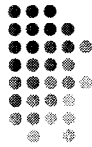


Trustees of Trust Funds Advanced Session - 2013

Anthony I. Blenkinsop, Director
Terry M. Knowles,
Assistant Director
Charitable Trusts Unit
Office of the Attorney General



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Topics for Discussion

- Trustees as Fiduciaries and Selected Court Cases Relating to Municipal Trustees' Administration
- Governmental Accounting Standards Board (GASB) Reporting Issues
- Capital Reserve Funds
- Investing Issues: Prudent Investor Rule, Voting Proxies, Socially Responsible Investing
- The Right-to-Know Law and related cases



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When is a City a Town?

- **21:5 Town.** – The word "town" shall extend and be applied to any place incorporated, or whose inhabitants are required to pay any tax, and shall mean that *city*, town, ward, or place in which the subject-matter referred to is situate, or in which the persons referred to are resident, unless from the context, a different intention is manifest. (Emphasis added)



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Therefore



- When a statute uses the word “town” it also applies to cities unless there is specific language or a specific section of the law that uses the term “city”
- Example: Capital Reserve Fund laws
 - RSA 34 refers to Cities
 - RSA 35 refers to Towns, Counties, Districts, and Water Departments

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School Districts as Towns



- 194:1 What Constitutes a District. – Each town shall constitute a single district for school purposes; provided that districts organized under special acts of the legislature may retain their present organization, and the word “town,” wherever used in the statutes in connection with the government, administration, support, or improvement of the public schools, shall mean district. Notwithstanding any other provision of law to the contrary, in the case of unincorporated towns or unorganized places in a county, the county shall constitute the district. (Emphasis added)

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Trust Funds and School Districts RSA 31:31



- Trustees of Trust Funds hold all gifts, bequests, and devises given to a school or school district.
- The Principal, School Board, Coaches, etc. cannot hold private funds
- The only exception to this law is in cases where there has been a “special act of the legislature”. *Chapter 309 of the Laws of 1977 establishing the Union School District of Keene Board of Trustees.*

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Custody of Trusts



- What if the Donor specifies the money is to be held by the School District? Or the Board of Selectmen?
- Drury v. Sleeper 84 N.H. 98 (1929)
 - "It must be presumed that the testator had in mind officers of the town having legal authority to hold and administer such a trust whatever their successive titles might be."

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Trustees of Trust Funds as Fiduciaries: Practical Applications



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WHAT IS A FIDUCIARY?



- A fiduciary is one who holds something in trust for the benefit of another
- The Trustee of a charitable trust stands in the place of the donor and expends the funds given by the donor for a public purpose
- Trustees of Trust Funds *are fiduciaries* and hold both public and private funds in trust for the purposes permitted by Statute.

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Fiduciary Duties

- Duty of Loyalty
- Duty of Care
- Duty of Obedience

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The Duty of Loyalty

- Each Trustee of Trust Funds takes an oath of office and promises to uphold the laws and the Constitution of the State of New Hampshire
- Trustees must have an understanding of the laws they *administer*
- Each Trustee must act in the best interest of the funds in their custody rather than in furtherance of personal interests or the interests of third parties.

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The Duty of Loyalty for Public Officials

- **Conflict of Interest:**
 - A situation, circumstance, or financial interest which has the potential to cause a private or personal interest to interfere with the proper exercise of a public duty.

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The Duty of Loyalty: Staying Legal



John Jamison owns and operates an investment firm. He wants to expand his book of business to include municipalities. He runs for and is elected to the office of Trustee of Trust Funds in his town. He offers his investment services at a discounted rate to his fellow Trustees.

Legal and Ethical issues:

Legal: The RSAs governing Trustees of Trust Funds does not address this situation but other statutes may affect this transaction.

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Conflict of Interest Ordinances



- **31:39-a Conflict of Interest Ordinances.** – The legislative body of a town or city may adopt an ordinance defining and regulating conflicts of interest for local officers and employees, whether elected or appointed. Any such ordinance may include provisions requiring disclosure of financial interests for specified officers and employees, establishing incompatibility of office requirements stricter than those specified by state law or

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Conflict of Interest Ordinances



- ***establishing conditions under which prohibited conflicts of interest shall require removal from office.***
- **The superior court shall have jurisdiction over any removal proceedings instituted under an ordinance adopted under this section.**

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Conflict of Interest Statutes



- **RSA 49-D: Town Charters.** Any town adopting a town charter may include provisions regarding conflicts of interest by public officials “which shall be at least as strict as those established in the general laws.”

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Codes of Ethics and local Ethics Committees



- **Officials, board members and employees of the Town of X shall avoid conflicts of interest or even the appearance of a conflict of interest.**
- **As a town official, board member or employee, you shall not participate in any matter in which you, or a member of your family, have a personal interest which may directly or indirectly affect or influence the performance of your duties. In such instances, you shall recuse yourself from discussion and decision-making.**

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Code of Ethics



- **Recusal means to remove yourself completely from all further participation in the matter in question.**

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John Jamison



- Before considering Mr. Jamison's offer the Trustees should determine:
 - Whether the town has adopted a conflict of interest ordinance through the town meeting process.
 - If the town is under a charter, does the charter contain provisions for removal from office if the conflict of interest provisions are violated?
 - Does the town have an ethics policy and an ethics committee?

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Due Diligence



- Whether or not the town has an ethics policy or committee it is necessary for the Trustees of Trust Funds to perform their due diligence in this case.
- Is Mr. Jamison's offer the one the Trustees should select?
- The Trustees may want to consider sending out a request for proposal for investment advice to assist in their decision making.

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Duty of Care: Internal Controls




- Are essential in managing the risk associated with the administration of taxpayer money and privately donated money.
- All Trustees of Trust Funds must pay attention to the income, investment and disbursement of funds under their jurisdiction and care.
- Beware the Trustee who volunteers to be bookkeeper and then refuses to answer questions and/or produce documentation.

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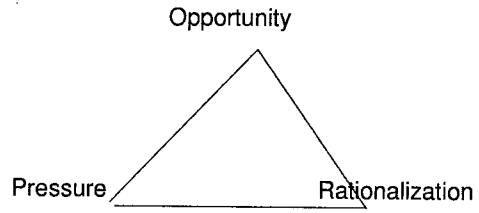
Embezzlement and Theft

- Each Trustee is equally and legally responsible for insuring the trust funds in his/her care are being properly deposited and expended.


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Understanding theft/embezzlement: The Fraud Triangle



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Pressure

- Financial need, real or perceived:
 - Inability to pay one's bills
 - Drug or gambling addiction
 - Desire for status symbols such as a bigger house, nicer car, etc.
 - Illness or personal tragedy

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Opportunity



- The person must see some way he/she can use (abuse) his/her position of trust to solve her financial problem with a low perceived risk of getting caught.

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Rationalization



- I was only borrowing the money
- I had to steal to provide for my family
- My mortgage payments were in arrears and the bank was threatening foreclosure.
- No one was paying any attention to what I was doing.

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Red Flags regarding the Trustees' Bookkeeper!



- "I didn't bring the books to the meeting because they are a mess."
- "I haven't had a chance to balance the checking account yet."
- "Can you sign a couple of blank checks so I don't have to bother you again?"
- "Why are you asking so many questions about the trust fund money, do you think I am stealing???"

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Theft of Trust Funds



- In a recent criminal municipal case two of the Trustees of Trust Funds appear to have abdicated their duties and responsibilities leaving the third trustee with no oversight or accountability providing an opportunity for theft.
- The third Trustee embezzled funds from the trust funds.

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What do the Trustees say?



- "We trusted him, he has lived in town forever and has always done a good job. We are both busy and just didn't have the time to spend on the books. Maybe we should have asked more questions."

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Remember . . .



- Each Trustee of Trust Funds is an elected official and has taken an oath of office.
- Trustees are responsible for protecting both public and private money from misappropriation, misdirection, or embezzlement.
- Lack of oversight and accountability can sometimes provide an ideal setting for financial malfeasance.

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Duty of Care: Other Issues



- Trustees of Trust Funds must also be careful in the investing of the funds in their custody.
- As the statute provides, if the Trustees are investing prudently they will not be held responsible for losses.
- If, however, the Trustees are not actively reviewing their portfolio of investments or not adhering to their investment policy and there is a loss of assets there may be liability.

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The Duty of Obedience



- The Trustees of Trust Funds have the duty to establish policies and procedures, to establish and review an investment policy, to exercise due diligence, and to act within the scope of their authority as defined by New Hampshire Statutes.
- Trustees are required to be obedient to the donor's intent and to invest and protect the trust funds in their custody.

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The William Smith Trust



- William Smith bequeathed \$50,000 to the Town of Graniteville in 1953 the income to be used "to pay the expenses of an annual town celebration each August 1st to commemorate the founding of the Town of Graniteville."
- For twenty years the event took place but the Smith Celebration Committee eventually lost interest and the money continued to accumulate in the account.

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The William Smith Trust



- By the year 2009 the unexpended income increased in value to \$150,000.00.
- The Selectmen do not want to raise taxes and they are looking for other sources of money. The notice this money isn't being spent and figure it is available for another purpose. They ask the Trustees to turn the income over to the town.

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Red Flag!



- Trustees cannot turn the money over to the town (or anyone else) for a purpose contrary to the intent of the donor. (Opinion of the Attorney General 1965-16 and Town of Boscawen v. Acting Attorney General 93 N.H. 444)
- If a trust fund can no longer be expended according to the instructions of the donor the purpose may be modified by the Probate Court under a petition for cy pres.

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The role of the Attorney General under N.H. law and the role of the Courts



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The Attorney General



- Is a necessary party to any case involving a charitable trust
- Is responsible for supervising and enforcing charitable trusts
- Has civil subpoena power
- May petition to have charitable trustees removed by the Court and a successor trustee or trustees appointed

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Trust Instruments



- It is extremely important for Trustees of Trust funds to retain copies of any trust instruments (Wills, trusts, letters of intent, deeds, etc.) accompanying private gifts to the town so they will know how to properly administer the gift.
- Recent laws have expanded the authority to enforce charitable trusts beyond the Attorney General.

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Trust Administration: Enforcement of Donors' Directives



- RSA 564-B, Section 405 (c) of the Uniform Trust Code states: "The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust." Traditionally the attorney general has represented the public interest in enforcing the terms of a charitable trust while settlors, their children, and other interested parties lacked the standing to intervene in these cases or to initiate an enforcement action independently.

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Enforcement (continued)



- The Uniform Trust Code as written under the NH Statutes extends standing to include the settlor and others, stating: “The grant of standing to the settlor does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests.”

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Enforcement (continued)



- While the attorney general is still a necessary party to these enforcement actions, the AG’s office does not have exclusive jurisdiction to institute litigation against trustees for alleged failure to carry out the terms of a restricted trust.

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Implications of Enforcement Change



- If Trustees of Trust Funds fail to adhere to the written directives of a donor, the donor’s family, descendants, or other interested parties, may bring litigation against the Trustees of Trust Funds to enforce the terms of the gift.

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Implications (continued)



- **Example:** Chandler Library in Nashua, NH. Given by Mabel Chandler to be the library for the City of Nashua. The building is no longer adequate for library purposes and the City of Nashua has built a new library. Petition for cy pres filed with the Probate Court. Several descendants and interested citizens objected to the sale of the Mabel Chandler Library at the hearing before the judge.

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Chandler Library cy pres



- The matter went to mediation and the parties reached agreement: the Mabel Chandler Library building can be sold to a nonprofit organization; the proceeds from the sale will fund the Mabel Chandler wing of the new Nashua Public Library.
- It is therefore important for Trustees to understand heirs and/or the public may be involved in the enforcement and/or change of purpose in a charitable trust.

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Reverter Clauses



- A trust instrument may also contain a "reverter clause" that states if the donor's wishes are not carried out the property will "revert" to the donor's heirs.
- If the gift in question, especially real estate, carries a high value the heirs will pay particular attention to its administration in hopes of claiming the property.
 - **Example:** The Catholic Bishop's house in Manchester.

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Who is authorized to spend trust funds?



- The NH Statutes provide some guidance depending upon the nature of the trust.
- **Cemetery Funds:** RSA 289:7 Cemetery Trustees 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.

Who is authorized to spend trust funds?



- **Library Trust Funds:**
- **RSA 202-A:11 Library Trustees Expend all income from trust funds held by the Trustee of Trust Funds for library purposes.**

Trustees' Discretion



- If a donor gives or bequeaths funds to a town, the income to be used in the discretion of the Trustees of Trust Funds the trustees should develop a process for deciding how to expend the funds.
 - How much money do you estimate you will have on an annual basis to effectively carry out the donor's intent?
 - Application?
 - Decision making process?
 - How can you insure the money is spent properly?

Who is Authorized to Spend Trust Funds?



- **Trustees of Trust Funds** 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.**
- What happens if the intent of the donor is ambiguous?

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The Unique Nature of Trustees of Trust Funds



- Trustees of Trust Funds are permitted to obtain advisory opinions from the court regarding their authority to expend for a specified purpose. **City of Keene v. Martin** 96 N.H. 504 (1951)
- These advisory opinions are requested through the filing of a Petition for Instructions.

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Town Trustees and the Courts



- The Courts have the power, in certain circumstances, to interpret legislative intent, to decide a point of law based on precedent, and to interpret the language of a trust instrument in order to determine the donor's intent.



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Example



- “I give and bequeath the sum of \$50,000 to the Town of X specifically for repairs and improvement to the Town Hall.”
- While the \$50,000 is held and administered by the Trustees of Trust Funds the testatrix failed to define the terms “repairs and improvement”.
- The Selectmen are not in agreement regarding the proposed implementation of this trust and will not permit any work to be done to the Town Hall.

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Petition for Instructions: Sample Language



- “Given the Testatrix’ failure to specify procedures for the definition, administration, and distribution of the bequest the Trustees of Trust Funds are unable to carry out their statutory duties with regard to ARTICLE NINE of the Will.”
- “The Trustees seek instructions from this Court regarding the bequest contained in ARTICLE NINE of the Will.”

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Court Order



- The Judge of Probate will issue an order specifying how the funds from this will can be accessed.
- For example: “This Court grants the Board of Selectmen the power and discretion to authorize the distribution of funds from ARTICLE NINE of the will for purposes of making repairs to the Town Hall.”

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What About Small Funds?

- “We have a lot of little funds (worth less than \$500) which generate no income. What can we do?”
- The probate court, with the assent of the Attorney General, can grant permission to consolidate or terminate these small funds.
- This does not, however, include perpetual care funds.

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Court Decisions Relating to Municipal Trustees and how they affect trust administration

By what authority do municipalities accept and administer private funds for public purposes?

This question was posed to the New Hampshire Supreme Court in 1873 in a case entitled Sargent v. Cornish 54 N.H. 18. The Court ruled:

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Sargent v. Cornish (continued)

- Municipal corporations in this state may take and hold property in trust for any purpose *not foreign to their institution nor incompatible with the objects of their organization.*
- This language was later incorporated verbatim into statute under RSA 31:19 (page 5).

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Cemetery Trusts in New Hampshire



- The question of whether or not cemetery trusts are “charitable trusts” was addressed twice in 1921 by the NH Supreme Court in the following cases:
- In Re Tuttle 80 N.H. 155
- In Re Tuttle’s Petition 80 N.H. 36

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Cemetery Trusts (continued)



- The New Hampshire Supreme Court again recognized these trusts as “valid charitable trusts” in
- In Re Byrne’s Estate 98 N.H. 300
- Webster v. Sughrow 69 N.H. 380
- See page 137 of Handbook

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The Tuttle Cases



“Cemetery trusts are valid charitable trusts”
“If a fund given to a town is more than required to keep a burial lot in repair the balance does not revert to the heirs-at-law. The money, if any, not required to execute the trust is a valid gift to the town.”

Trustees of Trust Funds are required to administer and report cemetery trusts individually.

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The Use of Excess Accumulated Perpetual Care Income



- The New Hampshire legislature authored a bill in 1957 which would have permitted municipalities to expend excess accumulated perpetual care income for general cemetery maintenance. This bill was reviewed by the New Hampshire Supreme Court. In its decision the Justices stated:

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The Use of Excess Accumulated Perpetual Care Income (cont)



- “The proposed legislation vesting discretionary powers in trustees of trust funds to use accumulated income from perpetual care funds for general cemetery maintenance violates the separation of powers provision of the Constitution (Pt. 1, Art. 37)”

Opinion of the Justices
101 N.H. 531 (1957)

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The Use of Excess Accumulated Perpetual Care Income (cont)



- Therefore, under the separation of powers clause of the Constitution, it is the *Probate Court* and not the *Legislature* which has the authority to change the purpose of perpetual care funds (valid charitable trusts) thereby making the excess accumulated income available for general cemetery maintenance.

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Cemetery Cy Pres Considerations



- What is the total amount of excess accumulated income in perpetual care funds?
- Have individual records been maintained for each fund?
- If the Court grants your petition do you have a plan for the use of the money – general cemetery maintenance, purchase of additional cemetery land, etc.
- **REMEMBER:** The principal can never be expended.

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Cy Pres of Perpetual Care Funds under RSA 31:22-a



- The Trustees of Trust Funds must prove to the Court and to the Attorney General that it is in the public interest to remove the restriction from excess accumulated perpetual care funds. The Trustees must demonstrate three elements: the financial status of the trust account, a projection of future interest rates, and a projection of future labor costs necessary to maintain the lot.

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Is financial necessity a compelling reason for the cy pres of perpetual care funds?



- **No.** The NH Supreme Court ruled: “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.”

Town of Boscawen v. Acting Attorney General 93 N.H. 444 (1945) (see page 140)

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Cemetery Trust Funds for Religious Cemeteries



- **Not considered to be discriminatory** Roman Catholic Bishop of Manchester v. Director of Charitable Trusts, Merrimack County Superior Court (1995) Judge McGuire ruled “because there is no excessive government entanglement with religion occurring in the administration of cemetery trust funds there is no violation of the state or federal constitution.”

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RSA 31:37



Payment by Towns. – Each town shall pay over to the trustees the full amount of its trust funds.

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Reports by Trustees of Trust Funds




- Although appointed in a Last Will and Testament the Trustees of Trust Funds, unlike other testamentary trustees, are **not** required to file annual reports with the Probate Court.

In Re Trust u/w/o Elmer C. Smith
131 N.H. 396 (1988)

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Administration Issues:
➤ **Investment Issues**
➤ **Prudent Investor Standard**


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Capital Gains issue

- **Capital gains on permanently restricted principal are likewise permanently restricted.**
- **Why can't capital gains be spent as income?**
- **There are two reasons: the evolution of charitable trust law as it pertains to investment and administration and cases decided by the N.H. Supreme Court**


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Charitable Trust Administration

- **The law regarding Trustees of Trust Funds were originally enacted in 1915.**
- **The law was amended in 1951 in order to bring municipal trustees into line with the endowment management theories of the day through the "collective investment" statute and the "10%" diversification statute. The legislative history on these enactments is extensive and these changes were very controversial at the time.**


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Administration (continued)

- In the 1950s both municipal trustees and the trustees of non-municipal endowment funds were bound by the Prudent Man Rule and very rigid definitions of principal and income: all realized gains to principal in a permanently restricted charitable trust were likewise permanently restricted and not available for expenditure; income and dividends could be expended.


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Administration (continued)

- Opinion of the Attorney General 1966-2
 - “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.”

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Administration (continued)

- In re: Jean M. LaTour Estate 110 N.H. 50 (1969) “In the absence of a provision in the will to the contrary, capital gains distributions are to be accounted for as principal in probate and trust accounting.”

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UPMIFA's Exclusions



- RSA 292-B V. "Institutional fund" means a fund held by an institution exclusively for charitable purposes. The term does not include:

(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.

Capital Reserve Funds



- Effective July 17, 2010 capital reserve funds may now be invested in common (HB 1276)
- 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. 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.*

Common Investment Challenges for CRFs



- Communication between Trustees of Trust Funds and the Selectmen regarding the timing of capital reserve fund expenditure and liquidity needs is essential.
- If a fund will be needed within 12 months short term investments are appropriate
- If a fund will not be needed for several years longer term investments may be considered

Legislation 2011 and 2012



- Bills were retained in committee and not acted upon by the legislature
- If enacted the bills would have permitted towns and cities to pay for capital reserve fund investment advice out of capital reserve funds
- Therefore fees to investment advisers must be raised and appropriated by the taxpayers

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Investment Standards



- **Private Money**
 - Trust Funds
 - Cemetery Funds
- **Public Money**
 - Capital Reserve Funds
 - Expendable Trusts

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Investing Private Money



- Bequests under a Will
- Trust Funds
- Donations
- Gifts of cash, stocks, bonds, etc.
- Scholarship or other funds for the benefit of a school district

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Prohibition on Expenditure of Permanently Restricted Private Funds: *No spending policy*



- Although the investment standard has changed the Trustees of Trust Funds can not 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.

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So why should trustees try to grow the principal if it can't be spent?



- If Trustee 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
- This can be demonstrated by using the U.S. Inflation Calculator on Page 125:
<http://www.usinflationcalculator.com/>

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Purchasing Power

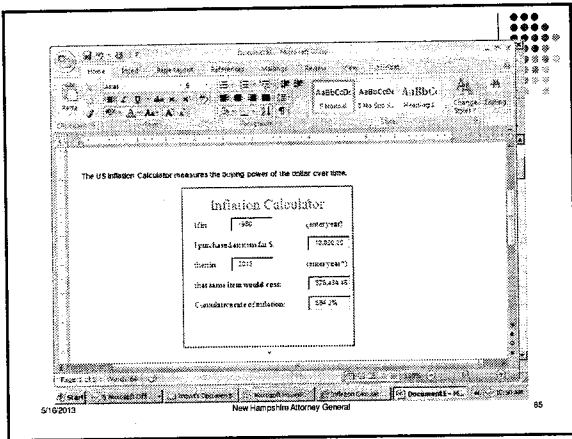


- Donor A gives \$10,000 in 1960 to the Town of X, the income to be used for the beautification of the town park.
- The Trustees are pressured by the park committee to make as much income as possible because principal cannot be expended.
- The Trustees invest for income only. The principal is still worth \$10,000 in 2013.

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Inflation Calculator

- If the \$10,000 was invested in 1960 to preserve purchasing power in 2013 it could be worth:
 - **\$78,434.46**
- By investing for income only the principal has lost approximately \$68,000 in purchasing power.

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Investment Standards for Private Money

- Prudent Man Rule RSA 31:25
OR
- Prudent Investor Rule RSA 31:25-d
- Must specify standard in the investment policy adopted by the Trustees

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RSA 31:25-a and c
Retention of "non-legal" Securities
page 12 and 16



Prudent Man: Trustees may retain non-legal securities after careful consideration and analysis of said securities provided, however, the total market value of all such securities shall not exceed 20% of the total market value of all investments held by the Trustees.

The Trustees shall report annually to the Attorney General any securities so retained as an addendum to the annual report (RSA 31:38).

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RSA 31:25
Investment (continued)



"When so invested, the trustees shall not be liable for the loss thereof."

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Prudent Investor



• 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:

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Prudent Investor Standard



- 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.

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Application



- Does the prudent investor law apply to **all funds** held by the Trustees of Trust Funds?
 - **NO.** The law applies to the privately donated trust funds and perpetual care funds **only** and not to any tax-payer funded accounts.

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To Which Funds Does the New Law Apply?

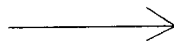


Privately Donated Funds;
cemetery perpetual care funds



Yes

Capital Reserve Funds



No

General Fund Trusts created
under RSA 31:19-a



No

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Which Standard – Prudent Man or Prudent Investor?

- **RSA 31:25-b sets the investment standard as the Prudent Man Rule**
- **RSA 31:25-d sets the investment standard as the Prudent Investor Rule.**
 - **If the Trustees choose the Prudent Investor Rule the portfolio is judged in its entirety and not based on each individual investment.**

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**Investment Standards for Taxpayer Money:
Capital Reserve Funds**

- **Capital Reserve Funds:**
 - **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.**

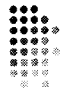
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Investing General Fund Trusts (public money) RSA 31:19-a

- **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.**

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Prudent Investor Rule definition



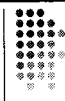
- **RSA 564-B:9-902:** A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

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Prudent Investor Rule (cont)



- A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

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Drafting the Investment Policy



- **Choose the standard**
 - **RSA 31:25 – 31:25-c Prudent Man Rule**
 - **RSA 31:25-d Prudent Investor Rule**
 - The Trustees can choose to invest under either standard but if they adopt the Prudent Investor Rule they must notify the Attorney General **AND engage the services of a professional investment advisor.**

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Who Pays for the Investment Adviser?



- 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.

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Professional Advice



- 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.

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Professional Advice



- 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.

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RSA 31:38-a Professional Banking and Brokerage Assistance

- **"Brokerage firm" in this section means a firm registered under the securities law effecting transactions in securities for the accounts of others.**
- **"Investment advisor" in this section means a qualified investment advisory firm registered with the appropriate regulatory authorities.**

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Remember the Difference: Trustees Expenses

- **The expenses of trustees or the trustee provided for in RSA 31:23 shall be charged as incidental town charges.**
- **All other expenses are paid for by the taxpayers and not from the trust funds themselves**

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Prudent Investor: Managing Risk

- **By choosing the Prudent Investor standard virtually all investments are now available to Trustees of Trust Funds but you now have a number of choices to make in consultation with your investment adviser.**
 - **Trustees cannot be reckless in their investment.**
- **So, which investments are you comfortable owning? Which investments do you consider "off limits"?**

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Set Investment Goals and Objectives



- Examine the types of trusts in your custody: cemetery funds, scholarship funds, worthy poor funds, park funds, etc.
- How much income do you need in order to carry out the purposes of each fund in a meaningful way? *Remember you may be pressured by other public officials to maximize income but the investment decisions are yours alone.*
- What percentage of principal growth is reasonable on an annual basis?

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Factors Affecting Investment Strategies



- General Economic Conditions: economic growth, unemployment rate, consumer spending, retail sales, interest rates
- The possible effect of inflation or deflation
- Other resources of the beneficiaries (i.e. town appropriation)
- Needs for liquidity, regularity of income, and preservation or appreciation of capital; and
- An asset's special relationship or special value, if any, to the purposes of the trust

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Selecting Suitable Investment Management



- If Trustees wish to obtain professional assistance in managing the portfolio it is necessary to select an investment manager.
- Generally it is advisable to send out a request for proposal to selected banking institutions and/or investment advisers.
- The Trustees of Trust Funds should carefully review the proposals received and interview the prospective investment advisers.

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Selecting Suitable Investment Management (continued)



- Questions to ask: Due Diligence

What services are the trustees seeking?
What is the cost?

Does the entity have experience in municipal trust issues and the laws governing municipal trustees?

Check references.

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After an investment adviser has been chosen. . .



- The Trustees of Trust Funds must decide whether or not to:
 - Place securities in "nominee" name (RSA 31:38-a III)
 - Delegate the management (including purchases, sales, and trades) of trust funds to the investment adviser subject to the investment policy (RSA 31:38-a III)
- BUT**

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Trustees' Due Diligence



- "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."

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Analyzing Performance



- Trustees must choose appropriate benchmarks in order to measure performance and must periodically review performance of the portfolio.
- Benchmarks include: Standard and Poor 500 which is a broad measure of market activity, the Dow Jones Industrial Average which represents thirty blue-chip stocks, Lehman Brothers Bond Index, etc.

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Socially Responsible Investing



- “Socially responsible investing (SRI), also known as sustainable investing, socially-conscious or ethical investing, describes an investment strategy which seeks to maximize both financial return and social good.
- In general, socially responsible investors favor corporate practices that promote environmental stewardship, consumer protection, human rights and diversity. Some (but not all) avoid businesses involved in alcohol, tobacco, gambling, weapons, and/or abortion.” Wikipedia

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Socially Responsible Investing




- Other considerations: most major corporations are multi-national and often invest in any number of business ventures.
- How far do Trustees “drill down” in SRI?
- Example of percentage limitation policy:
“Equity and fixed income managers cannot invest in the securities of companies, identified by the Investment Policy whose earnings or sales are derived primarily from the distribution or sale of alcohol, tobacco, firearms, or gaming. Primarily is defined as greater than 15 percent.”

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
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Proxies

- A vote by proxy is a vote that is mailed in or cast in some other way while the person voting is physically absent. This is most frequently used by shareholders in a company who are unable to attend the annual shareholder's meeting.


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Proxies

- When the notice for the annual shareholder's meeting is sent out, there is usually a form sent along with it outlining some of the decisions to be made at the meeting. These are usually posed as questions to the shareholders, and the answer chosen is based upon a tally of the votes cast for any particular answer. The shareholders present at the annual meeting can vote in person, or they can vote by proxy before the event.

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Voting Proxies

- Trustees can vote proxies themselves or they can delegate the responsibility.
- If the responsibility is delegated Trustees should include guidelines for voting

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Voting Proxies



- The investment manager or adviser should take the proxy voting guidelines into consideration in making voting decisions.
- Additionally, the trustees should ask the investment manager or adviser to provide a copy of the manager's or adviser's own proxy voting guidelines to compare with the Trustees' guidelines.

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Duty of Loyalty and Care



- The duty of care requires that proxy-voting authority be exercised with the care, skill, prudence and diligence that a similarly situated prudent person knowledgeable in such matters would exercise.
- In making proxy-voting decisions, issues should be reviewed case-by-case with final decisions based on the merits of each.
- The duties of loyalty requires the Trustees to make voting decisions consistent with the "economic best interests" of the public purposes of the trusts.

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State Chartered Banks



- **N.H. Banking Commission:**
 - <http://www.nh.gov/banking/index.html>

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National Banks: Comptroller of the Currency

- Freedom of Information Act (FOIA) Requests
 - Comptroller of the Currency Disclosure Officer
Mail Stop 2-3
Washington, DC 20219
- General Correspondence
 - Comptroller of the Currency Administrator of National Banks
Washington, DC 20219

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Accounting Issues

Governmental Accounting Standards Board

GASB

Scott C. McIntire CPA
MELANSON HEATH & COMPANY, PC

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Trustees of Trust Fund

Selected Accounting Pronouncements

- GASB 14 (and Amendments)
 - Inclusion of TTF with Primary Government
 - Inclusion does not mean control
- GASB 31
 - Fair Value Reporting
- GASB 54
 - Distinguish between General Fund Reporting and Trust Fund
 - Constraint on Spending

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Governmental Fund Type Definitions



- Special Revenue Fund
 - **GASB 54 Definition**
 - Used to account for and report the proceeds of specific revenue sources that are restricted or committed to expenditure for specified purposes other than debt service or capital projects. The term "proceeds for specific revenue sources" establishes that one or more restricted or committed revenues should be the foundation for a special revenue fund.

Fund Balance Under GASB 54



- Five Categories
 - Nonspendable
 - Restricted
 - Committed
 - Assigned
 - Unassigned

Under Pre-54 Standards



	GF	SRF	CPF	TTF	Total
Reserved for:					
Permanent Funds				50	50
Unreserved:	100	100	100	100	400
Total	\$100	\$100	\$100	\$150	\$450

(1) \$75 is Capital Reserve Fund, \$25 is Other Trusts.

Under Current Standards

	GF	SRF	CPF	TTF	Total
Nonspendable				50	50
Restricted		100	50	25	175
Committed	75		50		125
Unassigned	100				100
Total	\$175	\$100	\$100	\$75	\$450

Audits



- **31:33 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.
- Auditors are now reporting trust funds according to new GASB rules

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Implications



- It is important for Trustees of Trust Funds to make sure the funds held in their custody, whether privately donated funds or taxpayer funds, are properly classified under GASB 54.
- Recordkeeping is key to proper classification
Reporting under GASB does not change the purpose or the custody of funds held by Trustees of Trust Funds

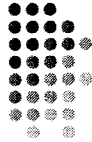
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NH DEPARTMENT OF REVENUE ADMINISTRATION

2013 TRUSTEES SEMINAR
Municipal Services Division



CONTACT INFORMATION



- 109 Pleasant Street, Concord, NH 03301
- P.O. Box 487, Concord, NH 03302-0487
- Telephone: 230-5090
- Fax: 230-5947
- Website: www.revenue.nh.gov

CAPITAL RESERVE FUNDS and EXPENDABLE TRUST FUNDS



CRFs – WHAT ARE THEY?



- "Savings account" for future projects
- Where to find the statutes?
- RSA 35 for town CRFs and village districts
page 46
- RSA 34 for city CRFs page 41
- RSA 31:19-a for expendable trust funds
(ETFs) page 5

PURPOSES

What can CRFs/ETFs be used for?

- See RSA 35:1 for allowable purposes
- Specific capital improvement or item of equipment
- Example: Maple Road Bridge CRF
- Specific type of capital improvement or item of equipment
- Examples: Town bridge repairs CRF or Police Vehicles CRF



CRF PURPOSES, RSA 35:1 (Continued)

- Reappraisal or revaluation
- Land acquisition
- Tax maps
- Extraordinary legal fees
- Municipal and regional transportation projects
- Debt Service Payment (specific project defined)
- RSA 35:1-a, optional fiscal year
- RSA 35:1-b, special education



“NON-CAPITAL” RESERVES, RSA 35:1-c

- Maintenance and operation, or any other distinctly stated specific public purpose
- Examples: Computer software non-CRF,
Extraordinary fuel expenses non-CRF
- Legislative intent was to reduce confusion regarding exact terminology.*
- Be sure to report consistently in MS-9.*



PURPOSE



- Voters must understand what money is being set aside for
- Good for governing body to have some latitude
- Example: "Police Department CRF" may not be specific enough
- "2010 dark blue 4-door Crown Victoria cruiser with 8-cylinder engine and Michelin all-season tires CRF" is too specific
- Police Department Vehicles CRF is suggested

POTENTIAL PROBLEMS



- Purpose too vague
- Vague Examples: CIP CRF, Maintenance CRF
- Conflict regarding proper expenditures
- Conflicting Example: Does CIP include all town facilities, or just vehicles, or other items?

FUNDING SOURCES



- RSA 35:5
- Any source other than money given for charitable purposes
- Donations cannot be placed directly in a Capital Reserve or Expendable Trust Fund

CUSTODY



- Who holds the money?
- Trustees of Trust Funds
- RSA 35:10 towns
- RSA 35:2 schools
- Regional school meeting designates which town trustees hold capital reserve funds
- Village districts

HOW AND WHEN ARE CRFs/ETFs CREATED?



- At town meeting, annual or special
- Proper warning in posted warrant
- Special warrant article, NOT in operating budget
- RSA 35:3 "shall include an article"

Sample warrant article to create CRF/ETF



To see if the town will vote to create a Police Vehicles capital reserve fund, and to raise and appropriate the sum of \$10,000 into said fund. Furthermore, to name the board of selectmen as agents to expend. *The selectmen recommend this article.*

SPECIAL WARRANT ARTICLE



- RSA 32:3, VI
- Must be an article with an appropriation, AND
- By petition, OR
- Involving bonds or notes, OR
- Money going into or expended from a separate fund such as CRF/ETF, OR
- Article designated in warrant by governing body as non-lapsing or non-transferable

WHY SPECIAL?



- Money can only be used for that purpose
- Cannot be transferred

WHEN DO TRUSTEES RECEIVE THE MONEY?



- If from fund balance, within 10 days of vote, RSA 35:11
- If from taxes or other source, by end of Fiscal Year, RSA 35:12
- If calendar year municipality, by Dec. 31
- If optional fiscal year municipality, by June 30 of the fiscal year for which the money is appropriated

EXPENDITURES FROM CRFs/ETFs



- RSA 35:15, town meeting vote or agents named
- Lease/purchase use, RSA 35:15, III, Lease contains no escape clause and gets supermajority vote, or
- Lease has escape clause, but is for final payment
- Land acquisition, no agents allowed unless RSA 41:14-a has been adopted

WHEN SHOULD TRUSTEES RELEASE MONEY?



- Upon Presentation of Invoice
- Or, just before purchase with documentation
- Create audit trail
- Fiduciary duty

OBSOLETE CRFs/ETFs



- Change purpose, 2/3 vote, RSA 35:16
- Renaming of Agents is required on a change of purpose
- Discontinue CRF/ETF, separate warrant article, RSA 35:3;RSA 198:20-c, IV school district ETF
- Fund discontinued when vote occurs
- Money paid to general fund when discontinued

Sample Warrant Article to Discontinue a CRF/ETF

To see if the town will vote to discontinue the Police Vehicles CRF. Said funds, with accumulated interest to date of withdrawal, to be deposited in the town's general fund.



QUESTIONS?



THE RIGHT TO KNOW LAW

**Anthony Blenkinsop
Director of Charitable Trusts**



The Attorney General's Memo on the Right to Know Law is available on our website at:

http://www.doj.nh.gov/publications/documents/right_to_know.pdf



**Part 1, Art. 8.
Accountability of Magistrates and Officers
Public's Right to Know.**

"Government [] should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted."



**RSA 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.



NH Supreme Court



- “We resolve questions regarding the Right-to-Know law with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents.”

Today . . .

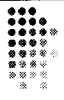


- Overview of the Law
- Responding to a Right to Know Request
- Recent Court decisions
- Confidential Records
- Topics for Discussion

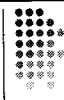
RSA 91-A “Right to Know Law”



- General Rule: unless otherwise provided,
- Process is public
 - Agency/public body records are subject to disclosure
 - Specific statute may create exceptions to Right to Know Law (e.g., several professional licensing boards)

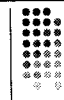


MEETINGS OF PUBLIC BODIES



What is a meeting?

- The convening of:
 - a quorum of the membership of a public body; or
 - a majority of the members, if the rules of that body define "quorum" as more than a majority of its members
- When all members can communicate contemporaneously



What is a Public Body?

- Executive Council, legislative committees, boards, and commissions, school boards, planning boards, select boards, trustees of trust funds, library trustees, cemetery trustees...

Member Participation



- A quorum must be physically present
- Remote participation is permitted when member's attendance is not reasonably practicable
- Remote participant must be:
 - audible to the public
 - Able to speak to and hear other members simultaneously

Notice of Meetings



- Notice must be posted
 - At least 24 hours in advance, except in emergency
 - 2 appropriate locations, including the municipal website or in paper of general circulation in the city or town
 - Applies to non-public sessions

Meetings Must Be Open



- "No session at which evidence, information, or testimony in any form is received shall be closed to the public."
- Non-public sessions are permitted in very narrow circumstances

Public Participation



- Public must be able to hear, read, or otherwise discern meeting discussion contemporaneously at the meeting location specified in the meeting notice
- No email meetings
- Public has the right to videotape, audiotape
- 91-A affords no right to speak

Meeting Minutes



- Must be available to public in 5 business days
- Briefly explain what happened and decisions made.
- Include names of all members in attendance.
- Minutes are permanent records of the public body – should not be stored in private residences

Permissible Non-Public Sessions



- Specifically defined in RSA 91-A:3, II
- Includes:
 - Hiring, dismissal, promotion, compensation, discipline of a public employee;
 - Matters, if publicly discussed, would adversely impact person's reputation

Going Into Non-Public Session



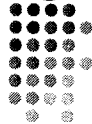
- Must be done by motion and roll call vote
- Minutes must refer to specific provision of RSA 91-A:3, II
- Minutes must be taken
- Only matters properly considered in non-public session can be acted upon

Minutes of Non-Public Sessions



- Must be disclosed within 72 hours
- May be kept sealed if 2/3 of members determine that disclosure would:
 - Adversely affect reputation of a non-member of public body
 - Render proposed action ineffective
 - Pertain to terrorism

GOVERNMENTAL RECORDS



Access to Governmental Records



- The public has a right to:
 - inspect and/or copy
 - all non-exempt governmental records
 - in the custody or control of a public body or agency
 - during regular or business hours
- If records aren't immediately available, they must be made available later

Governmental Records



- 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.

What is Information?



- 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.
 - RSA 91-A:1-a, IV

Electronic Records



- Information created or retained in digital format
 - RSA 5:29, VI
- May include:
 - Documents Stored in a Computer
 - Email
 - Voicemail
 - Instant messages
 - Digital Photos
 - What else???

Retention of Records



- Period of retention for government records is defined by a retention schedule
- Each public body must create a retention schedule in conjunction with its municipal counsel

Retention of Electronic Records



- Electronic records must remain accessible for the same retention or archival periods as their paper counterparts
 - RSA 91-A:4, III-a

Maintaining Electronic Government Records



- An electronic record is not subject to disclosure after it has been legally deleted
- Legally deleted means deleted in accordance with retention policy for the record at issue.
 - RSA 91-A:4, III-b

Deleted Electronic Record



- An electronic record is deleted only if it's not readily accessible to the public body or agency
- Transferring an electronic record to a readily accessible "deleted items" folder or similar location on a computer is not sufficient
 - RSA 91-A:4, III-b

Exemptions From Disclosure RSA 91-A:5



- Internal personnel practices
- Confidential, commercial, or financial information
- Test questions, scoring keys, examination data
- Personnel, medical, welfare ... and other files whose disclosure would constitute invasion of privacy

Exemptions, cont'd



- Notes or other materials made for personal use that do not have an official purpose
- Preliminary drafts, notes, memoranda, other documents not in final form and not disclosed or circulated to a quorum or majority of board

Other Exemptions



- Written legal advice from counsel.
 - *Society for the Protection of N.H. Forests v. Water Supply and Pollution Control Commission*, 115 N.H. 192 (1975).
- Documents or material that a public body received in non-public session to the extent disclosure of such records would frustrate the purpose for the non-public session

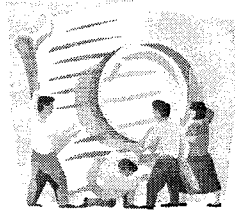
Remedies for a Violation



- Public body liable for costs if lawsuit necessary to insure compliance with the statute
- Public body liable for attorney's fees if agency knew or should have known conduct was a violation
- Court may invalidate the action
- Court may enjoin future violations

What should you do when you receive a Right to Know Request?

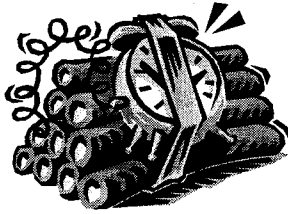
Request should be in writing and make sure the date of the request is evident. Even if request for records doesn't reference right to know law, treat it as a right to know request.



What should you do when you receive a Right to Know Request?

Timing is critical! Must respond to requestor within five business days.

RSA 91-A:4(IV)



Responding to A Request

- Make records available for immediate review;
- Make records available within 5 days;
- Deny the request in writing with reasons; or
- Acknowledge receipt of the request in writing and say how much time is reasonably necessary to respond to the request.
 - RSA 91-A:4, IV

What Should Happen When You Receive a Right to Know Request?



- Are the records immediately available for review?
- They are not if:
 - The records are in use
 - The records must be reviewed or redacted prior to responding, or
 - Legal counsel cannot be reached to discuss request.
 - RSA 91-A:4(I), 91-A:4(IV)

What Should Happen When You Receive a Right to Know Request?



- If the records **ARE** immediately available:
 - Ask the citizen to sit in a waiting area;
 - If production is appropriate, make records available for inspection and/or copying
 - If production is not appropriate, explain why.
 - You can request payment for copying costs or production costs.
See RSA 91-A:4(I), 91-A:4(IV), RSA 126-A:5(X)

Charging for Records



- The person requesting the copy may be charged the **actual cost** of providing the copy.
- If a statutory fee applies, then no other cost can be charged
- What is the actual cost of producing an electronic record? PDF, Disc.
 - RSA 91-A:4, IV

Request for Information in Specific Format

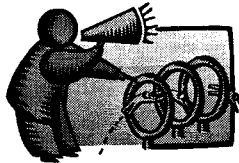


- RSA 91-A does not require public bodies or agencies to compile data into a format specifically requested by a person seeking information under the statute.
- Hawkins v. New Hampshire Dept. of Health and Human Services, 147 N.H. 376, 379 (2001).

Should Record Be Disclosed? Three Step Process



- Is it a record?
- Is it a governmental record?
- Is it subject to an exemption?



Remember . . .



- Portions of a record may be subject to disclosure, while other portions are not
- If necessary, redact portions that are not subject to disclosure

Redacting



- Computer redaction is the way to go
- What should be redacted?
 - Confidential information
 - Attorney work product
 - What else?

Identification of Withheld Records



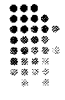
- Indexing redacted pages
- Maintain a record of what was and what was not disclosed

Destruction of a Requested Government Record



- Once a Right-to-Know request is received, do not delete any responsive record, even if the archival period has expired
- Deletion of a governmental record, after a record has been requested is subject to misdemeanor prosecution
 - RSA 91-A:9

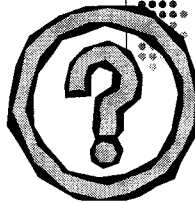
Denial of a Requested Government Record



If a request for inspection is denied on the grounds that the information is exempt, the requested material shall be preserved for 90 days or while any lawsuit pursuant to RSA 91-A:7-8 is pending.

- RSA 91-A:9

FAQ's



1. Are names and addresses public?
2. Do I have to compile lists or summaries?
3. Can I charge for staff time in compiling records?
4. Do I have to answer written questions?

Case Law Relating to Right-to-Know



Invasion of Privacy?



- 3 part analysis
 - Is there a privacy interest at stake?
 - What is the public's interest in disclosure
 - Balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure

Lamy v. N.H. Public Utilities Commission, 152 N.H. 106 (2005)

Invasion of Privacy? (cont.)




- NH Supreme Court has found a privacy interest in addresses of residential clients
 - *Lamy v. N.H. PUC*, 152 N.H. 106 (2005)
- There is no privacy interest in the salaries of employees of an entity subject to RSA 91-A
 - *Prof. Firefighters of N.H. v. Local Government Ctr, Inc.*, 159 N.H. 699 (2010)


- Entities subject to RSA 91-A cannot be required (other than by statute) to create specific documents for record keeping purposes

- *ATV Watch v. N.H. Dept. of Resources and Economic Development*, 155 N.H. 434 (2007)






- Public body's statutory filing obligation did not preempt disclosure obligations under RSA 91-A
 - *Prof. Firefighters of N.H. v. HealthTrust, Inc.*, 151 N.H. 501 (2004)
- Entity seeking to avoid disclosure, "bears a heavy burden to shift the balance toward nondisclosure"
 - *Prof. Firefighters of N.H. v. Local Government Center, Inc.*, 159 N.H. 699 (2010)



- Establishing that the agency 'knew or should have known' that its refusal to disclose information constituted a violation of 91-A "is required for an award of legal fees, but not for costs"
 - *ATV Watch v. N.H. Dept. of Resources and Economic Development*, 155 N.H. 434 (2007)



- Motive of person seeking disclosure is irrelevant.
 - *Union Leader Corp. v. City of Nashua*, 141 N.H. 473 (1996)
- Internal investigatory files that document procedures leading up to potential internal personnel discipline are exempt from disclosure under RSA 91-A:5, IV
 - *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006)

CONFIDENTIAL RECORDS



Confidential Records

Requests for confidential treatment of documents submitted to a public body



- By an individual or business
- By another governmental entity

Confidential Records

• 91-A:1-a, III "**Governmental records**" means **any information** created, accepted, or **obtained by**, ... **any public agency** in furtherance of its official function.

• 91-A:5 Exemptions:
IV. Records pertaining to internal personnel practices; **confidential**, commercial, or financial **information**; ... and other files whose disclosure would constitute invasion of privacy.



What Is Confidential?



- Not defined in 91-A
- Look to DOJ Memo regarding Right to Know (Cheat Sheet)
- If not included: no clear answer

Confidential Records



- NH Supreme Court: Agency must have a basis for applying the 'confidential exception'

Basis for applying the 'confidential exception'



- Prior promises: insufficient
- Subjective expectations -- insufficient
- Custom – insufficient
- Look at "potential harm that will result from disclosure."
 - Goode v. LBA, 148 N.H. 551, 554-55 (2002)

Confidential Records



- 'Confidential' documents not *per se* exempt
- Balancing Test:
 - benefits of disclosure to the public vs.
 - the benefits of non-disclosure to the government.

Union Leader Corp. v. New Hampshire Housing Finance Authority, 142 N.H. 540 (1997).



- The Court may consider whether disclosure would:
 - impair the State's ability to obtain necessary information in the future; or
 - cause substantial harm to the competitive position of the person from whom the information was obtained

Can a body assert that information is confidential without also asserting an invasion of privacy?



- Probably not. Professional Firefighters Association of NH v. LGC, 159 NH 699 (2010)
- If there is no privacy interest, then disclosure is mandated
- Release of company's trade secrets or financial data?

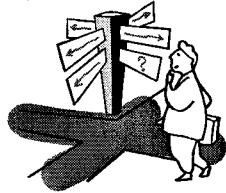
Strategies for dealing with Requests for Confidential Treatment



- Avoid promises
- Consider other exemptions:
 - Documents compiled for law enforcement purposes
 - Drafts
 - Agency-specific confidentiality statutes
- Agreement to give notice of a 91-A request – A potential tool.
 - Consider agency practice
 - Ensure documentation of agreement for future reference

THANK YOU!

ADDITIONAL QUESTIONS?



Contacting the Attorney General



- Department of Attorney General
Charitable Trusts Unit
33 Capitol Street, Concord, NH 03301-6397
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Remember to Complete Evaluation Forms!

- Questions?



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