





TO: Jeff Gilderson-Duwe, Library Director
Russ Van Gompell, Finance Director
Jennifer Messerschmidt, Assistant Finance Director

FROM: Lynn A. Lorensen, City Attorney 
Amy VandenHogen, Assistant City Attorney 

DATE: November 15, 2021

RE: Funds for the Benefit of the Library / Characterization / Transfer to Oshkosh Community Foundation

With Godfrey and Kahn's assistance, we evaluated a number of existing Library funds identified by Library Director Gilderson-Duwe for potential transfer to the Oshkosh Community Foundation. These funds had been traditionally identified as "trusts" and/or as "permanent funds" within City Documents and practice. We reviewed the original documents of gift for each, resolutions or ordinances that were passed in connection with each and the City's annual trust accounting as well as probate filings for the various funds. Based on the information we were able to gather and review in relation to these funds we then categorized the funds as gifts/bequests, endowments or trusts as those terms are used in the Wisconsin Statutes and created the attachment to this memorandum with our findings and recommendations as to each fund.

Because it is important to understand the various legal terms in relation to these funds, as well as for other funds held by the City, we will address the legal terms generally in this memorandum to provide context for the conclusions reached in the attachment and to provide guidance for other existing funds or future funds that may be created. However, as a very simple summary to help you keep things straight, non-endowed gifts are gifts that can be spent immediately. Endowments are gifts that need to be preserved and spent over time. Trusts are more formal with specific legal requirements, and after review, none of the library funds are trusts.

Non-Endowed Gifts

Very broadly speaking, there are two types of gifts. Endowments (which we will talk about below) and non-endowed gifts. The difference between the two is that endowments will be spent over time, whereas non-endowed gifts can be spent immediately.

Non-endowed gifts can be either restricted or unrestricted. An unrestricted gift may be used for any purpose and may be wholly spent by the City at any time after receipt. A restricted gift may still be spent immediately any time after receipt, but it must be spent on the donor's stated use/purpose.

In order to determine whether a gift is restricted or not, you must look to the instrument governing the gift. Any restrictions on a gift should be identified clearly when the funds are taken in – forms under the City's gift policy, for example, contain sections for persons to fill out regarding any restrictions and otherwise state that gifts are without restriction. Gifts that are donor restricted must be spent consistently with the donor's wishes.

Trusts

A trust is created when a person transfers property to a trustee to hold title to property or assets for the benefit of a third party, the beneficiary. The terms of a trust are governed by the Trust Agreement. A Trust is a separate "entity" or "person" for tax purposes. Trusts have their own tax ID# and they must file separate tax returns, not as a part of the City or under the City's tax Id. The City may act as a trustee, but this is uncommon in historical practice and is generally not desirable due to the additional administrative requirements and fiduciary duties placed that would be placed on the City if acting as a Trustee.

In our review of the various documents governing the gifted funds, we determined that none of the funds currently managed by the City are held in a trust. We did, however, determine that some of the gifts the City received were originally received from trusts because the City was designated as a beneficiary of those trusts.

Prior to 2013, annual trust accounts were required to be filed with the probate court for trusts that were created under a will. Although we concluded that none of these funds were in fact trusts and required reporting, previous city staff filed annual account statements detailing the holdings of funds which were established from a gift through a will with the probate court. We believe these reports were likely filed out of routine and without critically reviewing the status of the funds. Although we can't be sure, it appears

that a change of staff in or about 2000 resulted in an end to this reporting, either intentionally due to critical review and determination that the funds were not in fact trusts, or unintentionally simply as an oversight upon change of staff. It appears that the probate court did not take any action upon the failure to continue these reports presumably because the probate court also understood that such accountings were not necessary.¹

Endowments / Institutional Funds

An endowment is an institutional fund that is not wholly expendable by the institution on a current basis. Unlike non-endowed gifts (which can be spent all at once) endowments should have a lasting impact. Unless the language of the endowment limits its duration, the endowment will likely be considered a permanent fund. The income may be used consistent with the donor's intent, but generally the principal should remain intact.²

As with gifts and trusts, in order to determine if funds are an endowment, you must start with the instrument creating the fund/accompanying the funds; for example, a completed gift form, the will, Trust Agreement or other donor agreement or correspondence. Any endowed gift should be clearly identified when funds are taken in.

WUPMIFA (Wisconsin Uniform Prudent Management of Institutional Funds Act) covers endowment funds held by an institution for charitable purposes. A government agency may hold gifted/bequested funds for charitable purposes including education or any purpose that is beneficial to the community. Endowment Funds shall be managed and invested in good faith and with the care that an ordinarily prudent person would exercise under similar circumstances. §112.11 applies to funds existing on or established after August 4, 2009. There is a list of factors in the statute to consider when making these decisions.

WUPMIFA specifically applies to investment of gifts, bequests or endowments received by a public library pursuant to §43.58 Wis. Stats. Further, §43.58(7)(b) specifically allows delegation to a Foundation by its terms. §112.11 Wis. Stats. also permits, subject to

¹ In addition, Wisconsin's Trust Code (WTC), was updated in 2013 and part of that modernization included eliminating annual reporting to the probate court. So even if the funds had required reporting, that requirement would have ended in 2013.

² It should be noted that endowments may be set up within an entity, such as a Trust. But, as noted in the attached chart, even if set up within a trust, an endowment is not a separate entity and does not require separate tax filing and reporting.

limitation in the gift instrument, an institution to delegate to an external agent the management and investment of an institutional fund. So transfer of institutional funds and endowments to the Oshkosh Area Community Foundation would be permissible so long as those funds are still used for the purposes expressed in the endowment.

§112.11 Wisconsin Statutes also allows for the release or modification of restrictions within the endowment with a 60 day notice given to the Wisconsin AG if a restriction is unlawful, impracticable, impossible to achieve, or wasteful or the institutional fund subject to the restriction has a total value of less than \$75,000 and has existed for more than 20 years and the proposed use for the funds is consistent with the original gift.

Most of the funds that the City is carrying are actually Institutional Endowment Funds under the Statutes. They were set up in a manner that either explicitly required or implicitly suggested that they were not intended to be spent within the short term – “on a current basis” in the language of the statute. The funds are donor restricted funds – meaning that they can only be spent in accordance with the wishes of the donor as identified in the gifting instrument. All of the endowments on the attached list are Permanent Funds – meaning that they were set up to be permanent/long term funds, many to keep principal intact and spend only income. Endowment funds held by the Library may be transferred to the Community Foundation so long as donor restrictions maintain intact. Some funds may be evaluated for impracticability over time – for example, if a fund was set up for the purpose of buying VCR tapes – that would no longer be practicable and the City may want to consider whether to seek relief from the donor restrictions through the AG or court.

Moving forward

In our review of the funds with Godfrey and Kahn, it appears that many of the library funds were identified with the word “trust” but were not actually trusts in fact.

Regardless of whether the library funds are transferred to the Oshkosh Community Foundation, our recommendation is that these funds are no longer called trusts. This creates confusion with the legal term trusts and potentially raises issues as to whether the City is complying with trust law. Depending on how the fund is classified on the attached chart, we would suggest changing the name funds that are gifts to “gift” or “bequest” and changing the name of funds that are endowments to “permanent funds” or “permanent endowment funds” to avoid confusion.

Finally, our review in this case was solely limited to library funds. There are obviously several other funds at the City that are designated as “trusts.” This may be something

the finance department wants to look into. Not only would it be advisable to update terminology, but some of these funds that we are currently carrying as "trusts" may well be gifts that can just be spent.