

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

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KELLY A. AYOTTE
ATTORNEY GENERAL



DEPUTY ATTORNEY GENERAL

January 9, 2006

VIA E-MAIL ATTACHMENT/FAX AND US MAIL

Diane Pollock Trippett, Town Clerk/Tax Collector
Town of Merrimack
P.O. Box 27
Merrimack, New Hampshire 03054

Re: Proposed Charter

Dear Clerk Trippett:

Pursuant to RSA 49-B:5-a, the Secretary of State, the Department of Revenue Administration and the Attorney General's Office is required to "review the proposed . . . charter . . . to insure that it is consistent with the general laws of this state." RSA 49-B:5-a. The Secretary of State, the Department of Revenue Administration, and the Attorney General's Office, pursuant to RSA 49-B:5-a, do not object to the proposed Town of Merrimack charter.

Our review was limited to assessing whether the proposed charter if adopted would be in conflict with specific provisions in state law. We understand our role as one of providing assistance to the Town in conforming the local options it desires to implement with the restrictions set forth in state law. We would like to thank the Merrimack Charter Commission, its chair and members as well as its legal counsel, for their many communications and great assistance during our review. Their cooperative effort exemplifies the very kind of local-state cooperation which leads to better government service to the voters and inhabitants of the towns and cities of our State, which we believe the Legislature had in mind when they created the State review process. Thank you.

At the request of the Charter Commission and to afford the Legislative Committees that address municipal charters insight into issues resolved through the meetings held between the local and state officials, we will comment on two issues. This communication is a response to your letter dated December 15, 2005, received by the Attorney General on December 16, 2005; The Charter Commission's letter dated January 6, 2006 and the re-drafted proposed charter submitted with that letter. We also previously received a courtesy copy of an earlier draft on December 8, 2005.

Comment

RSA Chapter 49-B guides our analysis.

It is the purpose of this chapter to implement the home rule powers recognized by article 39, part first, of the constitution of the state of New Hampshire. To that end, the general court hereby provides a vehicle whereby a municipality may adopt a form of government that best addresses local needs. **At the same time, however, the general court recognizes a need to require uniform procedures and practices when there is a corresponding state interest.** Therefore, this chapter is intended only to provide a procedural framework by which a city or town may amend its actual form of government. Nothing in this chapter shall be construed to create any power in, or confer any power upon, any city or town beyond that necessary to carry out the amendment of a charter or form of government as set forth in this chapter. The general laws of this state shall remain in full force and effect, and they shall be construed to be consistent with this chapter to the greatest extent possible in the effectuation of this chapter's stated purpose. Accordingly, **this chapter shall be strictly interpreted to allow towns and cities to adopt, amend, or revise a municipal charter relative to their form of government so long as the resulting charter is neither in conflict with nor inconsistent with the general laws or the constitution of this state.**

RSA 49-B:1 Purpose and Intent (emphasis added). *See also Town of Hooksett v Baines*, 148 N.H. 625, 628 (2002) (RSA 49-B:1 shall be strictly interpreted to allow amendment only if the amendment is not in conflict with or inconsistent with statutes); *Appeal of Barry*, 143 N.H. 161 (1998). Accordingly, our analysis should not be misconstrued as our taking a position on the underlying public policy issues presented where the proposal is, in our view, in conflict with or inconsistent with a statute. Even where we would not oppose statutory revision that would allow the proposed charter provision, we understand RSA Chapter 49-B to impose on our Offices a duty to state an objection in each instance where we observe a conflict or inconsistency with current law.

Comments:

We have no objection to the current version of the proposed charter. At the request of the charter commission we comment to explain our view of the law on two issues that were the focus of local-state discussions.

Issue 1 – Dates when municipalities adopting charters may hold elections, including official ballot session two voting.

The town elections statute and the Town Meeting statute appear to be in conflict to the extent that the meeting statute permits official ballot voting in April or May while the election statute allows only May. RSA 669:1, II restricts charter towns to choosing the second Tuesday in March or the second Tuesday in May as the date of their annual election.

Notwithstanding the provisions of paragraph I of this section, any town which has adopted a municipal charter under the provisions of RSA 49-B:1-6 may establish the second Tuesday in March, the second Tuesday in May, or the first Tuesday after the first Monday in November in odd-numbered years as the date for the election of town officers.

RSA 669:1, II. RSA 40:13 and RSA 40:14, X, in contrast, allow municipalities to also choose to have an April meeting. The charter law, RSA 49-D, however, permits a municipality to choose to adopt the RSA 40:13, "official ballot" meeting process for some purposes. Allowing a municipality that uses the "official ballot" meeting for all purposes to vote on the official ballots in April, while denying that option for a charter town which uses "official ballot" voting only for limited purposes appears to be a conflict in law.

RSA 40:13, II-b which details the dates for events leading up to an April meeting was most recently amended by Laws of 2000, Chapter 16. RSA 669:1, II, was enacted in its current form by the Laws of 1988, Chapter 223. A "specific, more recently-enacted statute controls over general, earlier-enacted statute." *Soraghan v. Mt. Cranmore Ski Resort, Inc.*, slip op. at ____ (N.H. June 24, 2005) (citing *Petition of Public Serv. Co. of N.H.*, 130 N.H. 265, 283, (1988)) See also: *Board of Selectmen v. Planning Bd.*, 118 N.H. 150, 152 (1978) (when a conflict exists between two statutes, the later statute will control).

Therefore, applying this rule, that "where two statutes conflict the more recently enacted controls," we have not objected to Merrimack adopting an April date for its annual election and for conducting session two official ballot voting on those issues authorized by the charter to be voted on by official ballot. A copy of this letter will be sent to the Chairpersons of the legislative committees that address the charter statutes, as the Legislature may wish to consider addressing the apparent conflict between these two statutes.

Issue 2 – Adopting a quorum requirement for the deliberative session of an annual or special meeting.

It is our understanding that Merrimack considered adopting a charter provision establishing a quorum requirement for the deliberative session of the annual town meeting. Having been informed that we would object, the provision has been removed from the proposed charter. At the request of the Charter Commission, and to afford the legislative committees that address charters notice that this issue exists, we are providing an explanation of why we contemplated objecting to a quorum requirement.

RSA 49-B and 49-D limit the authority of a municipality to adopt certain forms of government. A charter provision which provides that voters may amend warrant articles, including the article proposing the budget, only if a minimum number of voters are present at the deliberative session is inconsistent with state law.

State law establishes a quorum requirement for special meetings which is applied only to articles that will make appropriations or alter previously made appropriations. RSA 31:5. State law does not establish a quorum requirement for traditional town meetings or Senate Bill 2 deliberative sessions. When the Legislature makes law governing a specific subject, for example establishing when a quorum shall be required in order for the actions of the voters to have legal effect, it is our understanding that doing so simultaneously prohibits other municipal regulation of that area of law. In other words, by saying when quorum is required, it is our understanding of the law that the Legislature is at the same time saying that the specified circumstances are the only circumstances where a quorum may be required.

The Supreme Court has directed that when interpreting the meaning of statutes we are to apply an "axiom of statutory construction *expressio unius est exclusio alterius*: 'Normally the expression of one thing in a statute implies the exclusion of another.'" *St. Joseph Hospital of Nashua v. Rizzo*, 141 N.H. 9, 11-12 (1996) (citing *In re Guardianship of Raymond E.*, 135 N.H. 688, 691, 609 A.2d 1220, 1221 (1992)). Here the Legislature's directive that a quorum is required for the vote of a special meeting to have effect if the vote changes an existing appropriation or makes a new appropriation is the expression of one thing, the circumstances where a quorum is required. Unless there is an explicit grant of authority to a municipality to establish a quorum in other circumstances, those other circumstances are excluded by law.

The New Hampshire Supreme Court has also applied the preemption doctrine in striking down municipal attempts to regulate, through charter amendments, in areas where the State has established a comprehensive statutory scheme governing a subject.

It is well settled that towns cannot regulate a field that has been preempted by the State. The preemption doctrine flows from the principle that municipal legislation is invalid if it is repugnant to, or inconsistent with, State law. Thus, preemption will occur when local legislation either expressly contradicts a statute or otherwise runs counter to the legislative intent underlying a statutory scheme. 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. That the State has created a comprehensive statutory scheme does not automatically result in preemption, however, because it could nonetheless authorize additional municipal regulation.

Town of Hooksett v. Baines, 148 N.H. 625, 627 (2002) (internal citations and quotations omitted) (citing and quoting *Town of Salisbury v. New England Power Co.*, 121 N.H. 983, 985 (1981); *Casico v. City of Manchester*, 142 N.H. 312, 315 (1997)). See also *JTR Colebrook, Inc. v. Town of Colebrook*, 149 N.H. 767 (2003); *Thayer v. Town of Tilton*, No 2004-145, Slip op. (November 30, 2004). It is our view that the legislature has fully regulated the field of when a quorum requirement may be imposed to limit the authority of the voters present at a duly called annual or special meeting to take actions otherwise within the authority of that legislative body.

Finally, there is a general principle of government that one legislative body cannot bind a future meeting of the same legislative body. "A legislative house cannot tie its own hands by establishing unchangeable rules. It may adopt and change procedure at any time and with no other notice than the rules may require." Mason's Manual of Legislative Procedure, 13-4, 2000 Ed. at 23. "No meeting of a legislative body can bind a subsequent one by irrevocable acts or rule of procedure. . . ." *Id.* at 13-6. Legislative bodies are subject to the Constitution and municipal legislative bodies are subject to State statute, but even were the setting of a quorum for a deliberative session of a town meeting an authority granted to a municipality, this principle would suggest that the legislative session from one year could not bind the legislative sessions of future years. Exceptions exist only where there is specific statutory authorization. For example, bonding is permitted. With bonding, the legislative body in a particular year binds all future legislative bodies to continue appropriating funds to pay off the bond. In the absence of such specific authorization, binding future legislative bodies is impermissible.

Were the 2006 meeting of the Town's legislative body to adopt a quorum requirement for future meetings, it would in effect be binding a future legislative body. Town meetings have some authority to adjourn. Towns with meetings that experience a loss of voters because the meeting is running late often will adjourn to another date in hopes that more voters will participate. Allowing the 2006 annual meeting to adopt a charter provision requiring a quorum at future deliberative sessions is just like the 2006 annual meeting in a traditional town meeting voting to say that in 2007 or 2008 whenever the number of voters present falls below a set number, or if that number is never achieved, that meeting will be adjourned to a future date. If allowed, this would permit one group of voters, those attending the 2006 meeting, to take away the right another group of voters, those attending the 2007 meeting, to determine if and when to adjourn because of poor attendance.

You have brought to our attention that a charter may have been adopted in the State with a quorum requirement. We are engaged in a process of enhancing the level of our review of charter amendments. We address new charters, charter amendments, and charter revisions, but generally do not review existing charters in the absence of explicit complaints.

While we are sympathetic to the charter commission's desire to adopt a form of government which precludes an insular minority from controlling the legislative body's decisions, we believe that the statutes authorizing charters require that either the voters be trusted to participate at town meetings in numbers appropriate to the town's needs or that all legislative authority be vested in the council.

The contemplated quorum provision, even were it permissible, failed to address what happens if there is no quorum. It was unclear whether another meeting would be scheduled or if the intent was to take away from voters their right to alter the warrant articles as proposed by the council or petitioners?

Conclusion

We do not object to the proposed charter. While we have endeavored to provide legal authority and a clear explanation for our comments, we will be happy to answer any questions you may have and remain willing to discuss our legal analysis with the Town or its legal counsel. Please feel free to contact Senior Assistant Attorney General Bud Fitch if there are any further questions or concerns.

Sincerely yours,
For the Department of State



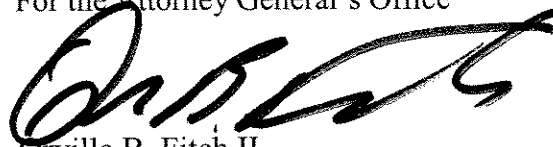
David M. Scanlan
Deputy Secretary of State for

For the Department of Revenue Administration



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cc: The Honorable Senator Sheila Roberge, Senate Public and Municipal Affairs
Committee Chairperson
The Honorable Representative Betsey L. Patten, House Municipal and County
Government Committee Chairperson

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Charter Commission
Allan Krans, Esquire, Commission Legal Counsel

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