

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

RECEIVED

DEC 31 2018

NH SUPREME COURT

Fred S. Teeboom

v.

City of Nashua

2018-0171

and

Daniel Moriarty

POSTED
COM D

v.

Mayor, City of Nashua, *et al*

APPELLEES' MEMORANDUM OF LAW

INTRODUCTION

Plaintiffs brought actions challenging the adoption of the City of Nashua's budget for the 2018 fiscal year. The Plaintiffs asserted that the provisions of Nashua City Charter §56-c and 56-d, commonly referred to as "the spending cap," were contravened.

Following a hearing on the merits, the Superior Court found and ruled that the Plaintiffs, the Appellants, lacked standing because the court could not provide any redress for the Plaintiffs' claims. The court affirmatively declined to address the

issue of whether or not the Plaintiffs had a personal injury granting them standing. Accordingly, Plaintiffs' position that the standing issue has been addressed by the recent amendment to the New Hampshire Constitution is incorrect. The court's conclusion that the Plaintiffs' claims were not capable of being redressed by the court stemmed directly from the court's determination that the spending cap provisions of the Nashua City Charter were unenforceable because they failed to meet the requirements of the state enabling legislation, RSA 49-C:12 III and 49-C:33 I(d). Thus, it is the validity of those spending cap provisions which are the heart of this appeal.

ARGUMENT

In *City of Manchester v. Sec'y of State*, 161 N.H. 127 (2010), this Court determined that RSA49-C: 12 I contemplated a simple majority vote of a city's legislative body to adopt a budget. This conclusion resulted in a proposed budget limitation amendment to the Manchester City Charter being deemed to conflict with that statute as it would have required a two-thirds majority in some circumstances. As a result of this decision the validity of existing tax and spending cap provisions in the charters of other communities, including Nashua, were in doubt. The legislature then acted to authorize tax and spending cap charter provisions with certain requirements. RSA 49-C: 12 III and 49-C: 33 I(d).

RSA 49-C: 12 III states: "Notwithstanding any contrary provision in paragraph I, the adoption of an override threshold provision to a tax cap included in a charter pursuant to RSA 49-C: 33 I(d) shall provide for a supermajority vote of the elected body to adopt the annual budget."

RSA 49-C: 33 I states: “City charters may include provisions relating to any or all of the following matters: . . .

(d) A limit on the annual spending increases that increase the amount raised by taxes under the city budget adopted pursuant to RSA 49-C: 23. Such a tax cap shall provide for an override threshold on a vote to exceed the limit on annual increases which shall be by a supermajority as determined in the charter. A tax cap provision in the city charter may provide for specific exclusions for dedicated, enterprise, or self-supporting funds or accounts, capital reserve funds, grants, or revenue from sources other than local taxes.”

Additionally, the legislature enacted a savings provision impacting the treatment of previously adopted tax or spending caps. RSA 49-B: 13 II-a.

RSA 49-B: 13 II-a states: “All town or city charters which have been adopted, revised, or amended to include a tax or spending cap of any kind and all charter commissions which have been properly established and elected; all elections properly held; and all actions properly taken related to the tax or spending cap in such charters are hereby endorsed, ratified, validated, and legalized and are fully enforceable, without regard to whether such entities or actions were authorized by law at the time they were established or taken.”

In enacting these enabling provisions for spending and tax cap limitations in city charters the legislature expressed its clear intent that such provisions would be permitted only when accompanied by an override threshold permitting a supermajority of the body to adopt a budget exceeding the cap. In the case of the Nashua spending cap charter language the Superior Court found and ruled that the charter contained no such override threshold (more on this below).

Lacking the necessary override threshold, the Plaintiffs in this appeal, contend that it is the saving provision, RSA 49-B: 13 II-a, which authorizes and establishes the legal enforceability of the Nashua Charter spending cap. Accordingly, the familiar rules of statutory construction apply. This Court is the final arbiter of the legislative intent as expressed in the words of the statute considered as a whole. The Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. The Court interprets legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. The Court construes all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Moreover the Court does not consider words and phrases in isolation, but rather within the context of the statute as a whole. This enables the Court to better discern the legislative intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. When the language of a statute is plain and unambiguous, the Court need not look beyond the statute itself for further indication of legislative intent. The Court further presumes that the legislature does not waste words or enact redundant provisions and, whenever possible, gives effect to every word of a statute. *New Hampshire Board of Psychologists v. Young*, 169 N.H. 361, 366 (2016)(citations omitted).

RSA 49-B 13 II-a begins expansively referring to “all town or city charters” and continues in that vein with “all charter commissions,” “all elections,” and “fully enforceable.” However, all that comes before is modified by the last clause which reads “without regard to whether such entities or actions were authorized by law at the time they were established or taken.” This phrase answers the question: From what are these prior tax and spending cap provisions saved? They are saved from a challenge asserting that they were not authorized by law at the time they were enacted. The Plaintiffs invite the Court to construe the language so as to conclude that previously enacted spending and tax caps are also saved from challenges asserting that they are not authorized by current law. To do so would be to add words that the legislature chose not to include violating a tenet of statutory construction. Further the familiar axiom *expression unius est exclusion alterius*, the expression of one thing in a statute implies the exclusion of another urges against Plaintiffs’ position. The legislature could well have omitted that last clause or expanded upon it but it did not.

The result promoted by the Plaintiffs also flies in the face of the legislature’s particular interest in making it clear that tax and spending caps have an override threshold allowing a supermajority to enact a budget above the otherwise determined cap limits. So emphatic was the legislature that it included the requirement in both RSA 49-C: 12 III and in RSA 49-C: 33 I(d).

RSA 49-B: 1 sets forth the legislative purpose of chapters 49-B and by extension 49-C and 49-D and, in part, provides, “the general court recognizes a need to

require uniform procedures and practices when there is a corresponding state interest.” The requirement of the override threshold is a uniform procedure and practice which the legislature determined to be necessary. Plaintiffs’ interpretation lends itself to non-uniform practices throughout the state. Indeed under their theory even an ironclad, inflexible cap would have the grandfathered status which they urge. Such result is clearly outside the statutory scheme developed by the legislature.

Alternatively, Plaintiffs suggest that the Court consider as being an override threshold the provisions of the Nashua Charter that permit a vote of ten aldermen to exempt all or part of payments for principal and interest on bonded debt and / or capital expenditures from the cap limitation. The simple answer is that the ability to exclude from the limitation certain expenditures thereby increasing the limitation on spending while leaving a, albeit higher, limitation in place is not the same thing as being able to exceed the limit whatever it may be. To illustrate, suppose the budget limitation calculation computes to a cap of \$100 million. Suppose the total; contemplated expenditures for debt service and capital improvements is \$10 million. Suppose the mayor and all fifteen aldermen agree that the city faces a crisis and the lowest responsible total budget is \$115 million. With a properly written cap provision including an override provision the aldermen unanimously vote to override the limitation and adopt a budget of \$115 million. Crisis averted. But with the exemption provision of the current Nashua Charter, ten or more aldermen can vote to exempt the \$10 million for debt and capital expenditures and then applying the cap authorize another \$10 million to reach the \$100 million limit. That brings total spending to \$110 million at the maximum, still \$5 million short. Even with the unanimous agreement of all elected officials

they are powerless to avert the crisis. Not the result contemplated by the legislature and not the equivalent of an override threshold.

Even if those exemption provisions could somehow be construed to meet the override threshold requirement, another fundamental flaw exists in the Nashua cap provisions. They apply to all spending, not only spending that increases the amount raised by taxes. Plaintiff Teeboom took pains to make this point at the hearing below. Tr. p.15, ll. 13-20. The enabling legislation, RSA 49-C: 33 I(d), limits the authority to enact tax and spending caps to “spending increases that increase the amount raised by taxes” While the court below did not reach this issue, it is well settled that a wrong reason does not invalidate a correct ruling and where the correct decision is made on mistaken grounds, this Court will sustain it. *Sprague v. Town of Acworth*, 120 N.H. 641, 643-4 (1980)(citations omitted).

CONCLUSION

Wherefore the Appellees pray that this Court uphold the decision below. Should the Court conclude that it must overrule, Appellees request remand to consider issues not reached by the Superior Court.

December 2, 2018

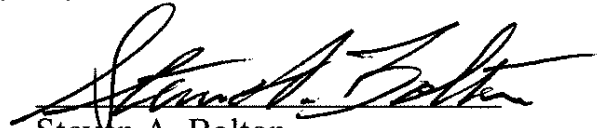
Respectfully submitted,
Jim Donchess, Mayor
City of Nashua

By their Attorney
Office of Corporation Counsel



Steven A. Bolton, NH Bar #67
Corporation Counsel
Dorothy S. Clarke, NH Bar #12455
229 Main Street
Nashua, NH 03061
(603) 589-3250

I hereby certify that two copies of the foregoing motion was mailed this date to
Charles G. Douglas, III, Esq.



Steven A. Bolton