

# Private MONEY for Public Use:

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# The Administration of Trust Funds, Restricted Gifts, and Private Donations

By Terry M. Knowles

Anyone who has attended a town meeting, deliberative session, or a budget committee hearing knows there is a direct relationship between the goods and services provided in a municipality and the resulting tax rate. Because the choices voters make will have a direct financial impact on the real estate taxes they will pay, New Hampshire citizens often have at least a basic understanding of how the budgeting process works in their town or city.

Towns and cities may also have custody of non-tax money including trust funds, restricted gifts, and private donations from individuals seeking to benefit the public, care for the poor, provide scholarships, maintain a cemetery, or support a particular activity in their community. Examples range from specific purposes, the maintenance of a particular cemetery lot or public park, to broad purposes, “the annual income of this fund is to be used for general purposes of the Town as the Board of Selectmen of the Town of Sandwich may determine.”<sup>1</sup> But unlike tax revenue, this “other money” and its use is often misunderstood by public officials and citizens. This article is designed to help dispel the confusion surrounding the acceptance, administration, and expenditure of private money in a municipality.

Towns and cities are not authorized to accept all donations; generally speaking private gifts may be accepted only if given for a public purpose. RSA 31:19 I lists examples of public purposes New Hampshire municipalities have the authority to “take and hold in trust” including “any other public

purpose that is not foreign to their institution or incompatible with the objects of their organization.”<sup>2</sup> Therefore towns and cities may accept donations for a public purpose but may not accept gifts given for a private purpose. Towns are also prohibited from accepting discriminatory trusts under the holding of a N.H. Supreme Court decision involving two scholarship funds held in trust by a city for “protestant boys.” The Court stated “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.”<sup>3</sup>

Private gifts, donations, and bequests are classified in three categories: unrestricted, temporarily restricted, and permanently restricted. These distinctions are important in administering the gift appropriately. An example of an unrestricted gift is a donation “for the benefit of the fire department.” This gift is purpose restricted (fire department) but may be expended fully for that purpose. A temporarily restricted gift is often both purpose and time restricted. The donation to the capital fund drive for the new library is an example of a temporarily restricted gift. In this case the gift is purpose restricted (new library) and time restricted (it may not be expended until the library construction project commences). Permanently restricted gifts must be held in perpetuity and, under current New Hampshire law, only the income and not the principal nor any principal appreciation may be expended for the donor’s stated purpose unless so authorized in the

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gift instrument. An example of a permanently restricted donation is one in which the donor gives or bequeaths an amount of money to the municipality specifying the income only can be expended for the stated purpose.

While towns and cities may be the beneficiaries of thousands, and in some cases millions of dollars in private trusts, donations, and gifts, the administration of these funds is often misunderstood. It is therefore important to understand how and by whom these private donations are accepted, administered, and expended.

### **The Acceptance of Gifts, Donations, and Trusts**

Who can accept (or reject) a donation offered to a town? This power resides with the legislative body unless the voters, through a warrant article, delegate their authority to specific public officials. (RSA 31:19 I) The town meeting may authorize the board of selectmen, or town council, to accept trust funds without further action by the town meeting. (RSA 31:19 II) The voters have the option to decide whether to grant this authority for a period of one year or indefinitely. The town meeting may also delegate its authority to accept unanticipated private funds to the board of selectmen. In this case, the authority is delegated unless and until it is rescinded by the voters through a subsequent warrant article. (RSA 31:95-b) Towns may also delegate their authority to accept private donations to the library trustees pursuant to RSA 202-A:4-c. In this case the authority is delegated unless and until it is rescinded by the voters through a subsequent warrant article. If the selectmen, town council, or library trustees are granted the authority to accept trust funds and/or unanticipated private funds, there are specific requirements which must be followed:

money can only be accepted for the legal purposes for which a town may appropriate money, a public hearing may be required, and acceptance of the donation may not require the expenditure of other town funds except those funds lawfully appropriated for the same purpose. Once private trusts or donations are accepted, the administration of these funds is under the jurisdiction of either the trustees of trust funds or the library trustees depending upon the stated intent of the donor.

One category of gifts, memorial funds and donations “in lieu of flowers,” can be problematic for towns to administer if not properly documented and the municipality may want to adopt guidelines for accepting these funds. Town officials might also consider posing the following questions to the creator of the fund at the time it is offered: What is the exact purpose of this fund? Is this an “income only” fund or can the principal be expended as well? Who has the authority to decide how to spend the money? How and when is the money to be distributed? Having guidelines and a consistent public policy in place can help to simplify the acceptance and administration of these types of donations.

Whether it is the town meeting, the board of selectmen, or the library trustees who accept a private donation, it is important to understand once the gift is accepted the municipality is legally bound to carry out the donor’s intent which, in some cases, may be in perpetuity. Unless the donor specifies otherwise in the gift instrument, the purpose of the donation, gift, or

trust may not be altered, changed or extinguished except by the court.<sup>4</sup> The attorney general is a necessary party to any legal proceeding involving a charitable trust or interest and represents the public interest in the litigation.<sup>5</sup>

### **Administration**

The most important element in administering a donation given to a municipality or a school district is the donor’s intent. This intent is found in the gift instrument: a trust, will, letter, or other document signed by the original donor. There are two New Hampshire Supreme Court rulings which address issues of administration and donor intent in municipalities. The first case addresses the custody of trusts, and the second case provides guidance in those situations where the intent of the donor is confusing or ambiguous.

RSA 31:37 states: “Each town shall pay over to the trustees the full amount of its trust funds.” RSA 31:31 states “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.” But what if a gift instrument specifically states the donation shall be held by the school district? Or the board of selectmen?

The New Hampshire Supreme Court ruled that regardless of the language of

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the gift instrument, "It must be presumed that the testator had in mind the officers of the town having legal authority to hold and administer such a trust whatever their successive titles might be."<sup>6</sup> Although the donor may specify another officer of the town or the school district as trustee, it is the trustees of trust funds who have the statutory authority to hold and administer these trusts. The only exception to this rule is the library trustees who may independently administer trust funds under the provisions of RSA 202-A:23 which states, "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." If the purpose of the trust is confusing or ambiguous, trustees of trust funds are permitted to obtain advisory opinions from the court through the filing of a petition for instructions.<sup>7</sup>

Trustees of trust funds hold, manage, and invest both public and private money; they insure the purpose specified by the donor of private money is followed, and they insure the directives of the taxpayers are followed when public money is appropriated for capital reserve funds or taxpayer funded expendable trusts.<sup>8</sup> The word "administer" means to manage, direct, or superintend the affairs of the trust.<sup>9</sup> Although there may not be a specific gift instrument, it is important to note cemetery perpetual care funds held by the trustees of trust funds are valid charitable trusts and the income from these trusts may be expended for the care of specific lots only and not for general cemetery maintenance.<sup>10</sup>

Occasionally the purpose of a trust, gift, or donation may become obsolete, impossible, or inefficient to administer. In order for the donor's intent to be fulfilled as nearly as possible in conformance with the provisions of the gift

instrument, the trustees may file a petition for cy pres with the probate court seeking to amend or modify the language of the trust.<sup>11</sup> The court's order amending or modifying the language becomes the new gift instrument.

Administration includes the responsibility to properly invest both public and private funds and the trustees of trust funds must adopt and file an investment policy pertaining to private funds with the attorney general under RSA 31:25 and an investment policy pertaining to taxpayer funds under RSA 34:9 and 35:9.

### Expenditure Authority

Although the trustees of trust funds administer both public and private money, they do not necessarily have the authority to make expenditures from the funds in their custody. Expenditure authority is determined in the following manner:

- For private money, the gift instrument may specify the entity with expenditure authority. In the case of the Town of Sandwich fund mentioned earlier, the donor, Doris Benz, delegated spending authority to the board of selectmen. If the gift instrument is silent or does not delegate spending authority "then expenditures shall be made by the full board of town trustees."<sup>12</sup> In either case, however, the donor's intent must be followed in making any spending decision.
- There may be "agents of the town established to carry out the objects designated by such trusts."<sup>13</sup> RSA 289:7 (d) delegates the authority to "Expend income from all trust funds for cemetery purposes in accordance with the conditions of each donation or bequest accepted by the municipality" to the cemetery trustees. RSA 202-A:11 IV

delegates the authority to "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" to the library trustees. While cemetery trustees are required to present a voucher to the trustees of trust funds in order to expend income from perpetual care and/or cemetery trusts, the library trustees are entitled to receive trust fund income from the trustees of trust funds "as the same is received."<sup>14</sup>

- The authority for expenditure from the two categories of public funds, capital reserve funds and expendable trust funds, rests with the legislative body of the town unless the voters have, by warrant article, named agents to expend.<sup>15</sup> Once agents are named and approved by the voters, those agents may withdraw funds from capital reserve funds or expendable trusts without further action of town meeting.

The trustees of trust funds are required to submit an annual report to the Department of Revenue Administration and the Office of the Attorney General.<sup>16</sup> The trustees' accounts must also be audited annually by the auditor of the town.<sup>17</sup>

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