

TOWN OF DERRY

Town Council  
Derry Municipal Center

April 16, 2013  
Tuesday - 7:30 PM

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**Non-Public Session under RSA 91A:3 II (c) Matters which, if discussed in public would likely affect adversely the reputation of any person, other than a member of the body or agency itself, unless such person requests an open meeting**

**Non-Public Session under RSA 91A:3 II 9 (d) Consideration of the acquisition, sale or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community**

**7:30 PM** Call to order

Pledge of Allegiance, Warning of Fire Exits, Handicap Access, Turn off all Cell Phones

Councilor Katsakiores asked for a moment of prayer for the victims and deceased of the Boston Bombing this past Monday.

**Roll Call:** Councilors Cardon, Osborne, Dimmock, Benson, Wetherbee, Katsakiores and Chairman Fairbanks

**Consent Agenda**

- 13-32** Approve Minutes – March 26, 2013
- 13-33** Approve Minutes – April 2, 2013
- 13-34** Elderly & Disabled Tax Deferrals
- 13-35** Veterans' Credits/Elderly Exemptions/Blind Exemptions
- 13-36** Schedule Public Hearing – May 21, 2013 – Authorize Town Administrator to apply for and accept grant funds from the NH Highway Safety Agency for Pedestrian Patrols and Red Light Running Patrols
- 13-37** Schedule Public Hearing – May 21, 2013 – Acceptance Of a Pavilion Structure from Derry Village Rotary
- 13-38** Schedule Public Hearing – May 21, 2013 – Barkland Acres Association Petition: Community Water System Acquisition

**Amend the minutes of April 2, 2013 Chairman's Report: Chairman Fairbanks and Councilor Osborne will meet with Auditors on April 15, 2013. Remove Councilor Cardon.**

**Accepted**

**Chairman's Report** – Michael Fairbanks

Boards / Commissions / Committees – There are openings. He read the list and Chairman Fairbanks urged the public to apply for Boards and Commission. Applications are online as well as a list of openings.

Councilor Fairbanks asked the Town Administrator if he has heard from Pinkerton Academy in regarding to a Councilor liaison for the school. Mr. Anderson stated has heard back and this has been approved.

Per a request from Ms. Martin, handouts for public meetings will now be available online. This information will be on the internet and will remain on there until the next meeting.

Public Forum – Everyone will be allowed to speak as long as it keeps moving and is non-repetitive; please hold speaking to three (3) minutes. During the public forum, all actionable items and questions will be address at the Councils next meeting.

Our Fire Department's Bill Rutherford has been nominated as 2013 Emergency Service Provider of the Year by the VFW. Mr. Anderson stated that a Public Works Employee and a police officer will also be recognized.

**Town Administrator's Report** – John P. Anderson

He also sends his condolence as well as prayers and thoughts for the people at Boston Marathon. Mr. Anderson stated that he has worked in the past at the finish line.

\*\*\*\*\* Weather permitting, work will begin at Manchester Road on Monday, April 22<sup>nd</sup>.

\*\*\*\*\* Household Hazardous Waste Day will be held on Saturday, May 11<sup>th</sup> from 8AM to 12 Noon at West Running Brook School.

From April 13<sup>th</sup> through the 20<sup>th</sup>, the Go Green Committee will be sponsoring 'Clean-Up week'. Blue trash bags are available at the Transfer Station. There's a link on town's website "Go Green" for more information.

The Town has expanded street sweeping clean up onto side streets surrounding the town.

The Budget Review Workshops begin at 7pm on Thursday, April 18<sup>th</sup>. The schedule is as follows:

Monday 4/22, Thursday 4/25, Tuesday 4/30, Public Hearing Budget & CIP 5/2, 5/6 Review if needed. Adoption of Budget and CIP 5/14/13

**Public Forum – Non Agenda Items**

**Motion Open Public Forum**

**Vote: 7-0-0**

Richard Tripp & Phil Bruno, Windham Rd – There is a rooster situation and residents are being woken at 2:00 am. They asked who would be getting back to them. Mr. Anderson will review email and get back to him.

Citizen Speakers: Aimee Huntemann, Dorothy Peters, Trina Brand, Mark Reimer, Arian & Ashley Miller (children), John Bridge, Terri King, Candace Andrews, Paula Hurley, Emily Pearson & daughter, Girl Scout Troup, Ray Fontane, Anna Controis, Cecil Cormier, Kelly Mahoney and her three children, Michelle Pifer, Gina Hutchinson, David Williams, and Christine Lane, Susan Mitchell– These citizens all spoke on the community spirit, what this small library has meant to them as children and now parents of children, the good it has done for children with disabilities, the quaintness and small town feel. Gina Hutchinson gave a history of what's been lost in Derry & the fact that this library is one of the few historical gems left in town. Ms. Pearson brought a sign, Terri

King, brought pictures colored by children ages 4 – 68. A petition to keep the Library open was signed by 300 residents and given to the Town Clerk. All these residents asked for consideration to keep the Taylor Library open with funding.

Steve Trefethen North Shore Rd – is offended the way Councilor Osborne was treated at last meeting. He also stated that taxes are arising out of control.

Brenda Willis, Maxwell Dr. – is in full agreement to keep Taylor library open. She praised the plow truck driver who does Maxwell Dr. She receives calls regarding the wonderful job our Fire department does for people.

Councilor Katsakiores asked Linda Merrill, Taylor Library Director, what the library hours were. They are 35 hrs. per/ wk. Monday and Wednesday 10-5pm, Tuesday, Thursday 12-8pm and Friday 10-3pm

Councilor Wetherbee stated he has never seen a public outpouring like this in his 5 years on the Town Council. He doesn't believe there is a consensus to close the Taylor Library and he asked that the Council elevate the fears of these people and take a consensus vote. Those in favor of not closing the Taylor Library were Councilors Benson, Wetherbee, Katsakiores, Cardon and Dimmock. Councilors Osborne and Fairbanks want to look both sides on the budget.

**Motion Close Public Forum**

**Vote: 7-0-0**

**Public Hearings -**

**13-24**

Sign Ordinance - To amend Article II, Word Usage and Definitions, Section 165-5, Definitions, to amend the definitions for Flashing Signs, Projecting Signs and Window Signs and to add definitions to define the following: Advertising Device, Billboard, Marquee, Sign Permit, Abandoned Sign, Awning Sign, Directional Sign, Digital Sign, Electronic Message Center Sign, Government Sign, Ground Sign, Interactive Digital Sign, Non-conforming Sign, Off Premise Sign, Residential Neighborhood Identification Sign, Sandwich Board Sign, Special Event Sign, Unsafe Sign, Wall Sign and Warning Sign

To amend Article VI, District Provisions, to repeal the following sections of the Article and to renumber them accordingly; Section 165-32.2.E, General Commercial III, Section 165-34L, Office Business District; Section 165-37G.3, Neighborhood Commercial District; Section 165-45D.2.f, Medium High Density Residential Special Exceptions; Section 165-45.1.C.2.f, Medium High Density Residential II Special Exceptions; Section 165-46B.2.f, Medium Density Residential Special Exceptions; Section 165-46E.5, Medium Density Residential Campgrounds; and Section 165-49H, Traditional Business Overlay District Signs

To repeal Article XII, Signs and Billboards in its entirety

and replace it with the following: Article XII, Signs, Section 165-100, Purpose; Section 165-101, General Provisions Section 165-101.1, Signs in Residential Districts; Section 165-101.2, Signs in Neighborhood Commercial Districts; Section 165-101.3, Signs in Business, Commercial and Industrial Districts; Section 165-101.4, Signs in the General Commercial III District, Section 165-101.5, Signs in the Traditional Business Overlay District; Section 165-101.6, Campground Signs; Section 165-101.7, Political Signs; Section 165-101.8, Off Premise Signs; Section 165-101.9, Nuisance Signs; Section 165-101.10, Interactive Digital Signs; Section 165-101.11, Electronic Message Center Signs, Section 165-102, Non-Conforming Use Signs, and Section 165-103, (Reserved for Future Use)

John Anderson gave an overview of the Sign Ordinance for the Town Council. George Sioras – thanked both Bob Mackey and Elizabeth Robidoux for their work on putting most of this ordinance together. He then read the background from the staff report to the Town Council.

Bob Mackey highlighted some of the additions and reasoning behind the changes to this ordinance.

**Open Public Hearing Councilor Wetherbee, seconded by Councilor Katsakiores  
Vote: 7-0-0**

Steve Trefethen, Non-Resident Business Owner – asked to include real estate signs to be 32ft and suggested there be no fee for signs under 16 sq. ft.

**Close Public Hearing Councilor Katsakiores, seconded by Dimmock  
Vote: 7-0-0**

There were some questions asked by Councilors.

***Motion to table by Councilor Osborne, seconded by Councilor Dimmock***

***Amended:***

**Motion to send this ordinance back to the Planning Board for changes discussed.**

**Moved by Councilor Osborne, seconded Councilor Dimmock**

**Vote: 7-0-0**

**13-25** Authorize the Refunding of the 2001 Municipal Center Bond

Frank Childs has been looking at bonds with financial advisors to see if there was a benefit to refinance. After reviewing, it was decided not to refinance the Ash St TIF Bond. The current rate on the Municipal Center Bond is 4.25%. By refinancing this bond the rate could be below 1.75% a potential savings of \$123,000. If approved the bond would be sold on 4/30/13.

**Open Public Hearing Councilor Wetherbee, seconded by Councilor Osborne**

**Vote: 7-0-0**

No Public input

**Close Public Hearing Councilor Dimmock, seconded by Councilor Osborne**

**Vote: 7-0-0**

**Move that the Town Council approve the attached Resolution Authorizing the Issuance of Refunding Bond Motion by Councilor Dimmock, seconded by Councilor Cardon (*Resolution read by Chairman Fairbanks*)**

**Vote: 7-0-0 (attachment #1)**

**Old Business –**

**13-30** Retirement gifts for recently retired Councilors - Report from legal counsel

Councilor Wetherbee asked how much the legal opinion cost. Mr. Anderson replied, "I do not have the bill yet".

Councilor Osborne restated his motion from 4/2/13; which was to ask for the iPad to be returned to the town.

**Move to waive Attorney-Client Privilege and make the legal opinion available to the public. Motion by Councilor Osborne, seconded by Councilor Dimmock.**

Councilor Wetherbee stated that it has been the Council's policy not to release attorney opinions to the public.

Chairman Fairbanks stated there is no legal standing that it can't be released due to transparency, unless it can damage someone or ongoing litigation.

**Vote: 4-3-0 (Benson, Wetherbee and Kastsakiores) (*Attachment #2*)**

Councilor Osborne stated in support of his motion it appears that the Town Attorney agrees the Town Council does have the authority as a resolution to ask for the iPad to be returned and he renewed his motion from 4/2/13.

There was discussion on the interpretation of the legal opinion.

**The motion is that the Town Council ask for the iPad to be returned**

**Motion by Councilor Osborne, seconded by Councilor Dimmock**

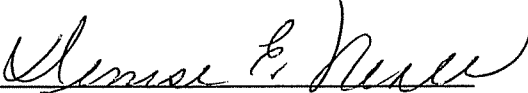
**Vote: 4-3-0 (Benson, Wetherbee, Kastsakiores)**

Chairman Fairbanks stated he will ask Mr. Chirichiello for the iPad back and if he refuses to return it, it's over and "this matter will be put to bed".

**Council Requests / Open Discussion**

None

**Adjournment 9:50 p.m.**

  
Town Clerk

5/13/13  
Date

Recorded and Transcribed by Denise Neale, Town Clerk 4/18/13  
Reviewed by John P Anderson, Town Administrator

TOWN OF DERRY, NEW HAMPSHIRE

A Resolution  
Authorizing the Issuance of Refunding Bonds  
April 16, 2013

WHEREAS, the Town of Derry, New Hampshire (the "Town") issued certain Bonds dated February 1, 2001, the outstanding principal amount of which is approximately \$1,200,000 (the "Refunded Bonds"); and

WHEREAS, the Refunded Bonds are subject to redemption on August 1, 2013, which is the next interest payment date, prior to their stated maturity; and

WHEREAS, it appears likely that bonds issued today would have a net interest cost less than the net interest cost on the Refunded Bonds; and

WHEREAS, the Town may be able to realize debt service savings by issuing certain refunding bonds (the "Refunding Bonds"), the proceeds of which would be utilized to refund or advance refund the Refunded Bonds and to pay certain other costs relating thereto;


NOW THEREFORE, BE IT RESOLVED that the Town, acting by and through its Town Council, hereby authorizes the issuance of Refunding Bonds pursuant to the provisions of RSA 33:3-d, the proceeds of which shall be utilized to refund or advance refund the Refunded Bonds, to pay the redemption premium, if any, applicable thereto, any principal and interest coming due on the Refunded Bonds prior to the Redemption Date, and to pay the costs of issuance of the Refunding Bonds, including any costs of credit enhancement; provided, however, that such refunding is only authorized to the extent that the same will achieve a net present value debt service savings in an amount equal to at least three percent (3%) of the outstanding principal amount of the Refunded Bonds; and

IT IS FURTHER RESOLVED that the Town Administrator is hereby authorized to finally approve the aforesaid refunding by entering into a Bond Purchase Contract with such bond purchaser or underwriter as they may deem appropriate in connection with the issuance of the Refunding Bonds to evidence the Town's approval of the terms and conditions of the Refunding Bonds; and

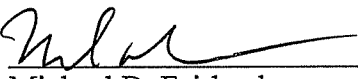
IT IS FURTHER RESOLVED that an Escrow Contract and such other documents as shall be required in connection with the issuance of the Refunding Bonds shall be signed on behalf of the Town by the aforementioned individuals, or such other individuals as may be required by state law or as may be specified by bond counsel; and

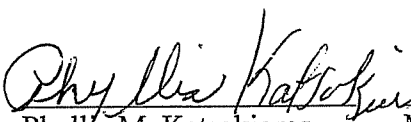
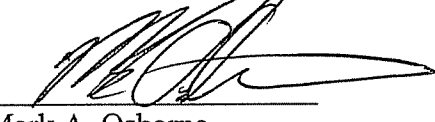
IT IS FURTHER RESOLVED that the Town is authorized to enter into such other documents, to engage such other professionals (including a Financial Advisor, Escrow Agent, Verification Agent and Paying Agent), and to do such other things as are necessary to consummate the aforesaid refunding; and

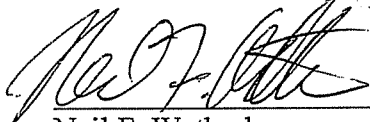
IT IS FURTHER RESOLVED that all actions heretofore taken by the Town consistent with the foregoing are hereby confirmed, ratified and approved.

  
\_\_\_\_\_  
Bradley N. Benson

   
\_\_\_\_\_  
G. Thomas Cardon      Albert M. Dimmock, Sr.

  
\_\_\_\_\_  
Michael D. Fairbanks

   
\_\_\_\_\_  
Phyllis M. Katsakiores      Mark A. Osborne

  
\_\_\_\_\_  
Neil F. Wetherbee



ATTACHMENT #2

AGENDA ITEM

# 13-30  
Date 4-16-13

**BOUTIN & ALTIERI, P.L.L.C.**  
Attorneys at Law

Brenda E. Keith

**ATTORNEY-CLIENT  
PRIVILEGED DOCUMENT**

April 12, 2013

John P. Anderson, Administrator  
Town of Derry  
14 Manning Street  
Derry, NH 03038

Via e-mail

**RE: Gifts and Surplus Property**

Dear John:

You asked the firm for a legal opinion on several issues involving the gift of a Town-owned I-Pad to retiring Town Councilor, Brian Chirichiello. This involves several factually related questions that implicate two distinct areas of the law: gifts to present or former Town employees and the disposal of a municipality's surplus property. The questions include, i) whether a municipality has the authority to gift Town property to retiring governmental officials ii) whether the Town can require Councilor Chirichiello to return the I-Pad iii) whether a vote by the Legislative body to require the return of the I-Pad can be enforced; and iv) whether a change in policy may be applied retroactively.

I find no explicit authority granting the Administrator or Council the power to gift Town property. There is, however, implicit authority for the legislative body (the Council) to appropriate funds for public purposes and, in the Town's existing procedures for the disposal of Town owned personal property. As to whether the Council can require the return of the I-Pad, the Town might be able to recover it through a civil action if there was no voluntary compliance with the request to return it. This is not likely to be cost-effective or practical. I do not think there is any ground to consider that this involves any form of misappropriation. Given the facts above, proceeding along those lines could not be undertaken in good faith. Finally, any change in an Administrative Regulation cannot be applied retroactively.

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With Offices in Meredith, NH and Fairfield, Conn.  
• 603.432.9566 • 603.432.7419 (fax)  
bkeith@boutinlaw.com

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### Background

I understand that there is an established tradition of giving remembrance gifts to retiring Councilors, going back to at least February of 2004. This tradition was assumed to be known to the Council when these gifts were made during the intervening years and it appears that the presentations were made in public during the Councilor's last meeting and acknowledged by or made by the Council itself.

I further understand that the budgetary line item used to expense the chairs was and is "supplies." I understand that the idea of substitute gifts began last year, when Councilor Coyle asked for his name to be placed on a bench on Town property rather than receiving a chair. Councilor Fairbanks requested the gift be reduced to an equivalent sum of money and donated to a charity she designated.

The I-Pads were purchased through an appropriation of the Town Council on June 19, 2012. In the case of Brian Chirichiello, retiring District Four Councilor, he asked that, in lieu of the traditional chair, he be allowed to pay the difference of the cost of the I-Pad over the cost of the chair in order to keep the I-Pad. The Administrator indicated to the Council during the April 2, 2013 Council meeting, that he had determined that, with three I-Pads "on the shelf," the I-Pad Councilor Chirichiello had been using was surplus property. He approved the substitute gift. Thus, an analysis of this gift is as one of surplus property disposal, not as one of misappropriation.

### Gifts of Town Property

Generally, municipalities have only the powers that are delegated to them by the state. 14 Loughlin 20, §741 (limits on Municipal Powers) RSA 31:4 grants towns to appropriate sums of money as the legislative body judge necessary "for any purpose for which a municipality may act if such appropriation is not prohibited by the laws or by the constitution of this state." RSA 31:4. Although there is a Constitutional prohibition against making gifts to for-profit corporations, *Opinion of the Justices*, 144 N.H. 374, 378 (1999), there is no specific prohibition against making gifts to individuals. Appropriations, however, must be for a public use. Although one might argue that a token gift commemorating public service is a public use of funds, towns certainly do not have unfettered authority to gift town funds.

In this case, the Administrator followed a pre-existing tradition of giving a gift to a retiring public servant. Although the Council, as the legislative body with the power to appropriate, apparently made no specific appropriation for gifts or the like, the Administrator made the decision to allow for the a substitute gift. We advise that, going forward, no gifts should be made without a

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specific appropriation for the same. This may also be done by appropriating a small discretionary fund.<sup>1</sup>

### **Disposal of Surplus Town Property**

The general rule is that municipal property held in its governmental capacity, i.e., for public use, cannot be sold without legislative authority, but must be devoted to the uses and purposes for which it was intended. 10 E. McQuillin Municipal Corporations §28.37 (3d ed. 1981). However, under RSA 31:3, general powers granted to cities and towns, "Towns may purchase and hold . . . personal [property] for the public uses . . . and may sell and convey the same. . . ." Although there are specific statutes governing the disposal of real property owned by a municipality, there is no specific statute governing the disposal of town owned personal property (personalty).

Because the Town has adopted the Manager-Council form of government under RSA 49-D, the manager has the powers of an RSA Chapter 37 Town Manager. Among them is the power of "supervision of the property and business affairs of the town and of the expenditure of moneys appropriated by it for town purposes. . ." RSA 37:5. The Council can, by ordinance, expand those powers under RSA 37:6 IX. Provisions of the Charter may also be applicable.

The Town's Charter in Section 8.6 (E) charges the Town Administrator with the duty of tracking inventory, and (F) with the responsibility for purchasing supplies, material and equipment for all departments and activities of the Town. The Charter does not set out a procedure for the disposal of Town personalty. The Administrative Code sets out a detailed procedure for the disposal of real property, tracking the statutes, but the Code is also silent as to the disposal of Town personalty. The Code is a town ordinance adopted by the Council from time-to-time.

In relevant part, the Code grants the Town Administrator the power to adopt Administrative Regulations. Section 5.5 states:

The Town Administrator may issue administrative regulations that shall promulgate detailed procedures, policies and programs of the Town to supplement this Administrative Code. These regulations, together with the Administrative Code and any other standard operating procedures established by subordinate departments, must conform to the requirements of the ordinances of the Town of Derry, the Town's collective bargaining agreements with its employees and all other applicable state and federal law.

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<sup>1</sup> This would be consistent with the broader authority given Town Managers in RSA 37.

The Town of Derry – Administrative Regulation, effective 10/1/1999, does set out a procedure for disposing of town owned personalty. The Regulation, entitled, “Subject: Surplus Material Policy,” sets out in Section II, the definition of surplus material stating that “Any property, items, equipment or vehicles owned or held by Town Departments that retains value of (sic.) usefulness after it is replaced or no longer needed.” The Policy then sets out a detailed procedure to dispose of surplus property. However, Section V sets out an exception as follows: “The Town Administrator or Town Council may waive the requirements of this policy if Town interests are better served through other negotiations or processes.” Although limited, this exception allows the Administrator or the Council to waive the processes if he or she deems that the Town interests are better served otherwise. We are not expressing an opinion on whether it is in the best interest of the Town to give gifts of surplus property to a departing Councilor but, based on the facts in this matter, it appears that the Administrator has the power to waive the regulation. It may be that the Council will adopt a Code provision clarifying the disposition of surplus property. This process should recognize, however, that surplus property often has only nominal value and the cost of disposition should be considered in making the procedure practically sound.

#### **Return of Town property**

I now turn to the next question posed, which is whether the Council can move to “order” the return of the I-Pad. Please note that this is distinct from adopting a new policy and retroactively applying it. The Council has no jurisdiction to order Mr. Chirichiello to do anything. At best, it has the power to order a town official to take such measures as are legally available to recover the I-Pad. If the Council were intent on enforcing a return of the gifted property, that official could take civil action against Mr. Chirichiello on behalf of the Town—assuming he refuses to voluntarily return it. The Council would have to establish that the Administrator had no authority to make the gift, given that no specific appropriation was ever made. The defense would be that this was a gift, which the Administrator had the right to make under the surplus property regulation. I cannot recommend this course of action as being cost effective or likely to succeed.

#### **Retroactive Application of Amended Procedure**

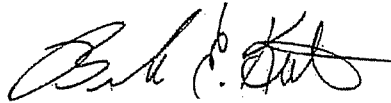
Assuming the Council would like to change the current policy for disposing of Town owned personalty, the Council will need to amend or add to the Code, as noted above. Presently, the Code is silent as to the disposal of personalty. The only regulation governing disposal is through the Administrative Regulation, which can only be changed by the Administrator. If this course of action is taken, Section 6.2 of the Charter sets out the procedure to adopt an ordinance amending the Code. Any new ordinance does not become effective until the expiration of 30 days after adoption. Therefore, no new ordinance may be applied retroactively.

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I trust I have answered the questions asked. If I can be of further help, please do not hesitate to contact me.

Sincerely,



Brenda E. Keith

c. File