Municipal Charters
&
Forms of Government in Massachusetts

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Preface - Transition from Dillon to Home Rule

By its adoption in 1966 the Massachusetts Home Rule Amendment ("HRA") effected a polar reversal of local legislative authority. After the memorable constitutional events of that year, local legislatures no longer needed to tip their hat to the ghost of the late Judge Dillon, whose "rule" would have the legislative bodies of cities and towns look to state laws for enabling authority for local legislative action. The self-executing nature of the HRA meant that in the structure and conduct of local government cities and towns were now equipped with a constitutional "right of self-government in local matters," except where the HRA itself or the General Court or by necessarily implication establish otherwise.

When in 1966 the dust from this constitutional convulsion began to settle, one might have assumed that it would settle in greater density on the copies of the General Laws and the Acts and Resolves reposing on the bookshelves of our city and town halls, given that recourse to the statutes was now principally to ascertain whether a state law prohibits some local legislative action rather than to find where it is enabled. But habits are hard to break. Municipal officials and the general public continued to go to the statutes and the Acts to find therein familiar words of enablement, to find in that language a false sense of comfort and legitimacy about local proposals.

After the Home Rule Amendment, the legality of a local enactment had to stand on its own, measured now only by the more deferential yardstick of

consistency with state and federal law. How much easier it is for the local legislature not to stand alone but rather to be borne, with greater comfort, firmly on the shoulders of the State Legislature for legitimacy.

In one sense, this local legislative behavior pattern is entirely understandable. If something had worked well in the past, it will work again. If the General Court declared something to be OK in the past, it must be OK again. If we act only where the General Laws or a Special Act enables, it is safe. Certainty and predictability are good things. Local officials and counsels like certainty and predictability, while the exercise of Home Rule authority demands a healthy dose of cautious boldness and confidence in the rightness of proposed local enactments under the new constitutional autonomy "in local matters."

Isn't it safer, some say, for us to ask the General Court for permission to do something that we <u>think</u> we can do anyway than to risk having it later held by the courts to be outside Home Rule powers? "Better to be safe than sorry," goes the saying. Is not consistency with state law best assured by acting pursuant to a Special Act rather than by acting within the imprecise boundaries of the Home Rule Amendment? Are not all doubts subsumed by the legislative blessing of the General Court? It should be kept in mind that Home Rule powers reside with the local legislative body and do not devolve upon local boards and officials directly.

<u>Vestigial Statutes</u>

Iowa adopted a constitutional Home Rule amendment in 1965. Shortly thereafter, the Iowa Legislature made the appropriate adjustments to the state statutes. Perhaps that task would be more complex here in the Commonwealth; but left undone, failure to accomplish that task then leaves us with more complex ambiguities in our General Laws.

Would that the Massachusetts General Court in 1966, in an unrestrained fit of revisionist passion, had likewise taken an eraser to all of the provisions of the General Laws whose *raison d'etre* had been to enable cities and towns to do something that had become, in legal effect, surplusage in the Home Rule era. Would that the General Court even now, nearly 40 years later, be inclined to repeal or revise those provisions of the General Laws that purport to enable cities and

towns of Commonwealth long after the official retirement of those provisions had been voted by the people.

To this day we find in the General Laws and in the Acts and Resolves the echoes of past Legislatures that today could be dropped without a scintilla of loss to local --or state -- authority . Yet, they continue on the books. Remarkably, laws enacted by the General Court even after the Home Rule Amendment purport to authorize and enable within lawmaking realms constitutionally assigned to cities and towns. Inadvertently, however, such pseudo-enablements serve in many instances to impose restrictions on the exercise of the powers purportedly granted by the enactment but already possessed by cities and towns under the HRA. Consider, for example, the provisions of G.L. c. 40A, § 9, dealing with "cluster developments" and the "transfer of development rights." Until the General Court acted to "enable" these things, weren't they previously available to cities and towns without statutory conditions attached ?

The Janus-face of this "enabling" addition to G.L. c. 40A, § 9, was a set of possibly unintended restrictions on the use of those planning tools. This is not to gainsay the General Court's powers under HRA Section 8 to restrict within those realms. But it is critically important for the General Court to make clear when its acts prohibit something cities and towns might otherwise do under the HRA, and when its acts authorize something that the HRA or the General Laws has prohibited. Isn't it fair to say that in this area the acts of the General Court do one of four things: (1) to prohibit what is otherwise authorized; (2) to authorize what is otherwise prohibited; (3) to lay down a state-wide, uniform manner of doing something; or (4) to illustrate the exercise of a local power. Lack of clarity here leads to problems.

All of this has given rise to the belief in some quarters that Home Rule in Massachusetts is a "myth." Those who adopt this view cite the continued supplicatory behavior of cities and towns since 1966 and the complicit reciprocal behavior of the General Court in granting what was asked for. They cite the large number of petitions for special acts as evidence that the petitions were necessary. Could it be that the real "myth" is the belief that the petitions were necessary in the first place?

Removing the Organizational Straight-Jacket
G.L. c. B3, § 20

It is against this background that we approach our topic today -- Forms of Government in Massachusetts.

Before the HRA, municipalities were conditionally free to choose from a limited menu of forms of government laid out by the General Court. Section 2 of the HRA lifted this limitation by declaring that "[a]ny city or town shall have the power to adopt or revise a charter" so long as the charter provisions were "not inconsistent with the constitution or any laws enacted by the general court" or barred by the HRA itself. The power to structure its own, unique form of governance extended even to the amendment or repeal of Special Acts of the Legislature that have the force and effect of a charter. HRA Section 9.

The key to unlock the meaning of HRA Section 2 and to map the full reach of the enfranchisement conferred thereby was best expressed by the General Court when it enacted Chapter 363 of the Acts of 1984, amending the Home Rule Procedures Act (GL c. 43B) by adding Section 20. Here the General Court declared that in matters "relating to the structure of city and town government, the creation of local offices, the term of office of mode of selection of local offices, and the distribution of power, duties and responsibility among local offices," municipalities enjoy autonomy and a threshold presumption that their charter provisions are consistent with any state law relating thereto. To draw out non-exhaustively some of the implications of this enfranchisement, Section 20, Subsections (a) through (g) illustrate a few things cities and towns may wish to do with respect to their form of government; the mode of election or appointment and terms of office, subject to some limitations; the composition of multiple member bodies; division or merger of local offices.

In short, if it deals with the structure of local governance, the shots are -- or should be -- called locally and not on Beacon Hill. Where state law may require or prohibit actions by cities and towns, the organizational means by which those prescriptions and proscriptions are honored are left to the local charter. State law may mandate a municipality do something, but absent statutory language that expressly or by necessarily implication mandates otherwise, it is left to the charter to say who does it and how.

Blurred Edges

The intuitive appeal and apparent clarity of this point blurs at the edges of its application in the real world. It is often not at all clear whether, for example, a Special Act has the force and effect of charter for purposes of its repeal or amendment under G.L. c. 43B. In one recent instance encountered by the Attorney General in review of a proposed city charter amendment, an amendment was proposed to an Act of the Legislature dating back to the nineteenth century. The Act in question had been to establish a corporation authorized for the exclusive control and management of a local beach, the beneficial interests being vested to property owners within the boundaries of two then-existing school districts within the city. The Attorney General, and later the courts, held the Act not to be an Act having the force and effect of charter and thus not amendable under the HRA. Conversely, local boards agencies created by Special Act are grist for the charter mill.

The historical ambiguities embedded in our General Laws dealing directly and indirectly with the forms and functions of local government leave everyone involved in the process bedeviled in doubt as to whether statutory text of any vintage stands preemptively in bar to local charter proposals. The natural outcome of this statutory imprecision is that municipalities are weakened in their resolve and that the General Court is induced to believe that its Special Acts are indispensable.

Sooner rather than later we must confront more than just the question of whether a local enactment is inconsistent with laws of the Commonwealth. We must face boldly the more fundamental question of whether the laws of the Commonwealth are inconsistent with the Home Rule Amendment. Until then we shall continue to struggle daily in the murky moat lying between Massachusetts Home Rule and the Ghost of Judge Dillon.

The Role of the Attorney General

The role of the Attorney General in all of this is to ascertain (1) whether the provisions of a charter or charter amendment proposed by a duly elected

charter commission are not in conflict with the Constitution and laws of the Commonwealth (G.L. c. 43B, §§ 3 - 9), and (2) whether the provisions of a proposed charter amendment approved by the local legislative body for inclusion on a forthcoming ballot are similarly not in conflict (G.L. c. 43B, § 10). The preliminary report of a charter commission under (1) and the vote of the local legislative body under (2) are then sent to the Attorney General and to DHCD for review. The Attorney General then has 28 days within which to render an opinion as to any inconsistency. The Attorney General's opinion is advisory as to (1), and binding as to (2).

When a charter or charter amendment is proposed by an elected charter commission, a copy of the commission's preliminary report must be filed with the Attorney General. G.L. c. 43B, § 9 (b) provides in part:

> Within four weeks after his receipt of the report, the attorney general shall furnish the commission with a written opinion setting forth any conflict between the proposed charter or charter revision and the constitution and laws of the commonwealth.

Charter amendments proposed not by an elected charter commission but rather by the legislative body of the municipality are dealt with by G.L. c. 43B, § 10.[1] Section 10 (a) deals with proposals initiated by the legislative body, while Section 10 (b) contains provisions that would compel the legislative body to consider and vote on charter amendments proposed by petition. Hardly a model of legislative clarity, Sections 10 (a) and 10 (b) have given municipal officials and counsels sleepless nights wondering if they got it right. Cutting through the verbal fog of Section 10 (b), note that Section 10 (b) serves essentially as a means by which a charter amendment proposal can be put before the full legislative body when the provisions of Section 10 (a) are not invoked by the action of the council of a city or the board of selectmen of a town. It seems to me that Section 10 (a) is triggered, in a city, when the council places the proposal on its agenda, and in a town, when the board of selectmen place the proposal on the town meeting warrant. Section 10 (b), then, is available to individual members of the council or select board to force the hand of the council and board respectively. I have rarely seen a Section 10 (b) proposal.

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[1] The full text of G.L. c. 43B, § 10, is attached as Attachment A.

Clearing the hurdle of which of these two sections applies, Section 10 (c) then deals in detail with the responsibility of the Attorney General regarding charter amendments proposed under subsections (a) and (b) of Section 10. Section 10 (c) provides in part:

> Whenever an order proposing a charter amendment to the voters is approved by the mayor and city council or town meeting, a copy of the proposed amendment shall be immediately submitted to the attorney general and to the department of housing and community development and such order shall not take effect for four weeks after the date of such submission. Within such four weeks the attorney general shall furnish the city council or board of selectmen with a written opinion setting forth any conflict between the proposed amendment and the constitution and laws of the commonwealth. A copy of the opinion shall at the time be furnished to the department of housing and community development. If the attorney general reports that the proposed amendment conflicts with the constitution of laws of the commonwealth, the order proposing such amendment shall not take effect except as may be specified by further proceedings of the mayor and city council or town meeting under subsection (a). If the attorney general reports no such conflict, such order shall become effective four weeks after its submission to the attorney general.

Contrast the level of detail attending proposals from city councils and town meetings under G.L. c. 43B, § 10, with proposals of an elected charter commission under G.L. c. 43B, §§ 3-9. Note that the role of the Attorney General is advisory only as to proposals of charter commissions but binding as to proposals under Section 10. Note also that however the action of the council or the town meeting may be described in the council agenda, in the town meeting warrant, or in the votes under either, the legal outcome and effect of such action is merely the approval of "an order proposing a charter amendment to the voters." Often cities and towns fashion text that implies that the charter amendment is "effected" by the vote of the council or the town meeting. All Home Rule charters and charter amendments are the exclusive prerogative of the voters, not the prerogative of those who have proposed them.

In undertaking his consistency assessment of charter proposals, the Attorney General credits all proposals with the presumption of consistency articulated in G.L. c. 43B, § 20, which provides in part:

> The provisions of any charter or charter amendment adopted pursuant to the

provisions of this chapter shall be deemed consistent with the provisions of any law relating to the structure of city and town government, the creation of local offices, the term of office or mode of selection of local offices, and the distribution of powers, duties and responsibilities among local offices.

A finding of "inconsistency" can be made only where the Attorney General finds that the implementation of a charter provision always and everywhere entails a violation of some provision of the constitution or laws of the Commonwealth, that the two cannot co-exist without fatal abrasion in their overlapping application. There are certainly many provisions of the General Laws that simply preempt any other local action than that prescribed or proscribed by the State. For example, right in Section 20 we read that "no term of office of a local elected officer shall be for more than five years, and the members of multiple member bodies shall serve for terms which, as nearly as possible, expire in different years." What could be clearer? A charter provision calling for 7 year terms, or a planning board consisting of 6 members, would be "inconsistent" with state law.

Thinking Outside the Reach of Dillon's Ghost

That having been said, I harken back to my earlier observation that habits are hard to break. This is no less true of cities and towns that are considering a new or amended charter. The traditional models of forms of local government are all around us, while images of possible new forms of government are difficult to envision. They are approached, it seems, with great trepidation even by the proponents of change.

The portent of disapproval by the Attorney General looms far larger in our imagination than the Constitution and laws of the Commonwealth in fact justify. The forms of government possible under our constitutional system are broad and malleable. The tensile strength of constitutional limits in this area has not yet been tested. But it is fair to say -- with considerable deference to Bob Smith if not as its source then at least as its faithful echo -- that cities and towns under our constitution are "little laboratories of democracy," each equipped by the HRA with the tools necessary to fashion a form of government that best fits the community as the voters of that community best vision it.

I have been intrigued by a foresightful proposal to fashion a form of government similar in some ways to a city and similar in other respects to a town having a representative town meeting. I am intrigued because so often I've seen charter proposals from a town that strive to achieve the efficiencies of a city but with the trappings and labels of a town. Setting aside for the moment the historical curiosity of the Attorney General's duty to review the by-laws of towns but not the ordinances of cities, what impediment is there to a municipality fashioning a Home Rule charter with legislative functions distributed creatively among several constituent parts? Picture a municipality, still in love with its town meeting and its aspiration for grass roots democracy, proposing to its voters a legislative body consisting, in part, of (A) a representative town meeting that sits on the call of the "select board" to act on the subjects included in its warrant, and in part of (B) a subset of town meeting members -- let's call them the "Select Board" or "Council" -- who possess specified legislative powers exercisable in the interstices between town meetings. The charter could lay out which legislative powers are reserved for the RTM and which are conditionally vested in the Board or Council. The boundaries between the two parts could be fixed, or might include appellate functions for the RTM over legislative actions of the Board or Council.

The foregoing is partly fanciful but partly also a semi-serious suggestion to cities and towns that they explore the unvisited borders of the *terra incognita* of possible forms of government available to them under the HRA and that differ from traditional forms.

What Exactly Is a "City," Anyway?

This brings me to my final reflections on what, under existing law, we mean when use the terms "city" and "town."

It is interesting to note that while the HRA itself and later the General Court have not expressly defined the terms "city" or "town," both have consistently used those terms as if their meaning were clearly understood and easily applied. That assumption has proven to be flawed, as is more amply discussed in the Attorney General's letter to the Town of Southbridge. (see Attachment B)

Lacking a definition of these terms in the Constitution, the General Laws, and court decisions, the Attorney General was recently faced with a need to fashion a workable definition of these two terms in connection with his review a submission of by-law amendments by "the Town of Southbridge." For reasons set forth the Attorney General's letter to the Town of Southbridge of December 8, 2004, he concluded that "[t]he salient differences between a city and town for our immediate purposes is whether its legislative body is representative, continuous, and in sole control of its legislative agenda." Applying this standard, the Attorney General found Southbridge to be a city and no longer subject to Attorney General review of its laws under G.L. c. 40, § 32.

Use it or Lose It

As with muscles that atrophy with non-use, the constitutional powers of local governments available under the Home Rule Amendment will wither and die if not exercised. I challenge you to use them.

Bob Ritchie is an Assistant Attorney General and the Director of the Attorney General's Municipal Law Division. This article represents the opinions and legal conclusions of its author or as otherwise attributed, and not necessarily those of the Office of the Massachusetts Attorney General.

Attachment A

Chapter 43B: Section 10 Amendments to charter previously adopted or revised under this chapter; procedure

Section 10. (a) Amendments to a city or town charter previously adopted or revised under this chapter may be proposed by the city council of a city or the town meeting of a town by a two thirds vote in the manner provided by this section; provided, that amendments of a city charter may be proposed only with the concurrence of the mayor in every city that has a mayor, and that only a charter commission elected under this chapter may propose any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager, or the board of selectmen or town manager. In this section, the word ""mayor" shall mean an officer elected by the voters as the chief executive officer of a city or an officer lawfully acting as such, and the term ""two thirds vote" shall mean, in cities, a vote, taken by yeas and nays, of two thirds of the members of a city council present and voting thereon, and shall mean, in towns, the vote of two thirds of the voters present and voting at a duly called meeting.

(b) In addition to any amendment proposed by a city council or town meeting under subsection (a) the city council or town meeting shall consider and vote upon any suggested charter amendment which it would have the power to propose under subsection (a), and which is not substantially the same as an amendment already considered and voted upon by it within the last twelve months, and which is suggested to it in a written request signed by the mayor or city manager or any member of the city council in a city or by the town manager or any selectman of a town, or is suggested to it by a petition in substantially the form set forth in section fifteen, signed and completed in accordance with the instructions contained therein by at least ten registered voters in the case of a town and by as many registered voters, in the case of a city, as would be required to nominate a charter commission member in such city under section five, which written request or petition shall be filed with the city or town clerk.

At the earliest convenient time not later than three months after the date any suggested amendment is filed with the city or town clerk, the city council or board of selectmen shall order a public hearing to be held thereon before it or before a committee selected or established by it for the purpose, provided that any number of suggested amendments may be considered at the same hearing. Such a hearing shall be held not later than four months after the filing date of any suggested amendment to be considered, and at least seven days notice of such public hearing shall be published in a newspaper of general circulation in the city or town. Except where the hearing is held by a city council, the board or committee holding the public hearing shall report its recommendations to the city council or town meeting, as the case may be. Final action on such a suggested amendment shall be taken not later than six months after such filing date in the case of a city and, in the case of a town, not later than the first annual town meeting held at least six months after such filing date, provided that at any time after the public hearing two hundred registered voters of a town or twenty per cent of the total number of registered voters of such

town, whichever is less, may in writing request the selectmen to call a special town meeting to consider the suggested amendment, and the selectmen shall thereupon call such meeting which shall be held not more than forty-five days after the receipt of the request.

(c) Whenever an order proposing a charter amendment to the voters is approved by the mayor and city council or town meeting, a copy of the proposed amendment shall be immediately submitted to the attorney general and to the department of housing and community development and such order shall not take effect for four weeks after the date of such submission. Within such four weeks the attorney general shall furnish the city council or board of selectmen with a written opinion setting forth any conflict between the proposed amendment and the constitution and laws of the commonwealth. A copy of the opinion shall at the time be furnished to the department of housing and community development. If the attorney general reports that the proposed amendment conflicts with the constitution of laws of the commonwealth, the order proposing such amendment shall not take effect except as may be specified by further proceedings of the mayor and city council or town meeting under subsection (a). If the attorney general reports no such conflict, such order shall become effective four weeks after its submission to the attorney general.

(d) No order or vote under subsection (a), (b) or (c) shall be subject to referendum or shall, except as provided in subsection (a), require the concurrence of the mayor.

(e) The provisions of subsections (a), (b), (c) and (d) shall apply to amendments of laws having the force of a city or town charter by virtue of section nine of Article LXXXIX of the Amendments to the Constitution as well as to amendments of a charter previously adopted or revised under this chapter.

Attachment B

Letter of the Attorney General
December 8, 2005
to
The Town of Southbridge

Re: Southbridge Third Reading - October 4, 2004
Case # 3134
Warrant Agenda Item # 8 (General)

I return with no action by this Office the amendments to the by-laws voted under this item on the agenda for the Southbridge Town Council meeting, Third Reading, that convened on October 4, 2004, and thereafter submitted to this Office for approval pursuant to G.L. c. 40, § 32. Our reason for taking no action on this item is that Southbridge's charter, as most recently amended and in effect as of July 1, 2004, establishes for Southbridge a city form of government, while the provisions of G.L. c. 40, § 32, are applicable only to towns. Thus, Southbridge is exempt from having to submit by-laws to the Attorney General for approval.

The Town's charter history is most interesting. In 1973, Southbridge adopted a new charter establishing a town council form of government. Deeming Southbridge to be a "city" under the new charter, the Attorney General's review and approval of local laws under G.L. c. 40, § 32, ended. Two years later, by Chapter 790 of the Acts of 1975, a Special Act of the Legislature relating to the Town's 1973 charter, it was declared that by the charter approved by the voters of the Town at its election of March 2, 1973, and "except as otherwise provided" therein, "the town council shall have all the powers and duties conferred on town meetings, and the town manager shall have all the powers and duties conferred on a board of selectmen." Chapter 790, Section 2. Section 3 of the Act stated: "Except where inconsistent with said charter, all provisions of law applicable to towns shall be applicable to the town of Southbridge and said charter shall govern unless said law specifically provides to the contrary."

On January 20, 2003, a duly elected Charter Commission forwarded to the Attorney General a copy of its Preliminary Report for review pursuant to the provisions of General Laws Chapter 43B. We received the Preliminary Report on February 5, 2003. In our letter to the Town of March 3, 2003, we set forth our view that the provisions of the new charter proposed in the Preliminary Report were not inconsistent with the constitution or laws of the Commonwealth. We nevertheless offered guidance on several points, including the observation that it would be unnecessary for the charter to provide -- as was proposed by the charter commission in its Preliminary Report -- that after the new charter takes effect the town council "petition the General Court to repeal Chapter 790." We noted in our review of the Preliminary Report that "the Home Rule Amendment and Home Rule Procedures Act permit the repeal to be effected by the voters on the ballot question proposed in your Final Report." In our letter we also noted that under the new charter Southbridge would be a city and might wish to refer to its local legislation as "ordinances" rather than as "by-laws," thus complying with conventional designation. As there is nothing prescriptive in the General Laws on how a municipality shall designate its laws, the

Commission in its Final Report held to its earlier preference for the label "by-laws" over "ordinances."

Following approval by the voters, the new charter went into effect on July 1, 2004, including the operative language of Final Report, Section 13-2-1, which provided that "Chapter 790 of the Acts of 1975 . . . is repealed and shall no longer apply to the Town of Southbridge." (Emphasis added.) Thus, on July 1, 2004, the effective date of the repeal of Chapter 790, the sole basis upon which "provisions of law applicable to towns" applied to Southbridge ended, leaving Southbridge fully subject to the laws applicable to cities.

Between 1973, when Southbridge voted on its first charter making Southbridge a city with a town council form of government, and 1975, when Chapter 790 went into effect, G.L. c. 40, § 32, was inapplicable to Southbridge, since that section applies only to towns and not to cities.

Between 1975, when Chapter 790 went into effect, and July 1, 2004, the effective date of the new charter, Southbridge -- although a city -- was subject to the provisions of G.L. c. 40, § 32. Chapter 790 did not, in our view, make Southbridge a town; rather, it made statutes otherwise applicable only to towns then applicable to Southbridge. Accordingly, during this 29 year period, all by-laws thereafter adopted by the town council were routinely submitted to the Attorney General for review and approval under G.L. c. 40, § 32.

Upon the recent repeal of Chapter 790, the Town's form of government had to be reassessed, since the extraordinary statutory basis upon which Southbridge had functioned under the laws applicable to towns had now been removed. This led us to conclude that, for the reasons set forth herein, Southbridge must now be seen as a city, again exempt from the applicability of G.L. c. 40, § 32.

By 1973, Southbridge had joined several other communities that had adopted a "town council" form of government. Previously Agawam and Methuen had done so, and thereafter several others including Franklin, Greenfield, and Barnstable did likewise. As with other "town council" forms of government, the Attorney General ceased his review of local laws adopted by the Southbridge Town Council, Southbridge's legislative body. Attorney General review of town by-laws resumed in 1975 not because Southbridge became a town, but rather a law applicable only to towns was made applicable to it.

Interestingly, at the very time Chapter 790 was making its way through the legislative process as House Bill No. 5812, the Legislature itself had serious doubt about the bill they were being asked to sign into law at Southbridge's request. Because of this, the Legislature posed three questions to the Supreme Judicial Court, Questions 1 and 3 being:

> 1. Would the enactment of House, No. 5812, a petition with local approval, which provides that the town council in Southbridge, a continuing legislative body, shall have all the powers and duties of a town meeting be unconstitutional because of its vague and indefinite application?
>
> 3. If the town of Southbridge is a city, is it constitutionally competent for the General Court to provide that all the laws relative to a town shall continue to apply to said municipality, thereby, in effect, creating a form of government which is neither a town or city and for which no provision is made under the Constitution of the commonwealth?

(Emphasis added.)

The Court declined to answer Question 1, explaining its reason:

> Asking us to decipher the implications of the bill with respect to the many provisions of the general laws relating to town meetings is like asking "us to examine a long and complicated bill . . . to ascertain whether we can discover questions to be raised as to . . . [its] validity," and this we cannot do.

Opinion of the Justices to the House of Representatives, 368 Mass. 849, 852 (1975)

The Court answered Question 3 in the affirmative. It found that the General Court was competent to enact the bill. It nevertheless construed the bill as not being an "optional plan" of government as provided by the General Court as envisioned by the second paragraph of Section 8 of the Home Rule Amendment and made available for voluntary adoption by a municipality. Rather, the Court determined that the bill qualified for action by the General Court under the first paragraph of Section 8, that is, as a request for it to "act in relation to cities and towns by special laws enacted on petition" as therein provided.

We think the Legislature, however, left us with a few keys to unlock the mystery of how to classify "a form of government which is neither a city nor a town" when in its requests to the Court it referred to the bill as providing for a town council that is "a continuing legislative body." This contrasts with a town meeting, whether open or representative, which meets -- and, indeed, may be said to exist -- only at the call of the selectmen. Furthermore, the subjects upon which town meeting exercises legislative power are limited to those prescribed by the selectmen in the warrant, contrasting with the city's legislative body's standing authority to set its own agenda.

It has often been suggested that the number of representatives is the determining factor in distinguishing a representative town meeting form of government from a city form of government. This yardstick proves troublesome when we see RTM's with as few as 50 members, and councils with as many as 27 members. How would the vitality of numbers fare as membership differences lessen? Can you have a council with more members than an RTM?

Under our analysis here, the number of representatives is not controlling in determining whether a form of government is a city or a representative town meeting. Rather, we consider as a more apt determinant whether the legislative body functions in a continuous, on-going basis with control of its own legislative agenda or merely intermittently upon the call of the selectmen who set the meeting's legislative agenda. For example, a representative legislative body of anywhere between 21 and 55 members might be a city or an RTM depending on the kind of functional analysis we have undertaken in connection with the by-law amendments before us.

By 1978 a question had arisen as to whether a "town council" form of government makes the municipality a "city," or whether by styling itself a "town" it could thus retain its "town" status. In a letter to the state Department of Public Works dated April 13, 1978, David E. Sullivan, Legal Counsel in the Elections Division of the Secretary of the Commonwealth, wrote the following analysis:

> The General Laws and the state Constitution do not define the words "city" and "town." The Supreme Judicial Court has stated, however: "Traditionally, the distinction between towns and cities was that the former were governed directly by the qualified inhabitants, while the latter were governed indirectly by the inhabitants through representatives." Del Duca v. Town Administrator, 1975 Mass. Adv. Sh. 1792, 1803 n.6, 329 N.E.2nd 748, 753 n.6 (1975) This

authorized the General Court to establish a limited town meeting, so called, in towns with over six thousand inhabitants, upon local petition.

The recent Home Rule Amendment (Article LXXXIX of the Amendments, adopted in 1966) continues to recognize a difference between cities and towns. Section 2 provides in part:

> No town of fewer than twelve thousand inhabitants shall adopt a city form of government, and no town fewer than six thousand shall adopt a form of government limited to such inhabitants of the town as may be elected to meet, deliberate, act and vote in the exercise of the corporate powers of the town.

The word "town" implies that a legislative meeting of the inhabitants is to be called by the selectmen.

Your charter does not refer to classic town meetings wherein the legislative powers of the corporate entity are exercised. Without such a town meeting, you would have been classified as a municipal or city government under the original Article II of the Amendments, adopted in 1821. Article LXX and Article LXXXIX do not change this, but rather confirm it by the language quoted above.

The substance of the thing done in your charter is to establish a representative form of city government for a community with more than twelve thousand inhabitants under Article LXXXIX of the Amendments.

Although there may be a question as to what number constitutes a limited town meeting, your charter does not raise this issue, since the town council does not purport to be a town meeting and since the office of selectman is eliminated.

Therefore, in view of the foregoing, you constitutionally have a city form of government. The importance of this is that many general laws apply only to cities or treat cities differently than towns, and these statutes will automatically apply to Franklin.

General Laws, Chapter 40, Section 32, being specifically limited to towns, does not give the Attorney General authority to approve by-laws adopted by a town council form of government since constitutionally it has to be viewed as a city.

I note that another town, Sturbridge [sic., Southbridge], adopted a town council form of government, and thereafter the Attorney General did not review its by-laws. Since the enactment of Chapter 790 of the Acts of 1975, however, the Attorney General has reviewed by-laws of Sturbridge [sic., Southbridge].

The Attorney General has thus made clear that a defining characteristic of a "town" is that the legislative meetings of its inhabitants are called by the selectmen on issuance of a warrant, contrasted with meetings of a continuously existing town council that convenes on a bi-weekly basis and at any other time upon the call of the chairperson or any other three members. Additionally, the scope of legislative authority in a town, whether the town has an open or a representative town meeting, is fixed by the warrant issued by the selectmen. Contrasted with this, the scope and content of the agenda for legislative action by a city is of its legislative body's own design and limits, subject only to the provisions of the local charter and of the constitution and laws of the Commonwealth.

We are mindful that forms of local government in Massachusetts lie across a spectrum of mixed characteristics, and that we are attempting here to discern the point at which they cluster to mark a municipality as a "city" for purposes of exempting the municipality from the application of G.L. c. 40,

§ 32. Perhaps no one characteristic alone suffices for making this determination. For example, the Town of Burlington has a charter which declares that its "town meeting shall be a continuous body, but it may adjourn for periods not exceeding 150 days," and that it shall meet at such times and places as the meeting may determine by rule." Burlington Charter, Section 12(a). Nevertheless, the town meeting may still only exercise its legislative powers with respect to subjects on a warrant issued by the selectmen.

Southbridge's charter, on the other hand, vests in the town council "all general, corporate, legislative, policymaking, and appropriations powers of the town," and may exercise those powers on any matter placed on the council's agenda by the council chairperson. Southbridge Charter Sections 2-4-1 and 2-5-2.

We are aware of Town Counsel's letter of September 10, 2004, in which Attorney Lauren Goldberg concludes that by the new charter, and despite the repeal of Chapter 790, Southbridge had not thereby adopted a city form of government but rather continues to have a town form of government with a representative legislative body. Town Counsel cites several parallels between the form of government laid down in the new charter and traditional town forms of government, including use of terms in the new charter that are traditionally and conventionally applicable to towns, such as "by-laws" rather than "ordinances." She also cites several features of the new charter relating to fiscal matters and local elections that are more typical of towns than cities. We cannot conclude, however, that these considerations are determinative, preferring to assess Southbridge, in the absence of Chapter 790, by the same criteria we have applied to other council municipalities.

The salient differences between a city and town for our immediate purposes is whether its legislative body is representative, continuous, and in sole control of its legislative agenda. Applying this standard, we find Southbridge to be a city and no longer subject to Attorney General review of its laws under G.L. c. 40, § 32.

For the foregoing reasons, we must return your submission without action by this Office.