

**STATE OF NEW HAMPSHIRE  
SUPREME COURT**

**2010 TERM**

**DOCKET NO. 2009-0791**

**CITY OF MANCHESTER**

**v.**

**SECRETARY OF STATE, ET. AL.,**

**&**

**RYAN CASHIN, ET. AL.**

**v.**

**CITY OF MANCHESTER**

**BRIEF ON BEHALF OF RYAN CASHIN, ET. AL.  
("KEEP MANCHESTER MOVING")**

Robert A. Backus, Esquire  
NH Bar # 457  
Backus, Meyer & Branch, LLP  
116 Lowell Street, PO Box 516  
Manchester, NH 03105-0516  
603/668-7272  
[bbackus@backusmeyer.com](mailto:bbackus@backusmeyer.com)

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A. **QUESTION FOR REVIEW**

Whether a charter amendment to the Manchester City Ordinances, commonly called a "tax" or "spending" cap, as adopted by a majority of the voters of Manchester in the 2009 municipal election, is authorized under New Hampshire law.

**B. RELEVANT LAW - TABLE OF AUTHORITIES**

**CASES**

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**C. STATEMENT OF THE CASE**

This appeal is brought by means of an interlocutory transfer.

It arises out of an effort, initiated by a petition drive, to place on the November 2009 Manchester City ballot a charter amendment which would limit annual municipal budget increases for both revenue and spending to a national index. The cap would preclude increasing revenue or spending above the national consumer price index unless the governing body of the City, the Board of Mayor and Aldermen, voted to override the cap by a two-thirds vote of all members.

When the City Clerk declared sufficient signatures had been obtained to place the proposed tax and spending cap on the ballot, the City of Manchester through the office of the City Solicitor, filed an appeal with the Superior Court challenging whether the proposed amendment would be consistent with New Hampshire law. A group organized as "Keep Manchester Moving," which opposed the cap, intervened in the appeal to support the City. A pro-tax cap group, the New Hampshire Advantage Coalition, intervened in opposition to the City.

The Court, after a hearing, ruled that the City's decision to institute the appeal had been made in violation of the New Hampshire Right to Know Law, RSA 91-A, and dismissed the appeal, without reaching the merits of the issue of the legality of the amendment.

While a motion for reconsideration of this ruling was pending, Keep Manchester Moving filed a Petition for Declaratory Judgment and Injunctive Relief. (Cashin v. City of Manchester, Docket 09-E-371.) The New Hampshire Advantage Coalition again

intervened, and sought dismissal on various grounds.

After a hearing, the Court (Hon. James D O'Neill III), rejected the arguments for dismissal and found that "because of the differing legal opinions and the widespread effects of this amendment, this is an issue of law that would best be decided by the New Hampshire Supreme Court," and ordered that the issue of the legality of the tax cap be transferred to this Court.

The original appeal of the City was subsequently joined for the purposes of presenting a consolidated case for appeal. (There was no possible Right to Know Law infirmity in the petition brought by Keep Manchester Moving, rendering the Court's ruling on this moot, as the Court in fact ruled.)

**D. STATEMENT OF THE FACTS**

Since this appeal involves the question of whether the now adopted tax and spending cap charter amendment is legal under New Hampshire law, there are few facts pertinent to the decision that this Court will make.

It is undisputed that the charter amendment was adopted by majority vote in the November 2009 city general election; nor is it disputed that sufficient petition signatures were obtained to place the tax and spending cap on the ballot.

It is also undisputed that the charter amendment will constrain both revenue and spending increases to a national formula, the National Consumer Price Index-Urban, unless there is a vote of two-thirds of all members of the Board of Mayor and Alderman to override the cap.

The tax and spending cap may preclude the City from appropriating the funds necessary to comply with state or federal obligations or contract obligations, in the absence of an override vote; examples include requirements for special education and union contracts.

In addition, it is undisputed that, in the only judicial decision in New Hampshire, an identical tax and spending cap proposed for the City of Concord was held illegal under New Hampshire law. City of Concord v. Gardner, et als., Merrimack Superior Court, Docket 08-E-406. (Nicolosi, J.) This decision was not appealed.<sup>1</sup>

There is one further fact that this Court may want to consider. Although it seems that the relevant legislative language clearly and unambiguously prohibits the tax and spending cap as adopted in Manchester, as argued below, if there were any need to seek out legislative intent, the Court should consider that in the current legislative session a bill was introduced in the House of Representatives which was intended to and would have authorized tax and spending caps to be adopted for New Hampshire cities.

HB 1522, "Relative to Local Spending Caps" was referred to the House Local and Regulated Revenues Committee. The Committee voted the bill inexpedient to legislate by a 12 to 6 vote. The bill was then defeated on a roll call vote by a bi-partisan vote of 202 to 148. See Appendix, Pages 26, 27 & 28.

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<sup>1</sup>The City of Concord case is distinguished from the current case only in that Concord has a city manager form of government. However, this difference does not constitute a valid distinction, since the statutes involved make no distinction depending on whether a city has a manager or mayor form of government. In addition, RSA 49-C:16 discussed below, specifically applies to either a city manager or mayoral form of government.

**E. SUMMARY OF ARGUMENT**

The adoption of a charter provision limiting the authority of the governing body of the City of Manchester, its Board of Mayor and Aldermen, is not permitted under relevant provisions of New Hampshire law.

Since New Hampshire municipalities can only exercise those powers granted by the General Court through statutory law, the absence of authorization to allow voter control of city budgets, whether through direct vote or by adoption of a national formula to cap revenue or spending, is illegal. Nothing in either RSA 49-C or 49-B permits such voter intrusion into the plenary authority of the City's governing body with regard to budget making or adoption. To the contrary, the comprehensive budget scheme provided by RSA 49-C:23 clearly disallows this form of voter intrusion into the budget authority of the Board of Mayor and Aldermen.

Finally, the only judicial decision on the validity of tax and spending caps in New Hampshire cities correctly held that such a provision is not legal under New Hampshire law.

Furthermore, this Court, in its 1992 decision in City of Claremont v. Craigue, 136 NH 528, in effect held that a similar voter intrusion into the authority of a city's governing body concerning budgeting was illegal.

F. **ARGUMENT**

**I. State Law Determines Whether the Tax and Spending Cap is Legal.**

Article 39 of the New Hampshire Constitution confers upon a municipality the power “to adopt or amend their charter or forms of government *in any way which is not in conflict with general law.*” (*Emphasis Added.*)

In this case, the general law which enables local options and city charters is RSA 49-C. Section 1 provides: “The purpose of this chapter shall be to implement part I, Article 39 of the New Hampshire Constitution enabling municipalities to draft city charters within the framework of the statute....”

Specifically, RSA 49-C:23 provides detailed provisions governing the budgeting process and for appropriate fiscal control, and RSA 49-C:16 provides for the mayor to be responsible for enforcing city ordinances. In addition, RSA 49-B provides a specific and narrowly tailored procedure through which cities may change certain forms of their government.

As will be more fully set forth shortly, nothing in these statutes authorizes or permits New Hampshire cities to alter the budget processes prescribed by the General Court to allow “budgeting by ballot” or the use of tax and spending caps as opposed to preparing and adopting budgets, including a process for public hearings, by the governing body, the Manchester Board of Mayor and Aldermen.

Despite a political tradition of claiming municipal “home rule,” it is well established that New Hampshire municipalities have only those powers granted them by the General Court. Loughlin, 13 New Hampshire Practice, Local Government Law,

Sections 61-63, "Towns are but subdivisions of the State and have only the powers the State grants to them." Girard v. Town of Allenstown, 121 NH 268, 270 (1981).

In Town of Hooksett v. Baines, 148 NH 623, 628 (2002) this Court stated:

"We have explained that the expressed purpose of RSA chapter 49-B is to implement the home rule powers recognized in Part 1, Article 39 of the State Constitution by authorizing a municipality to adopt a form of government that best addresses its local needs. This legislation provides the statutory framework through which cities and towns may amend their actual forms of government, and grants them the power necessary to carry out such changes. We have warned, however, that the constitutional authority supporting RSA chapter 49-B in no way provides or suggests that the towns, cities or other subdivisions of this State should have the right to exercise supreme legislative authority. Indeed, the statute expressly provides that its provisions 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 general laws or the constitution of this state. RSA 49-B:1. As a result RSA chapter 49-B grants a municipality only the power necessary to amend its form of government."

This Court has also held that the grant of authority conferred by RSA 49-B is to be strictly interpreted. City of Manchester School District v. City of Manchester, 150 NH 672 (2004).

This Court, in construing this grant of authority strictly has on several occasions previously held that a city lacked authority to amend its charter to accomplish a variety of objections. These include making a school district a city department by amending its

charter. City of Manchester School District v. City of Manchester (*supra*) authority to enact rent control, id., authority to term limits on city officials, or alter its retirement system. Appeal of Barry, 143 NH 161, 165-166 (1998), Town of Hooksett v. Baines, *supra*.

In short, unless the enabling legislation authorized the governing power of the Board of Mayor and Alderman in regard to setting the city budget to be subject to voter control, the tax and spending cap is unauthorized and illegal. Clearly, such voter control has not been authorized or permitted by the General Court.

**II. RSA 49-C:23 does not authorize and in fact, because it provides a comprehensive scheme for the establishment of city budgets, precludes ballot control of city budgets, and thereby renders the tax and spending cap illegal.**

In Town of Hooksett v. Baines, *supra* at 627, this Court said:

"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 state 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.”

As the Superior Court in the City of Concord case held, there can be no doubt that in enacting RSA 49-C:23, “the legislature has created a comprehensive statutory scheme for the budget process.’

Although this section does not explicitly reference tax or spending caps tied to a national formula (which may not be relevant to a particular New Hampshire city), it clearly makes “the elected body,” the Board of Mayor and Alderman, responsible for the final budget. Nowhere is this responsibility authorized to be instead controlled by reference to a national index. Nowhere is regulating the budget process by placing a dollar limit on the revenue or spending to be budgeted authorized by this section. Since the limitation of the budget authority by a tax and spending cap is not authorized by the governing statute, the Manchester charter provision is illegal.

**III. RSA 49-C:16 also precludes the tax and spending cap because it requires the Mayor to enforce the ordinances of the City and there are several Manchester ordinances which are not consistent with the tax and spending cap amendment.**

As held by the Court in City of Concord, RSA 49-C:16 requires a Mayor (or in the case of Concord the City Manager) to “enforce the ordinances of the city.”

In this case, as in the Concord case, those city ordinances require department heads to prepare budgets for the various departments and then submit those budgets to the Mayor for inclusion in the city budget. Manchester City Charter, Section 3.04(d). See Appendix, Page 5. The Mayor, charged with the administrative and executive powers of the city, then must exercise control over the expenditure of all appropriations; establish a budget format, review budget requests, and make recommendations to the Board of Aldermen regarding financial policies, appropriation resolutions and revenues. Section 2.08. See Appendix, Page 5.

The tax and spending cap amendment will interfere with the Mayor's duty to present the Board an original budget based on the financial needs as projected by the City's department heads.

“Although the proposed amendment does not preclude the [Mayor] from submitting a budget based upon the responsibilities of the City, it essentially makes this step futile because the proposed amendment would place restraints upon any budget that could be approved by the City Council without a two-thirds override vote.” City of Concord, supra, page 15.

Since these enabling statutes are to be construed strictly, the tax and spending cap charter provision limitation on the authority of the governing body to provide a budget that meets the needs of the City is inconsistent with the grant of authority, which requires the Mayor and Alderman to be responsible for meeting the city's fiscal

requirements. It is not therefore legal.

Finally, consideration should be given to RSA 49-C:33, "Optional Provision: Limitations," which specifically provides for referendums "whereby voters may petition to suspend implementation of an ordinance, *except budget adoption* and land use regulation ordinances, enacted by the elected body...." (Emphasis added.)

This provides further evidence of the legislature's intent not to allow the plenary authority of a city's governing body in regard to budget control to be shared with city voters.

**IV. This Court has previously held that a charter provision substantially similar to the Manchester tax and spending cap at issue is illegal under New Hampshire law.**

The Court in *City of Concord* appropriately cites this Court's decision in *City of Claremont v. Craique*, 136 NH 528 (1992).

In that case this Court also had to deal with a voter approved change to a city charter. The change would have required that the city budget be determined by a majority vote of city voters, or in the event that this did not happen, that the budget would be reduced from the prior year level by five per cent. This would have very clearly permitted "budgeting by ballot" in Claremont.

The Court held that the charter amendment in question was illegal. It found that the amendment would change Claremont's budgeting process from one available to a

city to one permitted only for a town, and that Claremont was a city. It noted that budgeting "by city voters" was not authorized for the two permissible forms of city government, either city manager and council or mayor and council.

The Court then noted that RSA 49-C:23, states, " [A]n annual budget shall be finally adopted by the elected body," and held, "We find that the legislature's failure to provide for budgetary approval by a city's voters manifests its intent to prohibit that form of government for cities." 136 NH at 531.

The Manchester charter provision differs from the provision at issue in Craigue because it ties the city budget to a national price formula, absent a two-thirds override vote of the governing body, rather than a direct annual vote of the citizens, to establish a budget. However, the difference is immaterial to the analysis the Court employed in its decision.

In either case, the provision involved derogates from the plenary authority granted to the governing body of a city rather than the voters, whether by annual vote or through reference to a voter approved national formula, to "finally" adopt a budget for the city. Under this section, it is only the governing body that has the power and duty to prepare a city budget.

Therefore, since the provision at issue in Craigue was unauthorized and hence invalid and the same reasoning is applicable to the Manchester tax and spending cap at issue in this appeal, the tax and spending cap adopted by the voters of Manchester is not permitted and is illegal.

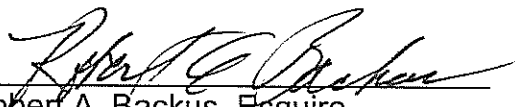
**G. CONCLUSION**

For the reasons stated, the question presented in this interlocutory transfer should be decided by holding that the tax and spending cap in the Manchester City Ordinances is illegal and invalid.

Respectfully submitted,  
RYAN CASHIN, ET. AL.  
("KEEP MANCHESTER MOVING")

By and through his attorneys,  
BACKUS, MEYER & BRANCH, LLP

Dated: March 9, 2010

By:   
Robert A. Backus, Esquire  
NH Bar #457  
116 Lowell Street, PO Box 516  
Manchester, NH 03105-0516  
603/668-7272  
[bbackus@backusmeyer.com](mailto:bbackus@backusmeyer.com)

**CERTIFICATION**

I, Robert A. Backus, Esq., hereby do certify that on this date two copies of the foregoing written **Brief On Behalf Of Ryan Cashin, Et. Al., ("Keep Manchester Moving")** were forwarded by first class mail, postage pre-paid to Peter R. Chiesa, Esq., James W. Kennedy III, Esq., Joseph K. Levasseur, Esq., Gregory M. Sargent, Esq., and Dean B. Eggert, Esq.

Dated: March 9, 2010

  
Robert A. Backus, Esquire

