

The Role of the Conservation Commission

Susan Slack, Esq.
Legal Services Counsel
New Hampshire Local Government Center

I. Powers and Duties of the Conservation Commission

- **RSA 36-A:1:** permits town meeting to adopt the provisions of RSA Chapter 36-A, which establishes the conservation commission. The board of selectmen appoints the members of the conservation commission.

A municipal conservation commission has no regulatory powers, but it is not simply an advisory board. The conservation commission's powers and duties are enumerated in RSA 36-A:2, 36-A:4 and RSA 36-A:5. RSA 36-A:2 states that a municipality that votes to establish a conservation commission does so "for the proper utilization and protection of the natural resources and for the protection of watershed resources of ...[the] town."

- **RSA 36-A:2:** lists the types of activities that may be engaged in by the conservation commission:

"Such commission shall conduct researches into its local land and water areas and shall seek to coordinate the activities of unofficial bodies organized for similar purposes, and may advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which in its judgment it deems necessary for its work. It shall keep an index of all open space and natural, aesthetic or ecological areas within the city or town, as the case may be, with the plan of obtaining information pertinent to proper utilization of such areas, including lands owned by the state or lands owned by a town or city. It shall keep an index of all marshlands, swamps and all other wet lands in a like manner, and may recommend to the city council or selectmen or to the department of resources and economic development a program for the protection, development or better utilization of all such areas. It shall keep accurate records of its meetings and actions and shall file an annual report which shall be printed in the annual town or municipal report. The commission may appoint such clerks and other employees or subcommittees as it may from time to time require."

- **RSA 36-A:4** gives the conservation commission authority to receive gifts of money and property and to acquire real estate or lesser interests in real estate (conservation easements, for example) in the name of the town, both subject to the approval of the board of selectmen.

- **RSA 36-A:5** permits towns that have established conservation commissions to appropriate money through the normal budget process “as deemed necessary for the purposes of this chapter,” meaning the purposes as listed in RSA 36-A:2 and 36-A:4 above. In addition, RSA 36-A: 5 permits appropriated money, gifts of money, and land use change tax (LUCT) revenues, if the town meeting so approves, to be placed in a Conservation Fund. RSA 36-A5 and RSA 4129 require the town treasurer to have custody of all moneys in the conservation fund. Moneys may be paid out of the fund only upon the authorization of the conservation commission by majority vote. Payment from the fund does not require approval of town meeting or authorization by the board of selectmen. However, the moneys may be expended only for the purposes authorized by RSA 36-A:2 and 36-A:4.

In summary, the conservation commission has authority to act to accomplish the purposes as set out in RSA 36-A:2 and 36-A4. The board of selectmen must give approval before the conservation commission can accept gifts of money and property or acquire property in the name of the town. The conservation commission has no power to enact regulations or act in a law enforcement capacity. Other municipal boards may call upon the conservation commission for advice on natural resource issues. For example, some municipalities require comment from the conservation commission prior to planning board approval of site plans or subdivisions involving wetland or other natural resource issues.

II. Conservation Commission’s Role in Managing Town Land

When gifts of property are given to the conservation commission and when the conservation commission acquires property, both subject to approval of the selectmen, RSA 36-A:4 states that the conservation commission “shall manage and control” them. Acceptance of such gifts and acquisitions of land are done through the conservation commission, but “in the name of the town.” In addition, RSA 31:112 permits towns to acquire land as town forests, and town meeting can vote to designate the conservation commission as the authority for managing the town forest. These are the only properties the conservation commission may manage. It cannot make decision regarding the management of other town land, such as ball fields and other open land owned by the town.

The conservation commission can make all the decisions involved in managing and controlling conservation land, such as what activities are permitted or prohibited on the property, contracting for services required in managing property, appointing volunteers to carry out duties regarding maintenance on the property. The conservation commission may determine that the best way to manage certain conservation land is for the town to grant a conservation easement on the property to a land trust. In this case, it must get approval of the town meeting, or board of selectmen if authority has been delegated to the selectmen pursuant to RSA 41:14-a, to convey the conservation easement (an interest in real estate) to the land trust.

III. Limitation on Conservation Fund Expenditures

Towns are prohibited by RSA 31:4 and the New Hampshire Constitution (Part I, Article 14 and Part II, Article 5) from spending public funds for private purposes. These provisions prevent towns from “donating” Conservation Fund money or other town funds to landowners to cover the landowner’s expenses in conveying real estate to a third party, or from “giving” money to land trusts to cover the costs of real estate transactions in which the municipality holds no enforceable real estate interest (for example, Owner A sells a conservation easement to Land Trust B and the town “donates” money to the land trust to make the purchase).

The central legal issue is the authority granted to municipalities to appropriate and spend public funds. RSA 31:4 states that towns may appropriate money “for any purpose for which a municipality may act if such appropriation is not prohibited by the laws or the constitution of this state.” Under the New Hampshire Constitution, public money can be appropriated only for valid public purposes, but not to create a purely private benefit. As a general rule, town money, including money in the conservation fund, cant be appropriated to a private person, company or organization unless that private person takes on some obligation to benefit the town. *Opinion of the Justices*, 88 N.H. 484 (1937). In other words, transactions involving the expenditure of town money must involve a “quid pro quo.” The town must obtain something real in exchange for that public money. Often, this obligation is contractual, as in the purchase of goods or services. A donation from the conservation fund to a private landowner to pay for costs associated with a conservation project is not permitted when the town will not either hold the conservation easement on the property (or a backup easement), or own the fee interest in the property. In other words, the town receives nothing in exchange for its money when the private landowner grants a conservation easement on his or her property to a private land trust or other third party. In these situations, the conservation commission cannot expend money from the Conservation fund as donations to private landowners who convey conservation easements to private land trusts.

One could argue that the conservation easement provides a public benefit and, therefore, the town’s contribution satisfies the public purpose requirement of state law and the state constitution. But there is a critical difference between a “public benefit” and a “public purpose” for which a municipality can spend public money. The public purpose involves both a benefit to the public and the ability of the town to obtain the benefit. This means that a town has to go one step further than a private party would when it appropriates money to conservation projects, whether to a private landowner or a land trust; the town has to determine not only that the project will benefit the public, but also that the town has the ability to enforce that benefit, whatever it is. The law requires a municipality to obtain a right to ensure it can enforce this promise because this is the public purpose for which the money was granted. If it does not do this, it has not property appropriated or spent those public funds for a public purpose.

However, RSA 31:3 permits towns to spend public funds to acquire real estate or interests in real estate (such as conservation easements as well as secondary rights (executory interests) in such (conservation easements). RSA 36-A:4 grants authority to the conservation commission to acquire interests in real estate, with the approval of the board of selectmen, and RSA 36-A:5 permits the conservation commission to expend money from its conservation fund for such purposes.

As long as the town spends its public funds in a *quid pro quo* transaction (receiving something in return for the money, including real property, goods or services), it can support specific conservation projects that result in the town acquiring either full ownership of the property, a conservation easement on the property, a lesser interest in the property or some other contractual right. This may sound like a semantic distinction, but town donations to cover landowners' administrative costs in conveying real estate interests are prohibited, while town expenditures to acquire interests in real estate are permitted.

IV. Acquisition and Conveyance of Real Estate by Municipalities

As described above, RSA 31:4 permits towns to acquire or dispose of real estate. This authority is given to the town meeting as the legislative body of the town. The board of selectmen is the town's governing body; it has no independent authority to acquire or sell town land. However, RSA 41:14-A permits town meeting to delegate its authority to acquire and sell town land to the board of selectmen, subject to provisions that require the issue to be decided by town meeting upon receipt of the selectmen of a petition signed by 50 or more registered voters. Town meeting delegation of authority under RSA 41:14-a does not affect the authority of the conservation commission, granted by RSA 36-A:4, to acquire real estate or interests in real estate in the name of the town with the approval of the board of selectmen.

V. The Common Law of Property

Can the town hold a conservation easement on property it already owns? No. A conservation easement is an easement in gross. An easement in gross is intended to exist without a dominant estate. (An easement appurtenant, on the other hand, requires two pieces of land – a dominant estate and a servient estate.) An easement in gross involves land owned by a person or entity other than the owner of the easement. A conservation easement is also known as a negative easement, with takes from the owner of the land the right to do some things, which, were it not for the easement, the owner would have a right to do with the land. The holder of a conservation easement typically enforces against the landowner his or her promise not to develop the land for most residential or commercial purposes.

The conservation commission is not an entity separate from and independent of the town. Therefore, a conservation commission cannot hold a conservation easement on land owned by the town. In addition, the New Hampshire Supreme Court has explained that “[a]n owner cannot have an easement over his own land independent of his ownership of

it.” *Hayes v. Moreau*, 104 N.H. 124, 125 (1962). Another entity, such as a local land trust, could hold the conservation easement on town-owned land.

VI. Sources of Conservation Fund Revenue

Towns may vote to appropriate to the Conservation Fund all or a portion of land use change tax (LUCT) revenue received when properties are removed from the current use program. In addition, gifts of money to the conservation commission for the acquisition of conservation land or easements may be placed in the Conservation Fund pursuant to RSA 36-A:4. Also, town meeting may vote to permit money it has appropriated to the conservation commission to be placed in the Conservation Fund. It is possible for some revenue placed in the Conservation Fund to be restricted to the acquisition of land or easements (gifts, or the LUCT when the town meeting has so designated). The conservation commission may use unrestricted revenues in the Conservation Fund for the purposes outlined in RSA 36-A:2 without further approval of town meeting or the board of selectmen. Unrestricted revenues in the Conservation Fund may also be used for the acquisition of land or easements, subject to approval by the board of selectmen, without further approval of town meeting. It is important for the conservation commission to keep track of the various sources of revenue in the conservation fund and which are restricted to acquisition and which are not.