



City of Portland Ad Hoc Committee Agenda

Location, Date, etc.

1. Call the Meeting to Order

- a. Due to the existence of an "emergency or urgent issue", the Charter Commission Committees will conduct this meeting by remote methods/technology at the Zoom link provided below, in accordance with the requirements of 1 M.R.S. section 403 -B and the Charter Commission Remote Participation Policy.

You are invited to a Zoom webinar.

When: Dec 15, 2021 06:00 PM Eastern Time (US and Canada)

Topic: Charter Commission Education Committee

Please click the link below to join the webinar:

<https://us06web.zoom.us/j/81701835516?pwd=SGNEbmR4S0JsWnB5b1NRU0hEcm0rUT09>

Passcode: 308268

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Webinar ID: 817 0183 5516

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International numbers available: <https://us06web.zoom.us/j/kcWNzmliC9>

2. Approval of the prior meeting minutes

3. Discussion with Attorney Jim Katsiaficas

- a. Memorandum from Attorney James Katsiaficas, Emily A. Arvizu

4. Prepare for full commission meeting on 12/22/2021

5. Public Comment

6. Work Plan

7. New Business

8. Adjournment

MEMORANDUM

TO: Portland Charter Commission Education Committee

FROM: James N. Katsiaficas, Emily A. Arvizu

DATE: December 14, 2021

RE: Authority to Amend Charter Provisions Regarding School Budget and Bond Authority

Summary

This memorandum explores issues raised in the August 11, 2021 Memoranda to Xavier Botana, Superintendent, drafted by attorneys at Drummond Woodsum (“Drummond Memo 1”), as supplemented by statements made before the Charter Commission and its Education Committee by Drummond Woodsum attorney Aga Dixon and by Drummond Woodsum’s November 5, 2021 Memorandum to Superintendent Botana (“Drummond Memo 2”). In particular, this memorandum explores 1) the conclusion of the Drummond Memos regarding the authority of a municipality to assign to an “other municipal legislative body” the municipal council’s authority to determine the total school budget amount, 2) whether a school board by municipal charter could be made that “other municipal legislative body” as Attorney Dixon suggested, and 3) whether the Charter could be amended to direct the City Council to send school bond referenda directly to the voters for approval. This memorandum concludes: 1) the City Charter could be amended to transfer City Council budget approval authority to another legislative body such as a voter referendum, 2) but transferring such City Council (“Council”) budget approval to the Board of Public Education (“School Board”) is of questionable validity because a) the Maine Legislature intended to occupy the field, b) the Legislative intent is to create a separation of powers between the School Board and City Council, and c) the legislative history of 20-A M.R.S. § 2307 suggests that “other municipal legislative body” is not intended to refer to an alternative to the municipal council where a municipal council exists; and 3) State law authorizes the municipality, but not the school board, to issue school construction and renovation bonds for a municipal school unit.

Discussion

Home Rule Authority

Home rule authority has been granted to municipalities by both constitutional and statutory grants of power.

Under Maine’s Constitution, “[t]he inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character.” Me. Const., art. VIII, pt. 2, § 1.

In addition, the Legislature has granted broad home rule authority to municipalities pursuant to 30-A M.R.S. § 3001: “Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.”

The Maine Supreme Judicial Court (the “Law Court”) has stated that “[S]ection 3001 constitutes an independent and plenary grant of power to municipalities to legislate on matters beyond those exclusively ‘local and municipal,’ and is not limited by the Constitution’s narrower home rule provision.” *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993). Municipal legislation enacted under the statutory home rule authority “will be invalidated only where the Legislature has expressly prohibited local regulation, or where the Legislature has intended to exclusively occupy the field and the legislation would frustrate the purpose of a state law.” *Id.* In *Town of York*, over the School Board’s objections, the Law Court upheld York’s municipal charter provision under which the Town transferred budget preparation authority from the School Board to a Budget Committee. The Law Court did so because it held that the Town’s home rule charter authority was as broad as its home rule ordinance authority – that the narrower constitutional amendment creating home rule charter authority approved by the State’s voters had been widened by the existence of broader statutorily created home rule ordinance authority. Using the broader test of ordinance validity to assess the validity of a charter amendment, the Law Court upheld the York Charter provision at issue.

Authority to Prepare and Approve School Budgets

As a result of the *Town of York* decision, then, regardless whether it was correctly or incorrectly decided, the Town could lawfully amend its charter to reallocate certain school budget preparation authority between the School Board and Budget Committee. But the school budget in York still had to be approved by a legislative body, and in York, that was by a voter referendum.

Since January 1, 2008, Maine law has required that all municipal school budgets be developed following the same budget requirements and process as those of regional school units. 20-A M.R.S. § 2307. This process is described in Drummond Memo 1,¹ and the discussion here centers on this statute.

Most relevant to this memorandum is § 2307(2), which specifies that in charter municipalities in which the charter gives “a municipal council or other municipal legislative body” the authority to determine the total amount of the school budget and gives the school board the authority to direct how those funds are spent, the municipal council or other legislative body determines “the total amount of the school budget to be submitted to a budget validation referendum” and “the school board shall determine the allocation of the approved school budget among the cost centers” of

¹ See Drummond Memo 1, p. 3.

that cost center budget. Drummond Memo 1 concludes that “[t]his delegation of authority over the school budget between the school board . . . and the municipal council or other municipal body . . . is a subject matter where the Legislature appears to have ‘occupied the field’ – and, in our view, a charter provision that alters it would likely be invalid.”² We agree with this conclusion.

This conclusion is supported by the legislative history of § 2307. The original text of § 2307 included only the requirement that municipal school budgets be developed in accordance with a budget validation referendum process. *See* 20-A M.R.S. § 2307 (2007). In discussing possible amendments in 2008, the House debated whether to include a provision that would allow charter municipalities to opt out of the budget validation referendum process altogether. Proponents of the amendment argued that the imposition of the budget validation referendum on all municipalities “ignores that many cities and towns in our state have created and voted on charters that serve as a framework [for] the governance of their city or town.”³ The amendment was indefinitely postponed and the budget validation process remained law. This discussion makes clear that the Legislature was aware that the statute could conflict with municipal charter provisions and intended to occupy the field on this matter.

However, both Drummond Memos argue that there may be room for other charter revisions in this area. The Drummond Memo interprets §2307’s use of the phrase “a municipal council or *other municipal legislative body*” to mean that “the Portland Charter may lawfully assign the final authority to approve the school budget to a municipal legislative body other than the city council”, thereby eliminating the City Council’s role in the school budget approval process.⁴ This argument comes out of the arguably ambiguous use of “other municipal legislative body” in §2307(1). The phrase is not explicitly defined in the statutes, and a review of the legislative history of the laws creating and amending §2307 does not reveal any explicit definition of this phrase.

Limited information on the purpose of the law and subsequent amendments suggests that the Drummond Memos’ interpretation was not intended. Section 2307 was amended in 2008 to include the provisions in subsections (1) and (2),⁵ specifically addressing issues related to charter municipalities. The bill summary for L.D. 2323 states that the 2008 amendment seeks to “clarif[y] the roles of the municipal officers and the school committee for municipal school units whose municipal charters give authority to approve the school budget to the municipal officers.”⁶

² Drummond Memo 1, p. 3.

³ *See* 3 Legis. Rec. H-1689 (1st Spec. Sess. 2008).

⁴ Drummond Memo, p. 3 (emphasis added).

⁵ The provisions state:

1. **Budget meeting.** In charter municipalities the budget meeting required by section 1485, subsection 3 must be a meeting of the municipal council or other municipal legislative body established by the charter with authority to approve the budget.
2. **Municipal charter.** In charter municipalities where the municipal charter confers upon a municipal council or other municipal legislative body the authority to determine the total amount of the school budget and confers upon the school committee or school board the authority to direct the expenditure of those funds for school purposes, the municipal council or other municipal legislative body shall determine the total amount of the school budget to be submitted to a budget validation referendum and the school committee or school board shall determine the allocation of the approved school budget among the cost centers of the cost center summary budget format.

In an administrative letter dated May 01, 2008 to the Superintendents of Schools, the Commissioner of Education explained that L.D. 2323 “correct[s] technical errors” and clarifies that for those charter municipalities to which subsection (2) of §2307 applies, the council “will not be allowed to set or approve separately each of the 11 cost-center articles required per legislative body approval procedures” but “will instead approve the total expenditures and the school board will assign that approved total to the required 11 cost centers.”⁷ It appears that the amendments to §2307 sought to clearly delineate and balance the roles and power of the school board and the existing municipal legislative body having school budget approval authority.

Further, the phrase “other municipal legislative body” appears to serve as a catchall for municipalities that do not have a municipal council or that do not entrust budget authority to the municipal council. The Town of Windham, for example, has a municipal school district and has a “hybrid” Charter that establishes a town council to enact legislation, but allocates budget approval authority to the town meeting; in this instance, a council municipality has a school budget adopted by an “other legislative body” – the town meeting. Also, in 2007-2008, when § 2307 was enacted and amended, the City (then “Town”) of Sanford had a home rule charter, but no council – instead, a 100+ member “representative town meeting” adopted legislation and the budget (Sanford has since amended its Charter to eliminate the representative town meeting form of government).

This is further supported by materials developed by the Maine Department of Education in 2013 that depict the “Budget Approval and Validation Process” for three types of school units: (1) Regional School Unit – Regional Meeting Legislative Body; (2) Municipal School Unit – Town or City Council Legislative Body; and (3) Municipal School Unit – Town Meeting Legislative Body.⁸ In this third type, the municipal council’s role of approving the full budget to go to the voters is filled by the town school budget meeting in which a majority of registered voters present and voting must approve the proposed budget in order to submit it to the referendum vote. The understanding seems to be that “other municipal legislative body” refers to this particular form of municipal governance. It is unclear that this is the precise meaning intended by the Legislature, but that is how it has been understood and communicated to those in the field.

At most, the use of the phrase “or other legislative body” could be considered to allow Portland to amend its charter to transfer budget adoption authority from the City Council to a City-wide voter referendum. That seems counter to the example of State law, but an argument can be made for it as Attorney Dixon offers. This also would be redundant, since State law already requires a school budget validation referendum (see 20-A M.R.S. § 1486(1)), so that there would be two separate City-wide voter referendum elections on each school budget – one required by the Charter to adopt the budget, and one required by State law to validate it. While Attorney Dixon correctly points out that § 1486(2) allows the voters to decide every three years whether to eliminate the validation referendum, Portland voters have had four chances to date to eliminate it and have not done so in what traditionally has been a low voter turnout election.

⁶ L.D. 2323, Summary (123rd Legis. 2008).

⁷ Administrative Letter 038, Maine Commissioner of Education (May 1, 2008), https://www.maine.gov/tools/whatsnew/index.php?topic=edu_letters&id=55011&v=article.

⁸ Budget Approval and Validation Process, Maine Dept. of Education (Mar. 15, 2013), <https://www.maine.gov/doe/sites/maine.gov.doe/files/inline-files/Budget%20Validation%20Graphics.pdf>.

Finally in this regard, in a presentation to the Charter Commission's Education Committee, Attorney Dixon stated that nothing in State law prevented the Charter from making the School Board the "other legislative body," which would allow it to both prepare and adopt the school budget. While nothing in State law explicitly says this cannot be done, no Maine municipality has amended its charter to do so. More importantly, as Attorney Dixon writes in Drummond Memo 1 at page 3, "The school board is not subordinate to the City Council *but derives its duties and authority directly from the Legislature.*" (emphasis added). Those duties and authority in large part are set out in Title 20-A M.R.S. which includes § 2307, a provision that we have noted places budget preparation authority in the hands of the school board and budget adoption authority in the hands of the municipal council or other legislative body. Section 2307 thus establishes a separation of powers between a school board and a municipal council on budgeting that would prohibit a municipality from granting budget adoption authority to a school board. Therefore, we believe the better argument is that the School Board is prohibited by law from both preparing the school budget and also being the "other legislative body" adopting that budget, and that the Legislature has "occupied the field" so as to prevent a School Board from playing such a dual role. There is at the very least a legal risk that a court could strike down a municipality's home rule charter amendment that purported to allocate budget approval power to a school board, which could affect the validity of any budget adopted by that school board and of any expenditures made in reliance on that budget.

Authority to Over School Bond Issuance

Lastly, as to school bond issuance, State law authorizes municipalities to issue general obligation bonds (30-A M.R.S. § 5772). We agree we agree with the Drummond Memo 2 at page 4 that therefore, in a municipal school district, State law authorizes the municipality, but not the school board, to issue school construction and renovation bonds for a municipal school unit, and that this appears to constitute a comprehensive statutory scheme which prohibits transfer of bonding authority from the City Council to the School Board by Charter revision. As to directing the placement of school construction and renovation bonds before the voters by referendum, the City Charter currently requires proposed bond issues that exceed certain percentages of the City's State valuation be approved by the voters at referendum rather than by the City Council, except for certain categories of bonding that are exempted (refunding obligations; general obligation bonds for streets, sidewalk, and sanitary and storm sewers; and construction or financing of improvements or equipment needed for fire, flood, natural disaster or other emergency). See City Charter, Article VIII, Sections 10, 11 and 16. The City Charter may be revised as a policy matter to alter the percentages or to specify categories of borrowing (such as school construction and renovation bonds) that must be approved by direct vote at referendum. However, it would be the City Council, and not the School Board, that would direct the bond measures to be placed before the voters.