# THE STATE OF NEW HAMPSHIRE
## JUDICIAL BRANCH
SUPERIOR COURT

Merrimack Superior Court
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## NOTICE OF DECISION

**File Copy**

Case Name: **In re: Dunbarton School District**
Case Number: **217-2018-CV-00379**

Enclosed please find a copy of the court's order of July 20, 2018 relative to:

ORDER

July 20, 2018

Tracy A. Uhrin
Clerk of Court

(485)

C: Matthew H. Upton, ESQ; Demetrio F. Aspiras, III, ESQ; JR Hoell

# The State of New Hampshire

**MERRIMACK, SS** **SUPERIOR COURT**

**In re Dunbarton School District**

**No. 2018-CV-00379**

**ORDER**

The Dunbarton School District (the "District"), has petitioned this Court, pursuant RSA 197:3, for permission to hold a Special School District meeting on September 26, 2018 so that the voters of the District may consider warrant articles in order to determine how to utilize in excess of $1 million in unexpended non-appropriated funds. The funds were discovered after an audit which was completed after the District's annual meeting was held in March 2018. Mr. J.R. Hoell, a non-lawyer, has filed a pleading he captions "Motion to Dismiss and Objection to Petition For a Special District Meeting". Mr. Hoell's pleading is signed by a number of Dunbarton Residents. For the reasons stated in this Order, the Motion to Dismiss is DENIED, because Mr. Hoell, as a taxpayer, does not have standing to move to dismiss the Petition. However, considering the Petition on the merits, it is DENIED, as the Petition does not satisfy the requisites of RSA 197:3.

I

The District did not raise the issue of the taxpayer's standing to move to dismiss; the Court raised the issue *sua sponte*. The New Hampshire Supreme Court has held that in order for a taxpayer to have standing to challenge an action of the government, the

taxpayer must demonstrate that his or her rights are impaired or prejudiced by the action. Baer v. New Hampshire Department of Education, 160 N.H. 727, 730 (2010). This principle is of constitutional dimension. Duncan et al. v. State of New Hampshire, 166 N.H. 630, 637-638 (2014). A taxpayer's rights are not impaired by the grant *vel non* of a Petition for a Special District Meeting, at which the expenditure of funds will be discussed; until a decision is made, no taxpayer's rights could be impaired. In simplest terms, the District could simply vote not to expend any funds and arguably, no pecuniary interest of the taxpayer would be affected. Accordingly, the Court cannot consider the Motion to Dismiss, and it must be DENIED. However, the District did not object to Mr. Hoell being heard at the hearing, and the Court has reviewed and considered the materials filed and the arguments made.

II

While no evidence was presented at the hearing, and the District proceeded by offer of proof, there appears to be no dispute regarding the facts alleged in the Petition. School district budgets are subject to the general municipal budget law, RSA 32. Funds may not be spent without voter authorization RSA 32:8. Voters may only appropriate funds at annual or special district meeting RSA 32:6. For that reason, each school district is required to hold an annual meeting. RSA 197:1. The primary purpose of the meeting is "for raising and appropriating money for the support of schools for the next fiscal year consistent with the Municipal Budget Law". Under RSA 197:1, subject to limited exceptions, if a school district holds appropriated but unexpended funds at the end of the fiscal year, the funds lapse and then are, by default, returned to the taxpayers as an offset of funds raised through general taxation. RSA 32:7. In other words, a school district

cannot retain budget surpluses from year to year without voter authorization.

For many years the District has entered into an agreement with neighboring school districts to provide secondary education to its pupils. Until 2013 the District was a member of School Administrative Unit 19 ("SAU 19") along with the New Boston School District and the Goffstown School District. Pursuant to an agreement, the District sent its secondary students to Goffstown High School. During that time, the District relied on SAU 19 to manage the financial affairs of the District. In March 2013, the District voted not to extend its agreement with Goffstown, and voted to enter into an agreement with the Bow School District, effective July 1, 2014. The District also voted to leave SAU 19, effective July 1, 2014, and join SAU 67, which would thereafter oversee the financial affairs of the District in the Bow School District.

In the fall of 2017, the SAU 19 Superintendent hired an independent auditor to conduct an audit of the SAU and its member districts' financial records. Although at the time of the audit, the Dunbarton School District was not a member of SAU 19, the audit covered years in which the District was a member of SAU 19, 2007 through 2014. In December 2017 SAU 19 and the Goffstown School District announced that the audit was complete. The audit discovered that $9.1 million in unaccounted for and unexpended funds were in Goffstown School District accounts. Additionally, the auditors discovered over $1.1 million in unaccounted and unexpended funds in the New Boston School District accounts. SAU 19 informed the District that it had not looked at the expenditure of Dunbarton School District funds, and the District hired an independent auditor, Plodzik and Sanderson, to conduct a review of its records from the same period.

The Dunbarton School District annual meeting was held on March 10, 2018. At oral

argument, counsel for the District represented that while the auditors were aware that the surplus was likely, they did not have a firm figure at that time but anticipated a surplus in the $600,000 range. The completed audit report was received on June 7, 2018. The auditors determined that the Dunbarton School District had an unaccounted for and unexpended surplus in excess of $1 million. This surplus had accumulated while the District was a member of SAU 19, between 2007 and 2014.

The District now requests that the Court find that an emergency has arisen within the District which may require an immediate expenditure of appropriations money and that the Court authorizes the District to hold a special school district meeting on September 26, 2018, for the purpose of acting upon articles and that the District meeting shall have the same authority as that of an annual school district meeting. If the funds are not spent, they will lapse, and the funds will cause Dunbarton taxpayers' bills to drop dramatically in the current tax year. Petition, ¶ 3. The proposed warrant articles, which are appended to the Petition, in substance, seek to spend the surplus. Article 1 seeks to determine if the District will vote to establish the Middle and High School Tuition Expendable Trust Fund for the purpose of paying tuition expenses for Dunbarton middle and high school students to attend grades 7 through 12 under an approved tuition agreement, and to raise an appropriate to $959,803 to be placed in the fund, said amount to come from the surplus available for transfer. Article 2 seeks to determine if the District will vote to raise an appropriate $100,000 for deposit into the existing Dunbarton school capital reserve fund, from the same funds.

III

RSA 197:1 provides that every school district shall hold an annual meeting between

March 1 and March 25 "for raising and appropriating money for the support of schools for the fiscal year again the next July 1". The District may not appropriate money at a special meeting of other than in accordance with RSA 197:3. That statute provides that in case of an emergency arising requiring immediate expenditure of money, the school board may petition the Superior Court for permission to hold a special district meeting.

The statute defines emergency as:

> [A] sudden or unexpected situation or occurrence, or combination of occurrences, of a serious and urgent nature, that demands prompt or immediate action, including an immediate expenditure of money. This definition, however does not establish a requirement that an emergency involves a crisis in every set of circumstances.

RSA 197:3, I (b).

The statute also sets forth specific criteria for determining whether an emergency exists; a petitioner must present and the court shall consider:

> (1) The severity of the harm to be avoided;
> (2) The urgency of the petitioner's need.
> (3) Whether the claimed emergency was foreseeable or avoidable.
> (4) Whether the appropriation could have been made at the annual meeting.
> (5) Whether there are alternative remedies not require an appropriation.

RSA 197:3, I (c).

The criteria set forth in the statute appear to come from Appeal of Mascoma Valley Regional School Dist., 141 N.H. 98 (1996).

When considering a statute, a court will consider the plain meaning of the words used. Appeal of Garrison Place Real Estate Investment Trust, 159 N.H. 539, 542 (2009). The District does not allege that the statute is ambiguous. The Court agrees. Where a statute is clear and unambiguous, a court need not look behind it to determine legislative intent. Matter of Neal, -N.H.-, 184 A3rd 90, 92 (2018). These principles guide the Court's analysis.

The District asserts that the unexpected surplus constitutes an emergency, and that a meeting should be convened so that the District voters can decide how to handle the unexpected surplus. It alleges that "given the sheer size of the current undersized fund balance, the District school Board is concerned about returning the funds directly to the taxpayers in a single tax year without giving the voters an opportunity to consider other alternatives that *might be more desirable*". (Emphasis supplied). Petition, ¶ 34. It asserts that return of the tax funds would cause the Town's property owner's taxes to drop dramatically. It states that "it is estimated that if the $1.0 million undesignated fund balance is allowed to lapse, it would cause the annual tax bill for each home valued at $300,000 to drop by nearly $1,000". Petition, ¶ 35. It recites that if this occurred, in the following fiscal year there would be a reciprocal increase in the tax bill and return to normal or historic property tax rates. It asserts that:

> This dramatic dip and surge in tax bills *could* interfere with taxpayers' ability to budget, affect private mortgage insurance policies/payments and wreak havoc with planned mortgage escrow arrangements . (Emphasis supplied).

Petition, ¶ 37.

The Court is not persuaded. In the first place, considering the plain meaning of the language, it is difficult to see how a reduction in tax rate can constitute an emergency. The statutory definition of emergency specifically requires a "sudden or unexpected situation or occurrence" which is of "a serious and urgent nature" that "demands prompt or immediate action". The Court does not believe that the fact that money may be returned to taxpayers requires prompt or immediate action to determine whether or not the money would be better utilized to, in substance, provide a rainy day fund to cover tuition in upcoming years. The District provided no evidence or even an offer of proof in support of the conclusory statement that the dramatic "dip and surge in tax bills could "interfere

with taxpayer's ability to budget" and "wreak havoc with planned mortgage escrow arrangements".

Moreover, the use of the conditional tense in the District's Petition- that "this dramatic dip and surge" in tax bills *could* interfere with taxpayers ability to budget, ¶ 37, and that a meeting should be held to give the voters an opportunity to consider other alternatives that *might* be more desirable, ¶ 34 - is a tacit concession that the District has no persuasive evidence that an emergency does, in fact, exist.

Moreover, even if an emergency could be said to exist, the Court is not persuaded that the supposed emergency was not foreseeable or avoidable and could not have been dealt with at the annual meeting. RSA 197:3, I (c) (3) (4). At oral argument, counsel for the District advised the Court that at the time of the Town Meeting in March, the auditors it had engaged in December 2017 had determined that at least $600,000 would be available to the town, but that a final figure had not been reached, because the forensic audit had not been completed. Counsel had no satisfactory answer as to why the audit was not completed before the Town Meeting, other than that the auditing firm was busy. It is a matter of common experience that a personal services firm, such as an accounting firm or a law firm can expedite a task such as the forensic audit, albeit at greater expense. The Court cannot find that the claimed emergency was unavoidable.

It is certainly understandable why the District seeks a special meeting. It may be a wise use of unexpected funds, to, in substance, place a windfall the District has received in a rainy day fund so that in an economic downturn the educational opportunities available to the children of Dunbarton are not diminished. Moreover, there is not necessarily a complete overlap between the taxpayers who overpaid and created the windfall between

2007 and 2014, and the taxpayers who reside in the Town now and will receive the benefit of the overpayment. Taxpayers who overpaid between 2007 and 2014 but no longer live in the Town, will receive no benefit from the return of the overpayment.

Nonetheless, the Court and the District are bound by the strictures of RSA 197:3, which permit a special district meeting only in cases of emergency. Based upon the offer of proof presented, the Court cannot find that an emergency exists, or that the supposed emergency was not foreseeable.

It follows that the Petition must be DENIED.

**SO ORDERED**

7/20/18
DATE

Richard B. McNamara
Richard B. McNamara,
Presiding Justice

RBM/