Why CACR 15?
The Standing Issue in Taxpayer Suits
by Charles G. Douglas, III

A declaratory judgment action is filed to ask a court what the law is when governmental action is challenged as being unlawful or unconstitutional. It is not a suit for money damages. For a century and a half all taxpayers had standing in State court to seek such relief, until last year. Now "taxpayer suits" are virtually impossible.

HISTORY

As far back as 1863, the New Hampshire Supreme Court held that taxpayers have a legitimate interest in the disposition of their tax dollars. In Merrill v. Plainfield, 45 N.H. 126 (1863), for example, the plaintiffs were taxpayers who objected to using tax money for the selectmen to pay for defending proceedings concerning election fraud. The court recognized the standing of the taxpayers insofar as they were "residents and tax-payers in said town, and that they fear said money will be paid over according to said vote, unless the town and its present officers are restrained by injunction." Ultimately, the court granted the injunction and enjoined any public money from being spent for fraud defenses.

In Stocklan v. Brackett, 95 N.H. 227 (1948), taxpayers brought suit against Dover including the city manager, mayor and members of the city council, in order to prevent the fulfillment of a contract with a private company to revalue the city's land. The Supreme Court recognized the "well established rule" in New Hampshire that "equity may restrain the unlawful appropriation of public funds." Id. at 229.

Since the 1800s the Supreme Court expanded the standing of taxpayers so that they no longer had to rely on showing financial loss. For instance, in Clapp v. Town of Jaffrey, 97 N.H. 456 (1952), the court considered whether taxpayers had standing to sue despite their inability to show any financial loss to the town, but merely based upon their interest in efficient government. The court held, "it is plain that every taxpayer of a town has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched."

This principle was echoed in Green v. Shaw, 114 N.H. 289, 292 (1974), which held: "This right of taxpayers to maintain an equity action for relief is not dependent upon showing that the illegal acts 'result in financial loss to the town' since every taxpayer 'has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched.'" The Supreme Court also held that **"it is well settled in this state that plaintiffs, as taxpayers, have standing to seek redress for the unlawful acts of their public officials."** 114 N.H. at 291-92 (1974) (citing O'Neil v. Thomson, 114 N.H. 155 (1974)).

CHANGE IN READING OF STATUTE

However, eight years ago in the case of Baer v. N.H. Dept. of Education, 160 N.H. 727 (2010), all of these taxpayer standing cases were turned aside. The State Supreme Court in Baer said in the context of litigation concerning a local school district bond issue:

> The petitioners argue that they have standing as taxpayers of the District. They assert that they will be harmed by the waiver rules because the rules permit their taxpayer dollars to be used to finance schools that do not meet minimum lot size standards. The petitioners also assert that they will be harmed because these "substandard" schools will be in their community.
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> **Our case law contains two conflicting lines of cases regarding taxpayer standing to bring a declaratory judgment action**. Under one line of cases, we have permitted taxpayers to maintain an equity action seeking redress for the unlawful acts of their public officials, even when the relief sought was not dependent upon showing that the illegal acts of the public officials resulted in a financial loss to the town. Green v. Shaw, 114 N.H. 289, 291-92 (1974). We have reasoned that "every taxpayer has a vital interest in and a right to the preservation of an orderly and lawful government regardless of whether his purse is immediately touched." Id. at 292.
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> More recently, however, we have required taxpayers to demonstrate that their rights are impaired or prejudiced in order to maintain a declaratory judgment action.
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> **We find our more recent analysis of taxpayer standing to be more consistent with the language of RSA 491:22**.

Baer decision at page 730.

> The Supreme Court then concluded:
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> **Accordingly, we hold that taxpayer status, without an injury or an impairment of rights, is not sufficient to confer standing to bring a declaratory judgment action under RSA 491:22.**

Baer at page 731.

The 2010 Baer ruling was based solely on the court's new interpretation of RSA 491:22. Thus, the legislature was free to amend RSA 491:22 to clarify it to again permit

taxpayer suits to challenge governmental actions. Rather than some bold new departure, the 2012 legislative amendment to RSA 491:22 merely returned us to where we were from 1863 until 2010.

However, in 2014 in the case of Duncan v. State of New Hampshire, 166 N.H. 630, the Supreme Court found the newly amended statute was unconstitutional:

> Because the petitioners fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, they have failed to establish that they have standing to bring their constitutional claim.
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> We hold only that the generalized interest in an efficient and lawful government, upon which the petitioners rely, and the amendment to RSA 491:22 which purports to confer standing, are not sufficient to meet the constitutional requirements necessary for standing to exist.

Because the legislature's standing statute was declared to be unconstitutional, the only way to correct the Duncan case is by a constitutional amendment.

CACR 15 would give the voters a chance to decide this November if they want to make government accountable to the people again.