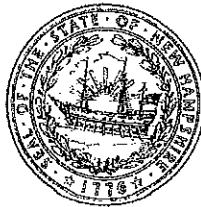


ATTORNEY GENERAL
DEPARTMENT OF JUSTICE

MICHAEL A. DELANEY

ATTORNEY GENERAL

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397



ORVILLE B. "BUD" FITCH II
DEPUTY ATTORNEY GENERAL

December 8, 2009

Susan M. Wall, Clerk
Town of Salem
33 Geremonty Drive
Salem, NH 03079

Re: Proposed Charter Amendment

Dear Ms. Wall:

The State hereby denies the Town of Salem's ("Town") proposed charter amendment pursuant to RSA 49-B:5-a. Upon review, the proposed changes are not consistent with the laws of the State of New Hampshire.

(1) Elimination of Deliberative Session

The Salem Charter proposal creates an Official Ballot Town Council form of government, and eliminates the opportunity for town voters to deliberate official ballot articles to be addressed on the warrant in a manner consistent with RSA 49-D:3, I-a. The Official Ballot Town Council form of local government is defined in RSA 49-D:3 I-a as follows:

Official ballot town council shall be a variation of the town council which provides for voting on some or all matters that general law requires to be addressed at the annual or a special meeting of a town, by official ballot. In such event, the town council shall be vested only with the limited authority to vote on all matters not voted on by official ballot. **When an official ballot town council is included in any charter, the provisions of RSA 49-D:3, I, relative to town councils, shall apply in all respects, except with respect to those matters to be voted on by official ballot.** When a charter provides for an official ballot town council it shall also specify with precision the budgetary items to be included on the official ballot, a finalization process for the annual budget, the process for public hearings, debate, discussion, and amendment of questions to be placed on the official ballot, the procedures for the transfer of funds among various departments, funds, accounts, and agencies as

may be necessary during the year, and the applicability of the official ballot procedure to special elections. The majority vote required to approve bonds or notes shall be either 2/3 or 3/5 as adopted and provided for in the charter. If a charter does not specify which majority vote is required, than the required majority vote shall be 2/3. All voting by official ballot shall be in accordance with the procedures established in RSA 669:19-29, RSA 670:5-7 and RSA 671:20-30, including all requirements pertaining to absentee voting, polling places, and polling hours. Nonbudgetary items may be placed on the official ballot pursuant to this section notwithstanding the provisions of RSA 40:4-e and RSA 39:3-d.

(Emphasis Added).

Under RSA 49-D:3 I-a, town voters are entitled to an opportunity to debate and amend articles that will be placed on the ballot. Indeed, RSA 40:14, VIII provides, in relevant part, "For any town which has adopted a charter under RSA 49-D:3, the method of adoption (of SB 2 or official ballot voting) shall be the manner of amending the charter as provided under RSA 49-B." Additionally, RSA 40:13 provides for, and requires, a deliberative session for discussion, debate and amendment.

The Town can remedy this issue by following the process set forth in RSA 40:13 for deliberative sessions, or alternatively, implementing a town council form of government.

(2) Citizen Recall Initiative

Section 7.7 of the proposed charter amendment permits citizen recall initiatives. As recognized by the Superior Court in Asa Knowles and Cora Stockbridge v. Owen Latham et al., Rockingham Superior Court docket no. 04-E-0361 (2005), elected officials can only be removed for cause and with procedural safeguards such as hearing or judicial review. In Asa Knowles and Cora Stockbridge, the Court stated "...that the Town's recall provision, which allows recall of elected officials without cause and without a hearing or judicial review, is inconsistent with expressed legislative intent to remove such officials only for cause and with procedural ~~—~~ safeguards." Id. A copy of the decision is attached as Attachment A for your convenience.

The Town can remedy this issue by removing the recall initiative in Section 7.7 of the proposed charter amendment.

(3) Number of Signatures Required to Petition Official Ballot Question

Section 7.4 of the proposed charter amendment establishes a petition process for official ballot questions with a minimum threshold of 2% of registered voters. This petition process

conflicts with RSA 39:3 which requires petitioned warrant articles to obtain signatures from 25 voters or 2% of the town's voters, whichever is less.

The Town can remedy this conflict by modifying the petition process to assure it is fully consistent with the requirements of RSA 39:3.

(4) Name Removal from Petitions to Amend Town Charter.

Section 7.3.B.2 of the proposed charter amendment provides for termination of a suspension of a measure from taking effect if "the filers of the petition withdraw it." No mechanism exists in established law for removal of a person's name once they have signed a petition.

The Town can remedy this issue by removing section 7.3.B.2 from the proposed charter amendment.

(5) Bonding of Municipal Officials.

Section 4.10.C of the proposed charter amendment provides that "The Council shall provide for bonding of officials, officers and employees, the cost of which shall be paid by the Town. The positions and persons to be bonded shall be determined by the Council." RSA 41:6 expressly provides for the bonding requirements applicable to municipal officials.

The Town can remedy this issue by expressly referring to the operation of state law and regulations in Section 4.10.C (e.g. adding the phrase "and in accordance with applicable state law and administrative rules" to the end of the provision in Section 4.10.C").

✓ (6) Internal Conflict in the Charter.

Section 3.7.1.2 of the proposed charter amendment specifies that "Bond articles and issuance of debt, and any lease or contract that requires payments beyond the then-current budget year" must be placed on the official ballot. In contrast, Section 5.13 of the proposed charter amendment states that "The Council shall follow the procedures set out in RSA 33:8-d for the issuance of bonds and notes. The questions shall be acted upon by official ballot in accordance with section 3.7.1 and shall require an affirmative vote of 2/3 of the votes cast." RSA 33:8-d, II provides that "in the event that a proposed bond issue or note is in excess of 10 percent of the town's operating budget for the most recently concluded fiscal year, a referendum shall be held on said issuance..."

The Town can remedy this conflict by referring to RSA 33:8-d, II in Section 3.7.1.2.

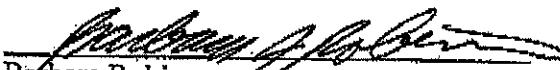
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For the reasons discussed above, the proposed charter amendment is denied.

Sincerely yours,



William M. Gardner
Secretary of State



Barbara Robinson
Director, Municipal Services Division
Department of Revenue Administration



Suzan M. Lehmann
Senior Assistant Attorney General
N.H. Department of Justice
Civil Bureau

423789

THE STATE OF NEW HAMPSHIRE

SUPERIOR COURT

ROCKINGHAM, SS.

Asa H. Knowles and Cora E. Stockbridge

v.

Owen Latham, Leroy Southier, Bonnie Fowler, Bruce Brown,
Gary Fowler, Richard Fowler and Paul Kelly

04-E-0361

ORDER

Before the Court is respondent Bonnie Fowler's Motion for Summary Judgment, requesting that the Court declare the recall provision of the Seabrook Town Charter to be valid and vacate the temporary injunction issued on July 21, 2004. Petitioners object and have filed a Cross-Motion for Summary Judgment, contending that the recall provision of the charter is invalid and requesting the Court require the Town of Seabrook to amend its charter by removing the recall provision. Upon consideration of the parties' arguments and the applicable law, the Court finds and rules as follows.

The following facts are undisputed. By vote of the Town Meeting in 1983, the Town of Seabrook ("the Town") adopted a town charter pursuant to RSA chapter 49-B. Section C-26 of the charter provides for the recall of elected officials. Under this provision, "[a]ny qualified voter of the Town may file with the Town Clerk an affidavit containing the name of the official sought to be recalled and a statement of the grounds of recall." The Town Clerk then supplies the voter with petitions containing the name of the person sought to be recalled and the grounds for the recall. The voter must then collect signatures from ten percent (10%) of all registered voters. Once the petitions are

certified, the Board of Selectmen provides written notice to the official of the recall. If the official does not subsequently resign from office, a recall election is held.

On or about May 11, 2004 and May 28, 2004, respondents Owen Latham and Leroy Southier began circulating petitions for the recall of Selectmen Knowles and Knight. On June 23 and 24, 2004, the Town's Supervisors of the Checklist met and certified that the petition calling for the recall of Selectman Knowles contained the requisite number of signatures. The Court is unaware whether the petition seeking the recall of Selectman Knight has been certified.

On July 1, 2004, petitioners, in their capacity as the Board of Selectmen of the Town, filed the instant petition for declaratory judgment and injunctive relief, claiming the Town's recall provision is invalid. Following a hearing, the Court (Perkins, J.) granted petitioners request for preliminary injunctive relief, enjoining any recall elections pending final judgment by the Court. (Doc. 9.) Respondent Fowler now moves for summary judgment, contending that there are no issues of material fact and that the sole issue for the Court is whether the recall provision of the charter is valid.

"Municipalities have only powers that are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." Simonsen v. Town of Derry, 145 N.H. 382, 385-86 (2000) (quotations and citation omitted). In this case, the parties dispute whether the home-rule provision of the New Hampshire Constitution and RSA chapter 49-B expressly or impliedly granted the Town the power to adopt the recall provision in its charter. In 1966, the citizens of New Hampshire adopted the following amendment to the state's constitution:

No law changing the charter or form of government of a particular city or town shall be enacted by the legislature except to become effective upon

the approval of the voters of such city or town upon a referendum to be provided for in said law.

The legislature may by general law authorize cities or towns to adopt or amend their charters or forms of government in any way which is not in conflict with general law, provided that such charters or amendments shall become effective only upon the approval of the voters of each such city or town on a referendum.

N.H. Const. pt. I, art. 39. Part 1, Article 39 was adopted to place certain limitations upon the traditional plenary control by the Legislature over municipalities

by insuring that any changes in the charter or form of government of a particular city or town should be made by the Legislature only with the consent of the governed, and that any change instituted by the municipalities themselves, under general legislative authority, should similarly become effective only with like consent.

Opinion of the Justices (Municipal Bonds), 145 N.H. 680, 682 (2001) (quotations and citation omitted). Thus, "[t]he extent of home-rule power granted by Part 1, Article 39 is 'the prerogative to choose' one of the statutorily specified forms of municipal government." Id. (citation omitted).

As this article was not self-executing, in 1979 the Legislature enacted legislation authorizing municipalities to adopt and amend charters that established a form of local government. See RSA ch. 49-B. RSA 49-B:2 (1979) provided:

Any incorporated city or town, regardless of population, shall be entitled to exercise the home rule powers granted by article 39, part first, of the New Hampshire constitution, through this chapter, to create a charter commission and present to its inhabitants by referendum a municipal charter, which may establish any one of the following generally-described forms of municipal government as utilized in the New England states:

- I. Board of selectmen – town meeting
- II. Mayor – board of aldermen or mayor-council
- III. City council – city manager
- IV. Town council – town manager, with or without budgetary town meeting
- V. Elected first selectmen – board of selectmen – town meeting

While limited to the adoption of one of the above-described basic forms of government, the voters of a municipality may adopt a charter which, in their opinion, specifically meets the needs of their municipality as to such matters of local concern as number of elected officials; at-large or district representation; manner of filling vacancies; powers of nomination, appointment and confirmation; and terms of office.

The remainder of RSA chapter 49-B, as enacted in 1979, set out the procedure for towns to follow when adopting, revising or amending their charters. In addition, RSA 49-B:11 (1979) stated that the chapter should be liberally construed. This statute remained in effect in 1983 when the Town chose its form of government, the board of selectmen-town meeting form, and adopted its charter, including the disputed recall provision.

Respondent first contends that the recall provision was explicitly authorized by RSA 49-B:2. Specifically, respondent maintains the recall provision was authorized by the authority granted to municipalities to adopt charter provisions concerning the "terms of office" of elected officials. The Court disagrees. In Town of Hooksett v. Baines, 148 N.H. 625, 630 (2002), the New Hampshire Supreme Court construed the phrase "terms of office" to mean "the duration of time during which an elected official holds an office" and distinguished between regulating the length of a term of office and regulating the qualifications for office by imposing term limits on elected officials. The Court is not persuaded by respondent's claim that the express authority to regulate the duration of time during which an elected official holds office encompasses the power to recall those officials. If the Legislature had intended to explicitly grant municipalities the power to recall elected officials, it could have done so by adding that power to those listed in RSA 49-B:2. See JTR Colebrook, Inc. v. Town of Colebrook, 149 N.H. 767, 771-72 (2003).

(holding that statute granting municipalities authority to ban smoking for purposes of sanitation does not grant authority to regulate for purposes of public health).

Next, respondent argues the Town had implied authority to adopt the recall provision in its charter. In support of this argument, respondent points to the language of Part 1, Article 39, which granted the Legislature the power to authorize municipalities "to adopt or amend their charters or forms of government in any way which is not in conflict with general law." However, implied authority granted to municipalities must be necessary implied or incidental to express authority. Here, RSA chapter 49-B grants municipalities express authority to adopt a form of government and sets out procedures that ensure consent by the citizens of municipalities when those municipalities revise or amend their charters. The recall of elected officials is not necessarily implied from such authority.

Furthermore, legislative history provides evidence of legislative intent to not provide municipalities with the authority to include recall or removal procedures in their charters. House Bill 292 originally granted municipalities authority to adopt charters governing the "[n]umber, powers, election and removal of officials." The version of this bill ultimately adopted as RSA 49-B:2, however, does not include language concerning the removal of officials. If the Legislature had intended to authorize municipalities to include removal or recall provisions in their charters, it could have done so by adopting the proposed language.

Respondent also relies upon Harriman v. City of Lebanon, 122 N.H. 477 (1982), in support of her arguments. In Harriman, the Supreme Court considered whether the City of Lebanon could amend its city charter under RSA chapter 49-B to include citizen

initiative and referendum provisions. The Supreme Court held that such an amendment was permissible because the petition to amend the charter followed the procedures of RSA chapter 49-B and the proposed amendment "neither intrudes into matters reserved for the city council under RSA ch. 47, nor contravenes the general laws or constitution." Id. at 483.

In contrast, the Supreme Court invalidated the town of Hooksett's charter provision imposing term limits on locally elected officials in Town of Hooksett v. Baines, supra. The Court reached this decision after finding the Legislature has neither expressly nor impliedly granted towns the authority to impose such limits. Baines, 148 N.H. at 630-31. In addition, the Court concluded that a comprehensive statutory scheme governing the field of elections existed. Id. "As a result, the town's term limits provision is preempted by statutory law and Part 1, Article 11 of the State Constitution." Id. at 631.

In this case, petitioners contend that a comprehensive statutory scheme governing the removal of elected officials existed when the Town adopted its recall provision and that this statutory scheme preempts the recall provision. "It is well settled that towns cannot regulate a field that has been preempted by the State." Id. at 627 (citation omitted). "[P]reemption will occur when local legislation either expressly contradicts a statute or otherwise runs counter to the legislative intent underlying a statutory scheme." Id. (citation omitted). "Generally, a detailed and comprehensive State statutory scheme governing a particular field is demonstrative of the State's intent to preempt that field by placing exclusive control in the State's hands." Id. (citation omitted).

Petitioners cite several sections of RSA chapter 41 and RSA 31:39, all of which were in effect in 1983, to show that the Legislature preempted the field of removal of elected town officials. According to petitioners, these statutes evidence a legislative intent to assert complete control over the removal of officials from office. The Court agrees. These statutes set out reasons why elected officials may be removed from office and generally provide a procedure for doing so. For example, under RSA 31:39-a the legislature grants municipalities the authority to adopt an ordinance regulating conflicts of interest of local officers. These ordinances may also establish "conditions under which prohibited conflicts of interest shall require removal from office." RSA 31:39-a. In addition, the statute grants the superior court jurisdiction over any removal proceedings instituted under any such ordinance. Id.

RSA 41:16-c governs the removal of town clerks. As in the statute discussed above, this statute provides reasons for which a town clerk may be removed and outlines the proceedings a governing body shall institute to undertake a removal. In like manner, RSA 41:26-d governs the removal of municipal treasurers and RSA 41:40 controls the removal of tax collectors. None of these statutes, nor any other in effect in 1983, grants municipalities any additional authority to utilize recall proceedings. In fact, the sole statute, to the Court's knowledge, granting a municipality authority to recall its officials is RSA 49-D:3, I(e) (Supp. 2004). This statute, however, was not in effect in 1983 and applies only to those towns that choose a town council-town manager form of government. Thus, the Court finds that the Town's recall provision, which allows recall of elected officials without cause and without a hearing or judicial review, is inconsistent with expressed legislative intent to remove such officials only for cause and with

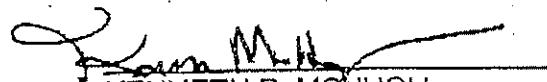
procedural safeguards. As the recall provision was not explicitly or impliedly authorized by the Legislature and is inconsistent with a comprehensive statutory scheme governing the removal of elected town officials, the recall provision is invalid.

Petitioners also request injunctive relief permanently barring further recall proceedings in this case and requiring the Town to delete the recall provision from its charter. "Whether to grant an injunction is within the trial court's sound discretion, exercised after consideration of all the circumstances and controlled by established principals of equity." Smith v. New Hampshire Bd. of Psychologists, 138 N.H. 548, 550 (1994) (citation omitted). The Court may grant an injunction if there "is an immediate danger of irreparable harm to the party seeking injunctive relief, and there is no adequate remedy at law." UniFirst Corp. v. City of Nashua, 130 N.H. 11, 14 (1987) (citations omitted). The alleged harm to the petitioner must outweigh any harm to the defendant if the injunction is granted. New Hampshire Donuts, Inc. v. Skipitaris, 129 N.H. 774, 781 (1987). Here, two members of the Board of Selectmen are in danger of being recalled from their elected offices under a charter provision that has now been declared invalid. The harm to the Board and to the Town if an illegal recall election were to go forward greatly outweighs any possible harm to respondents. Furthermore, there is no adequate remedy at law for such harm. Thus, the Court finds injunctive relief appropriate in this case and grants petitioners' request for a permanent injunction. The Court enjoins respondents from taking any steps in furtherance of a recall election. In addition, the Board is ordered to begin amendment procedures under RSA 49-B:5 to delete the recall provision.

For the reasons stated above, the Court finds and rules that the Town's recall provision in its charter is invalid. Additionally, the Court finds petitioners' request for injunctive relief appropriate in this case. Accordingly, respondent's Motion for Summary Judgment is DENIED and petitioners' Cross-Motion for Summary Judgment is GRANTED. If the citizens of Seabrook wish to remove Selectman Knowles as a Selectman they must do so as the Constitution intended, by voting him out of office when his term expires.

So ORDERED.

March 7, 2005
DATE


KENNETH R. McHUGH
Presiding Justice