., Rochester, for Richard Hersam and Elaine Stimpson, Trustees of Trust Funds for the Town of New Durham, filed no brief.

JOHNSON, Justice

This is an appeal from the ruling of the Strafford County Probate Court (*Cassevechia, J.*) that two trusts established under the will of Elmer C. Smith, both of which were to be administered by the "Trustees of Trust Funds for the Town of New Durham," were testamentary trusts to be administrated pursuant to RSA 564:1. The court therefore required the individuals acting as town trustees to be appointed by the probate court, and to post bonds and account to the probate court, consistent with RSA 564:1. We reverse and remand.

Elmer C. Smith created two trusts, by virtue of his will drawn on January 25, 1985, for the benefit of the children of New Durham. After his death, his will was approved and allowed in common form on December 10, 1985. The first of the trusts established by Mr. Smith's will (the Smitty's Garden Trust) was funded by a bequest of the unpaid balance from the installment sale of his business. The bequest was "to the Trustees of Trust Funds for the town of New Durham," in trust for the purpose of using "the income for a recreation program for the children of New Durham." The second trust (the Scholarship Trust) was funded by a bequest of the residue of his estate, after specific bequests, "to the Trustees of Trust Funds for the Town of New Durham," in trust for the purpose of using the income "toward scholarships for the children of New Durham to attend college, vocational schools or any practical institution of higher learning beyond high school." The will stated that this second trust was "to be administered by the Trustees of Town Funds for the Town plus the lone member from New Durham to the Governor Wentworth Regional High School (the school board member is to be a consultant, not a Trustee of the Fund)."

The executor inquired whether the probate court would apply the appointment and other requirements of RSA 564:1 to these testamentary trusts. The probate court, by an order dated December 11, 1986, held that the trusts were governed by RSA 564:1, and that the testator did not intend direct charitable bequests to the "Town of New Durham, *per se*, or to the trustees of the trust funds as a consequence of their mere incumbency as such." In support of this conclusion, the court stated that the language of the will, with respect to the nomination of the trustee, "is interpreted as *descriptio personae*, for general purposes of identification only," and

that “[t]he effect of the nomination was to nominate the individuals who serve as the trustees of the trusts funds for the Town of New Durham by their proper names.”

Following this order, the Director of Charitable Trusts intervened and a hearing was held. On May 27, 1988, the court reaffirmed its original order. It noted that the testator's intent to have the trustees presently in office serve as trustees in their individual capacities could be ascertained from the provision that the trustees were granted powers pursuant to RSA chapter 564-A, by the provisions dictating how assets were to be managed, by the provision in the Smitty's Garden Trust that it be “created” only if installment payments from the sale of the business remained due at his death, and by the provision for the high school board member to assist in the administration of the Scholarship Trust as noted above. The intervenors appealed. We disagree with the probate court's interpretation of Elmer C. Smith's intention.

The determination of the ultimate fact of the intent of the testator rests with this court. *Sylvester v. Newhall*, 97 N.H. 267, 272, 85 A.2d 378, 382 (1952). The term “trustees of trust funds” is found throughout RSA 31:19 through :38. Hence, a bequest to the trustees of trust funds, given the plain meaning of those words, is to those persons who have been duly elected by the town to serve in that position, in their official capacities. *See* RSA 31:22. In searching for the proper interpretation of words used in a written instrument, we require that the words and phrases be given their common meaning. *Murphy v. Doll-Mar, Inc.*, 120 N.H. 610, 611-12, 419 A.2d 1106, 1108 (1980). We note that trustees of trust funds are bonded, as are all town officers, RSA 41:6, I (Supp.1988), and that their accounts are audited annually. RSA 31:33 (Supp.1987).

In this case, the Director of Charitable Trusts offered written evidence, which was un rebutted, from the executor of the testator's will, Carleton Woods, that Mr. Smith had served as a selectman and planning board member, and had held other town offices, and that he was familiar with the duties of the trustees of trust funds. Further, Mr. Smith discussed his charitable bequests with Mr. Woods, and he never suggested that he desired the individuals then in office as trustees of trust funds to serve as trustees in their individual capacities; rather, he indicated that the persons elected trustees of trust funds were to have custody of the two trust funds at issue here. The written and un rebutted testimony of the attorney who drafted the will essentially confirmed Woods' testimony.

The current two trustees of trust funds, whose testimony was received in written form and was un rebutted, stated that although they knew Mr. Smith, he did not discuss the two trusts at issue here with them and that he did not ask them to be trustees of the two trusts. The court further found that “the phrase, ‘Trustees of Trust Funds,’ is commonly used to designate or refer to the board of trustees established by RSA 31:22.” The court found Mr. Smith “was familiar ... with the Board of Trustees of Trust Funds in New Durham their function, duties and powers” and that “Elmer C. Smith did not suggest to either his attorney, his executor or to Mr. Hersam and Mrs. Stimpson [the trustees of trust funds] themselves that he wished them to serve as trustees.”

Given these findings of fact, and the plain meaning of the will of Elmer C. Smith, we conclude that it was his intent to name the incumbent trustees of trust funds, and their successors, in their official capacities, as the trustees of the trusts in question and not to name these persons individually as trustees. We find that the testator's reference to RSA chapter 564-A was solely

for the purpose of defining more precisely the powers of the trustees. This reference was not an indication that he wanted the individuals, who held the position of trustee of trust funds, to hold these funds in their individual capacities. It should be noted that there was a third trust, "the Berry Family Trust," to which this reference to RSA chapter 564-A was particularly appropriate. Hence, the court's order that the trustees be appointed by the probate court, post bonds, and account to the probate court was error. Accordingly, we remand to the probate court with instructions to vacate the appointment of Richard Hersam and Elaine Stimpson, to discharge their bond, and to discharge them from any further duty to account to the court.

REVERSED AND REMANDED.

All concurred.



**CUSTODY OF DISCRIMINATORY TRUSTS:**  
**IN RE CERTAIN SCHOLARSHIP FUNDS.**

133 N.H. 227 (1990)

Supreme Court of New Hampshire.

May 24, 1990.

Goodnow, Arwe, Ayer, Prigge & Wrigley P.C., of Keene (John D. Wrigley on the brief and orally), for the School Board of the Union School District of Keene.

John P. Arnold, attorney general (William B. Cullimore, Director of Charitable Trusts, on the brief and orally), for the State.

BATCHELDER, J.

Frank A. Wright, a resident of Keene, died on October 29, 1929, and within his will, probated November 4, 1929, was language establishing a charitable scholarship trust requiring that eighty percent of the annual income on the principal:

"shall be used to provide a college education for some poor and worthy Keene boy who is a scholar in the Keene High School. Said boy is to be recommended by the Principal of the Keene High School and . . . approved by the Board of Education of the Union School District, or its successors. . . ."

Given the generosity of the Wright Scholarship Trust and the resources available to it, the scholarship has generally been awarded every four years. In the last decade, the Wright Scholarship was awarded in 1982, 1986, and 1988.

Maurice A. Alger, also a resident of Keene, died on February 28, 1970, and within Mr. Alger's will, probated March 6, 1970, was similar language establishing a charitable scholarship trust requiring that thirty percent of the annual income on the principal:

"shall be used to provide tuition for one year for some worthy protestant boy who is a scholar at the Keene High School, to attend some college in good standing. Said boy is to be recommended by the principal of the Keene High School and . . . approved by the Board of Education of the Union School District or its successors. . . ."

The Alger Scholarship has been awarded in the amount of \$3,400 annually for five out of the last six years.

From the record and the agreed statement of facts, there is no indication that a female student has ever applied for a scholarship under either of the trusts. Likewise, because there is no independent information available to the high school principal to verify the religious affiliation of the applicants, it is unclear whether any non-Protestant students have applied for, or have been

awarded, a scholarship under the Alger trust. The principal of the Keene High School assumes that the applicants have read the requirements of the scholarship and have applied according to its terms. Once the students have applied, the school board selects who shall receive the scholarships based upon the recommendation of the principal of Keene High School. The awards are announced during an assembly, and the funds are provided from the trust funds which are held by the City of Keene Trustees of Trust Funds. Thus, the facts of this case reveal that there are three different instances in which public officials are involved in the administration of these discriminatory trusts. We note in passing that there currently are, and most likely will continue to be, students at the Keene High School who meet both the Wright and Alger Scholarship requirements.

On October 8, 1987, the School Board of the Union School District of Keene (School Board), fearing that its actions in the administration of these religion and gender-based discriminatory trusts may be violative of constitutional guarantees of equal protection, filed a petition in equity seeking the removal of the discriminatory provisions. At trial, the Superior Court (Hollman, J.) reformed the language of the trusts, utilizing its *cy pres* powers to replace the terms "boy" and "protestant boy" with the term "student." RSA 498:4-a. In particular, the court held that it was unconstitutional "State action" for the School Board, as an arm of the State, to participate in the administration of religion and gender-based discriminatory trusts. Furthermore, the court found that it would be exercising constitutionally impermissible "State action" were it to employ its equitable powers of deviation, as urged by the Director of Charitable Trusts, to reform the trusts by striking the language requiring the participation of public officials and appointing private persons to act in their absence. In arriving at a remedy, the court reasoned that it was appropriate to use its *cy pres* powers to preserve the primary intent of the testators, which was to aid deserving students at Keene High School in their pursuit of a college education. For the following reasons, we affirm.

On appeal the defendant, the Attorney General, Director of Charitable Trusts, presents the following two questions: (1) whether the actions of the Union School District of Keene, in participating in the administration of religion and gender-based discriminatory trusts, may be viewed as "State action" within the ambit of part I, article 2 of the New Hampshire Constitution and the equal protection clause of the fourteenth amendment to the United States Constitution and, if so, (2) whether the court may employ its equitable powers of deviation to reform the trust by striking the language requiring the participation of public officials and appointing private persons to act in their absence, thereby terminating any State participation. In affirming the decision of the trial court, we must answer the first question in the affirmative and the second in the negative.

Since we have been presented with both State and federal constitutional claims, we will address the State constitutional claim first. *State v. Ball*, 124 N.H. 226, 231, 471 A.2d 347, 350 (1983). To the extent that we look to the United States Supreme Court for guidance in approaching these difficult issues, we borrow only the analytical framework of the Court's decisions in our interpretation of part I, article 2 of the New Hampshire Constitution, and as such, we are not "tied to present or future federal pronouncements on the issue." *State v. Bradberry*, 129 N.H. 68, 73, 522 A.2d 1380, 1382 (1986). Part I, article 2 of the New Hampshire Constitution as amended provides as follows:

"[Art.] 2d. [Natural Rights.] All men have certain natural, essential, and inherent rights—among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin."

The first step in our inquiry requires us to determine whether there is the necessary "State action" present to implicate the provisions of our constitution. As the United States Supreme Court in *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948), stated:

"Since the decision of this Court in the Civil Rights Cases. . . the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

As previously suggested, there are three levels of potential "State action" implicated by this appeal: (1) screening of applicants by the principal of the Keene High School, (2) the participation of the School Board in the selection of students to receive the scholarships, and (3) the role of the City of Keene Trustees of Trust Funds in the administration of the trust funds.

[1] The determination of what acts may properly be considered "State action" within the meaning of part I, article 2 of the New Hampshire Constitution must be established on a case-by-case basis. See *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 722 (1961). The development of a formula to determine whether or not "State action" is present has been labeled an "impossible task." *Id.* "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Id.*

[2] In *Pennsylvania v. Board of Trusts*, 353 U.S. 230 (1957), the United States Supreme Court held that the administration of a discriminatory trust by an agency of the Commonwealth of Pennsylvania, benefitting poor male white orphans, was constitutionally impermissible. Similarly, of those cases in other jurisdictions that have addressed this issue, the majority have held that the administration of discriminatory trusts by agencies of the State is "State action" subject to the constitutional mandates of equal protection. See *In re Crichfield Trust*, 177 N.J.Super. 258, 261, 426 A.2d 88, 89 (1980); *Trammell v. Elliott*, 230 Ga. 841, 845, 199 S.E.2d 194, 197 (1973); *Bank of Delaware v. Buckson*, 255 A.2d 710, 713-14 (Del. Ch. 1969). Accordingly, we hold that the participation by the principal, School Board, and the City of Keene Trustees of Trust Funds, as agents of the State, in the administration of these discriminatory trusts amounts to "State action" within the ambit of part I, article 2 of the New Hampshire Constitution. Since the State's participation in the administration of either the Alger or Wright Scholarship trust cannot even withstand the lowest level of judicial scrutiny, we need not determine what level of review should be employed in cases of gender and religious discrimination that are expressly forbidden by the most recent amendment to part I, article 2 of the New Hampshire Constitution. Cf. *Belkner v. Preston*, 115 N.H. 15, 18, 332 A.2d 168, 170-71 (1975) (part I, article 2 was amended in 1974 providing that equality of rights under the law shall not be denied or abridged on the basis of, inter alia, creed or gender). Having concluded that the State's participation in the beneficiary selection process, management, and miscellaneous

administration of these trusts is constitutionally impermissible, we now turn to the issue of whether the trial court erred in employing the cy pres doctrine to reform these trusts, replacing the terms "boy" and "protestant boy" with the term "student."

[3] The trial court found, based upon the facts before it, that there was no indication that Mr. Wright or Mr. Alger would not have responded to the changes in attitudes experienced by society since the creation of these trusts. Furthermore, the court could not find, from language of the wills, any particular discriminatory intent. Thus, the trial court concluded that the primary intent of both testators was not to discriminate against women and non-Protestants, but to assist the students at Keene High School in their pursuit of higher education. After finding a general intention to devote the property to a charitable purpose, and in the absence of a gift-over provision, the trial court invoked the doctrine of cy pres to reform the terms of the trusts. *See* IVA SCOTT, THE LAW OF TRUSTS § 395, at 384 (4th ed. 1989). As we have stated on numerous occasions, we will not disturb the trial court's findings of fact or rulings of law unless they are unsupported by the evidence or erroneous as a matter of law. *See Desmarais v. Joy Mfg. Co.*, 130 N.H. 299, 303, 538 A.2d 1218, 1220 (1988).

In New Hampshire, the application of the cy pres doctrine is controlled by RSA 498:4-a, which provides in pertinent part:

"498:4-a. Cy Pres Doctrine. If property is or has been given in trust to be applied to a charitable purpose, and said purpose or its application is or becomes impossible or impracticable or illegal or obsolete or ineffective or prejudicial to the public interest to carry out, the trust will not fail. Upon petition by the trustee or trustees or the attorney general, the superior court may direct the application of the property to some charitable purpose which is useful to the community, and which charitable purpose fulfills as nearly as possible the general charitable intent of the settlor or testator. . . ."

(Emphasis added.) This statute is of great significance because it contains language allowing the court to apply the doctrine of cy pres where the purpose or application of a charitable trust becomes "illegal or obsolete or ineffective or prejudicial to the public interest to carry out." RSA 498:4-a. Concern for the public's interest may be found throughout the historical development of the cy pres doctrine, *see* DiClerico, Cy Pres; A Proposal For Change, 47 B.U.L. REV. 153, 154 (1967), and the presence of this language distinguishes the application of cy pres in this case from other cases where the courts have been reluctant to do so. *See Matter of Estate of Wilson*, 465 N.Y.S.2d 900, 905, 452 N.E.2d 1228, 1233 (1983) (charitable intent must be rendered impossible or impracticable, and so long as there were available beneficiaries that qualified under the testator's specific intent there was no impossibility).

Part I, article 2 of the New Hampshire Constitution forbids the State to discriminate on the basis of creed and gender. The New Hampshire voters, in ratifying this amendment, have firmly established public policy that demands equal protection for all, regardless of creed or gender. Although the views of society are ever changing, they can hardly be discounted or overlooked when they become the object of a constitutional amendment. The statutory provision requires that, upon finding a trust either illegal or prejudicial to the public interest, the "charitable purpose" of the trust may be reformed or redirected so as to fulfill the testator's intent as nearly

as possible. In accordance with this directive, we hold that the trial court properly invoked the doctrine of cy pres to strike the terms "boy" and "protestant boy" and to replace them with the term "student."

Notwithstanding, the defendant argues that the court should employ its equitable powers of deviation to reform the trust, striking the language requiring the involvement of public officials, and replacing it with language designating private persons to carry out the administration of the trusts. We disagree. Our cy pres statute, quoted above, directs our courts to reform the illegal purpose, not to preserve it as far as possible by modifying those provisions requiring public administration of the trust. But even if our statute were uncertain on this issue, our review of the two leading cases on this subject would persuade us that the trial court followed the proper course.

The two leading cases that have dealt with this issue are *Commonwealth of Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.), cert. denied, 391 U.S. 921 (1968), and *Matter of Estate of Wilson, supra*. In *Commonwealth of Pennsylvania v. Brown*, the United States Court of Appeals for the Third Circuit ruled on the constitutionality of the actions taken by the Orphan's Court in substituting a private trustee for a public trustee to administer a discriminatory trust established by Stephen Girard. The court held that the substitution and selection of trustees by the Commonwealth, in an effort to uphold the discriminatory purposes of the trust, did "significantly encourage and involve the Commonwealth in private discriminations" and was therefore unconstitutional "State action." *Brown*, 392 F.2d at 125 (quoting *Reitman v. Mulkey*, 387 U.S. 369, 381 (1967)). The *Brown* court explained that its holding was not based solely on any momentum created by the State's involvement throughout the institutional life of the trust, *see Evans v. Newton*, 382 U.S. 296 (1966), but was also based upon the obvious consequences of the State's participation in the modification of the trusteeship structure from public to private trustees; i.e., the perpetuation and continuation of discrimination at the Girard College. *Commonwealth of Pennsylvania v. Brown*, 392 F.2d at 125.

In contrast, the New York Court of Appeals in *Matter of Estate of Wilson*, 465 N.Y.S.2d 900, 452 N.E.2d 1228, held that the use of the court's equitable powers to facilitate the continued administration of discriminatory trusts, replacing the school district as trustee with a private trustee, was not "State action" within the ambit of the fourteenth amendment. *Id.* at 909, 452 N.E.2d at 1237. The *Wilson* court stated:

"It is only when the State itself discriminates, compels another to discriminate, or allows another to assume one of its functions and discriminate that such discrimination will implicate the amendment."

*Id.*

[4, 5] In choosing between these two opposing views, we are necessarily required to choose between the competing values that they represent. Starting from the assumption that a public trust administered through "State action" violates our constitution when it discriminates on grounds of sex or religion, the court must ask whether its first priority is to end the discrimination or to preserve it by substituting a private administrative mechanism that would, if

chosen by the testator, have carried no unconstitutional implication. As we said above, we believe that the appropriate source of values for our judgment is the constitution, which forbids the agencies of the State to act in a manner that would preserve the constitutionally impermissible desires of the testator. We therefore reach the same result ordered in *Commonwealth of Pennsylvania v. Brown supra*. Furthermore, we hold that the use of the court's powers to appoint or reappoint a trustee in those cases where the trust involved is, and has been from its inception, a privately administered lawful discriminatory trust, does not rise to the same level of State involvement so as to be considered significant. See *Moose Lodge No. 107 v. Irvis*, 407 U.S. at 163.

Our society permits discrimination in the private sector in recognizing that the nature of human beings is to associate with, and confer benefits upon, other human beings and institutions of their own choosing. Such private decision-making is a part of daily life in any society. However, when the decision-making mechanism, as here, is so entwined with public institutions and government, discrimination becomes the policy statement and product of society itself and cannot stand against the strong and enlightened language of our constitution.

Affirmed.

BROCK, C.J., dissented; the others concurred.

BROCK, C.J., dissenting:

The mandate of the New Hampshire Constitution that "equality of rights under the law shall not be denied or abridged by this State on account of race, creed, color, sex or national origin" does not vest the State with the unfettered power to determine how a private individual must dispose of property acquired over his or her lifetime. From the earliest days of our country, Americans have rightly believed that they enjoy a legally protected right to choose the objects of their bounty and to bequeath their property by will, as they see fit. Neither our State nor our Federal Constitution requires this court to write a "better" will for a decedent in terms which reflect the breadth of concern and conception characteristic of a public welfare program.

Accordingly, I would not strain, as my colleagues do, to attempt to find an "illegal purpose" within the educational objectives of the Wright and Alger scholarships, which would justify judicial cancellation, through application of cy pres, of the term "boy" in the Wright scholarship and "protestant boy" in the Alger scholarship, followed by substitution of some other criterion applicable to all students, so that all might become potential beneficiaries of the testators' largesse. Although the law favors equal opportunity for all persons, dispositional provisions in a will benefiting persons of one sex or religion are neither illegal nor unconstitutional. I am therefore gravely troubled by the portion of this court's opinion which purports to find an "illegal purpose" in the Wright and Alger trusts, tainting their benevolences and warranting application of our cy pres statute to modify the educational objectives of both trusts.

The reasoning employed by the majority in reaching their result calls to mind an observation made by Justice Harlan in his dissent in *Evans v. Newton*, 382 U.S. 296, 315 (1966): "This decision, in my opinion, is more the product of human impulses, which I fully share, than of

solid constitutional thinking. It is made at the sacrifice of long-established and still wise procedural and substantive constitutional principle." Accordingly, I respectfully dissent from this court's holding.

Although the constitutional guarantees of equal protection apply to the expenditure of taxpayers' money, and State funds cannot be distributed in a manner which prefers one class of deserving persons over other similarly situated individuals, when we see fit to create a foundation out of our own fortunes, we are at perfect liberty to do what we will with our own, and private prerogatives may be projected beyond the grave, uninhibited by constitutional provisions. *The Civil Rights Cases*, 109 U.S. 3 (1883), "embedded in our constitutional law" the principle that private conduct, however discriminatory, is immune from the prohibitions of the fourteenth amendment. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). Thus, there exists a realm of private action, beyond the reach of the constitutional amendment, that permits an individual to dispose of property as he sees fit. *Clafin v. Clafin*, 149 Mass. 19, 23, 20 N.E. 454, 456 (1889). Arbitrary in life, we are not required to be impartial at death, and the desire to enrich one's own kind is a legitimate incentive to philanthropy for the charitably inclined. *Cf. Green v. Connally*, 330 F.Supp. 1150, 1163 (D.D.C.), *aff'd mem. Coit v. Green*, 404 U.S. 997 (1971). Whether or not a court deems itself more competent to establish a purpose which will promote the general welfare of society, such wisdom is out of place when it results in the redirection of a decedent's private life savings to purposes clearly opposed to the testator's expressed and lawful intention.

Because I have a different perception than the majority of how this case should be decided, I begin my discussion by addressing the first issue presented by the parties. The petition in equity that sparked the present litigation was based upon the school board's role as trustee in administering the Wright and Alger trusts. Although the State concedes that the school board is an arm of the government, it has attempted to avoid the label of State action, urging that the school board "selects a recipient not in the exercise of state power, but as a private fiduciary does." In essence, then, the State argues that a government agency is free to discriminate whenever it does so in a fiduciary capacity. It is well settled, however, that when a State agency serves as trustee of a charitable trust which bestows its bounty disparately upon similarly situated persons, administrative compliance with the testator's restrictions for selection of beneficiaries constitutes a level of State participation in private discrimination sufficient to implicate the constitutional guarantees of equal protection. *See Pennsylvania v. Board of Trusts*, 353 U.S. 230, *reh'g denied*, 353 U.S. 989 (1957).

In *Pennsylvania v. Board of Trusts*, *supra*, one of the long line of cases involving Girard College, the United States Supreme Court first interpreted the fourteenth amendment to preclude the State's role as a fiduciary where a city or its agent acts as trustee of a discriminatory testamentary trust. *Id.* at 231. Girard College was a boarding school for orphans, named after its founder, Stephen Girard, who left two million dollars in trust to the City of Philadelphia with instructions that the city establish an orphanage and admit only "poor male white orphan children" between the ages of six and ten years. *Girard Will Case*, 386 Pa. 548, 551, 127 A.2d 287, 288 (1956). When two black orphans brought an action in the Orphan's Court seeking to compel the trustee board to admit them, the Board asserted a proprietary-fiduciary distinction, claiming that as trustee it acted only in a fiduciary capacity, exercising no State or governmental function or power. Although the fiduciary distinction was accepted by the Orphan's Court, *Girard Estate*, 4

Pa. D. & C. 2d 671, 696-701 (Phila. County Orphan's Ct. 1955), and the Pennsylvania Supreme Court, *Girard Will Case*, *supra*, the United States Supreme Court unanimously reversed in a summary opinion, holding that the Board was an agency of the State, and that its refusal to admit orphans because of their race was discrimination by the State forbidden under the fourteenth amendment. *Pennsylvania v. Board of Trusts*, *supra* at 231.

Thus, a settlor may describe a discrete class of individuals to whom educational advantages are to accrue, subject to constitutional difficulties if the trustee is an agent of the State. *See* G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 375, at 123-24 (2d ed. rev. 1977). Here, the appointment of municipal officers as trustees, and the participation of the school board in the administration of scholarships which discriminate on the basis of religion and gender, invested both trusts with constitutionally forbidden State action. Consequently, I concur in that part of the majority's opinion which holds that the superior court was correct in ruling that neither the City of Keene nor the school board may continue to administer the trusts, and that reformation is appropriate to preserve the trusts.

However, I disagree with my colleagues' conclusion that the trial court properly reformed the trusts by amending their dispositive provisions through the exercise of cy pres. Accordingly, I start my discussion with the premise that no constitutional or statutory provision has ever existed which would prohibit Mr. Wright, Mr. Alger, or any other testator from establishing a charitable trust for the purpose of providing a "poor and worthy boy" or a "worthy protestant boy" with a college scholarship.

Where a donor has diverted his estate from his heirs, devoting it instead to a selected public purpose permitted by law, and that immediate purpose becomes impossible, impractical, or by change of law, illegal, the fund having once vested in charity does not, absent a forfeiture clause or gift-over, revert to the heirs as a resulting trust; rather, equity directs the court, through the exercise of its cy pres powers, to carry out the testator's intention as nearly as possible. *See* RSA 498:4-a. The rule of "cy pres," which means "as near" in Norman French, permits the court to depart from the expressed intention of the founder, when it cannot be fulfilled to the letter, and to redirect the funds to another similar charitable use if the donor has exhibited a charitable impulse that is "general," extending beyond the named object of his bequest. G. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 431, at 490-502 (2d ed. rev. 1977).

The facts of this case, however, do not show a proper occasion for the application of cy pres. While charitable trusts are favorites of equity and are construed as valid where private trusts would fail, courts are not at liberty to exercise their cy pres powers when the donor's express purpose can be fully accomplished. *See* C. DEGRANDPRE, *7 NEW HAMPSHIRE PRACTICE, WILLS, TRUSTS AND GIFTS* § 764, at 318 (1976); *Exeter v. Robinson Heirs*, 94 N.H. 463, 466, 55 A.2d 622, 624 (1947). Here, the school board does not suggest that it has been unable to attract sufficient applicants for the Wright and Alger scholarships, or that applicants have failed to meet scholarship qualifications. To the contrary, there are sufficient candidates graduating from Keene High School to exhaust the annual income from each trust. The testators' purposes, as expressed in each will, command neither the impossible nor the illegal, but can be carried out to the fullest extent, and there is no occasion for the application of cy pres.



While the incapacity of the school board to serve as trustee defeats an administrative direction of both the Wright and Alger wills, it by no means follows that the dominant and lawful purpose of the scholarships must be nullified. If a settlor creates a trust for an illegal purpose, the trust will fail, but where, as here, an administrative provision in the terms of the trust is illegal, the trust fails only if the provision cannot be deleted without defeating the lawful purpose of the settlor in creating the trust. RESTATEMENT (SECOND) OF TRUSTS § 65 (1959). Thus, a trust dedicated to illegal ends is a proper subject for cy pres, whereas a trust dedicated to a lawful purpose, but burdened by prohibited conditions, is susceptible to modification by alteration of the annexed conditions where the conditions are regarded as subordinate details of the testator's larger, lawful design. *See* I A. SCOTT, THE LAW OF TRUSTS §§ 60-62.9, at 277-316 (4th ed. 1987); *Exeter v. Robinson Heirs*, *supra* at 465-66, 55 A.2d at 624. The educational objectives of the Wright and Alger trusts, however old-fashioned or illiberal, are legitimate dispositive prerogatives to which equity should give maximum effect. *See* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 375, 376, at 121-59 (2d ed. rev. 1977).

Despite the majority's identification of a so-called "illegal purpose" as grounds for reformation under our cy pres statute, a charitable trust may lawfully, and consistent with public policy, provide funding or financial assistance that is directly responsive to the needs of particular groups of persons, to the total exclusion of all others. The trust purposes at issue here are not per se "illegal or obsolete or ineffective or prejudicial to the public interest" within the meaning of RSA 498:4-a simply because the testators donated their money to a particular class of beneficiaries. By holding as it does today, that private philanthropy may not focus on certain segments of society without violating public policy and triggering our cy pres statute, the majority presents us with our first judicial construction of RSA 498:4-a, and simultaneously calls into question the validity of every charitable trust or philanthropic foundation within this State that has focused its benevolence on a select segment of society.

I do not believe that we have the right to extend the constitutional guarantees of equal protection heedlessly to situations never intended by the framers of either our State or Federal Constitution to be covered by the language of those constitutional provisions, and unless a particular construction of RSA 498:4-a can be supported by sound legal reasoning or founded upon applicable precedent, it ought not to be made. *Matter of Johnson*, 93 A.D.2d 1, 23, 460 N.Y.S.2d 932, 946 (Niehoff, J., dissenting), *rev'd Matter of Estate of Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228 (1983). Surely, it is not the law of New Hampshire that a testator may not, consistent with public policy, bestow the benefit of a charitable gift upon a class of persons of his or her own choosing. It is regrettable that these uncertainties are being introduced into settled law; the court's decision may have effects far beyond the result reached today, for the inability of donors to choose confidently the objects of their own bounty may inhibit the charitable impulse and discourage charitable giving within our State.

While eradication of discrimination is a worthy social policy which ought to be facilitated, courts ought not to attribute to a testator a breadth of social concern and conception for which the will discloses no marked favor, at the expense of benevolences for which the will discloses an express interest of provision. In sum, courts are not free to update a decedent's will in keeping with contemporary notions of public good, but must concentrate on effectuating the testator's specific intentions. Here, the Director of Charitable Trusts, who represents the interest of the

public in upholding the philanthropic objectives of all charitable trusts, has correctly advanced the doctrine of deviation as the appropriate equitable remedy for the administrative impasse encountered by the school board. Proposing that administration by a private trustee would prevent any unconstitutional entanglement between the State and the trusts, while permitting both trusts to operate for the charitable purposes envisaged by their founders, the Director of Charitable Trusts has rightly sought to reform the trusts' means, rather than their ends, through the doctrine of deviation.

Where the dominant objective of a trust remains capable of fulfillment, but its method of accomplishment has been stalled due to a hitch in the administrative machinery, the doctrine of deviation permits a reworking or repair of the administrative mechanism so that the trust purposes may be accomplished effectively. *Jacobs v. Bean*, 99 N.H. 239, 241-42, 108 A.2d 559, 561 (1954). The doctrine of deviation permits changes in the management of all trusts, and in the case of charitable trusts, may be employed to substitute trustees as well as to alter trust conditions. See IV-A A. SCOTT, THE LAW OF TRUSTS § 381, at 323-33 (4th ed. 1989). Thus, if an administrative vacancy occurs due to the unsuitability of a particular named trustee, equity permits the court to appoint another, for it is axiomatic that a trust will not fail for want of a trustee. See *French v. Lawrence*, 76 N.H. 234, 235, 81 A. 705, 706 (1911); *Carr v. Corning*, 73 N.H. 362, 366, 62 A. 168, 169 (1905); IV-A A. SCOTT, THE LAW OF TRUSTS § 397, at 398 (4th ed. 1989).

As noted in Bogert on Trusts:

"The court regards the expression of a charitable trust intent and the indication of a class of beneficiaries as the important factors in creation. The personality of the trustee is not vital. There are many possible trustees available. The court can easily supply a trustee. The important matter is that the benefits of the property in question should be applied toward the described social purpose."

G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 328, at 609-10 (2d ed. rev. 1977). Accordingly, equity does not countenance a wholesale invasion of trust purposes for the want of a trustee; rather, it authorizes the court to appoint a trustee who is capable of effectuating the testator's dominant intent.

The inability of the school board to administer the Wright and Alger scholarships does not render impractical or impossible the accomplishment of specific trust purposes, but it impairs, to a minor extent, the testamentary scheme of candidate selection, in that the School Board can no longer participate in the awarding of scholarships, and a private individual or entity must assume responsibility for the selection of recipients. Such a slight departure from dispositive instructions falls within the scope of the well established rule that "[t]he court will direct or permit the trustee to deviate from a term of the trust if owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purposes of the trust. . . ." *Jacobs v. Bean, supra* at 241, 108 A.2d at 561; RESTATEMENT (SECOND) OF TRUSTS § 381 (1959); see RSA 498:4. Deviation, then, entails only the incidental departure from the prescribed administrative procedures of the trust without varying the end results envisaged by the donor. The frustration of administrative details encountered in

both the Wright and Alger trusts presents a classic case for the application of the trust-saving mechanism of deviation, and accordingly, appointment of a successor trustee is the appropriate method of reforming and thereby preserving both trusts.

Regrettably, however, our court has undertaken to reform the Wright and Alger wills by amending their dispositional provisions and naming other persons, not designated as beneficiaries, to share in the testators' estates. Citing to *Commonwealth of Pennsylvania v. Brown*, 392 F.2d 120 (3d Cir.), *cert. denied*, 391 U.S. 921 (1968), the majority states in its opinion that the trial court may exercise its equitable powers, if at all, to delete the eligibility criteria of both trusts, because judicial appointment of a successor trustee would implicate the court in a testamentary scheme of discrimination. According to the majority, the judicial act of appointing a substitute trustee would amount to unconstitutional State action.

Although the complex legal concept known as judicial State action is "a concept whose application is a source of considerable mystery even to legal scholars," *Matter of Johnson*, 93 A.D.2d at 28, 460 N.Y.S.2d at 949 (Niehoff, J., dissenting), *rev'd*, *Matter of Estate of Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228, the majority has no trouble in reaching its conclusion and, in fact, does so cursorily, conspicuously ignoring and failing to address *Shelley v. Kraemer*, 334 U.S. 1, 13, the seminal case in the area of judicial State action. Although the *Brown* court applied the doctrine of *Shelley v. Kraemer* to the particular facts of its own case, this court's marked reluctance to meet *Shelley* squarely is cause for grave concern; indeed, the majority's opinion is vulnerable both in law and in fact.

The *Brown* court did not hold, as my colleagues seem to suggest, that the judicial appointment of a substitute trustee is per se unconstitutional whenever the named trustee of an exclusionary trust is a State agency. Moreover, while the majority acknowledges that courts approach the issue of State action on a case by case basis, a fair reading of the majority's opinion discloses nothing but silence as to the State action analysis actually employed in *Brown* or why the rationale of *Brown* controls the facts in the case before us today. It is inconceivable, in my mind, that such important questions of constitutional law can be thought to be settled authoritatively for future cases *sub silentio*.

Significantly, the Third Circuit's decision in *Commonwealth of Pennsylvania v. Brown* derives much of its content and force from the Supreme Court's landmark decision in *Shelley v. Kraemer*. In *Shelley v. Kraemer*, the United States Supreme Court articulated a "judicial enforcement" doctrine of State action, holding that judicial enforcement of a private contract excluding non-Caucasians from the ownership of real property is State action violating the fourteenth amendment. *Shelley v. Kraemer*, 334 U.S. at 20. The dispute in *Shelley v. Kraemer* concerned a parcel of land subject to the terms of a racially restrictive covenant. When the property was sold to a black family, the neighboring property owners, parties to the restrictive covenant, sought redress for the breach in State court. The Missouri State courts enjoined the family from taking possession, divesting them of title, but the United States Supreme Court reversed. *Id.* at 5-6.

Noting, first, that the fourteenth amendment "erects no shield against merely private conduct, however discriminatory or wrongful," the Court repeated the well established rule that the

prohibitions of the fourteenth amendment apply to actions by the State, but not to actions by private individuals. *Shelley v. Kraemer*, 334 U.S. at 13. The Court observed that the racial restrictions were not illegal and could be "effectuated by voluntary adherence to their terms," *id.* at 13, but distinguished an order of enforcement as "judicial action. . . [bearing] the clear and unmistakable imprimatur of the State." *Id.* at 20. Reasoning that "but for the active intervention of the state courts, supported by the full panoply of state power, [the purchasers] would have been free to occupy the properties in question without restraint," the Court emphasized that the State courts had, by commanding compliance with the discriminatory restrictions, exercised the "full coercive power of government" to deny purchasers the enjoyment of property rights. *Id.* at 19.

Citing *Shelley v. Kraemer*, the school board urges that a court acts, in the constitutional sense, if it appoints a trustee who may, as a private individual, adhere to the discriminatory directives of a decedent's bequest. However, the theory of judicial State action advanced by the school board cannot be reconciled with either the facts or the law of *Shelley v. Kraemer*. Under the *Shelley* rationale, judicial enforcement of private rights may, in certain circumstances, involve State action. But the doctrine of judicial enforcement, as articulated in *Shelley v. Kraemer*, presumes the existence of both a private discriminatory agreement and an enforcement proceeding to redress a corresponding breach. The case before us is not one involving an agreement, nor is the whole force of the State being brought to bear upon a faithless trustee.

The situation presented in this case is, therefore, easily distinguishable from that presented in *Shelley v. Kraemer*, where the United States Supreme Court held unconstitutional the judicial action of State courts which had affirmatively enforced a private scheme of racial discrimination. *See Evans v. Abney*, 396 U.S. 435, 445 (1970). *Shelley v. Kraemer* imposes no requirement upon our courts to abandon longstanding and neutral principles of State trust law that authorize the court to appoint trustees when they are needed and to effectuate as nearly as possible the intentions of the trust settlor. Indeed, the authority to appoint trustees is a part of the law of this jurisdiction which the court is not at liberty to decline. Our cases clarify that "it is the duty of the probate court to appoint trustees whenever they are needed to administer trusts created by wills. . . ." *Carr v. Corning*, 73 N.H. at 366, 62 A. at 169. Such judicial action compels no discrimination and falls outside the doctrine of judicial enforcement.

While assailability under the fourteenth amendment turns upon a threshold finding of "state action of a particular character," *Civil Rights Cases*, 109 U.S. at 11, the United States Supreme Court has never attempted to define the level of State involvement necessary to convert "private action" into "State action," observing instead that "the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974) (citations omitted). The essential question, according to the Court, is whether "to some significant extent the State in any of its manifestations has . . . become involved in . . . private conduct" abridging individual rights, *Burton v. Wilmington Pkg. Auth.*, 365 U.S. 715, 722 (1961) (emphasis supplied), but the Court has declined to articulate a precise formula for recognition of significant, and hence actionable, State action. *Id.* Emphasizing the difficulty of drawing a constitutionally meaningful boundary within the public-private penumbra, the Court ruled in *Burton* that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be

attributed its true significance." *Id.* Thus, no single factor determines whether discrimination is chargeable to the State; rather, State action analysis requires a particularized inquiry into the facts and circumstances of each case, an assessment of the rights advanced by each party and, most importantly, a consideration, on balance, of the particular context in which those interests are asserted. *See Jackson v. Metropolitan Edison Co.*, *supra* at 360 (Douglas, J., dissenting).

Although an intervivos trust may operate without government involvement, the testamentary trust has no such original vitality. *See Clark, Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard*, 66 YALE L.J. 979, 1004 (1957). Indeed, the sanctity of wills, and the institution of inheritance in general, depends largely upon the State, because the power to dispose of property through testamentary devise is a privilege which the State confers by statute, and regulates through the process of probate administration. *See RSA 551:2 (Supp. 1989); RSA 547:3.* However, the fact that a private enterprise cannot be conducted in the absence of a governmentally conferred privilege is not, according to the United States Supreme Court, a relevant consideration in the State action analysis. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972). In *Moose Lodge*, the Court rejected a claim that racial discrimination by a private club amounted to unconstitutional State action because the club held a liquor license under a State regulatory scheme. Referring to the State's regulatory involvement, the Court held that "[h]owever detailed this type of regulation may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." *Id.* Accordingly, to the extent that the testamentary trusts at issue here derive vitality from a legislative grant of power which breathes testamentary life into all wills executed in compliance with the requisite formalities, *see RSA 551:2 (Supp. 1989)*, their discriminatory provisions are not actionable under the fourteenth amendment.

It follows that a court may apply neutral principles of trust law permissive of private volition in the disposition of testamentary gifts and enable the private administration of an exclusionary trust by appointing a substitute trustee. That a court performs a function which permits the continuation of private discrimination does not make its acts State action; rather, "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' . . . in order for the discriminatory action to fall within the ambit of the constitutional prohibition." *Moose Lodge No. 107 v. Irvis*, 407 U.S. at 173. The core issue, then, is not whether the court has acted at all, but whether it has exercised coercive power or has become so significantly involved in conduct abridging private rights that the discrimination must in law be attributed to the State. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982). Although trust law facilitates private arrangements and has as its objective the fulfillment of private intentions, the judicial act of appointing a private trustee cannot be said to involve the State significantly in private discrimination unless it is the State, and not the trustee, which is controlling the management of trust funds.

While the majority is determined to "reach the same result ordered in *Pennsylvania v. Brown*," the situation presented in this case is easily distinguishable from that presented in *Commonwealth of Pennsylvania v. Brown*, where the Orphan's Court of Pennsylvania acted upon its own motion to install its own group of trustees, and through a conspicuously unusual and unneutral method of appointment caused the trustees to swear an oath that they would "manage

the will of Stephen Girard in accordance with the way it was written." *Commonwealth of Pennsylvania v. Brown*, 392 F.2d at 122.

As previously discussed, the Supreme Court of the United States held in *Pennsylvania v. Board of Trusts*, 353 U.S. at 231, that the City of Philadelphia, while exercising its obligations as trustee under the will of Stephen Girard, was engaged in State action proscribed by the fourteenth amendment. In response to the Supreme Court's decision, the Pennsylvania Orphan's Court "without notice or opportunity for the plaintiffs to do anything and with no request from the City or other source whatsoever, on its own initiative ousted Philadelphia as trustee and installed in place of the City Board, persons of its own choosing . . . [who] were sworn in by at least one of the Orphan's Court judges. . . ." *Id.* at 122. When the orphan plaintiffs challenged the ouster of the City Board, the Pennsylvania Supreme Court found that the action of the Orphan's Court was not inconsistent with either the mandate of the United States Supreme Court or the fourteenth amendment, and subsequent application for certiorari was denied by the United States Supreme Court. *Id.* at 122-23. The Pennsylvania Legislature then enacted a statute specifically granting to the Pennsylvania Orphan's Court the power and duty to appoint substitute trustees in aid of Girard College. *Commonwealth of Pennsylvania v. Brown*, supra at 122 n.1.

However, ten years after the Supreme Court denied certiorari, the Girard litigation was re-instituted in federal district court, giving rise to the Third Circuit's decision in *Commonwealth of Pennsylvania v. Brown*. Stressing the aggravated and unusual State involvement in the administration of the Girard Trust for over 125 years, and the Orphan's Court's obvious efforts, by formulating an oath of allegiance to the Girard will, to manipulate the conduct of the private trustees, the *Brown* court characterized the Orphan's Court's substitution of trustees as action taken of its own initiative, and concluded that the Orphan's Court's action did "significantly encourage and involve the State in private discriminations." *Commonwealth of Pennsylvania v. Brown*, 392 F.2d at 125.

Because the facts of *Brown* bear no resemblance to those in the case at bar, that case cannot properly be cited as one which warrants the result reached by the majority today. *Cf. Matter of Johnson*, 93 A.D.2d at 40, 460 N.Y.S.2d at 955-56 (Niehoff, J., dissenting), *rev'd Matter of Estate of Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228. As Circuit Judge Van Dusen pointed out in a separate concurring opinion, neither the Orphan's Court nor the Pennsylvania Legislature had made itself merely neutral in the Girard College case. Referring to the Pennsylvania Legislature's action in passing a statute which declared it the duty of the Orphan's Court to appoint substitute trustees committed to upholding the Girard will, Circuit Judge Van Dusen noted the unconstitutional legislative State action underlying the Orphan's Court's action. Specifically, he emphasized the ex post facto nature of the enabling legislation, observing that "[o]f the forms of 'state action' in aid of discrimination that the Supreme Court has held . . . unconstitutional, that in *Reitman v. Mulkey* . . . seems most clearly apposite to the facts of this case." *Commonwealth of Pennsylvania v. Brown*, 392 F.2d at 127 (Van Dusen, J., concurring) (*citing Reitman v. Mulkey*, 387 U.S. 369 (1967)) (State legislative enactment authorizing private racial discrimination violates fourteenth amendment).

Significantly, the facts of the case at bar do not include a legislative enactment demanding and encouraging discrimination, and hence, implicating *Reitman v. Mulkey supra*. Nor has the trial

court, like the Orphan's Court, unilaterally, *sua sponte*, and without formal hearing, removed a trustee and sponsored substitute trustees of its own choosing, binding them under a unique State oath to carry out discriminatory policies. Indeed, I agree with the Third Circuit that the actions of both the Pennsylvania Legislature and the Orphan's Court lent to the practice of private discrimination an aura of public approval and sanction which transcended mere testamentary supervision; the State involvement in the Girard case was of the most notorious nature.

More importantly, however, a majority of the *Brown* court found that the facts of its case were "fairly comparable" to the facts in *Evans v. Newton*, 382 U.S. 296 (1966), and held, accordingly, that "the decision of the Supreme Court therein governs the issue before us." *Commonwealth of Pennsylvania v. Brown*, *supra* at 123. As will be seen, *Evans v. Newton*, like *Commonwealth of Pennsylvania v. Brown*, cannot properly be cited as a case which supports the result reached by my colleagues in the case before us today.

In *Evans v. Newton*, the testator, United States Senator August O. Bacon, devised a tract of land to the city officers of Macon, Georgia, to be used as "a park and pleasure ground" for whites only. *Evans v. Newton*, *supra* at 297. For a number of years the trust was administered according to its terms, but eventually the park was integrated. *Id.* Certain park managers then sued to remove the city as trustee and to appoint private trustees who could legally enforce racial segregation in the park. *Id.* at 297-98. The Georgia state courts accepted the resignation of the city as trustee and appointed private individuals in its place, but the United States Supreme Court reversed, the majority holding that the park could no longer be operated on a segregated basis. *Id.* at 302.

The Court did not address or even acknowledge the question whether judicial appointment of a private trustee can be considered State action. *See Evans v. Newton*, *supra* at 303 (White, J., concurring); *id.* at 312 (Black, J., dissenting); *id.* at 315 (Harlan and Stewart, JJ., dissenting). Rather, it focused on the character of the park as a public institution. Reasoning that the "momentum it acquired as a public facility [was] certainly not dissipated ipso facto by the appointment of 'private' trustees," the Court found that the predominant character and purpose of the park was municipal, and that the tradition of municipal control had become so firmly established that the transfer of title to private trustees did not per se disentangle the park from its municipal regime. *Id.* at 301-02. Ultimately, the trust failed and reverted to the testator's heirs. *Evans v. Abney*, 224 Ga. 826, 833, 165 S.E.2d 160, 166 (1968), *aff'd*, 396 U.S. 435 (1970).

The public function theory upon which *Evans v. Newton* rested is inapplicable to the trusts we consider today. Unlike Girard College, which had "become assimilated to a public boarding school or orphanage, 'municipal in nature,'" *Commonwealth of Pennsylvania v. Brown*, 270 F.Supp. 782, 792 (E.D. Pa. 1967), and Senator Bacon's park, which had rendered services "municipal in nature," *Evans v. Newton*, 382 U.S. at 301, there is nothing inherently "municipal" about a scholarship. Rather, scholarships are traditionally selective and exclusionary, evoking images of private endowments, family fortunes, and generous alumni from days gone by. Hardly to be confused with a government loan, although arguably as difficult to receive, the Wright and Alger scholarships perpetuate the memory of their founders and finance the education of a selected few, much as a private family trust might finance the education of its sons or daughters.

Whether or not the scholarships provide a "public function" by bestowing financial aid upon students who would otherwise seek the aid of the State, the United States Supreme Court has clarified in its recent decisions that the fact "[t]hat a private entity performs a function which serves the public does not make its acts state action." *Rendell-Baker v. Kohn*, 457 U.S. at 842. In conclusion, the public function served by the Wright and Alger trusts, if any, is not determinative of State action. Both trusts can survive constitutional scrutiny if the State's role in their administration is assumed by private individuals.

Finally, by contrast to the facts in *Commonwealth of Pennsylvania v. Brown*, this court cannot confidently conclude, as a majority of the Third Circuit did, that "[g]iven everything we know of [the testator], it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times . . . ." *Commonwealth of Pennsylvania v. Brown*, 392 F.2d at 125. Unlike the facts in *Brown*, where the testator had died in 1831, well before the Civil War, Mr. Alger died in 1970 when it had become as commonplace as it is today for young women and non-Protestants to attend college. But notwithstanding the large numbers of women and non-Protestants pursuing higher education in 1970, Mr. Alger chose unequivocally to bestow his goodwill upon worthy college-bound Protestant boys. Accordingly, I do not believe it is fair to justify the result reached today by attributing to Mr. Wright and Mr. Alger "the changes in attitudes experienced by society since the creation of these trusts." Rather, I would point out instead that Wilhelmina F. Alger, the widow of Maurice A. Alger and his sole heir-at-law, has intervened in this action, seeking to be appointed as successor trustee, and has condemned the school board's attempt to redirect the Alger funds, observing that such an expansion of trust purposes is in keeping with the school board's own idea of fairness, but is contrary to the declared sentiments of her late husband's will.

I would conclude, then, that a court does not act in the constitutional sense when it applies neutral principles of trust law to enable the initial existence of a discriminatory testamentary trust or to permit its continuation. See *Matter of Estate of Wilson*, 59 N.Y.2d 461, 452 N.E.2d 1228. Freedom of testation is a cherished right which permits a testator to breathe his last, secure in the expectation that the law will venerate, and not frustrate, his last wishes. A court may, accordingly, replace an unfit or unsuitable trustee as part of its general duties in supervising the administration of a charitable testamentary trust, but the court is not free to rewrite a decedent's will or to attribute to him, posthumously, a desire to spend his bounty for the collective good when the designated and preferred class of beneficiaries has not been exhausted.



**RSA 31:22-A CY PRES OF CEMETERY FUNDS**  
**CHESHIRE COUNTY SUPERIOR COURT ORDER 11/19/1984**  
**TRUSTEES OF TRUST FUNDS OF THE TOWN OF FITZWILLIAM**  
**V. DIRECTOR OF CHARITABLE TRUSTS, THE SO-CALLED**  
**AMHERST DECISION**

OFFICE OF  
*Clerk of Superior Court*  
CHESHIRE COUNTY

-162-

STILLMAN D. ROGERS, CLERK  
DANA W. ZUCKER, DEPUTY CLERK

Box 444  
Keene, New Hampshire  
03431  
603-352-6902

DATE: June 10, 1986

DOCKET # 79-E-1029

CASE CAPTION: Trustees of Trust Funds of the Town of Fitzwilliam  
vs.  
Director of Charitable Trusts

Enclosed please find a copy of the Court order dated  
November 19, 1984 in the above captioned case.

  
Clerk

COPIES TO:  
Attorney General

HILLSBOROUGH, SS.

SUPERIOR COURT

\* \* \* \* \*

AMHERST BOARD OF TRUSTEES

v.

DIRECTOR OF CHARITABLE TRUSTS

\* \* \* \* \*

CEMETERY TRUSTEES OF CHESTERFIELD

v.

DIRECTOR OF CHARITABLE TRUSTS

\* \* \* \* \*

TRUSTEES OF TRUST FUNDS OF  
FITZWILLIAM

v.

DIRECTOR OF CHARITABLE TRUSTS

\* \* \* \* \*

(Hillsborough)

No. E-3438

(Cheshire)

No. 14135

(Cheshire)

No. 79-E-1029

ORDER

The Court has determined that it will not request an interlocutory review of its decision by the New Hampshire Supreme Court.

*Joseph A. DiClerico, Jr.*  
JOSEPH A. DICLERICO, JR.  
Presiding Justice

Dated: November 19, 1984.

- 164 -

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

APRIL TERM

TOWN OF AMHERST BOARD OF TRUSTEES :  
OF TRUST FUNDS :

V. :

DIRECTOR OF CHARITABLE TRUSTS :  
----- :

Hillsborough, ss  
No. E-3438

CEMETERY TRUSTEES FOR THE TOWN OF :  
CHESTERFIELD :

V. :

DIRECTOR OF CHARITABLE TRUSTS :  
----- :

Cheshire, ss  
No. 14135

PRELIMINARY DECREE

These cases shall be governed by the Preliminary Decree entered this date in Cheshire County 79-E-1029, Trustees of Trust Funds of the Town of Fitzwilliam v. Director of Charitable Trusts, a copy of which is attached hereto and made a part hereof.

Joseph A. DiCenico, Jr.  
Presiding Justice

Dated: July 15, 1983.

THE STATE OF NEW HAMPSHIRE

CHESHIRE, SS

SUPERIOR COURT  
April Term  
1981

TRUSTEES OF TRUST FUNDS OF THE :  
TOWN OF FITZWILLIAM :

V. :

79-E-1029.

DIRECTOR OF CHARITABLE TRUSTS :  
----- :

PRELIMINARY DECREE

I. Introduction

In this petition, the Board of Trustees of Trust Funds for the Town of Fitzwilliam and the Director of Charitable Trusts seek instructions from the Court concerning the use of accumulated excess income on perpetual care trust accounts that have been established for the maintenance and upkeep of burial lots. Specifically, the parties are seeking instructions as to whether or not part of the accumulated excess income may be used for the general care of the cemeteries to which the particular accounts apply and for capital improvements to or expansion of those cemeteries under the doctrine of cy pres, if applicable, or under any other trust doctrine. See RSA 31:22-a. The parties have filed an agreed statement of facts.

The Legislature has imposed on towns the duty, and granted towns the authority, to establish and maintain cemeteries (see generally RSA 298 and RSA 31) and the authority to receive and hold

- 166 -

funds for the care of cemeteries and any burial lots therein. RSA 31:20 and 21; RSA 289:13. A town can receive funds for cemetery purposes as a result of a trust, gift, legacy, devise or contract. Based on the agreed statement that has been filed, the majority of the funds received by the town for the perpetual care of burial lots were not accompanied by any written instrument. Rather, these funds were received at the time burial lots were sold with the understanding that a portion of the total cost of the lot would be set aside in a perpetual care account. This was in fact done and the Board of Trustees of Trust Funds has administered these accounts. The interest from these accounts is used from time to time for the maintenance and upkeep of the burial lots to which they relate. The principal, however, remains intact. In some instances, there exist trust instruments that accompanied the funds. In other instances, where there were instruments that accompanied the funds, they have been lost, but for the purposes of this opinion it is assumed that such funds have been handled in the same manner as other perpetual care accounts.

## II. Trust Accounts For Which Instruments Exist

As to those perpetual care trust accounts for which a trust instrument exists, a certified copy of each instrument should be filed with the Court so that a determination can be made, after a review of the terms of each instrument, as to whether or not the relief sought can be granted by applying the doctrine of cy pres or any other trust doctrine.

III. Trust Accounts For Which No Instruments Exist

As to those perpetual care trust accounts for which no instruments existed or for which the instruments have been lost, the Court, in the first instance, must determine the nature of such trust accounts in order to decide by what principles of trust law they are to be governed.

The New Hampshire Supreme Court in Tuttle's Petition, 80 N.H. 36 (1921) held that the care and maintenance of a burial lot constituted a public or charitable trust and that towns were authorized to receive and hold funds for such purpose.

It is thus clearly apparent that the care of burial lots by towns, in accordance with reasonable terms of trust deeds and legacies to them, may be a public duty in the nature of a public charity. Such service by a municipal corporation is as much a public service as it is when performed by a private association.

\* \* \*

That the object of the trust in this case is not inconsistent with the general powers of towns and is in itself praiseworthy and in accord with the general ideas of honoring the dead, are further reasons, aside from those already discussed, why the town should be permitted to hold and administer the trust. Moreover, it has been held that maintaining cemeteries is in the interest of public health and therefore a proper subject for a public trust. Starr Burying Association v. Association, 77 Conn. 83, 87.

Tuttle's Petition, supra, at pp. 38-89.

In the Opinion of the Justices, 101 N.H. 531, 533 (1957), the New Hampshire Supreme Court again stated: "The law is well

established that trusts for the perpetual care of cemeteries and cemetery lots are valid charitable trusts."

The same method used to create a private trust may be used to create a charitable trust. IV Scott, Trusts (3rd Ed.) §349.

Thus, the owner of property can create a charitable trust, either by conveying it inter vivos to another person as trustee, or by devising or bequeathing it upon a charitable trust. ... Ibid.

The settlor of the charitable trust must manifest an intention to create a charitable trust. IV Scott, Trusts, supra, §351.

The settlor need not, however, use any particular language in showing his intention to create a charitable trust; he need not use the word "trust" or "trustee". It is sufficient that he shows an intention that the property should be held subject to a legal obligation to devote it to purposes which are charitable . . . .

Id. at p. 2794.

The settlor may manifest an intention to create a charitable trust, although he does not expressly state the property given by him is to be applied to charitable purposes. Thus, where a testator leaves property to a designated person who is the holder of an office in a charitable institution, he may thereby manifest an intention that the property should be applied to the purposes of the institution rather than the legatee should take it for his own benefit.

Id., at pp. 2797-98.

In those instances where no instrument exists, it is a reasonable assumption that when individuals, their executors or administrators, purchased burial lots, they were familiar with the standard procedure employed by the town of allocating a portion of



the purchase price for the purpose of providing perpetual care for the lots. They paid money to the town, a public entity, with the intention and understanding on their part and on the part of the town that a portion of that purchase price would be set aside and held for perpetual care, an understanding which the town apparently has abided by and carried out in accordance with its legal obligation. Given the reasonable assumptions which can be drawn, the actual procedures which have been followed, and the intended use to which the trust accounts have been and will continue to be put, the Court finds and rules that such trust accounts are individual charitable trusts. These trusts were created implicitly, if not explicitly, at the time each lot was purchased, and at the same time, the town became trustee of each trust. See RSA 31:20 and RSA 289:13.

IV. Application of Cy Pres Doctrine to Trust Accounts For Which No Instruments Exist

A. General Charitable Intent

In Opinion of the Justices, supra, at p. 533, the New Hampshire Supreme Court stated:

. . . [T]he administration of charitable trusts falls within the jurisdiction of courts of equity, which have unquestioned authority in appropriate circumstances to permit departure from the literal terms of such a trust by exercise of the power of cy pres. Drury v. Sleeper, 84 N.H. 98. The courts will exercise this power, however, only when the purpose for which the fund was established cannot be carried out, and the diversion of the income to some other purpose can be found to fall within the general intent of the donor expressed in

the instrument establishing the trust. Pittsfield Academy v. Attorney General, 95 N.H. 51; Petition of Rochester Trust Co., 94 N.H. 207; Boscawen v. Attorney General, 93 N.H. 444, 445, and cases cited.

One of the prerequisites to the application of the cy pres doctrine is the existence of a general charitable intent on the part of the individual who has established a charitable trust for a particular purpose. If such an intent is found to exist, and it is found that it has become illegal, impossible or impracticable to carry out the original particular charitable purpose of the trust, then the Court under the doctrine of cy pres will apply the property to a use that is found to be within the general charitable intention of the trust's creator. As noted in IV Scott, Trusts, supra, §399.2, p. 3094:

This principle is easy to state but is not always easy to apply. It is seldom that the testator's intention can be definitely analyzed and divided into a particular and a general intention. It is ordinarily impossible to determine what disposition the testator intended should be made of the property if his particular purpose could not be carried out. Indeed, it is ordinarily true that the testator does not contemplate the possible failure of his particular purpose, and all that the court can do is to make a guess not as to what he intended but as to what he would have intended if he had thought about the matter.

The task discussed by Scott is made more difficult where no written instruments exist. In this case, the Board of Trustees of Trust Funds seeks to use part of the accumulated excess income from the trust accounts for the general care of the cemetery and for capital improvements to or expansion of the cemetery. The Court must next determine

whether such a proposed use of excess income falls within the general intention of the purchasers of burial lots. Since there are no written instruments, the Court must examine such general facts as are known and such reasonable assumptions that can be drawn from those facts.

We live in a society where a significant number of people have been and are concerned with the manner in which their remains and those of their loved ones are ultimately disposed of and memorialized. As the New Hampshire Supreme Court noted in Tuttle's Petition, supra, at p. 38, in referring to a trust for the perpetual care of a burial lot, the trust was ". . . in itself praiseworthy and in keeping with the general ideas of honoring the dead. . . ." There are both private and public characteristics to a cemetery which coexist. Each burial lot is dedicated to the memory of a deceased individual or family and their remains are placed therein. The cemetery as a whole is ground that has been set aside and dedicated to the memory of the dead in general and is a depository for the remains of many unrelated individuals and families. When an individual purchases a cemetery lot with the understanding that part of the purchase price will be set aside for perpetual care, it is reasonable to assume that the individual not only expects and wants his own lot to be maintained properly but also wants and expects the cemetery as a whole to be cared for in a reasonable, appropriate and dignified manner in memory of himself, his family and other deceased persons in general, since if the latter were not so it would detract from the former. This assumption is described very well

by the Pennsylvania Superior Court in Neely's Estate, 88 Pa. Superior Ct. 373 (1926, aff'd 288 Pa. 130, 135 Atl. Rep. 540). The Court was called upon to determine if excess income from a bequest, the interest of which was to be used "for the keeping of my lot in the cemetery," could be used for the maintenance and care of the whole cemetery which was in an unkempt condition. The Court stated, at pp. 375-76:

We agree however with the clear and convincing opinion of the auditing judge that the language of the testatrix's will should have a wider application. The keeping of her lot implied the keeping of the cemetery, and it might be assumed that such keeping included not only the maintenance of the testatrix's burial place in that particular lot, but also in some other place to which a removal of the cemetery might become necessary because of damaged conditions. It may reasonably be assumed also that she had in mind the keeping of her lot with respect to its surroundings, the approaches to it, and the condition of the other lots in the burial place. Interested as she evidently was in maintaining a respectable memorial for herself and her family, and in sustaining the church of which she was so long a member, it is not at all likely that she had regard only to the condition of her own lot which could have little attractiveness with any appropriate care when surrounded by neglected acres given over to weeds and brush and briars. Certainly she assumed that her provision would secure not only the maintenance of the family monuments and the surface of the lot in good condition, but that a proper approach thereto would be maintained and that the general condition of the God's Acre which was to be her resting place should be respectable in appearance.

Taking into account all of the foregoing, the Court finds and rules that with respect to the charitable trusts in question, beyond the specific charitable intent that exists to provide for the perpetual care of each lot, there also exists an implied general

charitable intent that the cemetery in which the lot is located be properly maintained and preserved as a whole, in a reasonable, appropriate and dignified manner, which would include the general care of, capital improvements to, or expansion of the cemetery. Such an undertaking is in the public interest because it is consistent with general ideas of honoring the dead and with maintaining public health.

B. Illegality, Impossibility or Impracticability

In considering the perpetual care trust accounts for which no written instruments exist, the Court has determined that such accounts are valid charitable trusts and that beyond the specific charitable intent of these trusts there exists an implied general charitable intent. The third and last prerequisite which must be met in order for the cy pres doctrine to be applicable is that it must be impossible, illegal or impracticable to carry out the terms of each trust. The legality of the trusts is not in question. Therefore, the remaining determination to be made is whether or not it is impossible or impracticable to carry out the terms of each trust, that is, will income in excess of what has been, is, and will be necessary to maintain the lot continue to accumulate, not being used for the specific purpose of the trust but merely being held by the Trustees for an indefinite period of time. With respect to each trust individually, the petitioner has the burden of proving by competent evidence, based on reasonable probabilities, that there is a certain portion of the accumulated excess income and any accretions thereto which has not been, is not and will

not be required for the care of the burial lot to which it applies, taking into account all relevant economic factors, and that, therefore, the requisite degree of impracticability or impossibility exists to warrant application of the cy pres doctrine. Boscawen v. Attorney General, 93 N.H. 444 (1945). On this issue, there is not sufficient evidence before the Court at this time to enable the Court to make a final determination on the requested relief.

V. Conclusion

The matter will be set down for another hearing to enable the petitioner to present such evidence as it deems appropriate on the issues remaining before the Court. Prior to such hearing, the Clerk of Court shall schedule a pre-hearing conference between the Court and all counsel. Counsel shall be prepared to discuss the issues of proper orders of notice, the appointment of a guardian ad litem to represent the interests of any unknown individuals who may have an interest in the outcome of the case, and the further presentation of evidence.

In considering the issues before the Court and in ruling on those issues, the Court has considered the policy enunciated by the New Hampshire Legislature in RSA 31:22-a and in the Declaration of Purpose for that statute set forth in Laws 1977 c. 128, S. 1. (See next page)

  
Presiding Justice

Dated July 15 , 1983.

**CARROLL COUNTY PROBATE COURT ORDER 11/1/2012 TOWN**  
**OF MOULTONBOROUGH V. DIRECTOR OF CHARITABLE**  
**TRUSTS**

RSA 31:19-a II. If the voters create an irrevocable general fund trust they cannot later vote to change the fund to a revocable trust. It is necessary to file a petition with the probate court. This case is an example of converting irrevocable general fund trusts created under RSA 31:19-a to revocable trust funds

-176-

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
NH CIRCUIT COURT**

3rd Circuit - Probate Division - Ossipee  
96 Water Village Rd., Box 1  
Ossipee NH 03864

Telephone: (603) 539-4123  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

**NOTICE OF DECISION**

**ANTHONY I BLENKINSOP, DIRECTOR OF CHARITABLE  
TRUST  
NEW HAMPSHIRE ATTORNEY GENERALS OFFICE -  
CHRITABLE TRUSTS UNIT  
33 CAPITOL STREET  
CONCORD NH 03301**

**RECEIVED**

NOV 2 - 2012

Case Name: **Town of Moultonborough v. Director of Charitable Trusts**  
Case Number: **312-2012-EQ-00362**

CHARITABLE TRUSTS UNIT

On October 30, 2012, Judge James R. Patten issued orders relative to:

Petition to Modify Six Irrevocable Municipal Trust Funds to Revocable Trust Funds  
Assented to Motion Granted. Prayer A., as stated alone, So Ordered.

Any Motion for Reconsideration must be filed with this court by November 11, 2012. Any appeals to the Supreme Court must be filed by December 01, 2012.

November 01, 2012

Elaine J. Lowe  
Clerk of Court

C: Town of Moultonborough; Peter J. Minkow, ESQ



-177-

THE STATE OF NEW HAMPSHIRE  
NH CIRCUIT COURT  
3<sup>rd</sup> Circuit – Probate Division - Ossipee

OCT 12 2012

Town of Moultonborough

v.

Director of Charitable Trusts, NH Department of Justice  
3/2-2012-EQ-00362

PETITION TO MODIFY SIX IRREVOCABLE  
MUNICIPAL TRUST FUNDS TO REVOCABLE TRUST FUNDS

NOW COMES the Town of Moultonborough, by and through its attorneys, Minkow & Mahoney Mullen, P.A., and respectfully submits the within Petition and in support of same states as follows:

1. On or about March 9, 1994, at the annual Town Meeting of the Town of Moultonborough, the voters passed Warrant Article 42 establishing an Irrevocable Maintenance Reserve Expendable Trust Fund to be known as the Dry Hydrant Fund for the purpose of installing dry hydrants. The article further authorized the Board of Selectmen to retain the then current dry hydrant account balance of \$8,792.54 to be placed in said Trust Fund. The article further authorized the selectmen to retain any unexpended balance of appropriated dry hydrant monies to become part of the Dry Hydrant Fund.
2. On or about March 9, 1994, at the annual Town Meeting of the Town of Moultonborough, the voters passed Warrant Article 43 establishing an Irrevocable Maintenance Reserve Expendable Trust Fund to be known as the Landfill Development Fund for the purpose of developing and maintaining the Moultonborough Resource Recovery Park/Waste Management Facility. The article further authorized the Board of Selectmen to retain the then current landfill development account balance of \$298,724.55 to be placed in said Trust Fund. The article further authorized the selectmen to retain any unexpended balance of appropriated landfill development monies to become part of the Landfill Development Fund.
3. On or about March 9, 1994, at the annual Town Meeting of the Town of Moultonborough, the voters passed Warrant Article 44 establishing an Irrevocable Maintenance Reserve Expendable Trust Fund to be known as the Road Sealing Fund for the purpose of road sealing. The article further authorized the Board of Selectmen to retain the then current road sealing account balance of \$24,076.38 to be placed in said Trust Fund. The article further authorized the selectmen to retain any unexpended balance of appropriated road sealing monies to become part of the Road Sealing Fund.
4. On or about March 9, 1994, at the annual Town Meeting of the Town of Moultonborough, the voters passed Warrant Article 45 establishing an Irrevocable Maintenance Reserve Expendable Trust Fund to be known as the Historical Society Fund for the purpose of maintaining the old Town House and Middle Neck School-Moultonborough Historical Society as custodians by vote of Town Meeting 1960. The article further authorized the Board of Selectmen to retain the then current historical society account balance of \$5,868.75 to be placed in said Trust Fund. The article further authorized the selectmen to retain any unexpended balance of appropriated historical society monies to become part of the Historical Society Fund.

A TRUE COPY  
ATTEST: Heidi Hatcher, CA#1


5. On or about March 9, 1994, at the annual Town Meeting of the Town of Moultonborough Town Meeting, the voters passed Warrant Article 46 establishing an Irrevocable Maintenance Reserve Expendable Trust Fund to be known as the Rangeway Fund for the purpose of locating and mapping rangeways in the Town of Moultonborough. The article further authorized the Board of Selectmen to retain the then current rangeway account balance of \$801.46 to be placed in said Trust Fund. The article further authorized the selectmen to retain any unexpended balance of appropriated rangeway monies to become part of the Rangeway Fund.
6. On or about March 9, 1994, at the annual Town Meeting of the Town of Moultonborough, the voters passed Warrant Article 47 establishing an Irrevocable Maintenance Reserve Expendable Trust Fund to be known as the Playground Improvements Fund for the purpose of playground improvements. The article further authorized the Board of Selectmen to retain the then current playground improvements account balance of \$981.26 to be placed in said Trust Fund. The article further authorized the selectmen to retain any unexpended balance of appropriated playground improvements monies to become part of the Playground Improvements Fund.
7. Previous to and including the 1993 budget, said expenditures had been funded annually as part of the operating budget.
8. The Trust Funds were funded solely by the unexpended balance of appropriated monies from the 1993 budget for those certain expenditures. No private monies were ever deposited into the Trust Fund accounts.
9. The expenditures related to the specific trust funds are no longer relevant. Modifying the trust funds to revocable trust funds would allow the Town to utilize said funds for other purposes.
10. At the 2005 Annual Town Meeting of the Town of Moultonborough, voters authorized the filing of certain court actions to change the six Irrevocable Trust Funds to Revocable Trust Funds.
11. The modification of the trust funds from irrevocable to revocable is consistent with the material purpose of the trust funds; that purpose being a means to hold unexpended funds from prior year's budgets.
12. The Director of Charitable Trusts, NH Department of Justice has been consulted and, on information and belief, has no objection to the relief requested herein.

WHEREFORE, the Petitioner respectfully requests that this Honorable Court:

- A. Modify the above-referenced Trust Funds from Irrevocable Trust Funds to Revocable Trust Funds; and
- B. Grant such other and further relief as this Court deems just and equitable.

Respectfully submitted,  
Town of Moultonborough  
By its attorneys:  
Minkow & Mahoney Mullen, P.A.

Date: October 10, 2012



Peter J. Minkow, Esq., NH Bar ID #1767  
PO Box 235  
Meredith, NH 03253  
(603) 279-6511

*Assented to Motion Granted.  
Prayer A., as stated above, is ordered.  
10/30/2012*



**JAMES R. PATTEN  
JUDGE OF PROBATE**



**STRAFFORD COUNTY PROBATE COURT ORDER 8/15/2007 IN**  
**RE ESTATE OF RHODA A. HOGAN**

A good discussion on municipal departments as charitable entities.

- 182 -

THE STATE OF NEW HAMPSHIRE  
Strafford Probate Court  
County Farm Road  
P. O. Box 799  
Dover, NH 03820-0799  
Telephone (603) 742-2550

RECEIVED  
AUG 16 2007

CHARITABLE TRUSTS UNIT

To: Director of Charitable Trusts  
NH Department of Justice  
33 Capitol Street  
Concord, NH 03301

RE: Estate of Rhoda A. Hogan

Docket No. 2006-0563

Please see enclosed copy of Judge Cassavechia's order dated 08/14/07.

Date: 8/15/2007

Kimberly Quint  
Register of Probate

cc: Fred W. Hall, Jr., Esquire  
Cocheco Valley Humane Society  
New Hampshire SPCA  
Northeast Animal Shelter  
Alley Cat Allies  
UNH Foundation

about behavioral alternatives to, and ethical and welfare consequences of, declawing. The Director of Charitable Trusts proffers no objection.

The executor is instructed that he may execute and distribute the gift to the Cornell Feline Health Center consistent with his desire. Such a legacy would be consistent with the testatrix' intention as gleaned from paragraph FOURTH A and the executor's submission.

Paragraph FOURTH B

In this paragraph of her will, Ms. Hogan leaves one-eighth of her residuary estate divided equally between Cochecho Valley Humane Society, New Hampshire SPCA, Northeast Animal Shelter, and Alley Cat Allies<sup>1</sup>, in trust for the "care, feeding and medical needs of cats and to promote the prevention of cruelty to cats." The instruction the executor seeks is with respect to whether formal testamentary trusts must be established or whether the gifts may be made directly to the named entities subject to use consistent with the dictates of the will and, at least with respect to the New Hampshire entities, supervision by the New Hampshire Division of Charitable Trusts. If the court instructs him that testamentary trusts may not be established, he questions how there can be any afforded assurance that the money gifted would be used appropriately, since the New Hampshire Division of Charitable Trusts would not have oversight. Two of the entities are non-New Hampshire resident organizations.

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<sup>1</sup> The will refers to "Alley Cats"; however, the executor has determined that the entity's actual name is "Alley Cat Allies."

The language of this will provision makes manifest Ms. Hogan's instruction that the money distributed be placed in trust and utilized for the purposes stated. The instruction being a part of her will, a testamentary trust must be established for receipt and management of it. It is of no consequence whether the beneficiary is or is not a New Hampshire resident. This is the inescapable consequence of the words Ms. Hogan chose to use. It is neither the privilege nor province of this court to ignore her directions simply because her determination may now seem ill-advised or misguided. If at some point there is some impracticality or other basis recognized in the law for modifying or terminating the trust to better fit accomplishment of the purposes of the gifts, the trustee(s) may have leave to do so. There is no such cause that has been presented, or that is otherwise now known to the court, for doing so at this time.

Paragraph FOURTH D

In this particular provision of the will, one-eighth of the residuary estate is distributable to "various charitable organizations to be designated by me, but in default of such designation, to be chosen by my Executor in his sole discretion." Ms. Hogan did not designate such charitable organizations. Again, the executor has made a due and diligent effort to identify organizations that might meet what he knows, or has reason to believe, would satisfy Ms. Hogan's wishes. Based on a review of her records, he has identified six such organizations—Durham Public Library, Tufts University, Seacoast Hospice, Durham Fire Department, Durham Police Department, and McGregor Memorial Ambulance Corps. The Director of Charitable Trusts takes no oppositional issue with the proposed gifts to the



organizations named, but expresses concern that those gifts to Durham fire and police departments may be of dubious propriety unless they qualify as the type of "charitable organizations" contemplated by Ms. Hogan. The court finds that they do.

A legacy is charitable whether it is to an organization grounded on the execution of charitable activity or one not so based but that receives it conditioned on charitable application. In her will, Ms. Hogan did not specify to what charitable activity the legacy must be applied. Instead, she empowered the executor to identify the charitable organizations that are to receive her largesse. The Durham fire and police departments are operational unit subdivisions of the Town of Durham. The Town of Durham is a municipal corporation. A gift to a unit of government utilized in an activity or cause otherwise funded by revenue raised through taxation reduces the tax burden on the community as a whole, regardless of its amount. Such a gift, whether general or specific, and restricted in its terms, is customarily accorded charitable status. 15 Am. Jur. 2<sup>d</sup> Charities § 59 (1976), see also Pierce v. Atwill, 234 Mass. 389, 390 (1920) (citation omitted). Activity furthering the interests of public welfare are generally considered charitable. At the same time, there is no list of activities exclusive to charities. That said, the real issue here is not whether the paragraph FOURTH D legacy is charitable in nature but whether the two municipal departments identified fit the meaning of "charitable organizations" intended by Ms. Hogan, for her intent governs. See In re Richardson Trust, 138 N.H. 1, 3 (1993) (citation omitted).

The court is unaware of any charitable organization that devotes 100% of its time, effort, or finances engaged exclusively in charitable activity per se. Each executes occasional functions that may not be strictly necessary for accomplishing its charitable task(s). So long as its predominant or primary charitable endeavor is furthered by whatever non-charitable activity or engagements take place, the organization is still viewed as charitable. See generally Petition of Tuttle, 80 N. H. 155, 156 (1921). Therefore, though any money given to the fire or police departments might not be solely applied to the governmental work they do, that alone doesn't necessarily preclude them from falling within the "charitable organizations" description intended by Ms. Hogan. See generally id. at 393-94. Ms. Hogan did not define or delimit in any way what she meant by "charitable organizations" in paragraph FOURTH D. As such, the court is left with divining her intent from the four corners of the will and such extrinsic evidence as has been permissibly presented. See Grant v. Nelson, 100 N.H. 220, 221 (1956). The language used by her in her will must be given its literal interpretation absent evidence of a contrary sense. See Amoskeag Trust Co. v. Haskell, 97 N.H. 89, 93 (1950) (citation omitted).

The words of a will are to be given the ordinary meaning they carry in common usage. See In re Robbins Estate, 116 N.H. 248, 251 (1976) (citations omitted). Charity in this court's mind connotes benevolence. Benevolence signifies beneficence—and in the world of charity, benefit to the public or community as a whole, however that community is defined or scoped. In

common parlance a charitable organization is thought of as one qualifying for favorable tax treatment under the Internal Revenue Code. There are five types of charitable organizations recognized in the code, one of which are governments and governmental subdivisions. See Internal Revenue Code § 501(3)(c). Such a construction of the term would be consistent with the definition given it by the legislature. See RSA 7:21, II (b) (defining "charitable organization" as an entity "established, in whole or in part, for any benevolent, philanthropic, patriotic, educational, humane, scientific, public health, environmental conservation, civic, or other charitable purpose...." See also RSA 72:23-I ("charitable" defined as describing "a corporation, society or other organization... established and administered for the purpose of performing, and obligated, by its charter or otherwise, to perform some service of public good or welfare advancing the spiritual, physical, intellectual, social and ethnic well-being of the general public...."


Finally, it is apparent from the will provision that Ms. Hogan entrusted to her executor broad discretion to determine what organizations would be the object of her gift. Therefore, the court accords to the executor's sound discretion the determination of whether any particular entity is a charitable organization as contemplated. See In re Lawrence Estate, 104 N.H. 457, 460-61 (1963) (citations omitted). While that in no way means the executor may abuse his discretion, as would be the case if he were to identify an entity that clearly would not qualify, such is not the situation here. At best, whether the Durham fire and police departments are charitable organizations is reasonably debatable. In such

a circumstance, the court cannot say that the executor's discretion has been or will be abused if he makes the gifts he proposes.

The executor is instructed that he may make the proposed paragraph FOURTH D distributions to the Town of Durham Fire Department and Police Department. Notwithstanding the foregoing, it is considered appropriate that the executor distribute the legacy subject to expressed restriction of its use for certain charitable purpose such as education, training, purchase, and maintenance of appliances or equipment, such that no reasonable person would question or doubt its charitable nature or application.

SO ORDERED.

Dated: 8.14.07

  
\_\_\_\_\_  
Gary R. Cassavechia, Judge

**CEMETERY TRUSTEES CASE: BILODEAU V. GREENLAND**  
**BOARD OF SELECTMEN**

Rockingham County Superior Court #218-2013-CV-00510, dated 7/15/2013

Who decides issues relating to maintenance of town cemetery.

-190-

THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT

Rockingham Superior Court  
Rockingham Cty Courthouse/PO Box 1258  
Kingston NH, 03848-1258

Telephone: (603) 642-5256  
TTY/TDD Relay: (800) 735-2964  
<http://www.courts.state.nh.us>

NOTICE OF DECISION

PETER J. LOUGHLIN, ESQ.  
ATTORNEY AT LAW  
144 WASHINGTON STREET  
PO BOX 1111  
PORTSMOUTH NH 03802-1111

RECEIVED  
JUL 22 2013  
CHARITABLE TRUSTS UNIT

William Bilodeau obo Inhabitants of Greenland, NH &/or owners of Cemetery

Case Name: Plots, et al v Greenland Board of Selectmen  
Case Number: 218-2013-CV-00510

Please be advised that on July 11, 2013 Judge Delker made the following order relative to:

Order Re: Injunction

July 15, 2013

Raymond W. Taylor  
Clerk of Court

(507)

C: William Bilodeau

RECEIVED  
JUL 17 2013  
DETER

The State of New Hampshire  
Superior Court

Rockingham, SS.

WILLIAM BILODEAU, O/B/O INHABITANTS OF GREENLAND, NH AND/OR OWNERS  
OF CEMETERY PLOTS IN TOWN OF GREENLAND PROSPECT HILL CEMETERY

v.

GREENLAND BOARD OF SELECTMEN

No. 218-2013-CV-00510

ORDER

Certain residents of Greenland, New Hampshire ("petitioners") have filed this petition for an injunction to enjoin the Greenland Board of Selectmen ("the Board") from appropriating funds to pay for the removal of trees surrounding Prospect Hill Cemetery, pursuant to a request by the Cemetery Trustees ("the Trustees"). The Town of Greenland's municipal public cemeteries are cared for and maintained by a Board of Cemetery Trustees, which consists of three individuals elected to the position pursuant to RSA 289:6 (2010). Petitioners seek to temporarily prohibit the Board from taking ~~action until the Town has an opportunity to submit the issue to voters on a written ballot~~ at a Town Meeting. The Court held a hearing on May 21, 2013. After considering the arguments of the parties, the applicable law, and the records certified to this Court, the Court finds and rules as follows.

**Factual Background**

In early 2013, the Trustees determined, on the advice of an arborist, that a certain number of trees at the Prospect Hill Cemetery needed to be removed. On April

22, 2013, the Trustees were present at a meeting of the Board, at which the tree removal project was discussed. It was clear that a number of residents were concerned about the issue. Subsequently, on April 29, 2013, the Cemetery Trustees held a public meeting to clarify any issues that the residents may have and also hear comments pertaining to the project. At the meeting, the Chairman of the Trustees stated that the trees in the cemetery were rotting and many were infested with bugs and needed to be removed. See Petition, Ex. A, Cemetery Trustee Minutes at 1 (April 23, 2013).

Specifically, the Chairman stated that the cemetery needed to be expanded and the Trustees were concerned about safety. Id. The Trustees relied on the advice of a certified arborist, Mr. Al Pace, who examined the trees. Mr. Pace explained how he inspected the trees and determined that they were infested with pine bark beetles. Id. He further articulated that some of the branches on the side of the abutting Greenland Central School were dead and presented a risk of falling on the school yard. Id.

During the discussion, there were some residents who were concerned about why selective cutting was not being done. However, both Mr. Pace and the Chairman articulated that many of the trees were infested with the beetles and that the Town would save money if the trees were cut in bulk. Id. One resident commented about how the trees acted as a wind barrier; however, Mr. Pace explained that because the trees were so tall and dying they were not currently useful for that purpose. Id. There was also additional discussion about re-planting trees. Mr. Pace indicated that other trees could be planted that are immune from bark beetles, such as hemlocks. Id.

After further discussing the issue, the Trustees voted to commence with the proposal and to seek funding from the Board of Selectman to cover the tree removal



process. However, the Trustees' decision became unpopular with a number of the residents of the Town. Primarily, the petitioners believed that if the trees were cut down then a "natural barrier" between a nearby grammar school playground, the Town's waste yard, and the Prospect Hill Cemetery would be lost. To support their position, the petitioners also retained the opinions of two arborists who offered evidence that the trees did not pose an imminent threat. The petitioners now request to enjoin the Trustees from seeking, and the Board of Selectmen from granting, the funds to remove the trees unless approved by a majority of Greenland's registered voters.

### Legal Analysis

As a preliminary matter, the Court finds that the petitioners have standing pursuant to RSA 491:22 (Supp. 2012), which provides that:

any taxpayer in the jurisdiction of the taxing district shall have standing ~~to petition for relief under this section when it is alleged that the taxing district or any agency or authority thereof has engaged, or proposes to engage, in conduct that is unlawful or unauthorized, and in such a case the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced.~~

RSA 491:22, I. There is no dispute that the petitioners are taxpayers in Greenland's jurisdiction. As such they have standing to pursue this matter. However, because the petitioners have not come before this Court via a writ of certiorari, the Court will not perform a substantive review of the Trustees' decision. Instead, the only issue before the Court is whether the petitioners can enjoin the disbursement of funds and whether the Trustees' decision can be subject to a town meeting vote.

"The issuance of injunctions, either temporary or permanent, has long been considered an extraordinary remedy." Murphy v. McQuade Realty, Inc., 122 N.H. 314, 316 (1982). "Whether to grant an injunction is within the trial court's sound discretion,

exercised after consideration of all the circumstances and controlled by established principals of equity." Smith v. New Hampshire Bd. of Psychologists, 138 N.H. 548, 550 (1994) (citation omitted). The Court may grant a preliminary injunction if there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (citations omitted). The alleged harm to the petitioner must outweigh any harm to the respondent if the preliminary injunction is granted. See New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). The party seeking an injunction must also show that there is a reasonable likelihood of success on the merits. Kukene v. Genualdo, 145 N.H. 1, 4 (2000).

The first issue is whether the petitioners will actually suffer irreparable harm. Here, many residents of Greenland are concerned about the aesthetics of the cemetery, should the trees be removed. To the extent that the trees, once cut down, will be all but impossible to replace for the foreseeable future, the Court finds this alleged harm to be irreparable.

Nevertheless, the petitioners have failed to demonstrate a likelihood of success on the merits. The petitioners have not cited any authority supporting their argument that the residents of Greenland have a right to vote on this matter. In fact, the law in this area suggests the opposite. "Where a town duly appoints an entity to handle specified matters and later attempts to overturn a decision of that entity by town vote, we have found a circumvention, rendering the town's decision invalid." Neville v. Highfields Farm, Inc., 144 N.H. 419, 423 (1999) (citing Cloutier v. Epping Water & Sewer Comm'n, 116 N.H. 276, 280 (1976)). Under New Hampshire law, the Cemetery Trustees have

the duty to provide for the care and maintenance of the cemetery and to use money from its trust and funding provided by the municipality to carry out that duty. See RSA 289:2 ("the operation and maintenance of all cemeteries owned and maintained by the municipality shall be in the charge of the cemetery trustees"); RSA 289:7 (trustees are empowered to prepare a budget and "[e]xpend all moneys raised and appropriated by the municipality for cemetery purposes."). If RSA 289:2 is to have any meaning, it follows that the residents should not be able to determine how the Trustees specifically carry out the duty, for which it has been duly appointed.

Perhaps most importantly, the residents of Greenland voted the current Trustees into office. See RSA 289:6 ("every municipality shall elect a board of cemetery trustees consisting of 3 members"). RSA 289:6 specifically delineates the type of cemetery issues which may be subject to vote at a town meeting. For example, voters are permitted to determine if the Cemetery Board consists of 3 or 5 members. See RSA 298:6, I. Residents in a municipality with a town manager may vote to assign the duties of the Board of Cemetery Trustees to the town manager. See RSA 298:6, II. Municipalities with a traditional town meeting form of government may assign the responsibilities to the Board of Selectman. See RSA 298:6, II-a. The Legislature has specified the precise issues, including the exact language of the warrant articles, that may be determined directly by the voters. Nowhere in Chapter 289 has the Legislature permitted municipal voters to decide issues relating to the maintenance of the cemetery.

In addition, the residents of Greenland approved the Trustees' budget at their annual Town Meeting. It should be noted, based upon the representations at the hearing, that there appears to be sufficient funding in the cemetery budget to allow the

Trustees to complete their project. In essence, the town voters determined the funds which the Trustees may use for the care and management of the cemetery, pursuant to RSA 289:2. The Cemetery Trustees are specifically empowered by the New Hampshire Legislature to expend those funds "for cemetery purposes." RSA 289:7, 1(c).

Here, the Trustees made a decision that was consistent with their authority, which was supported with sound reasons on the record at a public hearing. The Trustees' chief concern was the safety of the cemetery grounds; specifically, the risk of damage that falling trees posed to the headstones, cemetery visitors, and the abutting schoolyard. Although the residents have a right to be concerned about decisions that may affect them, the Trustees need to be able to carry out their duty without having to be subject to a town vote on how to utilize funds that have already been appropriated through a previous town vote.


Such is the nature of a representative democracy. Many municipalities in New England, including the Town of Greenland, have a proud tradition of deciding the town's affairs at town meetings, which are perhaps one of the purest forms of democracy. Yet not every aspect of a town's affairs can feasibly be decided by resident voters. In many instances, the residents of the town vest authority in boards, commissions, or trustees with the authority to conduct the day-to-day business of the Town. Many of these entities, such as the Trustees here, have statutory authority and operate autonomously. If the residents of Greenland believe that the Trustees are not providing adequate service to the Town, they may vote the Trustees out of office at the appropriate time. Until then, the Trustees are empowered to carry out their appointed duties.

-197-

In sum, the Court finds that the petitioners have failed to establish their entitlement to put the Board of Cemetery Trustees' decision to a referendum vote. Accordingly, for the foregoing reasons, the petitioner's Petition for Injunctive Relief is DENIED.

So Ordered.

7/11/2013  
Date

  
\_\_\_\_\_  
N. William Delker  
Presiding Justice

**ATTORNEY GENERAL OPINION 1965-16:**  
**AUTHORITY OF TRUSTEES OF TRUST FUNDS TO ADMINISTER TRUST**  
**FUNDS**

April 20, 1965

Mrs. Beulah M. Smith  
Trustee of Trust Funds  
Surry, New Hampshire

Dear Mrs. Smith:

This is in reply to your letter of March 31, 1965, addressed to the Attorney General.

On April 16 you were advised that your letter had been referred to the Division of Charitable Trusts and that there might be some delay in a reply due to the illness of the Director of the Division. It now seems that the Director will be ill for a period longer than anticipated, and since there may be some urgency to your inquiries, we have been called upon to answer your letter.

Your specific question is whether you, as Trustees of the Mary A. and Edward H. Joslin Fund, are compelled to turn over to the Selectmen the income from this Fund to be used for a purpose contrary to the judgment of the Trustees.

Towns may be take and hold in trust gifts, legacies and devises made to them for numerous purposes more specifically enumerated in RSA 31:19, 20 and 21. All such trust funds "... shall be *administered* by a board of three trustees ... ." (RSA 31:22). The word "administered" (emphasis added) insofar as trusts are concerned, would mean to manage, direct or superintend the affairs of the trust. *Wisconsin Dept. of Taxation v. Pabst*, 15 Wisc.2d 195, 112 N.W.2d 161, 2 W&P 34 (supp). "Administer" has not a strict legal or technical import but is a word in general use, with a commonly accepted meaning and is synonymous with "manage," "conduct," "give out," "distribute," and "furnish." *William Buchanan Foundation v. Sheppard*, Tex.Civ.App. 283 S.W.2d 325, 334. "... The custody, reinvestment and expenditure of trust funds held by cities and towns have ... been imposed upon elective boards of trustees ... ." *Drury v. Sleeper*, 84 N.H. 98 (1929).

It is the opinion of this office that the authority to administer town trust funds is vested solely in the trustees. Proper administration of such trust funds would prohibit you as trustees from turning over money to the selectmen to be used for a purpose contrary to the judgment of the trustees.

Very truly yours,  
William J. O'Neil  
Assistant Attorney General

**ATTORNEY GENERAL OPINION 1965-40:**  
**TRUSTEES' AUTHORITY TO HOLD INDIVIDUAL INVESTMENTS WHICH**  
**ARE NOT LEGAL FOR INVESTMENT UNDER NEW HAMPSHIRE STATUTES**

October 7, 1965

Mrs. Harry A. Richardson  
Secretary-Treasurer  
Trustees of Trust Funds for Town of Merrimack  
Reeds Ferry, New Hampshire

Dear Mrs. Richardson:

Your letter of September 28, 1965, addressed to the Attorney General has been referred to me for reply.

We are advised by the office of the State Bank Commissioner that a list of legal investments for savings banks, together with supplement, was mailed out to you on October 1.

You have inquired whether the trustees may retain investments received under a bequest. RSA 31:25 provides that the trustees may retain investments as received from donors until the maturity thereof – maturity relating to doubt to bonds. Under the law of trusts, however, the trustees should always have in mind their duty to make the trust property productive.

You will note the investment trust shares of the Massachusetts Investment Trust are not on the legal list.

As to securities removed from the legal list, trustees of town trust funds are required by a well-established rule of law to dispose of any securities that have been taken off the legal list. If the securities can be sold without any loss or with a profit, I do not believe they can delay in the hope of receiving a higher profit. If sale will produce substantial losses and there is a reasonable prospect for appreciation in the not too distant future, the courts are inclined to give trustees a bit more time.

One exception has been made to this rule in the case of mutual fund investments which have been removed from the legal list because of increased brokerage charges, this office having ruled in this particular instance that the encumbrance not being attached to mutual fund securities purchases prior to their removal from the legal list by the Bank Commissioner, the cause of their removal should therefore not be related back to investments not so affected.

Of course, in their annual reports to the Tax Commission and to the Attorney General (to the latter in the event a common trust fund is established) the trustees would be required to indicate the date of acquisition of such securities held in order to justify their authority for

holding such investments. Moreover, until reinstated to the legal list such mutual funds are not hereafter legal for investment.

Very truly yours,  
Robert Danais  
Director



**ATTORNEY GENERAL OPINION 1966-25:**  
**CEMETERY PERPETUAL CARE FUNDS**

March 22, 1966

Mr. Elton Woodward  
Trustee of Trust Funds  
Orford, New Hampshire

Dear Mr. Woodward:

When in the office today you inquired whether surplus income from cemetery trust funds may be used either for the care of other lots in the cemetery or for general cemetery care.

The answer to your question will be found in the case of *Boscawen v. Attorney General*, 93 N.H. 444 (1945). It was there held that the town trustees of cemetery funds were not authorized to expend surplus income for the general care of the cemetery. The Court stated that such use was not even suggested in the instruments creating the trusts and that it was very possible the accumulation might well disappear at some time in the future, through fluctuations in the interest rates and labor costs, even if applied solely to the particular purpose of the donor. Continuing, the opinion said that in the present state of the law, a *cy pres* application of such surplus funds to purposes not originally contemplated would only be permitted when there is a showing of either impossibility or impracticability of using accumulated and future current income as desired by each testator. The Court further pointed out that lack of funds for general cemetery purposes afforded no shadow of claim for a right to diver accumulations, especially where the town has the means to provide for them under the taxing power (RSA 31:4 (XV)).

In 1953 this office sponsored legislation to give town and cities authority to use such unexpended income for general cemetery care, subject to certain conditions, but the Senate Judiciary Committee which considered the bill reported it out as inexpedient to legislate and the Senate adopted the committee recommendation. Again, in 1957 similar legislation was defeated after the question of constitutionality of the bill was submitted to the Supreme Court. See *Opinion of the Justices*, 101 N.H. 531 (1957), in which the Court said: "We are of the opinion that this may not constitutionally be done by the Legislature. Such a course would seem to be an invasion of established equitable powers of the courts, and hence in violation of the Constitution, Part I, Art. 37th. ... So far as the purposes of the bill may be otherwise accomplished, this must be done through the courts by the application of established principles of law to the circumstances of particular trusts ... ."

Unless authorized in the trust instrument, any diversion of surplus income from trusts established for the perpetual care of individual lots for other purposes would subject the trustees to personal liability.

Very truly yours,  
Robert Danais  
Director

**ATTORNEY GENERAL OPINION 1966-2:**  
**THE "10%" RULE APPLIED TO TRUSTEES OF TRUST FUNDS**  
**INVESTMENT POLICIES**

January 15, 1966

Mr. Donald C. Gillam  
Trustees of Trust Funds  
New Ipswich  
New Hampshire

Dear Mr. Gillam:

This is in reply to your letter of January 5, 1966, in which you have raised several questions relative to the investment of town trust funds.

Taking them in the order presented –

Question 1. How much of the total principal may be invested in stocks?

The standard of investment for all town trust funds will be found in RSA 31:25, which describes permissible investments as being in savings banks, building and loan associations, cooperative banks, federal savings and loan associations, bonds of the United States government and state, county, town, city, school district, water and sewer district bonds, and include also "such stocks and bonds as are legal for investment by New Hampshire savings banks ... ."

Therefore, there is no limitation of category – whether in municipal bonds, banks, loan associations, bonds, stocks, etc., but stocks and bonds must be confined to the legal list.

In addition, where collective investments are made, as contemplated here, RSA 31:27 (Supp) provides that not more than \$10,000 or more than ten per cent of the funds, whichever is greater, shall be invested in the obligations of any one corporation or organizations. It is the opinion of this office – and it has so previously ruled – that mutual funds are to be regarded as a single investment and are subject to the same percentage of participation in the common fund as any other corporation or organization.

Question 2. May the trust funds be invested in growth stocks with a systematic withdrawal plan?

The answer is in the negative. Although stocks with a systematic withdrawal program may be on the legal list, they would not be a proper investment for town trust funds, which are income trusts, since the program involves the waiving of capital gains and stock dividends in order to insure a fixed income return. Under the law of trusts, all capital gains are properly applied to principal (and this has been so ruled by the New Hampshire Supreme Court), and to treat them as income would make the trustees personally liable.

Question 3. What, if any, is the legal limit of capital gains withdrawal or may as much of the capital gains be used for income as seen fit?

Capital gains may not be used any time as income. See our answer in Question 2.

Question 4. What are the legal requirements in regard to trust funds that are no longer on the legal list and may they be retained?

Trustees of town trust funds are required by a well-established rule of law to dispose of any securities that have been taken off the legal list. If the securities can be sold without any loss or with a profit, I do not believe that can be delay in the hope of receiving a higher profit. If sale will produce substantial losses and there is a reasonable prospect for appreciation in the not too distant future, the courts are included to give trustees a bit more time.

One exception has been made to this rule in the case of mutual fund investments removed from the legal list because of increased brokerage charges, this office having ruled in this particular instance that the encumbrances not being attached to a mutual fund security purchased prior to its removal from the legal list by the Bank Commissioner, the cause of its removal should therefore not be related back to investments not so affected. However, trustees are cautioned to indicate in their annual reports to the Tax Commission and to the Attorney General the date such securities were acquired in order to justify their authority for holding such investments. Moreover, until reinstated to the legal list such mutual funds are not thereafter legal for investment.

The trustees' program for making the town trust funds more productive is very commendable but it must be done within the framework of their authority by statute and at common law.

Very truly yours,  
Robert Danais  
Director

P.S. As to your holdings in Massachusetts Life Investment Shares, its retention would be governed by the second paragraph of our answer to Question 4.

**SAMPLE LETTER TO GIVE TO DONORS**

[Date]

TO WHOM IT MAY CONCERN:

**Section 170(a)(1)** of the Internal Revenue Code states: “*There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year.*” **Section 170(c)(1)** of the Internal Revenue Code states: “*For purposes of this section, the term ‘charitable contribution’ means a contribution or gift to or for the use of a State, a possession of the United States, or **any political subdivision** of any of the foregoing but only if the contribution or gift is made for exclusively public purposes.*” (emphasis added).

The Town of \_\_\_\_\_ and/or its library are political subdivisions of the State of New Hampshire. Therefore, any gift made to the Town of \_\_\_\_\_ for public purposes would be deductible for tax purposes to the donor.

Very truly yours,

Jane Smith, Chair  
Board of Library Trustees

NOTE: TOWNS AND CITIES MAY ALSO OBTAIN A GOVERNMENT  
INFORMATION LETTER FROM THE IRS FOR DONORS:  
<http://www.irs.gov/Government-Entities/Federal,-State-&-Local-Governments/Governmental-Information-Letter>

## FREQUENTLY ASKED QUESTIONS FROM MUNICIPAL TRUSTEES

### General Information

- How can we contact the Charitable Trusts Unit? The telephone is always busy!

Our telephone number is 271-3591. We receive an average of 100-150 calls per day, so yes, the phone is busy. If you cannot get through, try:

E-mail: See contact info on Page 1 of this handbook

Fax (271-2110 or 223-6207) with a request that we call you. Please include the best time of day to call.

Write the Charitable Trusts Unit at 33 Capitol Street, Concord NH 03301, (but expect a 6-8 week delay in getting a response).

Please remember the Attorney General's number is blocked for security reasons. If your telephone does not accept blocked calls, we will not be able to call you back unless you remove the block.

- Are Municipal Trustees subject to the Right-to-Know law?

Yes, the records and meetings of Trustees of Trust Funds, Cemetery Trustees, and Library Trustees are defined as "public proceedings" under RSA 91-A:1 IV and are therefore open to the public.

### Cemetery Trustees

- Are private or abandoned cemeteries subject to the jurisdiction of cemetery trustees?

It depends. If the municipality has taken no formal action to take ownership of the cemetery or burial ground then it belongs to the descendants of the individuals buried therein. The municipality may maintain the area (RSA 289:4) but may not sell or buy lots in the cemetery or burial ground. If the municipality has assumed ownership of the cemetery or burial ground (RSA 289:19-21) it then falls under the jurisdiction of the cemetery trustees and must be maintained by the town or city.

- Who owns cemetery plots?

See RSA 290:24 (included in the Cemeteries chapter of this book)

- Who signs the deeds?

The Selectmen, Mayor, or other governing body in the municipality. See RSA 289:7 I, (e).

## Library Trustees

- Are we required to enter into agreement with the board of selectmen under RSA 202-A:11, III?

Yes, but the agreement does not have to be in writing. The two boards may enter into a verbal agreement which must then be communicated to the town or city treasurer.

- Who holds the library's trust funds?

The trustees of trust funds hold any funds left to the town for the benefit of the library. Example: "I, John Smith, leave to the Town of Graniteville the sum of \$2,000 for the benefit of the Memorial Library."

The library trustees hold any funds left to the library directly. example: "I, John Smith, leave \$2,000 to the Memorial Library in Graniteville."

REMINDER: If the library trustees hold the **principal** of trust funds, they must file a report with the Attorney General under RSA 202-A:12-a and a copy of their investment policy. We will accept a photocopy of the library's report from the annual town report in satisfaction of this filing requirement. If the library trustees hold **income** only then no report need be filed with the Attorney General.

- Are the library trustees *required* to hold the principal of trust funds if those funds are left to the library, or can the trustees of trust funds hold them?

**YES.** The Donor's intent controls and if the donor specifies the fund is to be held by the library itself then the Library Trustees must administer the fund.

- Can library trustees use the prudent investor rule when investing the funds in their custody?

**NO.** The legislature has not changed RSA 202-A:23 to allow for use of the new rule, nor has it cross-referenced RSA 202-A:23 with RSA 31:25-d.

## Trustees of Trust Funds

- Must each perpetual care fund held by the trustees of trust funds be listed individually?

**YES.** The New Hampshire Supreme Court has ruled perpetual care funds are valid charitable trusts, are lot specific, and therefore must be listed individually on the MS-9 including the principal and income attributable to each fund. Computer spreadsheet programs can be of great assistance in complying with this requirement.

- Which New Hampshire Supreme Court case or cases refer specifically to perpetual care funds as valid charitable trusts?

RSA 31:19 states: "Towns [and cities] may take and hold in trust gifts, legacies, and devises made to them for the establishment, maintenance and care of . . . cemeteries, and

burial lots.” The New Hampshire Supreme Court ruled in 1957 that “The law is well established that trusts for the perpetual care of cemeteries and cemetery lots are valid charitable trusts. In re Byrne Estate, 98 N.H. 300; Webster v. Sughrow, 69 N.H. 380; Tuttle's Petition, 80 N.H. 36.” (*Byrne* and *Tuttle* are reproduced elsewhere in this handbook.)

Because perpetual care funds are defined as valid charitable trusts they must be administered in the same manner as any other charitable trust. This means the principal and income for each fund must be accounted for individually and the income generated is lot specific and may be used for the care and maintenance of the lot upon which the fund was placed.

- Can income from perpetual care funds be used for general cemetery maintenance?

**NO.** Excess perpetual care income **may not be used for general cemetery maintenance nor for the capital improvement of cemeteries without specific permission from the Probate Court** under a legal process known as cy pres. It is important to understand perpetual care money is *private* money and not *public* money and it is held for a specific purpose, in this case the care and maintenance of individual cemetery lots. If a municipality expends the funds for a purpose contrary to the original charitable purpose the town or city may be in breach of trust and could be held legally responsible.

RSA 31:22-a explains the procedure for bringing a petition for cy pres and RSA 498:4-a explains the standard which the petitioner must meet in order to invoke the cy pres doctrine. In summary, the town or city must convince the Probate Court that it is impossible or impracticable to expend the excess accumulated perpetual care income for the care and maintenance of the lot in question and the excess income should therefore be freed for general cemetery maintenance or capital expansion. However, be advised any court order issued will include a provision stating the taxpayers of the town or city agree they will raise and appropriate the funds necessary to care for these cemetery lots in perpetuity if the perpetual care income has been exhausted. *See Town of Boscawen v. Attorney General*, page 137 of this handbook.

- Can trustees collateralize trust funds deposited in a single bank which total over \$250,000 in the aggregate?

Yes. Effective January 1, 2002, trustees of trust funds are to collateralize bank deposits which exceed the \$250,000 FDIC limit. See RSA 31:25.

- What is collateralization?

Collateralization is the process by which a bank will guarantee any bank deposits over the \$250,000 insured by the FDIC by purchasing United States government obligations to cover the amount in excess of \$250,000. Collateralization services are generally provided by banks at no cost to the town.

- Where can I find the instrument of creation for any of the trust funds the town holds?

If the fund was created through a Last Will and Testament, a copy of the will may be available from the probate court in the county in which the town or city is located. If the fund is the result of a donation from a citizen, the donor should submit something in writing stating the purpose of a fund and any restrictions regarding the expenditure of the money. If you cannot locate a trust document or writing, call our office (271-3591) or send us an e-mail. When a new fund is created we ask the town to submit a copy of the instrument of creation and it is possible we have a copy in our file.

- What is the difference between the MS-9 and MS-10 forms?

The **MS-9** form is a listing of all individual trust funds (including but not limited to perpetual care funds), all capital reserve funds, and all general fund trusts (see RSA 31:19-a for definition) held in the custody of the Trustees of Trust Funds. The form requires the following information for each fund: date of creation, name of fund, purpose, how invested\*, principal information and income information.

\*the how invested column may contain the name and account number of the bank if the fund is individually invested, or the notation "PDIP" if the fund is invested in the Public Deposit Investment Pool, or the word "common" if the fund is invested in common with other funds. **Only those trustees which invest funds in common are required to submit an MS-10.**

The **MS-10** form is an inventory of the bank accounts, certificates of deposits, stocks, bonds, mutual funds, etc. in which the common funds are invested. Examples of the MS-10 can be found in this manual.

- Are vouchers required before Trustees of Trust Funds release funds?

Yes. See RSA 31:22. The only exception to this requirement are funds paid over to library trustees. See RSA 202-A:22.

- What are noncompatible offices?

Offices that cannot be held simultaneously by one person. See RSA 669:7 and 8 in the statutes section of this handbook.



## **OTHER INFORMATION**

### **How to obtain blank forms:**

MS-9 and MS-10 are available from the Department of Revenue Administration, Municipal and Property Division, phone number is (603) 230-5090, <http://www.revenue.nh.gov/forms/town-city.htm>

### **For further information or questions contact:**

**Office of Attorney General, Division of Charitable Trusts**, 33 Capitol Street, Concord, NH 03301-6397. Tel: (603) 271-3591. Information available: Questions relating to trust funds, cy pres petitions, perpetual care administration, and general questions. **REMEMBER** the Attorney General is prohibited by state law from providing legal advice to towns and cities – legal issues should be addressed by your town counsel. **AVAILABLE AT THE CHARITABLE TRUSTS WEBSITE (<http://www.doj.nh.gov/site-map/charities.htm>):** New Hampshire statutes relating to charities, Board of Directors Handbook, Handbook for Municipal Trustees, the Directory of Charitable Funds in New Hampshire, and much more. Please visit us soon.

**Department of Revenue Administration, Municipal and Property Division** may be contacted at PO Box 487, Concord NH 03302, telephone: (603) 230-5090, Fax: (603) 230-5947. Information available: Questions relating to capital reserve funds, bonding of trustees, warrant articles, tax rate information, and general questions. Website: <http://www.revenue.nh.gov/mun-prop/municipal/index.htm>

**New Hampshire State Library** has on-line resources for libraries available at [www.nh.gov/nhsl/index.html](http://www.nh.gov/nhsl/index.html)

### **Non-profit, resources, organizations and friends groups for libraries and cemeteries:**

Richard A. Boisvert, Ph.D., Division of Historical Resources, State of New Hampshire, [richard.a.boisvert@dcr.nh.gov](mailto:richard.a.boisvert@dcr.nh.gov), 271-6433

New Hampshire Cemetery Association, Inc., c/o Jeff Snow, Edgewood Cemetery, 107 Amherst Street, Nashua NH 03060 Website: <http://www.nhcemetery.org/>

New Hampshire Old Graveyard Association, 445 Greeley Street, Manchester NH 03101. See also [www.rootsweb.com/~nhoga/burial.htm](http://www.rootsweb.com/~nhoga/burial.htm)

New England Cemetery Association, [www.newenglandcemetery.org](http://www.newenglandcemetery.org)

Association for Gravestone Studies, 101 Munson Street, Suite 108, Greenfield MA 01301, Telephone: (413) 772-0836. See also [www.gravestonestudies.org](http://www.gravestonestudies.org)

New Hampshire Library Trustees Association, PO Box 617, Concord NH 03302-0617. Website: [www.nhlta.com](http://www.nhlta.com)

New Hampshire Library Association, 53 Regional Drive, Suite 1, Concord, NH 03301, Website: <http://nhlibrarians.org/>