

Optional Powers of RSA 36-A:4-a

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Over the years, there have been some questions, even disagreement, about optional powers, including when they are needed and what they mean. This represents an effort by the New Hampshire Association of Conservation Commissions to begin to provide some guidance on this topic. Please note this is only general information, not legal advice specific to any particular situation. Conservation commissions should always seek advice from their own attorney regarding their specific situation. But, when doing so, providing this general information may be helpful.

Background Context: What are the Purposes of Conservation Commissions?

It is important to consider optional powers in the overall statutory context. According to RSA 36-A, II, conservation commissions are for:

1. the proper utilization and protection of the natural resources; and
2. the protection of watershed resources.

That law also says conservation commissions “shall”:

3. conduct researches into its local land and water areas;
4. seek to coordinate the activities of unofficial bodies organized for similar purposes, and may advertise, prepare, print and distribute books, maps, charts, plans and pamphlets which in its judgment it deems necessary for its work;
5. keep an index of all open space and natural, aesthetic or ecological areas within the city or town, as the case may be, with the plan of obtaining information pertinent to proper utilization of such area ...;
6. keep an index of all marshlands, swamps and all other wet lands in a like manner, and may recommend to the city council or selectmen or to the department of natural and cultural resources a program for the protection, development or better utilization of all such areas;
7. keep accurate records of its meetings and actions; and
8. file an annual report.

Background Context: What are the Powers of Conservation Commissions?

According to RSA 36-A:4, automatically by operation of law conservation commissions have the following powers upon formation (please note the bolding and underlining for emphasis related to the topic of optional powers is provided by the author and not original to the text of the statute):

1. receive **gifts** of:

- a. money
- b. personal property
- c. real property, and
- d. water rights

either **within or outside** the boundaries of the municipality ... , subject to the approval of the local governing body, such gifts to be managed and controlled by the commission for the purposes of this section. RSA 36-A:4, I.

2. acquire in the name of the city or town, subject to the approval of the local governing body, by **purchase**:
 - a. the **fee** in such land or water rights **within** the boundaries of the municipality; or
 - b. **any lesser interest**, development right, easement, covenant, or other contractual right including conveyances with conditions, limitations, or reversions RSA 36-A:4, I.

Optional Powers Statutory Language

While the powers listed above in RSA 36-A:4, I are automatically part of a conservation commission's authority upon formation, the powers contained in RSA 36-A:4-a are not. These "optional powers" accrue to conservation commissions only after a duly passed affirmative vote of the legislative body of a city or town at an annual meeting. Such a vote is allowed to occur at the same time the conservation commission is formed or at an annual meeting afterwards.

The optional powers available are as follows (again please note the bolding and underlining for emphasis related to the topic of optional powers is provided by the author and not original to the text of the statute):

1. Expend funds for the purchase of **interests in land outside** the boundaries of the municipality, subject to the approval of the local governing body; (RSA 36-A:4-a, I(a)) and
2. Expend funds for contributions to "qualified organizations," as defined in section 170(h)(3) of the Internal Revenue Code of 1986, for the purchase of **property interests** or **facilitating transactions** relative thereto **to be held by the qualified organization**, when such purchase carries out the purposes of this chapter. Because such contributions further the protection of the state's natural resources, they are hereby declared to be a public purpose. RSA 36-A:4-a, I(b).

What Does it All Mean? Hypotheticals, That Might not be so Hypothetical.*

*For all of these, where it is noted that conservation commission acquires title, that is shorthand for the Town Selectboard, by and through its conservation commission, acquires title.

A. Conservation Commission Receives Gift of Land Inside Its Municipality:

Optional powers not needed. RSA 36-A:4 automatically allows conservation commissions upon formation to receive gifts of real property inside their municipality.

B. Conservation Commission Receives Gift of Land Outside Its Municipality:

Optional powers not needed. RSA 36-A:4, I automatically allows conservation commissions upon formation to receive gifts of real property outside their municipality.

C. Conservation Commission Purchases Fee Interest in Land Inside Its Municipality:

Optional powers not needed. RSA 36-A:4, I automatically allows conservation commissions upon formation to purchase fee interest of land inside their municipality.

D. Conservation Commission Purchases Fee Interest in Land Outside Its Municipality:

Optional powers needed. Nothing in RSA 36-A:4, I authorizes this. Only RSA 36-A:4-a, I(a) allows conservation commissions to purchase fee interest of land outside their municipality.

E. Conservation Commission Expends Funds Towards Land Trust's Purchase of Conservation Easement on Land Inside Conservation Commission's Municipality and Conservation Commission Receives an Executory Interest:

Optional powers possibly not needed. RSA 36-A:4, I automatically allows conservation commissions upon formation to acquire "any lesser interest" of land inside their municipality. Conservation commissions engaging in such transactions must take care in the structuring of the transaction to be clear that they are "obtaining" or "acquiring" "any lesser interest", namely an executory interest, or similar. In contrast, conservation commissions must not structure such a transaction as a "donation". Other words to avoid would be giving, supporting, contributing, offering up, etc. See next hypothetical.

F. Conservation Commission Expends Funds Towards Land Trust's Purchase of Conservation Easement on Land Outside Conservation Commission's Municipality and Conservation Commission Receives an Executory Interest:

Optional powers needed. While the above hypothetical is a bit of a close call, this one is not because nothing in RSA 36-A:4, I allows conservation commissions to acquire "any lesser interest" of land outside their municipality. While it is clear optional powers are needed, it is less clear which, or both, of the optional powers are needed. The safest path would be for conservation commissions to be authorized pursuant to both RSA 36-A:4-a, (I) section (a) and section (b). Similar to the above hypothetical, conservation commissions engaging in such transactions must take care in the structuring of the transaction to be clear that they are "obtaining" or "acquiring" "a property interest", namely an executory interest, or similar. In contrast, conservation commissions must not structure such a transaction as a "donation". Other words to avoid would be giving, supporting, contributing, offering up, etc. See next hypothetical.

G. Conservation Commission Expends Funds Towards Land Trust's Purchase of Conservation Easement on Land Inside Conservation Commission's Municipality:

Optional powers needed. Nothing in RSA 36-A:4, I authorizes this. Only RSA 36-A:4-a, I(b) allows conservation commissions to facilitate transactions with the property interests to be held a land trust (or other qualified organization) when the conservation commission obtains no

property interest. This “facilitation” typically takes the form of a donation, simply giving money. Maybe it is funding a survey, the legal fees, an appraisal, the recording fees, etc. But, regardless, if the conservation commission obtains no interest in property, optional powers are needed or else the conservation commission cannot do it.

H. Conservation Commission Expend Funds Towards Land Trust’s Purchase of Conservation Easement on Land Outside Conservation Commission’s Municipality:

Same exact answer above. When conservation commissions expend funds without getting any property interest in exchange, this falls into RSA 36-A:4-a, I(b) regardless of whether the land is inside or outside of the conservation commission’s municipality.

Bottom Lines

The best practice when conservations support a conservation project by expending funds is to always acquire an interest in real property. Likely the best option for the type of interest in real property is an executory interest. If a conservation commission expends fund in support of a project, and does not acquire any interest in real property, the conservation commission must have been authorized to have optional power, or else the conservation commission cannot expend those funds. Another best practice is that if a conservation expends funds for a project outside of its municipality, it must do so through optional powers.