

2013 WL 10001984 (N.H.) (Appellate Brief)  
Supreme Court of New Hampshire

GRANITE STATE MANAGEMENT & RESOURCES,  
v.  
CITY OF CONCORD.

No. 2012-0436.  
January 10, 2013.

Appeal from the Merrimack County Superior Court  
Oral Argument to be Conducted by Margaret H. Nelson, Esq.

**Plaintiff-Appellee's Brief**

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**\*v QUESTIONS PRESENTED**

1. Did the Trial Court properly grant summary judgment to GSMR when, after applying the standards laid down in *ElderTrust of Florida, Inc. v Town of Epsom*, 154 N.H. 693 (2007), it determined that GSMR was a charitable organization entitled to an exemption from *ad valorem* assessment under RSA 72:23, V?
2. Was the Trial Court's ruling excluding certain documents proffered by Concord in support of its motion for summary judgment an unsustainable exercise of its discretion?

### STATEMENT OF THE CASE

Granite State Management & Resources (“GSMR”) and the City of Concord (“Concord”) submitted cross motions for summary judgment regarding whether GSMR was entitled to a charitable tax exemption under RSA 72:23,V and the scope of certain Payment in Lieu of Taxes (“PILOT”) Agreements previously entered into between GSMR and Concord to the Merrimack County Superior Court (McNamara, P. J.) (the “Trial Court”). Concord appeals the Trial Court's determination that GSMR had met the standards for a charitable tax exemption under RSA 72:23,V and its decision to exclude certain evidence proffered by Concord.

### STATEMENT OF THE FACTS

The undisputed facts presented to the Trial Court showed the following:

#### A. Formation and Operation of GSMR

##### 1. The NHHEAF Network Organizations

During the tax years pertinent to this appeal, GSMR, a non-profit corporation and its nonprofit affiliates, New Hampshire Higher Education Loan Corporation (“NHHELCO”) the New Hampshire Higher Educational Assistance Foundation (“NHHEAF”), and The NHHEAF Network Educational Foundation (“NNEF”) known collectively as the NHHEAF Network \*1 Organizations, worked together on an integrated basis to provide information, support and financial resources to help students achieve a college education. The NHHEAF Network Organizations briefly describe their collective mission this way:

The Organizations' nonprofit status makes their charitable mission possible as student loan earnings are reinvested in programs and services that benefit students, parents and the greater community. Research sponsored by the Organizations' informs policy at the local, state, and regional levels. All events, materials programs and outreach initiatives are offered to New Hampshire residents free of charge.

#### GSMR Appendix 000454 (hereafter, “GSMR App.”)<sup>1</sup>

NHHEAF, founded in 1961, is a 501(c)(3) organization under the Internal Revenue Code that has served since 1965 as the in-state guarantor of loans under the federally guaranteed student and parent educational loan program now known as the Federal Family Education Loan Programs (“FFELP”). **GSMR App. 266-283.** NHHELCO, founded in 1983, is a 501(c)(3) organization and is a qualified lender under the FFELP program. In that capacity, it both originates FFELP educational loans in its own right and it acquires and holds educational loans originated by other FFELP lenders. Because the FFELP programs provide insufficient funding for most students, NHHELCO has also developed a series of alternative or private loan programs to supplement a family's FFELP loans. **GSMR App. 000284-000309. GSMR App. 266-283.** Both NHHELCO and NHHEAF have been granted certain powers under RSA 195:1 *et. seq.* to fulfill the State's policy of encouraging post secondary education and providing low cost financial assistance to New Hampshire parents and students by assuring the successful origination, distribution and collection of loans.

\*2 GSMR, a non-profit corporation and a 501(c)(3) organization, was established in 1986 as a result of a decision by NHHEAF to transfer certain assets to a new non-profit corporation. **Concord App. 398¶6; Concord App. 7-16.** As will be discussed in more detail below, it provides the staff and manages all the NHHEAF Network organizations and administers and services federally guaranteed and other student loans. In addition, it has a broad and extensive community outreach program to provide New Hampshire parents and students with information about higher education and tools to make a college education affordable.

NNEF was established in 2004. This organization is a charitable trust that is qualified as a 501(c)(3) exempt private foundation. It was formed by NHHELCO to serve as a single focal point for what previously were three separate charitable and educational initiatives of NHHEAF, GSMR and NHHELCO. NNEF used contributions from the three donor organizations to make charitable or educational grants and to advance, facilitate and encourage the interests of higher education throughout the State of New Hampshire. **GSMR App. 000310-000341.** In December 2008, due to financial pressures caused by the recession, NNEF suspended its operations and transferred its remaining investments and assets to NHHELCO. **Concord App. 281, 305.** NNEF remained in existence. *Id.* p.306

The history of the NHHEAF Network Organizations is summarized in a timeline provided in the record. **GSMR App., 000754-000755.** Further details on GSMR's specific mission and role is provided below.

## 2. GSMR's Mission and Operations

GSMR's Articles of Agreement define its charitable purpose as follows:

This corporation is organized exclusively for the charitable and educational purpose of providing low cost or alternative financial assistance to eligible students, and to parents, custodians or guardians of such students who are attending educational institutions or participating in educational programs in the \*3 United States of America and its territories, through all means allowed by law, including the use of financing obtained in accordance with RSA 195-E as amended, and from any other sources, and of supporting the development of higher education and educational opportunities for the citizens of the United States and its territories.

### **GSMR App. 000250.**

Furthermore, in the event of a dissolution, no members, officers or employees of GSMR are to receive any net earnings or profit. Upon dissolution, all remaining assets shall go to either a governmental or non-profit organizations organized exclusively for charitable, scientific, literary or educational purposes:

No members, officer, or employee or person connected with the Corporation shall receive at any time any of the net earnings of pecuniary profit from its operations, provided, that this shall not prevent payment to any such person for reasonable compensation for services rendered to or for the Corporation in effecting any of its purposes. No such person or persons shall be entitled to share in the distribution of any of the Corporation assets upon its dissolution. Upon the dissolution or winding up of the affairs of the Corporation, whether voluntary or involuntary, its assets then remaining after payment of all liabilities, including those to the New Hampshire Higher Education and Health Facilities Authority, shall be distributed and transferred to a governmental entity or entities or to one or more organizations or institutions organized exclusively for charitable, scientific, literary, or educational purposes which are described in § 501(c)(3) of the Code and are exempt from taxation under § 501(a) of the Code, such distribution and transfer to be upon the terms and conditions and in the amounts and proportions determined by the governing body of this Corporation. Any such assets not disposed of pursuant to [RSA 292:9-11](#), exclusively, as the Court referenced therein shall determine, which are organized and operated exclusively for such purposes.

### **GSMR App. 000252.**

GSMR has two primary functions. First, GSMR contracts with NHHELCO and other lenders to provide education loan servicing and loan origination services for FFELP loans (a federal guaranteed loan program) and certain private program loans. **Concord App. 398 ¶8, Concord App. 156-179, GSMR App. 000342-000343.** Second, pursuant to the terms of management agreements between GSMR and the other three organizations of the NHHEAF \*4 Network, GSMR provides all administrative and management services and all staff necessary to enable the respective organizations to carry out their charitable and educational purposes and to comply with the law. **Concord App. 106-154 and GSMR App. 000344-000357.**

The administrative structure of the NHHEAF Network Organization was designed to achieve efficiency and facilitate the collective goal of providing low cost access to higher educational opportunities for students and parents in New Hampshire. **Concord App. 469 ¶ 3.** While NHHEAF, NHHELCO and NNEF are separate corporate entities, with separate boards of directors or trustees, they have no employees. GSMR, through its employees located at its Barrell Court buildings in Concord, performs all of NHHEAF, NHHELCO's and NNEF's functions. This administrative structure reduces costs and supports the NHHEAF Network Organizations' extensive community outreach program. **Concord App. 469-470 ¶3.** The NHHEAF Network Organizations' structure is different from that of counterpart organizations in Massachusetts and elsewhere where each entity has had its own set of employees and administrative costs. *Id.*

Consistent with the goals of providing efficient administration, GSMR's President and Chief Executive Officer, serves as the President of all four NHHEAF Network organizations but receives a salary and benefit package only from GSMR. For 2008 and 2009, his compensation and benefit package was determined by the GSMR Board of Directors based on a review and analysis by independent consultants and an examination of other resources, including data on non-profit wages and benefits in New Hampshire.

In January 2003, GSMR received an inquiry from Terry M. Knowles of the New Hampshire Attorney General's Office, Charitable Trusts Unit, seeking information about the compensation of GSMR's Chief Executive Officer, Rene Drouin. The Charitable Trusts Unit has \*5 the authority under [RSA 7:24](#) to investigate charitable organizations to make sure that they are administered in accordance with the relevant law and their corporate purposes.

GSMR responded to that inquiry by a letter of its counsel dated March 14, 2008, which explained the process by which GSMR's Board of Directors established Mr. Drouin's compensation, including a review of data on compensation paid by other non-profit organizations and a review by an independent consulting firm which found GSMR's chief executive's compensation to be "competitive, if conservative." **Concord App. 471 ¶ 10, GSMR App. 000711-000760; Concord App. 107-154.** GSMR has received no further inquiries from the Charitable Trust Unit regarding these issues. *Id.*

GSMR provides its management services to NHHEAF, NHHELCO, and NNEF at cost. **GSMR App. 000344-000357; Concord App. 106-154.** Management fees are established for each fiscal year at the time of the adoption of annual budgets for the NHHEAF Network Organizations. GSMR's allocation of costs to the various entities for Fiscal Years 2009 and 2008 shows that certain costs were reduced in order to not exceed the originally established budget. **GSMR App. 000706.** In 2009, costs of some \$421,133 were reduced to meet budget while in 2008, the year the recession began in the United States, costs of some \$1,167, 296 were reduced.

GSMR is paid servicing fees by NHHELCO based on a schedule agreed to by the parties. **Concord App. 470 ¶5; Concord App. 156-179; GSMR App. 000342-000343.** In general, GSMR's servicing fees are priced at a level which will permit NHHELCO to issue bonds to originate FFELP educational loans and acquire and hold educational loans originated by other FFELP lenders. **Concord App. 470 ¶5.**

\*6 In 2008 and 2009, GSMR agreed to reduce its servicing fees to NHHELCO to help NHHELCO address substantial losses it was incurring with respect to its loan program due to the recession. GSMR reduced its fees by some \$2.1 million in early 2008 and an additional \$1.4 million later that year. **Concord App. 470 ¶6.** These reductions allowed NHHELCO to offer fee waivers, loan forgiveness, interest rate reductions and support its own charitable contributions. *Id.*

The educational loans administered by GSMR bear interest and borrowers pay an origination fee. Institutions pay GSMR's fees for loan origination and loan servicing services. Income received by GSMR is used to pay operational expenses, to pay for uncollectible loans and collection expenses, to fund loan default reserves, to provide student, parent, and institution information and counseling, and to pay for the development of new educational loan related activities and services. Income is also used to help pay for expenses associated with the Resource Center, the Center for College Planning, college planning materials and software, and statewide outreach efforts, some of which will be discussed further below. **Concord App. 403 ¶17.**

The loan portfolio serviced by GSMR during 2008 and 2009 was approximately \$2.5 billion. GSMR revenues in 2008 and 2009 were \$25,734,754 million and \$25,480,314 million respectively. **Concord App. 578 and 40.** GSMR generated a net profit (revenues less expenses) of \$1,903,214 million and \$3,124,784 million in 2008 and 2009, respectively. GSMR maintained \$19 million in investments in 2008 (0.76% of outstanding loans) and \$23.6 million in investments in 2009 (0.94% of outstanding loans) and a surplus of \$37.2 million in 2008 and \$39.8 million in 2009. **Concord App. 577, 31, 35, and 55.** GSMR's financial resources were necessary to permit it to maintain adequate reserves and demonstrate the financial capability \*7 needed to meet its contractual obligations, which, in turn, allowed it to fulfill its charitable mission. **Concord App. 471 ¶8.**

In addition to its indirect impact on the costs of student loans, GSMR's administration of the loan program provides direct benefits to New Hampshire students and parents in variety of ways. First, all loans stay in New Hampshire which means borrowers have a single point of contact from application to final payment. GSMR also provides personalized loan counseling to help borrowers best manage their student loans, including free college, career, and financial aid counseling for New Hampshire students. GSMR has streamlined the borrowing process by development of a comprehensive web site that permits borrowers to research options, apply for a loan, make payments and check account status 24/7. **GSMR App. 000455.**

Since its formation, including the years 2008 and 2009, GSMR has also assisted lenders and colleges by providing training and information about federal student loan programs. GSMR also administered and serviced various supplemental loan programs and provided information and counseling to students, parents, educational institutions, and lenders with regard to these loan programs. Through the activities of GSMR up to and including the tax years 2008 and 2009, New Hampshire students and parents were able to obtain access to lower cost funds to finance the cost of education. As a result, New Hampshire educational institutions were assured of the flow of funds necessary to allow them to continue their educational activities. Finally, New Hampshire lenders were provided with a convenient means to provide families with educational financing dollars. **Concord App. 400 ¶13.**

GSMR provides a wide range of free services to parents and students throughout New Hampshire through several outreach programs which seek to provide information about higher educational opportunities and ways to make that education affordable. A few examples illustrate \*8 the extent of GSMR's community outreach programs focused on making higher education both accessible and affordable to New Hampshire families. GSMR staffs and funds the Center for College Planning (CCP). Through the CCP, GSMR employees help tens of thousands of New Hampshire students with all aspects of college planning, including searching for grants and scholarships to reduce the costs to families and the need to obtain loans from any source. CCP has dedicated space at GSMR's buildings in Concord. CCP offers an array of early awareness, college and career planning and financial aid programs for K-12 students and parents, including not only information about loans administered by GSMR but also scholarships and grants that can make a college education more affordable. CCP's annual budget of almost \$600,000 is dedicated entirely to public outreach services. Employee hours devoted to CCP activities total a minimum of 10,400 per year. 93% of NH public high schools rely on the expert presentations delivered by GSMR staff on behalf of the NHHEAF Network Organizations. GSMR estimates that over 25,000 students and parents were reached during the 2008-2009 school year. **Concord App. 400¶ 14.** In addition to the activities that take place at GSMR's Barrell Court buildings, CCP conducts programs in some 800 schools in New Hampshire from kindergarten through grade 12 to promote the benefits of college education and provide information on ways to make college affordable. **See, Concord App. 400114; GSMR App. 000570-000608.**

On behalf of the NHHEAF Network organizations, GSMR staff traveled statewide and made hundreds of presentations to some 25,000 students, teachers and parents in grades K-12 during 2008-2009, including programs at 93% of New Hampshire public high schools. **Concord App. 472 ¶11,400 ¶14.** GSMR has provided a 42 page summary of its CCP programs at New Hampshire Schools from September 2007-July 2010. **GSMR App. 000570-000608.** They include 5th grade and 8th grade programs at elementary and middle schools to help students begin \*9 to think about college, more detailed programs on the college planning and application process for high school juniors and seniors and specific outreach programs for particular groups, such as the Hispanic and Vietnamese communities. *Id.*

Also, CCP created a number of online resources for students and families including the “Ask Joe College” blog, NHCollegeClub.com and the NH93 Scholarship Search in addition to the comprehensive nnheaf.org site. The Joe College blog connects students and parents with CCP counselors to answer questions about anything to do with college. NHCollegeClub.com is an interactive online experience for middle school students that allows them the opportunity to explore college life and beyond. The NH93.com Scholarship Super Highway is a listing of available scholarships for NH students in partnership with local high schools.

As part of its extensive community outreach program, GSMR, on behalf of the NHHEAF Network Organizations, organizes and presents annually “Destination College,” a full day program free to all New Hampshire high school juniors and their parents. The program features various speakers and workshops throughout the day designed to answer questions regarding the college application process, how to select a school and a major, and how to pay for college, including how to access scholarships and grants. Over 1000 parents and students attended Destination College 2009 held at Southern New Hampshire University.

As an additional component of its outreach efforts, GSMR, on behalf of the NHHEAF Network Organizations, developed and had in place during the 2008-2009 tax years a Campaign for Financial Literacy, a program it developed in partnership with the Consumer Credit Counseling Service of NH/VT. **Concord App. 472 ¶ 12.** The goal of the program is to educate students and parents about the importance of borrowing responsibly and good financial management. Workshops include: “The Very Real Life: Budgeting For Success”; “Credit Worth: \*10 Credit For Your Future”; and “The Freshman Forty: 40 Money Management Tips Every College Freshman Should Know.” **GSMR App. 000455.**

GSMR makes the Conference Center at its 3 Barrell Court building available free of cost to provide programs sponsored by a broad range of organizations devoted to promoting access to higher education. GSMR provided a summary of events at the Conference Center for 2007-2009 **Concord App. 472 ¶11; GSMR App. 000762-000779.** Programs included meetings on ensuring access to education, identifying New Hampshire needs for workforce training and encouraging lifetime learning. *Id.* Much of GSMR's advertising budget is focused on promoting these and the CCP programs discussed above, which are not simply designed to provide information about NHHELCO loan programs.

Collectively, the NHHEAF Network Organizations made direct charitable gifts of some \$19,102,695 from 2005-2009. **Concord App. Concord App. 403 ¶16; GSMR App. 000609.** *See also Concord app. 473 ¶13.* In addition to its own gifts, GSMR, through its management and service fees, including their reductions in 2008 and 2009, allowed NHHELCO and NHHEAF to provide interest rate reductions, waivers of borrower origination and guaranty fees and guaranty fee reductions. *Id.*

## **B. Concord's Treatment of GSMR as Tax Exempt Ends in 2009.**

In 1997, GSMR purchased land and built an office building on what is now known as 3 Barrell Court. Over time, GSMR acquired additional land and constructed another building connected to its original building, known as 4 Barrell Court and two parking lots (1 and 2 Barrell Court). Its office buildings at 3-4 Barrell Court in Concord are home to it and its non-profit affiliates, NHHEAF, NHHELCO, and NNEF. In addition, as of 2008 and 2009, some space was leased to other State agencies and non-profit entities involved in promoting access to educational \*11 opportunities. *See, Concord App. 408 ¶9; GSMR App. 000640-000680.* GSMR has annually complied with all obligation to provide an annual list of its property for which exemption

is sought and a statement of its financial condition as prescribed by [RSA 72:23-c](#) and [RSA 72:23](#), V and V-a respectively, including tax years 2008 and 2009. **Concord App. 407 ¶37; GSMR App. 000624-000632 and 000640-000680.**

Until the end of 2009, Concord treated GSMR as tax exempt, subject to two Payment In Lieu of Taxes (“PILOT”) Agreements entered into in the early 2000s regarding portions of GSMR's real estate. **GSMR App. 000826-000833; Concord App. 405-406 ¶23, 28; GSMR App. 610-623.** Under the PILOT Agreements, GSMR agreed to pay make payments based on Concord's annual assessment times the municipal portion of the tax rate. *Id.*

In a memorandum of the City's Assessor discussing one of those PILOT Agreements, and specifically whether a then undeveloped lot owned by GSMR was entitled to tax exempt status, Concord's Assessor made the following comments:

... the City, when it entered into the PILOT Agreement with Granite State, acknowledged that Granite State has acquired the lot in question to carry out its charitable purposes ....

Memorandum of Kathryn Temchack dated June 25, 2004. **GSMR App. 834.**

In 2008, GSMR and the City began discussions regarding the scope and effect of the existing PILOT Agreements. When those discussions did not result in an agreement, GSMR brought a Petition for Declaratory Judgment before the Trial Court. While that Petition was pending, GSMR continued to respond to requests by Concord for additional information on various issues. **Concord App. 408 ¶40, 41, 42; GSMR App. 000001-000005 and 000681-000692.**

\*12 By letter dated December 22, 2009, Concord, through its Assessor, Kathryn H. Temchack, wrote to GSMR to advise that Concord took the position for the first time that GSMR was not eligible for a tax exemption and was fully taxable. **Concord App. 408 ¶43; GSMR App. 000693-000694.** Concord offered no explanation for its assertion that GSMR was not entitled to an exemption under [RSA 72:23](#), V or why it had changed its long-standing position on this issue.

Concord then issued a tax bill to GSMR for the 2009 tax year in the amount of \$92,059.26, which GSMR paid. **Concord App. 408 ¶44; GSMR App. 000695-000700.** GSMR filed a timely petition with the Trial Court seeking an abatement of its 2009 taxes and a declaration of exemption. **Concord App. 409¶45; GSMR App. 000701-000702 and Concord App. 1-6.** GSMR's 2008 and 2009 Petitions were then consolidated by the Trial Court.

### C. The Trial Court's Decision

Following extensive briefing and oral argument on the parties' cross motions for summary judgment, the Trial Court entered an order, ruling that GSMR had met the standards laid out in *ElderTrust of Florida, Inc. v Town of Epsom*, 154 N.H. 693 (2007) to be considered a charitable organization entitled to an exemption from *ad valorem* exemption under [RSA 72:23](#), V. Focusing on GSMR's own mission and business activity, the Trial Court found that Concord's arguments that GSMR was a mere loan servicer “missed the mark” because “GSMR has shown that it provides a benefit to the public at large by providing highly efficient streamlined loan services to New Hampshire lenders.” **Concord App. 523.** The Trial Court found that GSMR's efficient servicing activities save students money and promote access to low cost access to educational financing, through community outreach, low cost affordable financing options, scholarships and other charitable operations. The Trial Court rejected Concord's

\*13 argument that the mere fact that loan servicing could be done by a for-profit entity justified denial of a tax exemption to GSMR which provides such services on a non-profit basis. The Trial Court found that “this argument highlights the very benefit GSMR provides, minimizing the costs of servicing student loans so that the loans become more affordable for students to undertake.” *Id.* p. 524-525.

In its decision, the Trial Court also granted GSMR's motions to strike certain documents proffered by Concord in support of its summary judgment motion, namely, 1) the purported 2009 Annual Report of SLM Corporation (formerly Sallie Mae) taken from the internet; 2) a 2011 Concord Monitor article about student loan debt; and 3) IRS 990 forms for two unrelated charities.



The Trial Court found that in addition to being hearsay, these exhibits had no relevance to the issues presented in the case. **Concord App. 517.**

Finally, the Trial Court addressed the scope of the PILOT Agreements between GSMR and Concord. The Trial Court ruled that one PILOT Agreement applied to the land and buildings at 3-4 Barrell Court. The Trial Court ruled that the second PILOT Agreement which pertained to 1 Barrell Court had expired. Therefore, the two parking lots at 1 and 2 Barrell Court were considered fully exempt from taxation. Neither party has challenged the Trial Court's rulings regarding the scope of the PILOT Agreements.

Concord then appealed the Trial Court's ruling on GSMR's tax exempt status and the evidentiary rulings discussed above.

Additional facts may be discussed in the Argument which follows.

### ***SUMMARY OF ARGUMENT***

The record fully supports the Trial Court's conclusion that GSMR met the standards laid down by this Court in *ElderTrust of Florida, Inc. v Town of Epsom, supra* and was entitled to a \*14 charitable exemption under [RSA 72:23, V.](#) GSMR was established and is administered to serve the public good by its efficient and effective loan servicing program and management of its nonprofit affiliates which permits an extensive community outreach program, educating New Hampshire parents and students about higher educational opportunities and providing them with the tools to make a college education affordable.

Contrary to Concord's claims, GSMR is not inappropriately “piggybacking” on the nonprofit, charitable purposes of the other NHHEAF Network companies. Rather, its own charitable purpose is fulfilled by its highly efficient loan servicing and management of these entities on a non-profit basis and extensive community outreach activities which demonstrably serve the public good. GSMR's real estate in Concord was directly used and occupied for these charitable purposes. No officer, director or employee derives any pecuniary benefit from the corporation. The Trial Court properly rejected Concord's efforts to mischaracterize GSMR as merely a loan servicer and to suggest without any probative and relevant evidence, that the compensation paid to GSMR's Chief Executive Officer was inappropriate or excessive. Thus, all 4 tests laid down in *ElderTrust* were met by GSMR. The Trial Court's decision should be affirmed.

### ***ARGUMENT***

#### **I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO GSMR.**

##### **A. Legal Standards**

##### **1. Review of Summary Judgment Orders**

In considering a trial court's summary judgment rulings, this Court considers the evidence “in the light most favorable to the non-moving party.” *Say Pease IV v. N.H. Dep't of Revenue Admin.*, 163 NH. 415, 417 (2012). The Court will uphold summary judgment if the moving party is entitled to judgment as a matter of law and there are no disputed material facts. \*15 *Id.* A fact is only material if it affects the outcome of the litigation. *Town of Barrington v. Townsend*, 2012 N.H. LEXIS 133, 14 (decided October 16, 2012); *Sabinson v. Trs. of Dartmouth College*, 160 N.H. 452, 455 (2010); *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 321 (2007). The Court reviews a trial court's “application of the law to the facts de novo.” *Id.* However, the Court defers to the trial court's findings of fact if they are supported by the evidence and are not erroneous as a matter of law. *City of Rochester v. Corpening*, 153 N.H. 571, 573 (2006).

##### **2. Statutory and Decisional Framework Governing Charitable Exemptions**

[RSA 72:23, V](#) provides an exemption from *ad valorem*, or real estate property taxation for:

[t]he buildings, lands and personal property of charitable organizations and societies organized, incorporated, or legally doing business in this state, owned, used and occupied by them directly for the purposes for which they are established, provided that none of the income or profits thereof is used for any other purpose than the purpose for which they are established.

The term “charitable,” for the purpose of [RSA 72:23, V](#) is defined in [RSA 72:23-1](#) as follows:

[t]he term “charitable” as used to describe a corporation, society, or other organization within the meaning of this chapter, including [RSA 72:23](#) and [72:23-k](#), shall mean a corporation or organization established and administered for the purpose of performing and obligated, by its charter or otherwise, to perform some service of public good or welfare advancing the spiritual, physical, intellectual, social, or economic well-being of the general public or a substantial and indefinite segment of the general public that includes residents of the state of New Hampshire, with no pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefits or services to such officers or members, or those of any related organization. The fact that an organization's activities are not conducted for profit shall not in itself be sufficient to render the organization “charitable” for the purposes of this chapter, nor shall the organization's treatment under the United States Internal Revenue Code of 1986, as amended. This section is not intended to abrogate the meaning of “charitable” under the common law of New Hampshire.

**\*16** This statutory definition of “charitable” has been held to be consistent with the common law definition of charitable organization. *The Housing P'ship v. Town of Rollingsford*, 141 N.H. 239, 241 (1996).

In *Elder Trust of Florida, Inc. v. Town of Epsom*, 154 N.H. 693, 697-698 (2007), this Court synthesized its prior holdings and delineated a clear four factor test that an organization seeking a charitable tax exemption must meet:

[T]he plain language of [RSA 72:23, V](#) and [RSA 72:23-1](#) requires the institution to satisfy each of the following four factors; namely, whether: (1) the institution or organization was established and is Administered for a charitable purpose; (2) an obligation exists to perform the organization's stated purpose to the public rather than simply to members of the organization; (3) the land, in addition to being owned by the organization, is occupied by it and used directly for the stated charitable purposes; and (4) any of the organization's income or profits are used for any purpose other than the purpose for which the organization was established. Under the fourth factor, the organization's officers or members must not derive any pecuniary profit or benefit.

The Court noted that this four part test was not only based on the plain language of the statute but was also fully consistent with its own prior jurisprudence on this issue. *Id.*

Applying these four part test, the Court found that *ElderTrust* qualified for a charitable exemption. The *ElderTrust* organization was found to have met the first factor where “it was established to perform a service of public good, namely providing skilled nursing and assisted living facilities for the **elderly**.” 154 N. H. at 698 (internal quotation omitted). Furthermore, *ElderTrust*'s facilities provided a level of care of services above that of mere apartment or rental units for the **elderly** and thus, met previously established standards for a charitable exemption. *ElderTrust* met the second prong of the test because its articles of incorporation, requiring it to operate exclusively for public charitable purposes and purposes, placed a significant and enforceable limitation on *ElderTrust*'s operations. *ElderTrust*'s operation of its skilled nursing facility and assisted living facility were consistent with its charitable purposes. Charging fees for **\*17** its services did preclude the charitable exemption as long as the fees “directly fulfill the organization's charitable purpose or are necessary for the organization to accomplish its purpose.” 154 N. H. at 701

quoting *Senior Citizens Housing Dev. Corp. v City of Claremont*, 122 N. H. 1104, 1108 (1982) (other citations omitted). Thus, ElderTrust met the third prong of the test by directly occupying and using its real estate for its charitable purposes. Finally, the Court found that no officer, member or employee of ElderTrust derived any inappropriate pecuniary benefit even though ElderTrust paid a substantial amount of its earnings to two for profit entities and two ElderTrust Board Members held stock in one or both of the for-profit entities. The Court accepted the trial court's findings that the contracts with the for-profit entities which managed ElderTrust facilities had been arrived at as the result of a competitive bidding process and the evidence otherwise did not show that ElderTrust intended to benefit the for-profit entities.

In *Town of Peterborough v. TheMacDowell Colony, Inc.*, 157 N.H. 1 (2008), this Court, applying the standards laid down in *ElderTrust*, affirmed a lower court decision on summary judgment to grant a charitable exemption to a non-profit corporation dedicated to promotion of the arts. The Court began its analysis by noting that “[t]he legislative purpose to encourage charitable institutions is not to be thwarted by a strained, over-technical and unnecessary construction.” *Id.* at 5 (quoting *Young Women's Christian Ass'n v Portsmouth*, 89 N.H. 40, 42 (1937)). The Court found that MacDowell's charter requiring it to use the property and to apply its funds to fulfill its charitable purpose of promoting the arts and provide a place for work and companionship for artists created an enforceable charitable obligation. While use of the property was confined to artists selected for the “artists in residence program, that program fulfilled the charitable purpose of arts promotion, and thus met the requirement of providing a public benefit, as the relevant inquiry is “... whether the public, or a substantial and indefinite segment thereof, \*18 benefits from the organization's performance of its stated purpose.” 157 N.H. at 7 (emphasis in original text). The Court also rejected the Town's argument that MacDowell did not sufficiently serve New Hampshire residents, finding that “a specific inquiry into the organization's impact on new residents was necessary only when the organization serves a narrower population than the general public,” which was not the case with MacDowell whose promotion of the arts “advances the intellectual well-being of the general public.” *Id.* at 9.

In *Appeal of City of Concord*, 161 N.H. 344, 350 (2011), this Court, relying on its analysis in *MacDowell*, *supra*, made clear that “direct service to the public is not required for a charitable tax exemption.” The Court concluded that for an institution or organization to meet the requirement that it was “established and is administered for a charitable purpose,” as required by *ElderTrust*, “that charitable purpose must be its dominant or primary purpose.” *Id.* at 352. Even if an organization's purpose is to primarily benefit the public, if the organization is actually administered so that any public benefit is “slight, negligible or insignificant” (quoting *Nature Conservancy v. Town of Nelson*, 107 N.H. 316, 320 (1966)), when compared to the benefit derived by the organization's members, the organization is not entitled to a charitable tax exemption. 161 N.H. at 352. The Court noted that the principles it articulated were completely consistent with its ruling in *MacDowell* where it agreed with the trial court that MacDowell's artist in residence program did “primarily” benefit society as a whole. *Id.* (emphasis supplied by the Court).

## **B. GSMR Met The Standards for a Charitable Exemption under RSA 72:23,V.**

At the outset, it should be noted that Concord's arguments regarding whether GSMR should be entitled to a charitable exemption cannot alter the undisputed fact that it treated GSMR as tax exempt in 2008. Concord cannot retroactively alter its decision to treat GSMR as tax exempt for 2008. RSA 76:14; \*19 *Pheasant Lane Realty Trust v City of Nashua*, 143 N.H. 140, 143 (1998); *LSPAss'n v Town of Gilford*, 142 N.H. 369, 375 (1997). The issues regarding the 2008 tax year concerned only the scope and impact of the PILOT Agreements and whether the parking lots constructed on 1 and 2 Barrel Courts were used for a charitable purpose. Concord did not challenge on appeal the Trial Court's findings that 1 and 2 Barrell Court (former Lots 17 and 20) were being used as parking lots for GSMR's office buildings at 3-4 Barrell Court as of the tax years in question in this case and thus, were no longer vacant land. **Concord App. 526 & 529**. Notice of Appeal, (page 3). Thus, Concord's challenge to GSMR's tax exempt status applies only to the 2009 tax year. In any event, Concord's arguments must fail. Viewed in the light of the statutory and decisional framework discussed above, GSMR plainly demonstrated by undisputed evidence that it was entitled to a charitable exemption under RSA 72:23,V.

### 1. *GSMR Was Formed and Is Administered For a Charitable Purpose.*

GSMR was formed by NHHEAF to effect a reorganization of NHHEAF which would segregate non-federal reserves from those reserves specifically restricted for use in federal programs, subject to and consistent with the terms of the Articles of Association of NHHEAF, itself a non-profit corporation dedicated to promoting access to higher education. **Concord App. 8; GSMR App 000266-000283.** The creation of GSMR and the transfer of certain funds to it were specifically made subject to its own Articles of Agreement which provided that it was “organized exclusively for the charitable and educational purposes of providing low cost or alternative financial assistance to eligible students and parents ... and of supporting the development of higher education and educational opportunities for the citizens of the United States of America and its territories.” **Concord App. 17.**

Promoting access to low cost, affordable education has been recognized by New Hampshire as an important public policy goal. See, e.g. [RSA 195-E:1, et seq.](#) GSMR' activities, \*20 which will be discussed in greater detail below, must be viewed in light of the legislative mandate to encourage access to higher education by establishing an efficient stable secondary market for student loans and by declaring the exercise of the authority conferred by the statute on NHHEAF and other entities the performance of an essential government function:

It is declared to be the policy of this state that for the benefit of the people of the state, the increase of their commerce, welfare, and prosperity and the improvement of their health and living conditions, it is essential that students attending higher educational institutions be given the fullest opportunity to learn and develop their intellectual and mental capacities. It is recognized that the financial costs to obtain an education beyond the high school level are often burdensome or prohibitive, and it is essential that qualified students or their parents be provided with low cost financial assistance in order that the students may attend such schools and to reduce the total amount of loan payments following graduation. In order to achieve this policy, it is essential that state residents be provided with an appropriate source of financing their postsecondary educations and that educational institutions wherever situated be provided with appropriate additional means to assist qualified students or their parents financially so that the students might achieve the required levels of learning and development of their intellectual and mental capacities. In order to assure the continued viability of existing loan programs whereby educational loans are made available to qualified students or their parents, it is necessary and desirable to provide an efficient, stable secondary market to which such loans may be sold, transferred, or pledged in exchange for funds with which the original lender will be enabled to continue or increase participation in such loan programs. Therefore, the general court has conferred certain powers on educational institutions, on loan corporations, on the New Hampshire higher education assistance foundation, and on the New Hampshire health and education facilities authority to assure the successful origination, distribution and collection of loans so as to accomplish the purposes of this chapter, all to the public benefit and good. It is further declared that the exercise by the educational institutions, the loan corporations, the New Hampshire higher education assistance foundation and the New Hampshire health and education facilities authority of the powers conferred under this chapter will constitute the performance of an essential governmental function.

#### [RSA 195-E:1.](#)

Bonds can only be issued under this chapter upon a determination by the governor and Executive Council that the origination or acquisition of low cost loans “will assist students in attending their educational institutions and will lower the cost to the students of financing their educations.” RSA 195-E.10, III (a). The foundation (defined to be NHHEAF or any voluntary \*21 non-profit corporation organized by 5 members of NHHEAF's Board of Trustees), qualified educational institutions and loan corporations, were given the authority to administer a loan program for qualified students and their parents, provided that the terms of such loans complied with relevant law and were not discriminatory. [RSA 195-E:2, VI](#) and [RSA 195-E: 14.](#) The foundation was given authority to contract with another entity to administer and service the loan program. [RSA 195-E: 14.](#) NHELCO was designated

an “eligible lender,” as defined by federal law, to enable it to provide a secondary market for federally guaranteed student loans. [RSA 195-E:15-a](#). Because these activities were the performance of an essential governmental function, the legislature provided for exemption from taxation:

The exercise of the powers granted by this chapter will be in all respects for the benefit of the people of this state, for the increase of their commerce, welfare, and prosperity, and for the improvement of their health and living conditions, and will constitute the performance of an essential governmental function. Neither the authority [the New Hampshire health and education facilities authority] nor the loan corporations shall be required to pay any taxes or assessment upon the activities of the authority or the loan corporations or their agents in the administration and operation of the loan programs pursuant to this chapter.

RSA 195-E: 15.

Even absent the express statutory articulation of the public policy set forth in RSA 195- E, GSMR's charitable purpose, as stated in its Articles of Agreement, plainly meets the statutory definition of “charitable,” laid out in [RSA 72:23-1](#), as promoting access to low cost, affordable education advances, the intellectual well-being of the general public “and *primarily* benefit[s] society as a whole” *MacDowell, supra* at 7. Furthermore, in the event of a dissolution, no members, officers, or employees of GSMR are to receive any net earnings or profit and on dissolution, all remaining assets shall go to either a governmental or non-profit organization organized exclusively for charitable, scientific, literary or educational purposes. **Concord App. 17-18**. Thus, the undisputed evidence shows that GSMR was formed for a charitable purpose.

**\*22** The record amply supports the Trial Court's conclusion that GSMR is administered for a charitable purpose. GSMR administers the student loan programs of NHHEAF and NHHELCO, which the legislature has declared constitute an “essential governmental function” (RSA 195- E: 1) and provides education and assistance to New Hampshire lenders regarding their own student loan programs. Furthermore, GSMR provides a wide range of community outreach programs, reaching thousands of students, parents and educators across the State, to promote access to higher education and encourage students and their families to make wise and responsible decisions about educational opportunities.

The Trial Court properly recognized that GSMR's efficient loan servicing program provided a benefit to the public at large by indirectly reducing the costs of student loans. **Concord App. 523-524**. Concord offered no evidence to refute the undisputed evidence in the record that GSMR's activities allowed New Hampshire students and parents access to lower cost financing for higher education, thus, fulfilling GSMR's charitable purpose. **Concord App. 403 ¶18**.

Furthermore, GSMR's administration of the loan program provides many other benefits to New Hampshire students and parents by providing for a single point of contact throughout the life of the loan, personalized loan counseling and a comprehensive website which permits borrowers to research options, apply for a loan and make payments and check their account status. Coupled with other programs, such as the Campaign for Financial Literacy, GSMR's loan administration encourages prudent financial decisions and management by New Hampshire students and families. **Concord App. 400 ¶4 and GSMR App. 000454-000455**.

As the Trial Court properly noted, Concord's arguments that GSMR's loan servicing activities could be provided by a for profit entity “miss the mark” in determining whether or not **\*23** GSMR is entitled to a charitable exemption. Decision, p. 8. First, Concord repeatedly refers to GSMR's “highly profitable” business operations as somehow disqualifying it for a charitable exemption. *See, e.g.* Concord's Brief, p. 7. However, the fact that GSMR is able to successfully conduct both its management and loan servicing activities does not transform it in a for-profit entity not engaged in a charitable mission. Non-profits need to properly manage their business operations if they are to achieve their charitable purposes. Revenue received by GSMR is used to pay operational expenses, pay for uncollectible loans and collection expenses, fund loan default reserves, provide student, parent and institutional information and counseling and pay for the development of new educational loan related activities and services. Given that GSMR's loan portfolio exceeded \$2 billion during 2008 and 2009, it needed to have adequate reserves and

demonstrated financial capability to meet its contractual obligations, which, in turn allows it to fulfill its charitable mission. Thus, contrary to Concord's claims, GSMR's prudent financial management should not be held against it to preclude it from receiving a charitable exemption. Second, whether or not GSMR's loan servicing could be provided by a for-profit entity is simply irrelevant to determining whether its non-profit activities are administered for a charitable purpose. See, *Clubs of California for Fair Competition v. Kroger*, 7 Cal. App. 4th 709, 721 (Cal. Ct. App. 1992) (citation omitted) (“A charitable enterprise does not lose its exemption merely because it engages in competition with businesses which are subject to taxation.”). Moreover, as the Trial Court noted, a for-profit entity would necessarily have to build into its costs of doing business an allowance for profit which would have to be passed on to borrowers. Third and finally, Concord simply fails to acknowledge, much less refute, the public benefits provided by GSMR's efficient loan servicing program which, among other things, permits the extensive community outreach activities of the NHHEAF Network Organizations.

**\*24** Concord also errs in claiming that the Trial Court incorrectly relied on GSMR's affiliations with the other NHHEAF Network companies to support its charitable exemption. In effect, Concord claims that GSMR is either “bootstrapping” or “piggybacking” on the charitable purposes of the other members of the NHHEAF Network Foundation to qualify as a charity.<sup>2</sup> Concord Brief, p. 20. Nothing in the Trial Court's Decision or the record of this case supports the City's arguments.

First, GSMR did not simply rely on the non-profit status of its corporate affiliates to support its claim for a charitable exemption. To the contrary, GSMR based its claim on its own charitable purpose as set forth in its Articles of Agreement, and the breadth and depth of its own activities which fulfill an “essential governmental function” and plainly serve the public good. Among other things, it provides management services at cost, establishes servicing fees at a level which allows access to lower cost funding, including when necessary, making reductions in its management and servicing fees, and provides a broad and extensive community outreach program designed to promote access to higher education. Thus, this case is unlike *Shallow River Properties, Inc. v. Town of Northumberland*, 2001 WL 345141 (N.H. Bd. Tax. Land. App. 2001), cited by Concord, where the taxpayer, which owned certain real estate leased to a non-profit affiliate, had no enforceable obligation to carry out any charitable mission purpose or objective during the term of its existence.

While GSMR can independently meet the standards for a tax exemption, a fair examination of GSMR's request for exemption cannot disregard the nature of its relationship **\*25** with the other NHHEAF companies and the seamlessly integrated way in which they work together to provide affordable higher educational opportunities to New Hampshire parents and students. Such an approach would be inconsistent with this Court's prior teaching that the integrated activities of an organization as a whole must be considered in determining eligibility for tax exemption. *Appeal of Town of Wolfeboro*, 152 N.H. 455, 462 (2005); *St. Paul's School v. City of Concord*, 117 N.H. 243, 250 (1977). While legal integration alone may not be enough, nothing in New Hampshire law precludes a taxpayer, which has a direct charitable purpose of its own, from providing the full context of its activities, including its work for and with other nonprofit related entities, to demonstrate that it is entitled to a charitable exemption. Indeed, to impose such a limitation would thwart the legislative purpose to encourage charitable institutions “by a strained, over-technical and unnecessary construction.” *MacDowell*, *supra* at 5. That is particularly true where in this instance, GSMR, through its management agreements, carries out all the work of the other NHHEAF entities. Certainly, Concord which sought extensive documentation about NHHEAF, NHHELCO and NNEF (see **GSMR App. 1-5**) and which never objected to introduction of evidence regarding the collaborative activities of the other NNHEAF Network companies, cannot credibly claim that GSMR's work for and with those entities is not relevant to the determination of its request for tax exemption. To the extent that *Lewiston Hosp. v. Mifflin Cty Bd. of Assessment Appeals*, 706 A.2d 1269, 1274 (Pa. Commw. Ct. 1998); *Sacred Heart Healthcare System v. Comm.* 673 A.2d 1021 (Pa. Commw. Ct. 1996), decisions of an intermediate appellate court in Pennsylvania proffered by Concord, suggest otherwise, this Court should not find them persuasive.<sup>3</sup>

**\*26** Concord either asks the Court to ignore GSMR's direct role in the development and presentation of the NHHEAF Network's extensive community outreach programs which reach thousands of parents, students, and institutions annually or tries to create a factual dispute on non-material issues. For instance, Concord points to certain line items in NHHELCO's Form 990 identifying certain expenses for the Center for College Planning as indicating that NHHELCO is the entity responsible for the Center for College Planning. Concord's Brief p. 9. Those expenses certainly do not reflect the over-all annual costs of the

Center for which GSMR provides dedicated office space and employees and devotes considerable time to counseling students, preparing materials, and making presentations both at its offices in Concord and around the State. Similarly, Destination College, the annual event drawing a thousand parents and students to a program on college planning, is developed and presented by GSMR on behalf of and under the banner of the NHHEAF Network of Organizations. **Concord App. 400¶ 14 and 472¶ 11.** The same could be said about all the wide range of community outreach programs which GSMR has developed and maintains for the NHHEAF Network. In arguing that GSMR's own charitable contributions to various programs and entities do not qualify it for a tax exemption, Concord again misses the mark. These voluntary contributions, while relevant to GSMR's charitable status, are not the sole grounds entitling GSMR to a charitable exemption. Rather, these contributions must be seen in context in light of GSMR's over-all activities to fulfill its charitable mission. In short, Concord raises no material disputed issues which could be considered "material to the determination of substantial truth." *Thomas v. Tel. Publ'g. Co., supra* at 337.

\*27 Despite Concord's attempt to mischaracterize GSMR as simply a highly successful loan servicer, the undisputed or undisputable facts demonstrate otherwise. GSMR's integrated and efficient loan servicing activities, its management, at cost, of the other NHHEAF Network companies, and its development of and support for an extensive community outreach program reaching thousands of New Hampshire parents, students and institutions annually are fulfilling its charitable purpose and primarily serve the public interest in providing affordable access to higher education. Certainly, the public benefits from GSMR's activities cannot be considered "slight, negligible or insignificant." *Appeal of Concord, supra* at 351. The record plainly demonstrates that GSMR was formed for and administered for a charitable purpose, meeting the first prong of the *ElderTrust* standards.

## ***2. GSMR Has A Legally Enforceable Obligation To Provide Its Stated Charitable Purpose to the Public.***

GSMR's Articles of Agreement, requiring it to operate exclusively for public charitable purposes, place a significant and enforceable limitation on GSMR's operations. As noted above, GSMR is subject to the regulation of the Charitable Trusts Unit of the Attorney General's Office, under [RSA 7:24](#), to ensure that it carries out its stated purposes. Concord does not dispute the enforceable nature of GSMR's charitable obligation. Thus, GSMR easily meets the second prong of the *ElderTrust* standards.

## ***3. GSMR's Real Estate is Directly Used and Occupied for its Charitable Purposes and Those of Its Non-Profit Tenants.***

GSMR also easily meets the third test under *ElderTrust*, requiring that the land owned by the charitable entity be used and occupied directly for the charitable purposes. GSMR's office buildings at 3-4 Barrell Court are home to it and the other members of the NHHEAF Network of Organizations. As of 2008 and 2009, some space was leased to governmental agencies and non-profit \*28 entities involved in educational activities. *Grondin Aff*, par. 39, ex 9. Under [RSA 72:23, V-](#) a, real estate owned by an entity entitled to a charitable exemption with respect to the tenant's space to the extent that it would be if the tenant owned the property it uses and occupies. Concord has never asserted that GSMR's tenants would not have been entitled to such a tax exemption. As noted above, the parking lots at 1-2 Barrell Court were used as of the 2008 and 2009 tax years to support the activities of GSMR and its governmental and non-profit tenants. Thus, GSMR's real estate qualifies for exemption from *ad valorem* taxation.

## ***4. GSMR's Income and Profits Are Not Used For Any Purposes Other Than The Charitable Purpose For Which GSMR Was Established.***

The final prong of the *ElderTrust* test requires a determination of whether the organization's income is devoted to the charitable purpose, including whether the organization provides any inappropriate pecuniary benefit to its officers or members. *ElderTrust, supra* at 703. Article 3 of GSMR's Articles of Agreement expressly provides that its officers or directors are to receive no pecuniary benefit or compensation, not precluding appropriate compensation for services rendered and that on dissolution, no members, officers or employees of GSMR are to receive any net profits or earnings. All remaining assets are to go to either

a governmental or non-profit organizations organized exclusively for charitable, scientific, literary or educational purposes.  
**Concord App 18.**

Concord's claim that the compensation paid to GSMR's employees, in particular the compensation paid to its President and Chief Executive Officer, Rene Drouin, results in an inappropriate pecuniary benefit is based purely on speculation, not supported by any competent, relevant evidence and is wholly without merit. The undisputed evidence showed that GSMR's Board of Directors, which is independent from the executives of GSMR, established Mr. Drouin's annual compensation in 2008 and 2009 based on an examination of specific data \*29 relative to compensation for executives at non-profit organizations and an analysis by an independent consulting firm which found Mr. Drouin's compensation to be "competitive but somewhat conservative." **Concord App. 471¶9; GSMR App. 000713-000760 and Concord App. 107-154.** The Charitable Trusts Unit, having been advised of the procedure followed by GSMR's Board in establishing Mr. Drouin's compensation has taken no further action. Nothing in *ElderTrust*, or this Court's other jurisprudence on charitable exemptions precludes a charitable organization from paying reasonable compensation to its employees. Indeed, this Court allowed a charitable exemption in *ElderTrust* despite some concern about "overlapping interests" of some of the principals involved in the charitable organization and some for-profit entities with which it had contracts. *Id.* at 706.

To support its assertions, Concord offered only certain Form 990s obtained from the New Hampshire Secretary of State's Office for two New Hampshire charities, the New Hampshire Charitable Foundation and Crotched Mountain. As will be discussed further in the next section, the Trial Court properly refused to allow this proffered evidence into evidence because the documents were both hearsay and irrelevant to the issues in this case. **Concord App. 517.** As the Trial Court found, "[t]he City has produced no evidence that it is[sic] GSMR's procedure in setting salaries is unreasonable and merely speculates that it is somehow unreasonable for an organization with 233 employees to pay \$15 million in salaries." **Concord App. 527.** This Court should accept the Trial Court's findings and rule that GSMR met the final prong of the *ElderTrust* standards.

In conclusion, GSMR has demonstrated that it meets the statutory and decisional standards for a charitable exemption under [RSA 72:23, V](#). Its efficient loan servicing and effective management of its allied organizations, including its extensive and far-reaching \*30 community outreach program, fulfill its charitable goal of providing affordable access to higher education for New Hampshire students and parents. Concord proffered no substantive evidence to justify its abrupt reversal in 2009 of its long-standing position that GSMR was tax exempt and using the developed portions of its real estate for its "charitable purposes" in its own Assessor's words. GSMR App. 834 The Trial Court applied the proper legal standards and his factual conclusions are fully supported by the record. This Court should affirm the Trial Court's Decision.

## **II. THE TRIAL COURT'S DECISION TO STRIKE CERTAIN DOCUMENTS PROFFERED BY CONCORD DID NOT CONSTITUTE AN UNSUSTAINABLE EXERCISE OF ITS DISCRETION.**

As this Court well knows, the Trial Court has broad discretion regarding the admission of evidence:

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *State v. Mitchell*, 148 N.H. 293, 294-95 (2002) (quotation omitted); *N.H. R. Ev. 401*. Evidence that is not relevant is inadmissible. *Mitchell*, 148 N.H. at 295. Whether evidence is relevant is a question for the trial court's sound discretion, and we will not overturn its determination absent an unsustainable exercise of discretion. *Id.* at 294. To show an unsustainable exercise of discretion, the defendant must demonstrate that the court's ruling was clearly untenable or unreasonable to the prejudice of his case. *Id.*

*State v. Town*, 163 N.H. 790, 795 (2012).



Concord challenges the Trial Court's decision to exclude from evidence: 1) the tax records of two New Hampshire charities; 2) the 2009 Annual Report of SLM Corporation (formerly Sallie Mae); and 3) a Concord Monitor article about student debt loan levels. The Trial Court's decision to exclude these materials was a proper exercise of its discretion. Moreover, Concord fails to demonstrate that the exclusion of this preferred evidence was in any way untenable or prejudicial to its case. GSMR will discuss the proffered exhibits separately below.

**\*31 A. *The Tax Records of the Two Other New Hampshire Charities Lacked a Proper Foundation And Provided No Relevant Evidence For the Determination of The Issues In This Case.***

Concord initially proffered the documents which purport to be the IRS 990 Forms of the Crotched Mountain Foundation, and the New Hampshire Charitable Foundation under the affidavit of its Solicitor without any further authentication. Following GSMR's Motion to Strike, Concord then belatedly offered a letter from the Charitable Trust Unit of the Attorney General's Office certifying that the Form 990s had been filed with its office. **Concord App. 264, 373.** Even if that letter could be construed to comply with the requirements of *N.H. R. Ev. 901(b)(7)*, the proffered evidence still constituted inadmissible hearsay. The documents were not offered through a witness who could testify about them based on personal knowledge regarding the data contained in the reports. Moreover, the data is simply not relevant to this case. Concord purports to compare the financial records of these two entities to GSMR apparently in an effort to support its argument about the compensation paid to GSMR's chief executive. However, Concord's solicitor is not qualified to compile such a study between these entities. Also, given that neither of these organizations performs work that is in any way related to GSMR's work, any comparison between these organizations and GSMR is meaningless and cannot demonstrate that the process GSMR used to establish compensation for its chief executive was unreasonable. The Trial Court properly excluded this proffered evidence.

**\*32 B. *The Annual Report of the SLM Corporation Was not Properly Authenticated and Constitutes Inadmissible Hearsay***

Concord apparently took from the internet the purported 2009 annual report of SLM, formerly known as Sallie Mae. The exhibit is not properly authenticated, it is unsupported by the testimony of any witness having personal knowledge of the data set forth therein, and is thus, not properly admissible. *See Omiya v. Castor*, 130 N.H. 234, 237 (1987); *see also Novak v. Tucows, Inc.*, Docket No. 06-CV-1909, 2007 U.S. Dist. LEXIS 21269 at \*17 (E.D.N.Y. Mar. 26, 2007) (finding use of documents taken from the internet to be impermissible, even if authentication issues were resolved, given the lack of "personal knowledge required to set forth with any certainty that the documents obtained via third-party websites are in fact, what [the proponent] declares them to be").

Moreover, the purported Annual Report is plainly irrelevant to any issues to be resolved in this case. The City, in effect, argues that GSMR should not receive a charitable tax exemption because SLM, "the largest student loan origination and servicing company in the nation" is not a charity. Concord Brief, p. 30. However, the City fails to draw any parallels between the business operations and community outreach programs of SLM (if any) and those of GSMR. In fact, as discussed above, the undisputed facts demonstrate that GSMR's business operations, including its extensive community outreach program, are completely consistent with its charitable mission of providing low cost or alternative financial assistance to students and parents to foster access to higher educational opportunities. As the Trial Court properly noted, whether loan servicing could be done by a for-profit entity is not dispositive as to whether GSMR should be entitled to a charitable exemption. **Concord App. 524.** Because SLM's charitable status is irrelevant, the purported SLM annual report has no bearing on whether GSMR is entitled to a charitable tax exemption and therefore, the Trial Court properly excluded it.

**\*33 C. *The 2011 Concord Monitor Article Constitutes Inadmissible Hearsay.***

Concord submitted a 2011 Concord Monitor article on student debt loan levels as an exhibit to its Motion for Summary Judgment and GSMR moved to strike it. **GSMR App. 000870.** The City did not object to GSMR's first Motion to Strike in a timely

manner but later submitted the same article in response to GSMR's Objection to Concord's Motion For Summary Judgment. GSMR objected again. **Concord App. 484.** The Trial Court found this article to be irrelevant hearsay.

Like many of its claims, Concord's argument that the newspaper article should be deemed self authenticating under N.H. R. of Ev. 902(6) (which Concord incorrectly describes as 901(6)) misses the mark. The Trial Court properly struck this exhibit because the article which was published two years after the tax dates in question in this case, still constituted hearsay and was simply not relevant to any issue before the Court in this matter which is to determine whether GSMR has met the standards for a tax exemption under New Hampshire law. Concord's injection of the issue of over-all student debt levels clearly is not intended to illuminate any issue in this case. If anything, the data shows the importance of having a nonprofit entity such as GSMR committed to providing low cost financing of education to students and parents in New Hampshire. Moreover, as discussed above, the undisputed record showed that long before the publication of this article, GSMR was taking the issue of over-all levels of student debt seriously and had worked to reduce the level of defaults, limit burdens caused by defaults on borrowers and the loan program and develop programs to foster responsible borrowing and improve students' financial management skills. **Concord App. 472 ¶12.**

**\*34** Since Concord has failed to demonstrate that the Trial Court's exclusion of the proffered evidence discussed above was an unsustainable exercise of its discretion, this Court should affirm the Trial Court's decision on these issues.

### III. CONCLUSION

For all the reasons set forth above, the Court should affirm the Trial Court's Decision. Margaret H. Nelson, Esq., will conduct oral argument on behalf of GSMR and respectfully requests fifteen (15) minutes.

Respectfully submitted,

GRANITE STATE MANAGEMENT & RESOURCES

By Its Attorneys,

SULLOWAY & HOLLIS, P.L.L.C.

Dated: January 10, 2013

By <<signature>>

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Footnotes

- 1 GSMR includes in its Appendix various documents which were part of the record before the Trial Court which Concord chose not to include in its Appendix but which are relevant to the resolution of the issues before the Court. GSMR will from time to time refer to materials in Concord's Appendix which it will refer to as "Concord App."
- 2 Despite its "piggybacking" argument, Concord sometimes suggests that NHHEAF and NHHELCO's status as charities has not been shown (see Concord Brief, p. 3). Given the undisputed evidence in the record concerning their corporate purpose and activities and the statutory declaration in RSA 195-E: 1 and 15, making the performance of their duties an "essential governmental function," this Court can and should disregard this suggestion.
- 3 It is worth noting that even under this unduly restrictive approach in *Lewiston Hospital, supra*, the Pennsylvania Commonwealth Court affirmed the trial court's refusal to allow the County to examine the activities of the Hospital's parent and other subsidiaries and went on to find that the Hospital met the tests for a "purely public charity" under Pennsylvania law.

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