

**DrummondWoodsum**  
ATTORNEYS AT LAW

## Lease Purchase Agreements

**Bradley F. Kidder Law Conference**  
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**Topics to Cover**

### Lease Purchase Agreements

- Statutory authority in RSA 33:7-e
- Terminology
- Non-Appropriation Clause (“Escape Clause”)
- Legal Authorization
  - Initial
  - Ongoing
- Selecting a Lease Finance Company; Pitfalls
- Practical Steps

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### Statutory Authority

#### RSA 33:7-e Lease Agreements of Equipment

The governing body may enter into leases of equipment as required by the municipality.

Appropriations to fund lease agreements with nonappropriation clauses may be approved by a simple majority vote of the legislative body.

Lease agreements with nonappropriation clauses shall not be treated as debt under RSA 33:4-a.

For the purposes of this section, "lease" shall include lease-purchase, sale and lease back, installment sale, or other similar agreement to acquire use or ownership of such equipment as is from time to time required by the municipality.

For purposes of this section and RSA 382-A, building or facility improvements related to the installation, purpose, or operation of such equipment shall be deemed to constitute equipment and the costs of such improvements may be financed through lease agreements under this section.

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**Terminology**

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**What is equipment?**

- “Equipment” is not defined in RSA 33:7-e.
  - School buses, plow trucks, technology equipment, copiers, etc.
  - Boilers, HVAC equipment
- “Equipment” also includes **“building or facility improvements related to the installation, purpose, or operation of such equipment”**
  - 2014 amendment to RSA 33:7-e
  - Grey area between “equipment” and “renovation”

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**Terminology**

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**What is a lease purchase agreement?**

A.k.a. lease, lease financing, equipment lease, capital lease, municipal lease

“Lessor”      the lease financing company (lender)

“Lessee”      the school district (borrower)

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**Terminology**

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**What is a lease purchase agreement?**

- Distinguished from an operating lease
  - Not a landlord-tenant lease for real property
  - Not a rental lease – e.g., car leasing (lessor owns equipment)
- Distinguished from a bond or note
  - Not a general obligation; not a long term debt
- Best described as a financing based upon a conditional promise to pay
- School (as lessee) owns the equipment and is responsible for insurance, taxes, maintenance. Option to purchase for \$1 at end of lease.

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## Terminology

### What is a lease purchase agreement?

- Distinguished from a bond or note
  - It is not a general obligation; not a long term debt
  - Secured by lien on equipment, not the District's taxing power

However, like a governmental bond, a lease purchase agreement may be issued on a **tax-exempt basis** (the lessor does not pay income tax on interest paid by lessee). Lease payments must have principal and interest components.

Under federal law, a tax-exempt lease purchase agreement is treated like a governmental bond for purposes of reporting (Form 8038-G or -GC), and compliance with arbitrage and private activity regulations.

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## The Non-Appropriation Clause ("Escape Clause")

The key feature of a lease purchase agreement is the **nonappropriation clause**. During the life of a lease, if the legislative body (District meeting) does not appropriate sufficient funds to make lease payments due in the coming FY, then the lease will terminate and the lessor may repossess the equipment.

A lease without a nonappropriation clause is the same as a general obligation bond under NH law and requires the same approvals, including 3/5 legislative body approval (RSA 33:8; 33:8-a).

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## Features of Non-Appropriation "Right"

- Reserved to the legislative body that authorizes the annual school budget (annual meeting)
- Exercise of nonappropriation is not a default under the lease; the lease agreement terminates and the equipment is returned
- Typically, nonappropriation is not easy to effectuate. In NH, however, the "No means no" law (RSA 32:10, I(e)) can be employed to nonappropriate funds for a specific purpose.

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**Lessor Protection from Non-Appropriation**

- Security interest in equipment
- “Good faith effort” language
- Essential Use Certificate
- Payments in advance; not arrears
- Short amortization period
- Non-substitution clause
- Effect of non-appropriation on credit rating

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**Non-Appropriation**

If members of the school board are considering a lease purchase agreement with a view that the District can always get out of the lease through nonappropriation,  
**DO NOT ENTER INTO THE LEASE**

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**Legal Authorization for Lease Purchase Agreements**

**RSA 33:7-e:**

The governing body may enter into leases of equipment as required by the municipality.

Appropriations to fund lease agreements with nonappropriation clauses may be approved by a simple majority vote of the legislative body.

**Two Authorizations required:**

1. Legislative body (annual meeting) approval of lease payments due in the coming fiscal year.
2. Governing body (school board) approval of lease agreement.

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### Legal Authorization for Lease Purchase Agreements

2 Authorizations required:

1. Legislative body (District meeting) approval of lease payments due in the coming fiscal year.  
Approval of lease payments in separate warrant article. OR  
Approval of lease payments as part of annual operating budget.  
Political considerations (initial and ongoing approvals)
2. Governing body (school board) approval of lease agreement.

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### Legal Authorization for Lease Purchase Agreements

2 Authorizations required:

1. Legislative body (District meeting) approval of lease payments due in the coming fiscal year.  
Approval of lease payments in separate warrant article. OR  
Approval of lease payments as part of annual operating budget.  
Political considerations (initial and ongoing approvals)
2. Governing body (school board) approval of lease agreement.  
The school board should take formal action to approve the lease and identify the person authorized to sign the lease.  
Board action supports the legal opinion requested by lessor.

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### Legal Opinion for Lease Purchase Agreements

As with other loans or bonds, the lessor (lender) often requires a legal opinion from bond counsel, stating that:

1. The lease has been duly authorized and executed; and
  2. Interest payable on the lease is tax-exempt for the lessor.
- Without the legal opinion, the lease cannot close
  - Bond counsel's duty of care
  - Opinion given to the other party (lessor)
  - Bond counsel reaches determination and expresses independent legal opinion that transaction is valid and tax exempt
  - Potential liability of bond counsel to lessor

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### Practical Steps – Get Legal Counsel Involved Early

Consult with legal counsel early as to:

- Legality of equipment as subject of lease;
- Legislative body approval of lease payments;
- Form of the school board vote.

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### Practical Steps – Select a Lease Financing Company

- Follow purchasing policy (call for quotes, formal bids)
- Benefit to using familiar leasing companies
  - Municipal Leasing Consultants (VT)
  - People's United Bank (NH)
  - TD Equipment Finance (ME)
  - Gorham Savings Leasing Group (ME)
- Does the lessor require a legal opinion?
  - Often, no opinion is needed if lease is <\$100,000

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### Practical Steps – Select a Lease Financing Company

Potential pitfalls

- Manufacturer's lease
  - Other lease finance options available; check for unreasonable terms
- Continuing lease
  - More like a rental agreement; can be required to make lease payments after the initial term
- True lease (fair market value lease)
  - A rental agreement where lessor owns the equipment
  - School is responsible to return equipment in good condition

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**Practical Steps – Lease Purchase Financing**

- Plan for acquisition of equipment
- Get legislative body (annual meeting) approval of upcoming lease payments (in separate warrant article or as part of operating budget)
- Have School Board vote to authorize the lease - have legal counsel draft or review the vote
- Coordinate execution and delivery of documents with legal opinion
- Funding of lease; acquisition of equipment
- For tax-exempt leases, file Form 8038-G or -GC.

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**Thank you**

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