

TO: Cornish Library Exploratory Committee**FROM:** Matthew C. Decker
Jane Taylor**DATE:** October 22, 2021**RE:** Donation of Cornish General Store

The Cornish Library Exploratory Committee has asked us to review various documents and provide legal advice related to the possible acceptance of a donation of property and building for the purpose of the building's use as a public library and community center. The Committee has provided extensive background documentation in an Appendix, referred to herein. Our opinions below attempt to follow the outline of the questions presented in the Committee's September 20, 2021 letter to us. Separately, we are also providing some suggested revisions to the donor's Letter of Intent, intended to clarify her specific intent as to various aspects of the donation.

As the Committee is aware, this proposed donation raises many complex questions involving both policy and legal considerations. Also, for certain questions, there may not be a clear answer under New Hampshire law. Where the letter of the law may be lacking, we have attempted to apply the spirit of the law. Also, while we have sought to address many of the Committee's questions, we understand that the information and advice we are providing is likely to raise additional concerns. We look forward to continuing work with the Committee, the Library Trustees, and the Selectmen to move this process forward.

Acceptance of Donation

Question: What is the appropriate process for the Town to accept the donation of the former general store building and the property on which it is situated for the purposes of use as a public library and community center?

Answer: There are alternative methods for acceptance of the donation, and the choice of which method to pursue is a matter of policy for Town officials.

It is our opinion that, more likely than not, acceptance of the property donation would constitute the establishment of a "new" library, as opposed to an extension of the existing Stowell library. We reach this conclusion based on the seeming incompatibility of the two donative intents. Mr. Stowell's donation stipulated that his library be known as the "George H. Stowell Free Library", and the language used in Mr. Stowell's will appears to indicate an intention that the library building he caused to be constructed on School Street – and no other – would be the Stowell Library. Meanwhile, Ms. O'Neill's intent as stated in the draft Letter of Intent is that the General Store building will be known as the "Cornish Library and Community Center". Accommodation of Mr. Stowell's and Ms. O'Neill's wishes likely requires treating a General Store library as a "new" library. (Additionally, we do not see a significant upside for the Town in attempting to treat the General Store property as an extension of the Stowell Library.)

For purposes of advice concerning the acceptance of donation, we are assuming that the building will become a “new” library. We are also assuming that the Selectmen prefer to put the issue of acceptance of the donation to a town meeting vote, rather than exercising their authority to act unilaterally.

Given these specifications, a town meeting vote to accept the donation pursuant to either RSA 31:19 or RSA 202-A:3, would be correct. In this regard, we generally agree with the advice provided from both the New Hampshire Municipal Association (NHMA) and Attorney Thomas Donovan of the New Hampshire Charitable Trusts Unit (CTU), recommending either or both RSA 31:19 and RSA 202-A:3 as appropriate vehicles for acceptance of the donation.

RSA 31:19, I expressly permits the Selectmen, without town meeting vote, to accept and “hold in trust gifts, legacies, and devises made to them for the establishment, maintenance, and care of libraries, reading-rooms...and for any other public purpose that is not foreign to their institution or incompatible with the objects of their organization”. The Selectmen in Cornish have this authority because the Town voted to grant it to them in 1996 pursuant to RSA 31:19, II and III (*see* Appendix V). Thus, it would be appropriate for the Selectmen to accept the donation of buildings and property for use as both a library and a community center. Alternatively, if the Selectmen prefer to put this question to a vote a town meeting, this can also still be done under RSA 31:19, I. (*See also* Appendix C.)

RSA 202-A:3 expressly permits the Town, by vote at a town meeting, to establish a library and/or accept the donation of a library.

It may be a purely academic question whether donation of the General Store property is more accurately classified as a “gift... for the establishment” of a library under 31:19 or the “accept[ance of] a public library which has been provided... by private donation” under 202-A:3. The proposed donation fits fairly under either scenario.

Question: If acceptance would establish a new library, would the current Library Trustees control the new library?

Answer: Yes, the current Library Trustees would control the new library. There does not appear to be any statutory requirement for creation of a second Board of Library Trustees in the event a municipality establishes more than one library.

RSA 202-A:2 simply defines “Library Trustees” as “the governing body of a public library.” “Public Library” is defined as “every library which receives regular financial support, at least annually, from public or private sources and which provides regular and currently useful library service to the public without charge. The words may be construed to include reference and circulating libraries, reading rooms and museums regularly open to the public.” Various additional references in RSA 202-A include the terms “library trustees” as well as “a library” or “the library”, but there are no references to multiple sets of trustees for multiple library facilities within a single municipality. It does not appear from our research that either New Hampshire statutory law or case law contemplates a municipality having more than one board of library trustees to administer distinct, individual library facilities that may exist in a town.

Thus, it appears that a single Board of Library Trustees is sufficient, regardless of whether the acceptance of the donation results in an expansion of the current library or the establishment of a second, separate library. However, regardless of whether libraries are operated independently, the Stowell Library will continue to exist, absent a *cy pres* petition (see discussion below).

Question: What would be the process to discontinue a library that is established by the proposed donation?

Answer: The answer may depend on the specific terms of the donation. Some of the language in the draft Letter of Intent perhaps implies an intent to permit the Town to sell the property in the future (e.g. in 20 years), which in turn implies that the Town would not be required to use the property as a library indefinitely. The Town needs to clarify the donor's intent in this respect, and we are suggesting redlined changes to the Letter of Intent to help clarify. It may be possible to structure the donation in a manner that avoids the need for a *cy pres* petition in the future, if the donor is willing to cede to the Town some control of her gift.

Otherwise, in general, a library that is established by donation may only be discontinued judicially by means of a *cy pres* procedure. RSA 202-A:18 would not apply to discontinuance of the Stowell Library or, probably, to the future Cornish Library and Community Center. RSA 202-A:18 states: "The provisions of this section shall not apply in cases where a public library has been acquired by the town in whole or in part by donation or bequest."

Instead, RSA 31:19 applies. RSA 31:19 establishes, in part, that gifts, legacies and devises to towns for the establishment, maintenance and care of libraries are held in trust by the municipality. It has long been settled that gifts for library purposes establish a public charity (*State v. Federal Square Corporation*, 89 N.H. 538, 3 A.2d 95 (1938)), or what is more commonly referred to today as a "public trust". Once such a trust is established, its administration, including expenditure of funds, must carry out the intent of the trust. The terms of such a trust may be modified, or the trust may be discontinued, only through a *cy pres* petition.

Attorney Donovan touched on the *cy pres* process in his emails of July 27 (Appendix E) and September 24, 2021. We agree with his opinion that if the use of Stowell Library building (or a library in the General Store) is changed or abandoned in the future, a *cy pres* action would be required.

In order to discontinue a library, the Town would need to petition the Probate Court for dissolution of the public trust by showing that the purpose or application under the trust is or has become impossible, impracticable, illegal, obsolete, ineffective or prejudicial to the public interest to carry out (RSA 547:3-d, I). Where a trust holds assets, whether real property or funds, the petitioner would need to articulate a purpose for the sale and/or distribution of these assets that is substantially similar to the intent of the trust being dissolved or modified (RSA 498:4-a, II).

However before any such filing is made, the Selectboard is required to hold a public hearing on the matter (RSA 543:3-d, II) and vote to proceed with the *cy pres* petition. We would also recommend that the Town seek to reach agreement with the CTU on how the public trust is to be

modified, prior to the filing of a petition. Additionally, as part of the petition, the Town should plan to obtain an independent appraisal of all non-cash assets that would be conveyed out of the trust, which would become an exhibit to the Probate Court filing.

Question: In addition to assessment by a structural engineer and a state fire marshal inspection, what additional steps should the Town consider before it accepts the donation?

Answer: At a minimum, we recommend that the Town should obtain a complete title search of the property as part of its due diligence. We would also suggest inspections of the septic system, water supply and any other underground utilities that may exist. Depending on the age of the building, it may also be advisable to have an inspection for lead paint or asbestos, especially if residential tenancies are continued. If structural or other repairs are required, it may also be helpful for the Town to get an estimate of the cost of such work, as well as any costs that would be required to fit-up the building for library and community center use. We also suggest an updated valuation for the property since this will be needed in order to add a new building to the Town's Primex coverage schedule.

Question: Are there concerns with the building's septic system lying partially on the abutting property?

Answer: Generally, the location on abutting property with a properly recorded easement might not be a legal issue. However, review of the recorded easement does raise some concerns.

The easement (Appendix I) states that the plan of the septic system was to be placed on file with the "New Hampshire Department of Environmental Services, Sub-Service Division." This should actually read the "New Hampshire Department of Environmental Services, Subsurface Systems Bureau". We assume this is a typographical error. Regardless, it is important for the Town to have a copy of this plan in its files for permanent retention.

The language of the easement also states that it "shall be solely for the construction, maintenance, repair, upgrade and replacement of the Effluent Disposal System as designed and as shown on the above-referenced Effluent Disposal System Design Plan. *The easement is for the use of the Cornish General Store, the existing two bedroom apartment, the existing studio apartment and other retail space (not including restaurant use) in the existing structure*" (emphasis added).

If the Town accepts the donation, the use of the septic system will be considerably different from the use stated in the recorded easement, and it could be argued that the Town's anticipated use of the property is outside the scope of the existing easement. Therefore, we recommend that, if the Town accepts the donation, the Town should seek a new easement that would specify the Grantee as the Town, and restate the use as being for the benefit of the Town's structures located on the property. This would also provide some flexibility to the Town in the building's configuration.

Question: Does the location of the building in the Regulatory Floodplain present any legal issues?

Answer: We do not see a legal issue. However, we suggest you discuss this issue with Primex, as losses related to structures in the Regulatory Floodplain are most likely addressed in the Primex coverage document.

Donor Letter of Intent Stipulations

Question: What are the implications of the Town becoming the landlord for the currently occupied residential and commercial rental spaces in the building?

Answer: If the Town acquires the building subject to existing leases, it will step into the role of a landlord, subject to all requirements of statutes, leases and the Letter of Intent, if it remains in its current form. The decision whether to accept the property subject to the leases should include discussion of a number of considerations. It is unusual for a municipality to become a residential landlord under circumstances like this. It would be even more unusual for the Library Trustees to become landlords, to the extent they would have control of the building. We have not considered the question of whether or not the Library Trustees have the authority to lease library facilities for other than library-related uses.

Concerning the residential leases, a landlord's actions with regard to residential leases are governed by RSA 540-A and RSA 48-A:14. The security deposits currently being held by Ms. O'Neill or Cornish Flat Enterprises, Inc. (hereinafter Cornish Flat) would have to be transferred to the Town and held in an interest-bearing account. As landlord, the Town would be responsible for ensuring the tenancies are habitable and it would have to monitor that there are no lease violations. Thus, the Town assumes repair and maintenance, as well as lease enforcement, responsibilities.

Concerning the commercial leases, landlords in commercial leases are not governed by RSA 540-A, landlords still must abide by lease terms, assume repair, maintenance and enforcement responsibilities and must act reasonably.

Revision of Leases: We would recommend that the Town update and improve the leases following transfer of ownership of the property. There are certain considerations applicable to both residential and commercial leases (Appendix K). Both types of leases present insurance exposures, the extent of which is better outlined by Primex. However, we expect that a commercial kitchen would have an increased risk of loss over either a retail or office space or a residential unit. The tenant of the antique stove shop is required to maintain insurance under the lease, but limits are not stated. The Tenant of the commercial kitchen is required to maintain insurance in stated limits. The one residential lease provided does not require the tenant to maintain insurance, although it does (as do the other leases) contain a basic indemnification provision.

Property Taxes: The Town would also need to consider how it would address property tax considerations for all leases. Cornish Flat is currently responsible for payment of taxes on the property. It is possible that Cornish Flat considered the need to pay property taxes in setting rental rates. If the Town were to own the property subject to the leases, it will receive the rental payments, but without a written agreement with the tenants, the Town would not be able to assess property taxes on this private use of public property (RSA 72:23, I).

Management of Town-Owned Property: RSA 41:11-a, I addresses the Selectmen’s general authority to manage town-owned property. RSA 41:11-a, II allows the Selectmen to lease excess town property, but any lease agreement for a period of more than one year must be approved by Town Meeting. RSA 41:11-a, III, allows Town Meeting to authorize the Selectmen to enter into such leases for a term of up to 5 years without further vote of the Town. We do not have information on whether or not there has been a vote of the Town under RSA 41:11-a, III. From the leases included in Appendix I, it appears that at least one of the residential leases (Brooks) currently has a 12-month term, notwithstanding the email from Ms. O’Neill that this lease will be rewritten to have a month to month term. If the representations in this email are correct, leases with month-to month terms would be governed by 41:11-a, I, the Selectmen’s general authority to manage town property, and not by either RSA 41:11-a, II or RSA 41:11-a, III.

Obligations to Tenants During Building Renovation: If the Town were to accept the property based on the current language in the draft Letter of Intent, which would include the continuation of the tenancies, the Town would have the obligations outlined above, including the requirements of RSA 540-A and RSA 48-A:14. Failure to meet these obligations may be a violation of the warranty of habitability, which is referenced in the statute (RSA 540-A:4; RSA 130-A:18; RSA 540:13-d, II), but is never defined. While this usually applies to such matters as the property meeting building and life safety code requirements, providing heat and access to utilities, a landlord may also be liable for disruptions such as those caused by construction, excessive noise and strong odors, often referred to as a warranty of quiet enjoyment (RSA 540-A:2). The New Hampshire Supreme Court has distinguished the concepts of “habitability” and “quiet enjoyment”, with the ability to safely dwell in a leased premises (*Crowley v. Frazier*, 147 N.H. 387, 389, 390, 788 A.2d 263 (2001)) being separate and distinct from the ability to dwell in a leased premises without disturbance (*Echo Consulting Services v. North Conway Bank*, 140 N.H. 566, 571, 669 A.2d 227 (1995)). Thus, if construction activities made it impossible to continue living in a tenancy, the disturbance might rise to a violation of the warranty of quiet enjoyment. However, regardless of the underlying legal theory, if tenants are forced by the landlord’s actions to vacate leased premises, the landlord would likely be responsible for damages to the tenants, the level of which would depend on the facts and circumstances of each tenant and which could include the cost of alternative living arrangements.

Special Revenue Fund: RSA 31:95-c, I allows the legislative body of a town to establish a special revenue fund to restrict all or a portion of future revenues from a specific source for expenditures for a specific purpose, with both revenues and expenditures of these special funds to be accounted for separately from the general fund. It should also be noted that RSA 31:95-c, IV states: “The provisions of this section shall be limited to those town activities funded primarily through user fees including, but not limited to, municipal airports and solid waste facilities.” More details of the final transaction are necessary in order to determine whether the rental income would be attributable to the library. However, if the Town were to vote to establish a special revenue fund for revenue from the rental units in the building, a purpose for the expenditure of these funds would also need to be established.

Question: Which governing body should manage the commercial and residential spaces, the Library Trustees or the Selectboard? Are considerations different if the building is entirely under

the control of the Library Trustees, as opposed to the operations of the building being divided between the Library Trustees and the Selectboard?

Answer: There are pros and cons to either arrangement. We generally agree with NHMA's conclusion that either arrangement could be made to work. However, we are not aware of a circumstance where Library Trustees manage a property that is not used for library purposes. Tenants and private leases of public property are more commonly managed by selectmen, if done at all. On the other hand, dividing management of different areas of a single building between two boards would also be a complex task. It may be difficult to clearly define who has which responsibilities and financial obligations. In our opinion, this is more a policy, as opposed to a legal, decision.

Our impression of the draft Letter of Intent is that the donor might be willing to accommodate the Town's desires on this point.

Question: Does the wording of the Letter of Intent limit the Library's hours of operation?

Answer: The wording, as-is, may cap the Library's hours of operation, but it may also require a minimum of 40 weekly hours of operation within 5 years of the Library's opening. We are recommending clarification of this language.

Future Use of G.H. Stowell Free Library

Question: Under what circumstances would a *cy pres* or other legal action be required?

Answer: Mr. Stowell's donation established a trust, which may only be modified or discontinued by a petition for *cy pres* filed in Probate Court. The need for such a petition will likely depend on the intentions of the Town for the use of the building. We generally agree with Mr. Donovan's views in this regard.

Although there does not appear to have been an actual document that establishes the intent of the Stowell donation of the Stowell Free Library building, the record indicates that Mr. Stowell built the library building at his own expense, donating it to the Town to be used as a Library (Appendices L, N and O).

Based on the information provided, a *cy pres* petition would be required if the use of the Stowell Library building were to be discontinued as a library. This would be required whether or not the Selectmen were to subsequently keep control of the building or if they decided to sell it. Loaning the entire Stowell Library building to the Historical Society would also require a *cy pres* petition, as the Stowell Library building would apparently cease to be used as a public library, contrary to the apparent intent of the donor.

If the Library Trustees continue to use the building for library purposes, but allowed another charitable organization, such as the Historical Society, to use a portion of the building, a *cy pres* petition might still be required. RSA 202-A:2 defines "public library" as providing "regular and currently useful library service to the public without charge." The degree to which "regular and currently useful library service to the public" would be provided by using the Stowell Library for

storage is an open question without more detail. Use of the Stowell Library in conjunction with a new library may not require a *cy pres* petition so long as the Stowell Library continues to meet the statutory definition of a public library.

Question: Is the trust fund bequeathed by George H. Stowell restricted to support of the Stowell Library?

Answer: Yes. The \$10,000 left to the Town by George H. Stowell's will was left in trust for the exclusive use and support of the George H. Stowell Free Library.

Mr. Stowell's will (Appendix R) states: "I have erected a Library in the town of Cornish, my native placed, known as the 'George H. Stowell Free Library' and I now give and bequeath the sum of ten thousand dollars (\$10,000) as a fund to support and maintain said Library..." Our interpretation of this language is that it shows an intent for these funds to be used solely for the building "known as the 'George H. Stowell Free Library..." Mr. Stowell's will further states that these funds are "to be safely and securely invested by said town and the income only to be used for such support, under the direction of the Selectmen of said town and the Library Committee." RSA 202-A:22 allows the entire income of such a donation to be paid over to the Library Trustees, to be expended by the Trustees under powers accorded by RSA 202-A:11, IV.

If the Trustees want these funds to be used for any other purpose than the support and maintenance of the Stowell Library, a *cy pres* petition would be required to modify the terms of the trust, using the standards outlined above.

Question: May funds be appropriated from the Library Capital Reserve Fund to support either the Stowell Library or the proposed new library?

Answer: It is not clear from the information provided if the Library Capital Reserve Fund is limited to expenses related to the Stowell Library.

Although the Annual Meeting Minutes for 2000 (Appendix X) indicate discussion of expenses related to the Stowell Library, there does not appear to be any limitation in the wording of the warrant article to create the Library Capital Reserve Fund to this particular library building. Additional information would need to be developed, including record of any expenditures from this Fund and any interaction with the New Hampshire Department of Revenue Administration to determine if expenditures from this Fund are intended only for the Stowell Library building.