

NEW HAMPSHIRE SUPREME COURT

City of Manchester v. Secretary of State, et al.

and

Ryan Cashin, et al. v. City of Manchester

Case No. 2009-0791

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AMICUS CURIAE BRIEF  
ON BEHALF OF CONCORD TAXPAYERS ASSOCIATION

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## **INTEREST OF AMICUS CURIAE**

The Concord Taxpayers Association (hereinafter CTA) is a Concord nonprofit organization of citizens interested in restraining the never ending local cycle of more spending and more taxes. It supports a spending and tax cap so that the elderly, those on fixed incomes and lower income folks will not lose their homes to higher city taxes. A favorable ruling in the Manchester case will help thousands of citizens to try again in Concord to enact a local tax and spending cap.

## **STATEMENT OF FACTS**

Amicus CTA adopts the City of Manchester's Statement of Facts.

## **SUMMARY OF ARGUMENT**

This transferred case should be considered as if it were an appeal from an administrative agency pursuant to RSA 541:13. The burden is on Manchester to set aside the decision of the Attorney General, Secretary of State and Department of Revenue Administration so therefore the RSA 541:13 standard should apply. The tri-agency decision "should not be set aside or vacated except for errors of law."

Limits on government spending in city charters are specifically authorized in the existing statutory scheme. The Manchester amendment is neither "in conflict with nor inconsistent with" the general laws or the Constitution.

To the extent that the constitutional and statutory scheme is in any way ambiguous, the doctrine of administrative gloss should lead the court to uphold the decision of the constitutional offices of the Secretary of State and the Attorney General who approved the cap language.

In this case the Secretary of State, Department of Revenue Administration and Department of Justice are the agencies charged with responsibility for ensuring that proposed

charter amendments are consistent with New Hampshire law. RSA 49-B:5-a. These executive branch entities have approved charter amendment proposals similar to the one now before the court for a period spanning decades.

The proposed spending caps do nothing to impair a city's ability to carry out its mandatory obligations. No party came forward in this litigation and presented evidence that State mandates exceeded existing revenue under any of the caps in place.

The charter amendment does not delegate any of the city government's power to the citizens of the city, because it does not give "the voters" any input into the budget process. The budget process remains the sole and exclusive domain of the mayor and aldermen.

### **ARGUMENT**

#### **I. The Conduct of State Officials in Approving Carefully Crafted Spending and Tax Limitations Creates Precedent the Court Should Consider in Construing RSA 49-B.**

RSA 49-B was enacted in 1979 by the legislature to provide for either a) targeted amendments to a city charter or b) wholesale revisions thereof. Built into the legislation is a filter for bizarre or off the wall changes initiated by citizens. With the provisions of a 1988 amendment governing citizen petitions for amendment the following occurs:

- (b) Promptly after the filing of the petitioners' affidavit relative to a charter amendment, the municipal clerk shall file a certified report consisting of a copy of said affidavit.
  - (c) Within 30 days of the receipt of said report by the secretary of state, attorney general, and the commissioner of the department of revenue administration, they shall review the proposed charter, charter revision, or charter amendment to insure that it is consistent with the general laws of this state.
- II) If the secretary of state, the attorney general, or the commissioner of the department of revenue administration do not approve, the proposed charter or charter amendment question, if initiated by a charter commission or the municipal officers, shall not be placed on the municipal ballot. If the proposed charter amendment was initiated by a petitioners' committee, official petition forms shall not be provided. The secretary of state,

attorney general, and commissioner of the department of revenue administration shall specify their objections in writing to the municipal clerk and to the petitioners' committee if relative to a charter amendment initiated by such petitioners' committee, within the period of time allowed for review and shall offer recommendations for changes in language which would correct any inconsistencies they may find in the proposed charter or charter amendment to be voted upon. Failure to specify objections to a proposed charter or charter amendment under this section shall constitute approval by the secretary of state, attorney general, or the commissioner of the department of revenue administration.

RSA 49-B:5-a I(b)(c) and II.

These State officials take their job as "filters" seriously, and carefully review proposed changes. For instance, in 2005 the Attorney General, Secretary of State and Department of Revenue Administration wrote a detailed thirteen page analysis of an earlier version of a Manchester budget cap and rejected it. See Appendix to Amicus CTA brief at page 14. Thus the three State agencies tasked with reviewing the proposal for any conflict with existing law explained the problem with their 2005 cap iteration but did approve the 2008 version of the Manchester cap because it cured the problems addressed in the earlier 2005 version. See letter to Deputy City Clerk Normand dated September 8, 2008 in the CTA Amicus Appendix at page 26.

Similarly in Laconia a cap was proposed and the three agencies charged with reviews rejected it initially but later said:

The Petitioner's Committee from Laconia has submitted a revised charter amendment to this Office and requested our review. The element of the revised amendment which addresses the previously stated objection reads as follows:

Override Provision. Budgetary restrictions described in any part of section 5:03.5 may be over-ridden upon a two-thirds vote of the Laconia City Council. Such an override expires following adoption of the annual budget. Subsequent budgets or supplemental appropriations require additional two-thirds override votes, or the limitations expressed below in section 5:03.5 will apply.

Our objection to the original amendment was that it was in conflict with the general laws of the state because it failed to provide an override that would apply

in all circumstances and that a supermajority in excess of two-thirds was required for bonds or off-budget appropriations. The revised amendment removes both conflicts.

See letter to Laconia City Clerk dated October 6, 2005, in Amicus CTA Appendix at p. 28.

The Attorney General is not a toothless tiger. Without his approval the voters never get to vote on a proposed charter amendment or revision. Further the Attorney General has the power under the law as follows:

The Attorney General's Office is given explicit authority to bring petitions for declaratory relief on behalf of the State or on behalf of the public to challenge the validity of the procedures used to adopt a charter amendment. RSA 49-B:10. While RSA Chapter 49-B does not explicitly provide authority for a city council to adopt a revised petitioned amendment as its own and to recognize the hearing held on the petitioned amendment prior to its revision as satisfying the requirement in RSA 49-B:IV, were Laconia to follow such a procedure in this case this Office would not bring a petition challenging the validity of such a procedure.

Id. at page 29. There clearly is no rubber stamp here. Tax and spending caps have been through such reviews and have been adopted as follows:

Franklin (1989) Appendix at page 33.

Nashua (1994) Appendix at page 34.

Laconia (2005). Id. at page 36.

Rochester (2008) Appendix at p. 37.

Derry (2008) Appendix at p. 38.

Dover (2007), Appendix at p. 40.

Furthermore, Rochester has enacted spending caps also tied to a national inflation index. Brief of Amicus N.H. School Administrators Association at page 1. Thus a substantial population of our State (about one-third) has had the opportunity under RSA 49-B to at least cast a ballot on the question of caps through our democratic processes.

## II. The State Executive Branch Agencies are Entitled to Great Deference Due to the Doctrine of “Administrative Gloss.”

Manchester does not come before this court in a vacuum. Many years ago in 1989 the voters of Franklin approved a cap that remains in its charter today. Has the legislature acted to say such a provision violates RSA 49-B or the Municipal Budget Act? Never. The Franklin cap appears in the Appendix of the Amicus N.H. School Administrators Association at p. 6 and is reproduced herein in the Amicus CTA Appendix at p. 33.

This transferred case should be considered as if it were an appeal from an administrative agency pursuant to RSA 541:13. The burden is on Manchester to set aside the decision of the Attorney General, Secretary of State and Department of Revenue Administration so the RSA 541:13 standard should apply. The tri-agency decision “should not be set aside or vacated except for errors of law.” Appeal of Morton, 158 N.H. 76, 78 (2008).

The doctrine of administrative gloss comes up often in the zoning law context, but it is actually a rule of statutory construction:

The doctrine of administrative gloss is a rule of statutory construction.... An administrative gloss is placed on an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an administrative gloss is indeed found to have been placed on a clause, the [government] may not change such a *de facto* policy, in the absence of legislative action, because to do so would presumably violate legislative intent.

Nash Family Inv. Prop. v. Town of Hudson, 139 N.H. 592, 602, (1995) cited by Conforti v. Manchester, 141 N.H. 78, 80 (1996) and see Anderson v. Motor Sports Holdings, LLC, 155 N.H. 491, 502 (2007).

This court is being asked to void the will of tens of thousands of voters in Manchester, Franklin, Nashua, Derry, Laconia, etc. by saying that spending caps violate some RSA such as 49-C:23 despite years and years of tri-agency approval and no legislative action to “correct”

them. The citizen petition section of RSA 49-B is in section 5. It has been amended many times since Franklin adopted its cap in 1989 and Nashua in 1994:

1991 amendment to 49-B:5 in Session Law Ch. 304:13

1992 amendment to 49-B:5 in Session Law Ch. 96:2

1995 amendment to 49-B:5 in Session Law Ch. 53:2

2005 amendment to 49-B:5 in Session Law Ch. 38:1

2008 amendment to 49-B:5 in Session Law Ch. 230:1

At no time has the legislature outlawed tax caps when it had ample opportunity to do so when considering numerous amendments to section 5 entitled “Charter Amendments, Procedure.”

The statutory construction urged by Manchester would require this court to construe two distinct and separately defined statutory provisions to have a single meaning. The court would have to ignore the provisions of RSA 49-B:1, which allows charters to be amended as long as the amendments do not conflict with State law. The court would also have to completely disregard RSA 49-B:1, IV(i), which clearly defines an “amendment” as a change creating something less than a wholesale revision in a municipal form of government. The General Court never intended to limit the charter amendment process to only a choice among various prescribed “forms of government.”

Limits on government spending in city charters are specifically authorized in the existing statutory scheme. RSA 49-C:23, IX, requires the “[e]stablishment of a fiscal control function” as part of the budgetary process. The Manchester amendment is designed to be operated as a fiscal control on the ability of a city government to spend money beyond a national inflation index, and to raise taxes to support such spending, unless a supermajority of the city aldermen so vote.

Nothing in the statutes can be construed to prohibit the use of a spending cap with a supermajority voting requirement as part of the “fiscal control function” of a city. The charter amendment is thus specifically authorized by statute.

Even if the court finds that RSA 49-C:23, IX, does not specifically authorize the charter amendment’s spending controls, the amendment is still neither “in conflict with nor inconsistent with” the general laws or the Constitution. The city correctly states that RSA 49-C:23 sets forth a list of provisions that must be addressed in any city charter. It does not, however, prohibit the charter amendment now before the court. The plain language of RSA 49-C:23 expresses the legislative intent that the budget processes of all city charters share certain minimum, enumerated elements in common. Nothing in the language of the statute, however, suggests that the items listed are intended to be exhaustive or exclude any other elements that cities may decide to include.

To the extent that the constitutional and statutory scheme is in any way ambiguous, the doctrine of administrative gloss should lead the court to uphold the decision of the constitutional offices of the Secretary of State and the Attorney General. “The doctrine of administrative gloss is a rule of statutory construction.” DHB v. Town of Pembroke, 152 N.H. 314, 321 (2005). An administrative gloss is found to apply when those responsible for the implementation of a statute interpret the provision “in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference. If an administrative gloss is indeed found to have been placed on a clause, [the implementing agency] may not change such a de facto policy, in the absence of legislative action, because to do so would presumably violate legislative intent.” Anderson v. Motor Sports Holdings, LLC, 155 N.H. 491, 502 (2007)(quoting Nash Family Inv. Prop. v. Town of Hudson, 139 N.H. 595, 602 (1995)).

In this case the Secretary of State, Department of Revenue Administration and Department of Justice are the agencies charged with responsibility for ensuring that proposed charter amendments are consistent with New Hampshire law. RSA 49-B:5-a. These executive branch entities have approved charter amendment proposals similar to the one now before the court for a period spanning decades. The city charter amendments passed in Franklin, Nashua, Dover, Laconia, etc. were, by definition, highly public events garnering significant media attention prior to being passed by a public vote. Despite the fact that charter amendments were adopted in these cities, the CTA is aware of no effort by the legislature to change RSA 49-B or RSA 49-C to preclude charter amendments such as the one now before the court.

Indeed, in the 2008 legislative session the General Court amended the very petition process used by the Manchester citizens in this case, yet did nothing to change the statute to signify that recently adopted amendments were contrary to the legislative intent. The fact that the legislature has not seen fit to alter the charter amendment process in the face of numerous similar amendments reflects the fact that the consistent statutory interpretation by the Secretary of State, Attorney General and D.R.A. is correct.

The School Administrators' additional arguments are also unavailing. The city is subject to financial obligations imposed by the state legislature and by the city charter. The NHSAA argues that any proposed charter amendment which seeks to limit city spending or taxes must ensure that no impairment of the city's ability to carry out its mandatory obligations will occur. This may be true, but it is also irrelevant to the matter now before the court.

The brief of Amicus N.H. School Board's Administrators trots out a lengthy parade of imaginary horrors at pages 14-20. Yet nowhere can the Administrators point to a single city

where mandates were not met. This is especially telling since Franklin, a Claremont case plaintiff, has had a cap for 21 years without a missed mandate.

This court must decide based upon concrete facts if it decides that caps will frustrate mandates. No evidence is provided by such proponents nor does it exist here. Franklin is Exhibit 1 for those, like the CTA, who say imaginary horrors, in the end, remain imaginary.

The proposed spending caps do nothing to impair a city's ability to carry out its mandatory obligations. When a city establishes its budget, one would assume that it starts by budgeting to meet its legal obligations, then, if funds are available, it funds discretionary services. No party came forward in this litigation and presented evidence that State mandates exceeded existing revenue. First, any such claim is impossible under New Hampshire law. Part II, Article 28-A of the New Hampshire Constitution bars unfunded mandates. In the first instance, we would hope that 2/3 of a city's aldermen would vote to comply with legislative mandates, were such mandates found to actually exist.

Second, if the state imposed such unfunded mandates, the aldermen could obtain relief in the courts. In reality the simple fact of the matter is that the Aldermen want the flexibility to raise taxes to fund their pet discretionary projects without having to be bothered by the need to obtain 2/3 support. This discretionary spending is exactly what the tax caps are designed to prevent. Arguments about mandates are simply a red herring on the evidence in this case.

Manchester also argues that the amended charter "permit[s] city voters input to the Elected Body's sole authority to approve a budget." City of Manchester brief at p. 17. This argument is specious. The voters do not vote on budgets in cities.

RSA 49-C:23, I, only requires that the city: (1) adopt a budget submission date; (2) adopt a budget final adoption date; and (3) provide that the originally submitted budget become law

failing final adoption by the deadline. Nothing in RSA 49-C in any way suggests what the content of the budget submitted by the city manager must, should, or could contain. The statute is completely silent in that regard.

Nothing in RSA 49-C requires the proposed city budget to be based “upon the financial needs and responsibilities of the City.” Indeed, the purpose of the tax cap is to guide the determination of what constitutes the “financial needs of the City departments.” The city mistakenly relies on Claremont v. Craigie, 135 N.H. 528 (1992), for the proposition that a city charter that includes the mere existence of such guideposts would effectively give voters “input” into the creation of the original or adopted budget. This is incorrect.

Under the charter amendment, “the voters” would not have the kind of “input” into the city budget that the court rejected in Craigie. In that case, “the voters” had to approve the specific budget each year before it could be adopted. In other words, the provision in Craigie delegated power from the elected city government to the citizens of the city. This court concluded 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.” Craigie, 135 N.H. at 531. The provision in that case would have effectively made the budgetary process the same as that occurring in towns. Thus, the court’s reference to the “form of government” was appropriate in the Craigie case but would be inapposite here.

In this case, the charter amendment does not delegate any of the city government’s power to the citizens of the city, and does not give “the voters” any input into the budget process. The budget process remains the sole and exclusive domain of the mayor and aldermen. The amendment merely provides limits on the breadth of discretion that they may exercise absent a two-thirds majority vote. With a two-thirds vote they can go up 10, 20 or 30% if they want to.

### **III. The Manchester Charter Amendment is Not a Revision or Change in the Form of Government.**

RSA 49-B offers citizen petitioners (and the city government) two choices: a) amendment or b) revisions. The tax caps are amendments only. RSA 49-B provides that upon written petition of certain voters: (a) Each amendment shall be limited to a single subject but more than one section of the charter may be amended as long as it is germane to that subject. RSA 49-B: II(a) provides that each amendment shall be limited to a single subject but more than one section of the charter may be amended as long as it is germane to that subject.

As this court said eighteen years ago:

In *Albert v. City of Laconia*, 134 N.H. 355, 358, (1991), we determined that the amendment process is directed toward specific changes to a city charter, whereas the revision process is less specific and contemplates the possible need for a general, more fundamental, change in a city's governmental structure. Claremont v. Craigie, 135 N.H. 528, 531 (1992).

In Albert this court rejected the following:

First, they assert that the changes to the city charter were of such a fundamental and broad nature that the city should have followed the charter *revision* procedures under RSA 49-B:3 and :4 (Supp.1990), instead of the charter *amendment* procedures under RSA 49-B:6 (Supp.1990). Second, they argue that, even if it was correct to use the amendment procedures, the city failed to comply with the statute in presenting a referendum question which violated the "single subject" requirement of RSA 49-B:5, II(a) (Supp.1990).

Albert *supra* at 356.

As this court observed regarding RSA 49-B:

Thus, from the foregoing, it is clear that the amendment process is directed toward specific changes to a city charter, whereas the revision process is less specific and contemplates the possible need for a general, more fundamental, change in a city's governmental structure....

Amendment implies continuance of the general plan and purport of the law, with corrections to better accomplish its purpose. Basically, revision suggests fundamental change, while amendment is a correction of detail.

Id. at 358.

This targeted amendment approved by the voters is not some vast revision of the government. It merely caps what the local government may do absent a two-thirds vote. It retards, but does not prevent, double digit spending if the super majority so chooses on the Board of Aldermen.

### **CONCLUSION**

Concord Taxpayers Association asks the Court to uphold the State officials who approved the Manchester tax cap adopted by its voters.

Respectfully submitted,  
Concord Taxpayers Association  
By their attorneys,  
DOUGLAS, LEONARD &  
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Dated: April 9, 2010

By: \_\_\_\_\_  
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### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing has been mailed by first-class mail this 9th day of April, 2010, to Robert A. Backus, Esq., Peter Chiesa, Esq., Glenn A. Perlow, Esq., Joseph K. Levasseur, Esq., Dean B. Eggert, Esq., Phil Greazzo, and Fred S. Teeboom.

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Charles G. Douglas, III

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