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Warrant Article 101: The Basics of Warrant Article Origin, Content, Legality and Amendment

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By Stephen C. Buckley

After months of preparation, it is time to assemble the warrant, the centerpiece of New Hampshire's town meeting. This article will cover the fundamentals of who authors warrant articles, provide guidance on the recommended content of a warrant article, address how to handle articles that might be deemed illegal and consider the extent to which a warrant article can be amended by town meeting. Most warrant articles are drafted by the Select Board, however, zoning amendment articles are presented by the Planning Board, governing body or by petition; the Official Budget Committee prepares the budget article; and, citizens can submit petitioned warrant articles.

Warrant Article Origin

The content of warrant articles is primarily drafted by the governing body, who may prepare and add warrant articles until the warrant is posted (although some articles, including those for appropriations and zoning, must comply with public hearing requirements).

When zoning is involved, only the planning board may propose the initial enactment of a zoning ordinance. RSA 675:3, I. Amendments to an existing zoning ordinance may be proposed by the planning board, the governing body or by citizen petition. RSA 675:3, I; RSA 675:4. During the public hearing process, the planning board may change the wording of articles it has proposed, but not those proposed by the governing body or by petition. Once the wording is final, the proposals go to the municipal clerk. The clerk, typically with assistance from the planning board, prepares the question for the official ballot using the language required in RSA 675:3, VII, and inserts a topical

description of the subject of the proposed amendment. The clerk also notes on the ballot when an amendment is submitted by the governing body or by petition and includes the planning board's approval or disapproval of the article.

The budget is prepared by the official budget committee, if any, or otherwise by the governing body. RSA 32:5, I. It may appear as a single proposal, a variety of individual warrant articles or a combination of the two. Individual appropriations articles may also be submitted by the governing body and by citizen petition. RSA 31:131; RSA 39:3. The budget committee controls the content of the budget it is proposing, but not the articles proposed by the governing body or by petition. Once the budget and other articles containing appropriations are in final form, they are submitted to the governing body for placement on the warrant.

25 or more registered voters may petition the governing body to place an article on the warrant (or 2 percent of the registered voters in town, whichever is less, although in no event fewer than 10 registered voters). RSA 39:3. The petition must be presented to the governing body not later than the fifth Tuesday before the date of the annual meeting (in SB2 towns the deadline is set in RSA 40:13 and is roughly 4 weeks before the Deliberative Session). The governing body is obligated to insert a petitioned article into the warrant with only such minor textual changes as may be required, and those corrections cannot change the intended effect of the petitioned article.

Warrant Article Content

The content of warrant articles is either prescribed by statute or is governed by common law and statutory ground rules, especially as applied to articles that contain appropriations. In many instances the legislature has provided the language of a warrant article in order to implement enabling statutes. For instance, the language for a warrant article that would adopt a special revenue fund under RSA 31:95-c and RSA 31:95-d is described in great detail with required statements of dollar amounts and revenue sources to fund the special revenue fund. By comparison, in many instances enabling statutes simply permit the enactment of local bylaws on a particular subject without specifying warrant article language, such as a conflict of interest ordinance under RSA 31:39-a. However, even though enabling legislation prescribes the form of questions to be presented to town meeting, that language is only advisory. RSA 31:130 provides that municipal legislation is not to be declared "invalid for failure to conform to the precise wording of any question prescribed for submission to voters, so long as the action taken is within the scope of, and consistent with the intent of, the enabling statute or statutes."

When drafting warrant articles containing appropriations, always be sure the wording of an appropriation is clear enough to let the governing body know how much flexibility it has. The amount of freedom the governing body has depends on how specific the purposes in the warrant article are. For example, consider a separate article which states: "... to raise and appropriate \$___ for a new grader to be purchased from Town Graders, Inc. of Concord." This wording is probably too specific because it limits the options of the officials making the purchase. It could be construed to prohibit purchasing from another dealer. What if that vendor does not have any graders at that price? What if it can be obtained for less money from another vendor? On the other hand, an article that says "equipment" instead of "grader" may not be specific enough and may lead voters to amend the article to more specifically define the action that may be taken by the governing body, thus keeping the reins on their officials.

Warrant articles containing appropriations must also comply with RSA 32:5, III and have all appropriations stated on a "gross basis," meaning that all anticipated revenue from all sources, not just tax money, must be shown as offsetting revenues to the amounts appropriated for specific

purposes. Revenues other than taxes raised may include grants, gifts, bond issues and proceeds of the sale of municipal property. With a few exceptions, revenues not appropriated cannot be spent.

This rule follows logically from the principle that all expenditures—not just tax expenditures must be supported by legislative body appropriations. RSA 32:8.

'Illegal' Warrant Articles

Each year, town meeting season in New Hampshire is marked by a crop of well-intentioned, yet probably illegal, warrant articles. The suggestions below may be helpful to local officials as they try to determine how to handle questionable articles.

An "illegal" warrant article is one that cannot have any legal effect even if town meeting approves it, usually because it violates some provision in the law. There are many ways an article may violate the law. It might give a board or official the authority to take some action that is not authorized

by law, such as an article that orders the board of selectmen to appoint the town clerk (illegal because RSA 41:16 requires the town clerk to be elected). An illegal article might include an appropriation of town funds for a purpose not permitted by law, such as a purely charitable donation for which the town receives nothing in return (no "quid pro quo"). *Opinion of the Justices*, 88 N.H. 484 (1937). Yet another kind of illegal warrant article is one where the subject matter was not included on the posted warrant. This would violate the requirement in RSA 39:2 that "the subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant." In addition, even if the subject matter is legal, there may be a procedural error in an article that affects its validity, such as citing to the wrong enabling statute or failing to meet statutory requirements for filing or notice.

Such potentially illegal articles can arise in one of several ways. The governing body may receive petitioned warrant articles from the voters. Municipal boards or committees may propose articles to the governing body that the governing body decides to include in the warrant. And of course, town meeting may amend many kinds of warrant articles on the floor at an official ballot referendum system (SB 2) deliberative session or during the business session of a traditional town meeting and these amendments can turn an otherwise legal article into something unenforceable.

What should a select board do when it receives a petitioned warrant article that may or may not be legal? The first step is to check whether the article meets the procedural requirements of RSA 39:3; enough signatures and timely submission to the Select Board.

If the article passes this threshold test, the select board must include the article in the warrant "with only such minor textual changes as may be required." In other words, the selectmen may make minor grammatical changes and typographical corrections to make the article more understandable or correct a clear mistake but cannot make any changes to the substance or meaning of the article and such corrections shall not in any way change the intended effect of the article as presented in the original language of the petition. It is always advisable to check with the town attorney before doing this, however, to be sure that the editorial changes do not go beyond what RSA 39:3 allows.

If the substance of an article is questionable and the select board cannot fix it with the minor changes the law allows, the board must decide whether to include it in the warrant. This decision is rather complex because it is not clear under the law exactly when the board can refuse to put a petitioned article on the warrant. On one hand, the New Hampshire Supreme Court has said that if the select board receives a petitioned warrant article that calls for the town meeting to take an action not authorized by law, the select board is not required to place it on the warrant. *Levasseur v. Selectmen of Hudson*, 116 N.H. 340 (1976). The Court has also found that the select board does not

have to call a special town meeting if the petitioned article involves an action prohibited or limited by statute. *Winchester Taxpayers' Ass'n v. Board of Selectmen*, 118 N.H. 144 (1978). On the other hand, the Court has referred to the inclusion of petitioned articles on the warrant as a "right," indicating that they must be included on the warrant. *Woodside v. Selectmen of Derry*, 116 N.H. 606 (1976). While these mixed decisions might create confusion, it may help tip the scales to note that RSA 39:3-b would impose the penalty of a violation if the select board refuses to include a petitioned article in the warrant.

It is therefore recommended that the board should include these articles in the warrant unless it has received a clear legal opinion from a court that the article is illegal and can be omitted. The board might seek a written opinion from the town attorney on the legality of an article and it can be helpful for the board or the attorney to share that opinion and explain the problem to voters at the meeting. This ensures that the article is at least considered by voters, which is the purpose behind RSA 39:3.

Amendments to Warrant Articles

Once the public hearings are over and the warrant is drafted and posted, it is up to the moderator—with the assistance of other officials, staff and the town attorney—to make sure that the town's business is accomplished fairly and efficiently at the annual meeting. There is no way to fully anticipate and prepare for a crucial legal issue that can arise whenever a voter at town meeting makes a motion to amend a warrant article. Would the proposed amendment violate a statute and thus make the article unenforceable?

When an amendment is offered, the moderator must determine whether it impermissibly adds a new purpose to the warrant article. This fundamental principle of town meeting is set out in RSA 39:2, which provides in part: The subject matter of all business to be acted upon at the town meeting shall be distinctly stated in the warrant, and nothing done at any meeting, except the election of any town officer required by law to be made at such meeting, shall be valid unless the subject thereof is so stated.

"It has long been the law of this state that the purpose of this requirement 'is to inform the inhabitants of the business upon which they are called to act in the meeting,—to bring before the town substantially and intelligently the subject with which it has to deal.'" *Opinion of the Justices*, 101 N.H. 544 (1957). More recently, in *Grant v. Barrington*, 156 N.H. 807, 811 (2008), the Court described the purpose of RSA 39:2 in the context of an official ballot referendum (SB 2) town meeting:

[t]he prohibition against changing the subject of a warrant article is to ensure that subjects that were not noticed to voters are not inserted into the articles at the deliberative session. This protects the voters who decided not to attend the first session from new subjects being addressed about which they had no notice and therefore did not have an opportunity to consider when deciding whether they were interested in attending the deliberative session.

This is what is described as the "stay-at-home test" for determining whether an amendment impermissibly introduces a new subject.

Consistent with RSA 39:2, RSA 32:6 requires that the "purpose" of any appropriation must appear in the budget (MS-636 or MS-737 form posted with the warrant) or in a special warrant article. The statute adds that the legislative body may vote to appropriate more than or less than the amount recommended in the budget or warrant article. RSA 32:10, I (e) specifies that the voters may ensure that no money is spent for a given purpose by deleting a line in the budget form or reducing it to zero. In terms of permissible amendments at town meeting, these statutes mean that the voters may

not add a new purpose of appropriation that is not in the posted warrant and budget, but amendments may increase or decrease a proposed appropriation or eliminate a purpose of appropriation.

The Department of Revenue Administration (DRA) considers the following amendments from the floor of the meeting as a change in the subject matter of the warrant article and will disallow them:

- Naming agents to expend capital reserve funds or town-funded trust funds when the article as posted in the warrant did not name agents.
- Changing an article from appropriating money for a capital reserve or trust fund to expending the money in the current fiscal year. In other words, an amendment to buy the police cruiser now instead of putting the money in the police cruiser capital reserve fund (or vice versa).
- Designating an appropriations article as “non-lapsing” when the article as posted did not.

However, DRA has generally found acceptable an amendment to switch from one source of funding to another, such as an amendment changing the source of revenue from a capital reserve fund withdrawal to general taxation.

The Ten Percent Rule. The final clauses in both RSA 39:2 and RSA 32:6 provide that no amendment to increase appropriations is valid if it violates RSA 32:18, the “ten percent rule” in towns with official budget committees. The total amount appropriated by the meeting, including amounts appropriated in special and separate warrant articles, cannot exceed the total recommended by the budget committee by more than 10 percent. RSA 32:18. The 10 percent calculation is computed on the total amount recommended by the budget committee, less that part of any appropriation item which constitutes “fixed charges.” Fixed charges include appropriations for principal and interest payments on bonds and notes, as well as mandatory assessments imposed on towns by the county, state or federal governments. (The 10 percent rule can be overridden by a proper warrant article in the case of a bond request. RSA 32:18-a.)

The statute is silent as to what happens if the total appropriations at a given meeting do exceed the recommended budget plus 10 percent. Generally, DRA will disallow on a “last voted, first out” basis. Therefore, it is important to consider the order in which the warrant articles will be voted. We recommend that priority articles, like the operating budget, be placed on the warrant before other articles. However, the voters can still change the order in which the warrant articles are addressed and voted upon.

RSA Chapter 33, Bond Articles. The procedure for authorizing long-term borrowing must comply with RSA 33, the Municipal Finance Act. Towns must be particularly careful to avoid errors. Bond articles for amounts in excess of \$100,000 require a public hearing with newspaper publication of a notice of “the time, place and subject” of the hearing. Thus, any amendment to a bond article must satisfy not only RSA 39:2, but must also not change the “subject” for purposes of RSA 33:8-a, I. Given the level of scrutiny, amendments to bond articles should be treated conservatively. Check with bond counsel if an amendment is anticipated.

RESOURCES FOR DRAFTING WARRANT ARTICLE CONTENT
(<http://www.nhmunicipal.org/Resources/ViewDocument/1133>)

Warrant Article Language Prescribed by Statute. Some statutes prescribe the language of the warrant article that must be used to exercise certain authority. Examples:

RSA 31:5, III, contingent authorization for special town meeting if cost items of a collective bargaining agreement are not approved.

RSA 31:95-d, creation of special revenue fund.

RSA 36-A:4-a, II(b), authorizing conservation commission to expend funds to help third-party organizations to acquire conservation easements.

RSA 79-A:25-b, I (c), separate accounting for land use change tax revenues.

RSA 289:6, II-a, delegating duties of cemetery trustees to board of selectmen.

RSA 31:130 provides that the prescribed language is advisory only, and failure to conform to the precise wording does not invalidate the vote “so long as the action taken is within the scope of, and consistent with the intent of, the enabling statute or statutes.” Thus, there is some room for selectmen or petitioners to deviate from the prescribed language in drafting the warrant article.

However, it appears that the voters are not intended to have an opportunity to amend many such articles at town meeting. RSA 39:3-d, II(b) provides that an article that prescribes the wording of a question may, but need not, be placed on the official ballot “unless a contrary intent is specified.”

If the official ballot is not used, the prescribed wording shall be placed on the warrant and “may be placed on a preprinted ballot to be acted upon in open meeting in the same manner as a secret ‘yes-no’ ballot under RSA 40:4-a.” At SB 2 deliberative sessions, “[w]arrant articles whose wording is prescribed by law shall not be amended.” RSA 40:13, IV(a). Check each statute for its intent.

RSA 40:13, IV(c), SB 2 Deliberative Session Restrictions. Moderators in towns with SB 2 town meetings face the additional issue of whether a proposed amendment at a deliberative session will violate RSA 40:13, IV(c), which provides:

No warrant article shall be amended to eliminate the subject matter of the article. An amendment that changes the dollar amount of an appropriation in a warrant article shall not be deemed to violate this subparagraph.

The role of the first session, in addition to providing information and debate, is to decide the final form of ballot questions. Except where the wording of a question is prescribed by law, all warrant articles, including petitioned articles, may be amended. RSA 40:13, IV and RSA 40:13, VI. However, amendments must relate to the general subject matter of the article and may not eliminate the subject matter entirely. RSA 40:13, IV(c). Adding the word “not” to make an article negative is also a risky move and is not advisable.

The New Hampshire Supreme Court recently addressed the meaning of “eliminate the subject matter of an article” found in RSA 40:13, IV(c). *Cady v. Town of Deerfield*, 169 N.H. 575 (2017). Deerfield is an “SB 2” Official Ballot Referendum municipality. The Town had received two petitioned warrant articles that proposed making the positions of welfare director and police chief elected offices with stipulated annual salaries. By amendment at the deliberative session, both articles were revised to state that the town meeting would express the advisory view that both the police chief and welfare director should remain appointed positions with nothing stated about annual salaries.

The Court determined that the term “subject matter” in RSA 40:13, IV(c) was ambiguous. Looking to the legislative history, the Court decided that the statute was intended to prohibit warrant articles from being amended in a manner that eliminates their subject matter *entirely*, thereby making it impossible for voters at the second session to determine what the article is about. Although these amendments substantially changed the original articles, the subject matter—the welfare director and police chief positions—remained the same. The Court also rejected the petitioner’s argument that voters are prohibited from changing the intent of an article, noting that this would require the Court

to read the word "intent" into the statute. Since the warrant article amendments still reflected the same intent of determining how the welfare director and police chief positions are to be filled, those amendments were permitted.

Accordingly, deliberative session amendments to warrant articles in an SB2 town may substantially change a warrant article, provided the subject matter is not effectively eliminated. This means that, as long as the subject matter remains the same, the intent of the article may be changed by amendment.

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