

STATE OF NEW HAMPSHIRE

MERRIMACK, SS

SUPERIOR COURT

In re: Dunbarton School District

Docket No. 217-2018 CV 379

MOTION TO DISMISS AND OBJECTION TO  
PETITION FOR A SPECIAL DISTRICT MEETING

We, the undersigned, as residents of the town of Dunbarton, object to the Dunbarton School District's ("the District") request for a special district meeting. The District alleges it inadvertently overcollected taxes for tax years 2007-2014 because accounting errors caused unspent funds to accrue. It alleges that the discovery of the accumulated overcollections—totaling more than \$1 million—is an emergency that justifies a special meeting to spend the accumulated overcollection. Having excess unspent taxpayer funds is not an emergency within the meaning of RSA 197:3. Therefore the Court must dismiss and/or deny the District's petition and allow the excess property taxes to be used to reduce the December 2018 property tax bill as required by law.

INTEREST IN THIS LITIGATION

The undersigned are longtime residents of the town of Dunbarton. We own property and pay taxes within the District. Although a general interest in the government obeying the rules is not sufficient to confer standing on a taxpayer, when "taxpayer has a sufficiently personal and concrete interest" in the suit, they can have standing.<sup>1</sup> It is undisputable that our tax bill will be affected if either of the warrant articles proposed by the District is adopted at a special meeting.<sup>2</sup> Thus, we have a "personal and concrete interest" in the outcome of this litigation. Therefore, we have standing to object to the District's request for a special meeting.

FACTS

For a long time, the District had an agreement with SAU # 19 for the secondary education of students in the District.<sup>3</sup> In 2014, the District discontinued that agreement and entered into a new agreement with SAU #67.

However, from 2007 to 2014, SAU # 19 had accounting errors that caused unspent funds to accumulate in accounts for the towns participating in the SAU. An audit of finances of SAU #19 in 2017 found these funds for the two other towns that were still part of that SAU had errors and there was significant funds in the unspent account. Those towns notified their residents and subsequently allowed the funds to remain in the unspent account and through the process of the DRA adjusting the

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<sup>1</sup>*Duncan v. State*, 166 N.H. 630, 648 (2014).

<sup>2</sup>Paragraph 35 of the District's petition alleges 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 \$300,000.00 to drop by nearly \$1000.00."

<sup>3</sup>We largely agree with the petition's statement of facts. We write this to provide clarity and note a few things omitted. A specific paragraph by paragraph answer to the petition's factual statements is attached as exhibit A.

tax rate, allowed the excess funds to offset the July 2018 taxes.

The audit did not include the [Dunbarton] District because it had already switched SAUs.

The District then commissioned its own audit. Its report, showing the \$1 million excess funds, was not released until June 2018. However, at the regular annual meeting in March 2018 of the District, District officials mentioned the audit and the potential for significant excess [ $> \$600,000.00$ ] funds to be found. However, no one proposed a plan for dealing with the excess of overcollected taxes in the foreseeable event the audit revealed the District had accumulated overcollections in the same way Goffstown and New Boston did.

The towns of New Boston and Goffstown experienced that same series of events that caused an overcollection of taxes and subsequently allowed the funds to remain in the unspent account and returned to the taxpayers. The letter from the accounting firm shows these amounts as \$9.1 Million for Goffstown and \$1.1 Million for New Boston<sup>4</sup> and these amounts are similar in magnitude to the excess taxes collected for the residents of Dunbarton. The District alleges that harm will come to the residents of the town, however, the other two towns that were part of SAU # 19, with larger populations, have already addressed this issue without holding a special meeting.

### DISCUSSION

The District should not be permitted to conduct an end run around the annual meeting to correct for its overcollection of taxes when it had sufficient reason at the time of the annual meeting to believe that such an overcollection had likely occurred. The legislature has plainly indicated that school district appropriations ought to be made at the annual meetings.<sup>5</sup> Only two exceptions are permitted and one is not directly implicated by this case. The non-relevant case is where the meeting is called by the members of the town and in that case, the quorum for action is 50% of the actual voting members of the district.<sup>6</sup> For the relevant exception, only in an emergency after a special meeting approved by the superior court may the district make an appropriation not at an annual meeting.<sup>7</sup>

### THE ACCUMULATION OF OVERCOLLECTION OF TAXES DUE TO ACCOUNTING ERRORS IS NOT AN EMERGENCY WITHIN THE MEANING OF RSA 197:3 THAT WOULD JUSTIFY APPROVAL OF A SPECIAL MEETING WHEN SCHOOL DISTRICT OFFICIALS HAD REASON TO BELIEVE AT THE ANNUAL MEETING THAT AN OVERCOLLECTION HAD OCCURRED.

This Court may approve a special school district meeting for appropriating money only if an emergency exists.<sup>8</sup>

Although an emergency need not always involve a crisis, it must be a “sudden or unexpected situation or occurrence.” Here, the School Board members were aware of the accounting anomalies at the time of the annual meeting and had already hired an accounting firm to investigate the errors. Therefore, the accumulated overcollected taxes cannot be a “sudden or unexpected situation” to find an emergency exists.

Moreover, an emergency must also be “serious and urgent” and “demand prompt or immediate

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<sup>4</sup>SAU19\_Audit-Findings\_Press\_Release\_12-15-17.pdf

<sup>5</sup>*In Re: Appeal of Mascoma Valley Regional School District*, 141 N.H. 98, 100 (1996).

<sup>6</sup>RSA 197:3 I(a).

<sup>7</sup>RSA 197:3.

<sup>8</sup>RSA 197:3 I(a).

action, including an immediate expenditure of money.”<sup>9</sup> The District held the annual meeting in March 2018 as required by law and there have been no changes to the school finances that would constitute an emergency. The Dunbarton school system was properly and fully funded by voters who participated in the 2018 Annual Meeting. There is no “serious and urgent” harm to be avoided. There is also no immediate need to expend money. Although the District proposes to immediately transfer the funds to another account, this is not an “immediate expenditure of money” as contemplated by the statute. The warrant articles proposed by the District do not immediately expend funds, they merely transfer the funds to other accounts to be spent over the course of many years.

Further, five factors must guide this Court when deciding whether an emergency exists:

- (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 requiring an appropriation.<sup>10</sup>

The District has failed to even allege sufficient facts to support four of these factors. Although we concede that if the other factors were met the request would be urgent—only because if the other factors were met any meeting would have to take place before the overcollected taxes are returned to the people—the remaining factors require this Court to reject the District’s contention that an emergency exists. The District has not alleged a serious or severe harm to be avoided. The claimed emergency was not only foreseeable and avoidable, but foreseen by the District when School Board officials mentioned at the annual meeting that it was expected the audit would reveal an accumulated overcollection of taxes. The issue could have been addressed at the annual meeting through a conditional warrant article. Finally, the statutory default provision in these circumstances—returning the overcollection to the taxpayers—is an adequate alternative that does not require a special meeting.<sup>11</sup>

**1. The alleged harm the District seeks to avoid is not serious or severe.**

The Court must consider the severity of the harm to be avoided. Here the alleged harm caused by the accumulation of overcollection of taxes is that the tax bills will swing dramatically if that overcollection is returned to the taxpayers in a single tax cycle. This is not serious as the residents themselves are the best judges of how to use the money and not the town. Additionally, the two other towns that were impacted by this accounting error already returned the funds to the residents without going through a special meeting. This demonstrates that other towns have been able to allow the overcollection to be returned without serious harm to taxpayers.

Moreover, at the annual meeting, all the appropriations were made that the District needs. No program will go unfunded and no student will be denied access to a publicly funded education if the Court finds that no emergency exists. Thus, there is no harm, let alone a serious or severe harm, to the District to be avoided by holding a special meeting.

Lastly, money that remains in the hands of the District would not be returned to the rightful

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<sup>9</sup>RSA 197:3 I(b).

<sup>10</sup>RSA 197:3 I(c).

<sup>11</sup> Technically, the return is accomplished by reporting the funds to the Department of Revenue Administration so that the funds are taken into account in the tax rate setting process, resulting in a lower tax rate for the tax year.

owners who overpaid taxes and said funds could potentially be given to residents that move into the town who did not pay the excess taxes.

Therefore, this factor favors this Court finding that no emergency exists within the meaning of RSA 197:3.

**2. There is an urgency for the Court to respond.**

There is a critical timeline for the DRA to develop the tax rates for the 2019 tax year and therefore we concur that there is an urgency to the request.

**3. The claimed emergency was not only foreseeable, but was foreseen by the district before the annual meeting.**

The District was aware of the outcomes of the other towns within the SAU and correctly voted to have an independent review of the accounting completed while we were members of SAU # 19. Additionally, the school board members discussed during the Annual meeting there was a likelihood that there would be excess funds from the accounting errors that impacted SAU # 19. The audit letter from SAU #19 notifies the residents of Goffstown and New Boston that there was an accounting error, and said audit revealed that the money was in the schools accounts and that the money could have been applied to reduce the taxes in both districts:

“The year-end fund balance amounts reported to the School Boards, tax rate setting authorities, and taxpayers were underreported and money was retained on the school districts’ books and in the bank

A series of reporting errors within the SAU 19 Business Office resulted in an accumulation of surplus money that could have been applied to reduce taxes in both districts “

The report also notes the amount of the accounting error for both towns.

“...The reporting errors to the State of New Hampshire and the improper returning of money for tax relief at the end of fiscal year 2017 has resulted in the cumulative collection and retention of approximately \$9.1 million since the fiscal year beginning in July of 2011 for the Goffstown School District.

In New Boston, the annual audit is currently in process. It appears that the same reporting errors were made resulting in the retention of approximately \$1.1 million that could have been applied for tax relief.”<sup>12</sup>

Because the alleged emergency was foreseeable, this factor favors this Court finding that no emergency exists within the meaning of RSA 197:3.

**4. The District could have addressed the issue at the annual meeting but no provision to deal with the accumulated overcollection of taxes was made at the annual meeting.**

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<sup>12</sup>SAU19\_Audit-Findings\_Press\_Release\_12-15-17.pdf

The District drafted several warrant articles and worked to make sure that the existing funds in the capital reserve account were applied to the total project cost to reduce the bond amount. The District and the voters also fully funded the budget at the annual meeting and also voted to raise and appropriate the sum of \$2,273,310.00 for the purposes of an "...addition and renovation to the Dunbarton Elementary School." . With little effort and foresight, the language of the warrant articles could have been drafted to anticipate the excess funds being available and could have been used to offset the payments out of the capital reserve account. Although the District was aware of the likely result of excess funds having been collected during the 2007-2014 timeframe, no provisions were made in the warrant articles.

Because the accounting errors and associated accumulation of overcollected taxes could have been addressed at the annual meeting through a contingent or conditional warrant article, this factor favors this Court finding that an emergency does not exist.

**5. *Returning the accumulated overcollection of taxes to the taxpayers is a sufficient alternative remedy that does not require an appropriation.***

Current statutes already create a simple process for addressing excess taxes being collected. The municipal budget law requires that any excess funds remain in the unspent fund.<sup>13</sup> These funds are then taken into account when the Department of Revenue Administration oversees the District's setting of the tax rate. Unspent funds are used to offset the taxes that must be collected in a given year. As the District acknowledge in its petition, if a special meeting is not held and the funds are not otherwise appropriated, the accumulated overcollected taxes will be used to offset the tax rate for this year. In effect, the overcollected taxes are returned to the taxpayers by lowering the taxes they are required to pay for the next tax period. Goffstown and New Boston are already using this method to return the overcollection to the taxpayers, and the District has not suggested that it is causing problems in these towns.

Because returning the accumulated overcollection of taxes to the taxpayers is an alternative remedy that will occur without a special meeting, this factor favors this Court finding that no emergency exists.

### CONCLUSION

The accumulation of the overcollection of taxes is not a serious emergency justifying a special school district meeting to spend the overcollected taxes. Four of the five statutory factors favor finding that there is no emergency justifying a special school district meeting. The school district knew—at the annual meeting—there had likely been an accumulation of overcollected taxes. This alleged emergency was entirely foreseeable and should have been dealt with at the annual meeting. There will be no serious harm to the taxpayers or the District without a special meeting. The overcollected taxes are returned to the taxpayers and the District will still have all of its programs funded as provided for at the annual meeting. Therefore this Court should find that an emergency does not exist.

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<sup>13</sup>RSA 32:7

PRAYER FOR RELIEF

WHEREFORE, the residents of the town of Dunbarton respectfully requests this Court:

- A. Find that the district has not alleged a sufficient emergency to justify a special meeting and dismiss, without a hearing, the Districts petition.
- B. In the alternative, hold an evidentiary hearing on whether an emergency existed pursuant to RSA 197:3 I(b) & (c) and then deny the petition when the evidence at the hearing demonstrates a lack of an emergency.
- C. Grant such other relief as is just and proper.

Respectfully submitted:

_____ JR Hoell 32 Ordway Road Dunbarton, NH	_____ 7 Stark Hwy South Dunbarton, NH
_____ Charlene Hoell 32 Ordway Road Dunbarton, NH	_____ Scott Andrews, 10 Stark Hwy South Dunbarton, NH
_____ Thomas Montgomery, 11 Robert Rogers Road Dunbarton, NH	_____ Debra Andrews 10 Stark Hwy South Dunbarton, NH
_____ Kaelyn Montgomery 11 Robert Rogers Road Dunbarton, NH	_____ Dean Jore 63 Old Hopkinton Road Dunbarton, NH
_____ David Montgomery 7 Stark Hwy South Dunbarton, NH	_____ Debbie Jore 63 Old Hopkinton Road Dunbarton, NH
_____ Linda Montgomery	_____ Francis Hull 39 Old Hopkinton Road Dunbarton, NH

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Dan Troy  
58 Winslow Road  
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Gregory Arce  
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Brad Klements  
48 Mansion Road  
Dunbarton, NH

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Stephanie Klements  
48 Mansion Road  
Dunbarton, NH

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Scott and Deb Aubrey  
32 Stark Lane  
Dunbarton, NH

#### CERTIFICATION

I, JR Hoell, Resident of Dunbarton, hereby certify that on this day, the 11<sup>th</sup> of July, I have hand delivered this document and supporting exhibits to the the office of the Superintendent of SAU #67

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By JR Hoell, July 11th

## EXHIBIT A

We respond specifically to the factual allegations in paragraphs 2–24, 32–33, and 51–52 of the District’s petition below. The remaining paragraphs are legal conclusions that do not require a specific paragraph by paragraph response and are thus denied.

2. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED.  
However, we would note that all of the mailings from the Dunbarton School Board have been addressed from “20 Robert Rogers Rd. Dunbarton, 03046” address including the mailing regarding the notice for the public forum to discuss this excess funds.
3. Admitted.
4. Admitted in part. The District entered into an AREA agreement specially with the towns of Goffstown and New Boston.
5. Admitted.
6. Denied. The School board was still the elected governing board, accountable to the voters and accountable for the actions of the delegated authority to the SAU. Under RSA 189:28-a, it is clear that the School Board is responsible for publishing an audited financial statement on an annual basis.  
“189:28-a Report to the Public. –  
I. School boards shall publish in the next annual report, or post at the annual meeting, the general fund balance sheet from the most recently completed audited financial statements or from the most recently completed financial report filed pursuant to RSA 21-J:34, V.”
7. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED. The School board is still the elected body accountable to the residents for oversight of the financial affairs of the District and they would be have the first hand information to make this claim. We believe that the School board is the taxpayers representative and therefore is accountable for what the SAU does.
8. Admitted.
9. Admitted in part. The municipal budget law under RSA 32:7 also requires that all “All appropriations shall lapse at the end of the fiscal year and any unexpended portion thereof shall

not be expended without further appropriation, ..." These funds have not been appropriated and therefore shall lapse.

10. Admitted in part. In fact the issue is even greater as the annual meeting is the only means for raising an appropriating money unless an emergency exists and the Superior court agrees.
11. Admitted in part. The process of returning excess funds through "an offset on funds raised through general taxation" is a statutory standard and was the process used by the other two school districts that were affected by this accounting error. These towns had accrued excess tax money similar in size to the funds that Dunbarton has stated in their petition.
12. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED. The Reports during this time period are either inaccurate or incomplete. In either case, that District was responsible and the DRA was working on inaccurate information when the tax rates were determined.
13. Denied. At least two other towns were impacted by this error and both of those towns returned the excess unexpended funds via the process laid out in statute. Additionally, a "wild swing" in the tax rate is insufficient cause to warrant the requested meeting. There has been no emergency that required the District to spend money above and beyond what was allocated during the annual meeting.
14. Admitted.
15. Admitted
16. Admitted
17. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED. We have not reviewed the reports and the audited statements and therefore cannot support at this time this statement as fact.
18. Admitted.
19. Admitted.
20. Denied. The Members of the school board were aware of the potential of an error in the accounting that could be financially favorable to the residents of the town. Conditional warrants could have been drafted.
21. Denied. By the close of the annual meeting, it was made clear that a significant amount of money was potentially being returned to the taxpayers. This was AFTER the bond was approved.

22. Admitted in part. The annual meeting also approved a large capital improvement to the buildings.

23. Denied. The District was aware of a significant amount of excess funds and although they may not have been aware of the exact dollar amount, they knew enough to begin discussions regarding the plan for a special meeting during the school board meetings prior to the June 7<sup>th</sup> date. Additionally, it has been reported that during the Annual meeting, a member of the school board noted that we expected to receive in excess of \$600,000.00 however we do not have that documented.

24. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED. We need to review the minutes and the reports from the auditor and their findings.

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32. Admitted in part. At the March 2018 Annual meeting, the District also voted raise and appropriate the sum of \$2,273,310.00 for the purposes of an "...addition and renovation to the Dunbarton Elementary School." This project included fixing a number of the deficient issues within the school building eliminating the need for this to be an "emergency".

33. Admitted.

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51. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED. We have not seen evidence of compliance with the statutes regarding the process.

52. We have insufficient knowledge of the truth of this allegation and therefore it is DENIED. We have not seen evidence of compliance with the statutes regarding the process. Furthermore as outlines above, there is no emergency and therefore the request is not compliant with RSA 197:3.