Chapter 16: State and Municipal Government: Home Rule

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§16.1. Introduction. Prior to 1966, the regulation of the affairs of the cities and towns of the Commonwealth was vested primarily in the General Court. In order for a municipality to react to the needs of its citizens, it would have to seek specific enabling legislation from the legislature. The increasing demands upon local government, together with the time-consuming method of reacting to these demands, led to the passage of Article 89 of the Amendments to the Constitution, which established the basic right of municipalities to self-government. The Home Rule Procedures Act (HRPA), in turn, was passed to detail the procedures under which the municipalities could effect this constitutional grant of home rule. It will be the purpose of this chapter to: (1) set forth an exposition of the HRPA, (2) analyze its impact upon previous legislation in this field, and (3) criticize some of the major defects and ambiguities which appear in the act.

§16.2. The steps to home rule. The HRPA became law, in the words of the preamble, "to facilitate the orderly implementation of Article LXXXIX of the Amendments to the Constitution." Article 89, the constitutional source for home rule, establishes the right of municipalities to self-government, and specifies those areas of municipal authority over which the legislature retains limited, contingent control. While Article 89 outlined, in general, the procedures to be followed in effectuating home rule, it soon became apparent that these general procedures would not be sufficient to govern the implementation of the amendment. In his message to the General Court concerning the HRPA, Governor Volpe stated: "In the absence of uniform standards promulgated by law setting forth in greater detail the procedures to be followed, there will be much confusion, litigation and delay in revising charters." It was to allay such confusion that the HRPA became law.

The HRPA provides for three methods of changing charters: (1)
adoption of a new charter,2 (2) revision of a home rule charter,3 and (3) amendment of any charter.4 The act outlines one set of procedures to be followed in the adoption and revision process, and a distinct set to be followed in the amendment process.

Adoption or revision. The threshold step in the adoption or revision of a charter is the filing of a petition with the board of registrars of voters in the city or town. The petition, calling for an adoption or revision, must be signed by at least fifteen percent of the voters in the municipality eligible to vote in the preceding state election.5 Within ten days after the filing of the petition, the municipal legislative body (be it city council or town board of selectmen) must receive the certified petition.6

From the date of receipt of the petitions, the legislative body has thirty days within which it must provide, by order, for an election or town meeting at which the question of adopting or revising a charter, and the election of a charter commission is to be submitted to the voters.7 The ballot does not contain any proposals for substantive charter change, but merely relates to whether there is to be a charter revision or adoption.8 This order must provide for the nomination of candidates to the charter commission.9 If the legislative body should fail to issue such an order, then the question of adopting or revising a charter will nonetheless be submitted to the voters, and charter commission members will be elected.10 Within ninety days after the receipt of the certified petitions by the legislative body, the date of the election will be set. The appearance on either the petition or the ballot of any political designation is forbidden.11

The ballot consists of two parts: the first directed to whether a charter commission shall be elected, the second to the actual election of the members of the commission.12 The election of the charter commission becomes effective only upon an affirmative vote on the question of the existence of the commission.13

2 HRPA §3.
3 Id.
4 Id. §10. Neither the HRPA nor Article 89 distinguishes between “revision” and “amendment.” Thus, a municipality which has adopted a charter under the HRPA may effect further changes in the charter either through the revision or the amendment process.
5 Id. §3.
6 Id.
7 Id. §4.
8 Section 3 of Article 89 contains the form of the question. If the city or town has not previously adopted a charter under Article 89, the question shall be: “Shall a commission be elected to frame a charter for (name of city or town)?” When dealing with a charter previously adopted under this article, the question shall be: “Shall a commission be elected to revise the charter of (name of city or town)?”
9 HRPA §4.
10 Id. The act does not explain how this automatic election is to take place. Apparently, the city or town’s election officials will proceed with the election in spite of such failure to issue the appropriate order.
11 Id. §§5, 6.
12 Id. §6.
13 Id.
Once elected, the charter commission has almost complete discretion in its organization. It may adopt its own procedural rules and employ such staff as it may deem necessary. The responsibility for financing the activities of the commission rests primarily with the city or town. The HRPA requires that the municipality credit to the commission’s account certain minimum sums of money, depending upon the size of the municipality. These required sums range from $500 in a municipality with fewer than 6000 inhabitants to $10,000 in a city with a population exceeding 100,000. The municipality has the option of appropriating up to ten times this minimum amount.

The commission, however, may accept funds from private sources. The commission must hold at least one public hearing within forty-five days after its election. Within eight months of its election the commission must publish a preliminary report which includes the text and explanation of any proposed changes. A copy of this report is forwarded to the Attorney General so that he may inform the commission of any conflicts with state law. After further public hearings, the commission must submit its final report to the municipal legislative body. The time period between the commission’s election and the submission of this final report may not exceed ten months.

Upon the submission of the commission’s report recommending charter changes to the legislative body, an election will be ordered at the first regular city election, or at the first regular town meeting held more than two months after the order issues. The HRPA requires that a summary of the basic changes be provided on the ballot.

The amendment process. Amendments to a city or town charter previously adopted under the HRPA may be proposed by a two-thirds vote of the city council or town meeting. Such amendments may be proposed only with the concurrence of the mayor in a city which has a mayor. Only the charter commission may propose changes

14 Id. §8(a).
15 Id. §8(b).
16 Id.
17 Id.
18 Id. §8(a). Such acceptance is subject to two conditions: (1) the source must be recorded in the clerk’s office; (2) any conditions incident to the commission’s acceptance of the funds are not binding on the city or town.
19 Id. §9(a).
20 Id. §9(b).
21 Id. Curiously, the HRPA does not set forth any procedure if the proposed charter revision is found by the Attorney-General to be in conflict with state law. An amendment submitted to him, however, will not take effect until he renders an opinion that it does not so conflict. Id. §10(c).
22 Id. §9(c).
23 Id. §11.
24 Id.
25 Id. §10(a). For a discussion as to whether the amendment procedures of Section 10 are applicable to optional charters adopted under Chapter 43 of the General Laws, see §16.4 infra.
26 Id. For a discussion of whether this section creates an absolute veto power in the mayor over proposals of amendments to the electorate, see §16.5 infra.
in the composition, mode of election or appointment of the municipality's legislative and executive departments.\textsuperscript{27}

The municipal legislative body must also consider and vote upon any charter amendment which it would have the power to propose and which is suggested to it in writing by the mayor, city manager, or a councilman, or submitted to it by a petition signed by at least that number of registered voters necessary to nominate a member of the charter commission.\textsuperscript{28} Within three months after any suggested amendment is filed, a public hearing must be held to consider this amendment and any others suggested. Final action upon the amendment must be taken not later than six months after filing in a city or not later than the first annual meeting in a town.\textsuperscript{29}

The order providing for the election on the amendment will not become effective until the Attorney General reports that the amendment does not conflict with the Constitution or laws of the Commonwealth.\textsuperscript{30} The order is not subject to referendum nor does it require the concurrence of the mayor.\textsuperscript{31}

Judicial review. The HRPA provides for a method whereby its procedures may be enforced by the courts of the Commonwealth. Upon petition of either the Attorney-General or ten registered voters in a municipality, the Superior Court has jurisdiction, in equity, to enforce the provisions of the HRPA.\textsuperscript{32} The HRPA imposes a thirty-day statute of limitations, starting from the date of the election on the proposed changes, on actions contesting the validity of the procedures whereby any charter is adopted, revised or amended.\textsuperscript{33}

\section{Home rule.} Before 1966, the source of the authority of the state over municipalities was found in the predecessor to Article 89 — Article II of the Amendments to the Constitution.\textsuperscript{1} Under Article II,

\begin{itemize}
  \item \textsuperscript{27} Id. §10(b). A town meeting similarly has the obligation to consider and vote upon amendments suggested by the town manager or any selectman, or by a petition signed by at least ten registered voters.
  \item \textsuperscript{28} Id. §10(b).
  \item \textsuperscript{29} Id. §10(c).
  \item \textsuperscript{30} Id. §10(d). Section 10 requires the mayor's concurrence before the city council may propose an amendment to the electorate. Once the mayor concurs in such proposal, however, he has no further veto power over the council orders which call for the election.
  \item \textsuperscript{31} Id. §14(1).
  \item \textsuperscript{32} Id. §14(3).
\end{itemize}

\textsuperscript{1}Originally Article II of the Amendments stated, in pertinent part: "The general court shall have full power and authority to erect and constitute municipal or city governments, in any corporate town or towns in this commonwealth, and to grant to the inhabitants thereof such powers, privileges, and immunities, not repugnant to the constitution as the general court shall deem necessary or expedient for the regulation and government thereof and to prescribe the manner of calling and holding public meetings of the inhabitants, in wards or otherwise for the election of officers under the constitution, and the manner of returning the votes given at such meetings. . . . [A]ll by-laws made by such municipal or city government shall be subject, at all times, to be annulled by the general court." Mass. Const. amend. art. II (1821).
"the towns of the Commonwealth possess[ed] no inherent right to self-government. . . ." The municipality was entirely a creature of the state in that all of its actions were subject to the veto power of the legislature. The General Court had complete plenary power to control the scope and objects of the activities of municipal corporations.

In keeping with the view that municipalities possessed no inherent powers, prior to 1915 the General Court would place a given charter into effect by special act. Although such charters were designed to provide for the particular needs of a given municipality, they were products of the legislature and could be modified only by subsequent special or general law. Those municipalities which did not possess special act charters operated under the General Laws and under special acts passed by the General Court to enable them to exercise a given power.

In 1915, with the passage of Chapter 43 of the General Laws, the legislature attempted to grant to the municipalities of the Commonwealth a measure of autonomy. Under this chapter, the General Court offered several different plans of government and gave to the voters of a municipality the option of choosing among them. It is significant that Chapter 43 did not change the traditional view toward the autonomy of the municipality. Although it gave to the cities and towns options as to form of government, it was the state legislature which created the charters from which the municipalities chose. Those municipalities which declined to elect one of the Chapter 43 plans were subject to the same control and had to utilize the same avenues for change that existed prior to 1915.

The courts of the Commonwealth have reinforced the inferior legal position imposed upon municipalities by narrowly construing against the municipality those powers which are expressly granted to it by statute or charter. This judicial position was succinctly stated in Berube v. Selectmen of Edgartown: "[M]unicipalities can exercise only such powers as are expressly or impliedly conferred upon them by the legislature." Statutes relating to powers conferred upon municipalities "have always been given a strict construction." In narrowly

6 See Mass. Const. amend. art. II (1821).
7 The five plans which Chapter 43 offered were: Plan A (strong mayor and weak council), G.L., c. 43, §§46-55; Plan B (weak mayor and strong council), id., §§56-63; Plan C (commission), id. §§64-78; Plan D (city manager), id. §§79-92A; and Plan E (a modification of D), id. §§93-116. In 1959, the General Court added Plan F, which created the option of government by mayor and council elected at large and nominated in party primaries. Id. §§117-127.
construing municipal power, the Massachusetts courts have tacitly accepted “Dillon's rule,” which, in capsule, states: “Any fair, reasonable, substantial doubt concerning the existence of a power is resolved by the courts against the [municipal] corporation, and the power is denied.”10 In Massachusetts, then, the municipality has held only those powers which the legislature has expressly granted. And even these expressly granted powers have been narrowly construed against the municipality.

In 1966, Article 2 of the Amendments to the Constitution was replaced by Article 89. The new article is the constitutional source for home rule in the Commonwealth. Section I of Article 89 grants “to the people of every city and town the right of self-government in local matters, subject to the provisions of this article and to such standards and requirements as the general court may establish. . . .” There are two limitations within this general grant of power set out in Section 1. First, the right extends only to “local matters.”11 Moreover, no exercise of this right may be inconsistent with the Constitution or with the General Laws as have been or may be enacted by the General Court.12

Out of the broad right to self-government in local matters granted in Section 1, Section 8 sets apart certain areas of municipal government in which the General Court may act through “general laws which apply alike to all cities or to all towns, . . . or to a class of not fewer than two. . . .” Significantly, Section 8 also grants to the General Court the right to enact special acts:

(1) on petition filed or approved by the voters of a city or town, or the mayor and city council, or other legislative body, of a city, or the town meeting of a town, with respect to a law relating to that city or town; (2) by a two-thirds vote of each branch of the general court following a recommendation by the governor.

Thus, under these two conditions, the General Court retains the power to act in relation to a city or town in limitation of the broad rights conferred by Section 1.

Section 6 grants to municipalities the authority to exercise any “power or function which the general court has the power to confer upon it,” provided that the power is not inconsistent with the Constitution or General Laws, and that it is not denied to the municipality by its own charter. Instead of searching for statutes authorizing municipal action, municipalities now “need only be concerned about constitutional or statutory provisions forbidding local action or establishing standards for particular actions.”13 Section 6 applies to every city and town, whether or not it has adopted a home rule charter.

101 Dillon, Municipal Corporations §237 (5th ed. 1911).
12 Id. §8.
Section 7 excludes certain specific powers from municipal home rule authority.\textsuperscript{14} Any municipal exercise of these prohibited powers must be specifically authorized by the General Court. This section, thus, narrows the breadth of the power granted to cities and towns in Section 6.

In spite of the limitations of Section 8, Section 6 manifests a new legislative attitude toward municipal power. If the broad grant of power is allowed to exist without judicial narrowing,\textsuperscript{15} then Article 89 has reversed the strict-constructionist approach of Dillon's rule and has granted to the cities and town of the Commonwealth all those powers not specifically denied them by the General Court.\textsuperscript{16} The American Municipal Association reached this conclusion\textsuperscript{17} concerning its own model home rule statute, which contains a section similar to Section 6.\textsuperscript{18} The AMA concluded that its approach

emphatically reverses the old strict-constructionist presumption against the existence of municipal powers and, so long as the legislature does not expressly deny a particular power, renders unnecessary petitioning the legislature for enabling legislation.\textsuperscript{19}

Given the similarity between the AMA model and Section 6, it would appear that the General Court intended to use Section 6 to reverse the strict-constructionist approach.

\textsection{16.4. Impact of the HRPA: Section 10.} The impact of the HRPA depends, to a considerable extent, upon whether the amendment procedures detailed in Section 10 of the act apply to charters enacted under Chapter 43 of the General Laws. Section 10 limits the application of its procedures to two classes of charters: (1) charters adopted or revised under the HRPA, (2) "laws having the force of a city or town charter by virtue of Section 9 of Article LXXXIX." In order for the amendment procedures set forth in Section 10 to apply to Chapter 43 charters, it is necessary to find that Chapter 43 charters fall within one of the above two classifications. Clearly, Chapter 43 charters do not fall within the first category. Thus, the question becomes whether Chapter 43 charters are "laws" within the meaning

\textsuperscript{14} These excluded powers are the power to lay taxes, to borrow money, to enact private or civil law governing civil relationships, to punish felonies, to regulate elections, or to dispose of park land.

\textsuperscript{15} Such narrowing occurred in New York and Rhode Island. See \textsection{16.6 infra.}

\textsuperscript{16} Massachusetts Legislative Research Council, note 13 supra.

\textsuperscript{17} Fordham, Home Rule — AMA Model, 44 Natl. Munic. Rev. 137, 140 (1955), quoting the official comments to the AMA draft.

\textsuperscript{18} See id. at 140. The pertinent language of this section reads: "A municipal corporation which adopts a home rule charter may exercise any power or perform any function which the legislature has the power to devolve upon a non-home rule charter municipal corporation and which is not denied to that municipal corporation by its home rule charter, is not denied to all home rule charter municipal corporations by statute and is within such limitations as may be established by statute."

\textsuperscript{19} Id., quoting the official comments to the AMA draft.
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of the second classification and, thereby, fall within the ambit of Section 10.

Section 9 of Article 89 reads:

All special laws relating to individual cities and towns shall remain in effect and have the force of an existing city or town charter, but shall be subject to amendment or repeal through the adoption, revision or amendment of a charter by a city or town in accordance with the provisions of sections three and four and shall be subject to amendment or repeal by laws enacted by the general court in conformity with the power reserved to the general court by section eight.

This section recognizes that the majority of Massachusetts cities and towns operate not under a formal charter granted by the General Court, but rather under the General Laws and under specific special acts passed by the legislature authorizing activity not enumerated in the General Laws. This section has the dual effect of (1) defining a charter as including “all special laws relating to cities and towns,” and (2) authorizing the city or town to modify these special laws having the force of a city or town charter under the adoption, revision or amendment process of the HRPA. In order for Chapter 43 charters to fall within the literal scope of Section 10, they must be found to be “special laws” within the meaning of Section 9 of Article 89.

There is a distinct lack of decisional authority on this point. There has been only one Massachusetts case which has held a Chapter 43 charter to be a special law. In Welch v. Contributory Retirement Appeal Board,¹ the Supreme Judicial Court, specifically referring to a charter adopted under Chapter 43, stated that “city charters are essentially special enactments designed to provide for the particular needs of the various cities.”² While this holding would indicate that such charters would fall within the definition of “charter” as stated in Section 9, it is submitted that this case is of dubious validity. In characterizing charters adopted under Chapter 43 as “special enactments,” the Court in Welch relied specifically upon the earlier case of Haffner v. Director of Public Safety.³ In Haffner, the Supreme Judicial Court characterized the charter of the city of Lawrence as a special enactment.⁴ This charter, however, became law by special act in 1911⁵—four years before the enactment of Chapter 43. The holding in Haffner, therefore, that charters were special laws could not have been intended to be applicable to Chapter 43 charters.⁶ It is anomalous,

² Id. at 507, 180 N.E.2d at 330, quoting Haffner v. Director of Public Safety of Lawrence, 329 Mass. 709, 714, 110 N.E.2d 369, 372 (1953).
⁴ Id. at 714, 110 N.E.2d at 372.
⁵ Acts of 1911, c. 621.
⁶ This holding could be considered inapplicable to the situation in Welch for
therefore, that the Court in Welch should have used Haffner as authority for its holding that Chapter 43 charters are special enactments.

The classification of Chapter 43 charters as special laws further conflicts with decisional precedents in other states with similar statutes. New Jersey has a statutory provision, similar to Chapter 43, which authorizes municipalities to choose from several optional forms of government. When specifically confronted with the objection that this statute was a special law and was, therefore, prohibited by the New Jersey constitution, the Supreme Court of New Jersey held this statute to be a general law:

The optional plans . . . are available to all municipalities in general. The fact that the voters of all municipalities do not adopt the same plan does not mean that a special . . . law has been enacted in each case. The Legislature has enacted a general law. In 1922, Georgia provided by general act for the establishment of a county-manager form of government which would go into effect only in those counties where a majority of voters favored it. The Georgia Supreme Court, again directly confronted with the contention that this was a special law, stated:

The fact that this act provides that it shall not go into effect in any county . . . except upon a majority vote of the qualified voters of the county does not rob it of its character as a general statute and make it a special one.

Furthermore, Chapter 43 charters would appear not to fall within the generally accepted definition of special law. McQuillan, in his work on municipal corporations, suggests the following definition of special law:

[A] law is special, as distinguished from general, if it embraces less than the entire class of persons, places, or things to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the law is designed. The Supreme Judicial Court has defined a special act as one which relates to particular wants, conditions and circumstances of the municipality to which it is directed. Chapter 43 charters are clearly without either of these definitions. They apply to the entire class of cities of the Commonwealth and are not directed to any one municipality's needs. Thus the questionable validity of the Welch case,
coupled with the decisional precedents in other jurisdictions and the 
generally accepted definition of special law, indicates that Chapter 
43 charters are not special laws within the definition of Section 9 of 
Article 89 and, thus, are without the ambit of Section 10.

Unless the General Court passed Section 10(e) with the Welch 
definition of Chapter 43 charters as special laws specifically in mind, 
the intent of the section appears clear: Chapter 43 charters may not 
be amended under the HRPA. Section 18, on the other hand, spe-
cifically affirms that “any city or town having a charter under chapter 
forty-three . . . may change the same in accordance with the procedures 
for the adoption or amendment of a charter prescribed by this chap-
ter.” Section 18, further, explicitly makes the HRPA procedures the 
exclusive means by which “a city or town shall adopt or change charters 
or change its method of electing officers under . . . [chapter] forty-
three . . . or under any special laws in effect on such date. . . .” In 
Section 18, the word “change” is used in conjunction with the phrase 
“in accordance with the procedures for the adoption or amendment of 
a charter prescribed by this chapter.” A reasonable reading of these 
two sentences should find that the amendment process falls within 
the meaning of “change.” Thus, Section 18 clearly seems to make the 
Section 10 amendment procedures applicable to Chapter 43 charters. 
Sections 2 and 4 of Article 89 are just as explicit. Section 2 states: “Any 
city or town shall have the power to adopt or revise a charter or to 
amend its existing charter through the provisions set forth in sec-
tions three and four.” Section 4 states: “Every city and town shall 
have the power to amend its charter. . . .” These statements would 
appear to encompass all existing charters without limitations and, 
thus, would appear to include Chapter 43 charters. In spite of the 
failure of the General Court to include Chapter 43 charters within the 
classifications of Section 10, it is submitted that the precise inclusion of 
such charters in Section 18, coupled with the statements of Sections 2 
and 4 of Article 89, indicate that the amendment procedures of the 
HRPA were intended to extend to Chapter 43 charters. If Section 18 
is not granted such a literal meaning, it will effectively have no mean-
ing; and the weight of authority indicates that statutes should be 
construed to give them meaning.\textsuperscript{13}

\textbf{\S 16.5. Impact of the HRPA: Veto power of the mayor.} Section 
10(a) of the HRPA requires the concurrence of the mayor plus a 
two-thirds vote of the council before an amendment to a charter may 
be proposed to the electorate.\textsuperscript{1} This section contains no provision for 
overriding the mayor’s lack of concurrence. Thus, it would appear that 
Section 10 grants to the mayor an absolute veto power over the pro-
posal of amendments to any charter. This would seem to conflict with 
the fact that certain of the Chapter 43 charters provide that the

\textsuperscript{13} See e.g., Town of Milton v. Metropolitan District Comm’n, \textit{342 Mass. 222, 225}, 

\textsuperscript{1} This section emanates from Section 4 of Article 89.
municipal legislative body may overcome the mayor's veto by a two-thirds vote. The question then becomes whether the provisions for overriding the mayor's veto in these Chapter 43 charters apply to the proposal of amendments under the HRPA. Section 18 specifies that the amendment procedures set out in the HRPA are to be the exclusive means of amending any charter, be it a conglomerate of general and special laws or a specific charter taken from Chapter 43. This clear statement of legislative intent should control the veto provisions of any Chapter 43 charter.

The impact of this absolute veto power goes beyond merely lessening the effectiveness of the amendment procedures of the HRPA. If, for some reason, the legislative and executive branches of a municipality are unable to agree on a proposed charter amendment, then the sole avenue open to effectuate the amendment is the creation of a charter commission for revision of the charter. Once the charter commission is elected, however, there is nothing in the statute which would limit its activity to the change embodied in the deadlocked amendment. The commission would be free to undertake a wholesale revision of the municipal charter—a result which neither the executive nor legislative body may have envisioned. Thus, a conflict between the mayor and council of a municipality over a proposed charter amendment could be resolved only by recourse to a costly and politically unpredictable charter commission.

The source of the mayor's absolute veto power is Section 4 of Article 89. In granting this veto power, the HRPA is simply restating a provision which its constitutional source made mandatory. Any solution to the problems resulting from this absolute veto power must, then, come through constitutional change of Article 89 rather than legislative revision of the HRPA. The General Court could not, through the HRPA, negate Article 89's clear expression of intention. It is submitted, therefore, that Article 89 should have provided for some means by which such conflicts could be resolved without recourse to a politically unpredictable charter commission.

A further complication arises in the application of this Section 10 veto power to a Plan C (Commission) Chapter 43 charter. Section 10 appears to grant the Plan C mayor a veto power over amendments while the Plan C charter specifically denies the mayor the veto power. Section 10 defines "mayor" thus: "In this section the word mayor shall mean an officer elected by the voters of a city as the chief executive officer of a city or an officer lawfully acting as such. . . ." Under the Plan C charter the commissioner of administration is designated as mayor and "shall be the chief executive officer of the city." Thus the Plan C mayor appears to fall within the definition of the term mayor as used in Section 10(a).

This apparent conflict could be resolved by a judicial interpretation

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2 G.L., c.43, §55 (Plan A); id. §63 (Plan B); id. §125 (Plan F).
3 Id. §74.
4 Id.
of the term "mayor" to be one who is elected as such, and not one who becomes mayor by virtue of his election as commissioner of administration. The power of the commissioner of administration falls far short of the mayor's power in any of the three other forms of government which provide for a mayor with veto power.\(^5\) It would appear, therefore, that Section 10 would not vest in the Plan C mayor any new power and would not require his concurrence for the proposal of amendments to the electorate.

§16.6. Limitations on the home rule power. There are several limitations which the HRPA and Article 89 impose upon the broad grant of home rule power: (1) the local city or town's power of self-government relates only to "local matters";\(^1\) (2) the municipality's actions must be consistent with the Constitution and General Laws, and the city or town charter;\(^2\) and (3) the General Court retains the right to act in relation to the cities and towns by general law and, in certain situations, by special law.\(^3\)

Under Article 89, the right to self-government relates only to "local matters . . . subject to such standards and requirements as the general court may establish by law in accordance with the provisions of this article." Nowhere, however, in either the statutory or case law, is there an adequate definition of the term "local matters." What emerges from a reading of the cases is the traditional narrow view of municipal power under which cities and towns are held to be "political subdivisions created for the convenient administration of government . . . ."\(^4\) It is submitted that the failure of the General Court to define "local matters," taken in light of this historical, narrow view of municipal power, may have been an invitation to judicial emasculation of home rule.

Such has been the result both in New York and in Rhode Island. The New York constitution conferred upon the municipalities the power to act in matters relating to their "property, affairs or government."\(^5\) The New York courts, adhering to the maxim that grants of local power are narrowly construed against the municipality, essentially defeated the purpose of home rule by developing a narrow definition of "property, affairs or government."\(^6\) The Rhode Island constitution similarly granted to the cities and towns of that state "the power . . . to . . . enact and amend local laws relating to its property, affairs and government . . . ."\(^7\) Again, the Rhode Island

\(^{5}\) See id. §75. \\
\(^{1}\) Mass. Const. amend. art. LXXXIX, §1. \\
\(^{2}\) Id. §6. \\
\(^{3}\) Id. §8. \\
\(^{5}\) N.Y. Const. art. IX, §12. \\
\(^{7}\) R.I. Const. amend. 28, §2.
Supreme Court frustrated the purpose of this home rule amendment by narrowly defining "property, affairs and government."\(^8\) In both of these cases the legislatures failed to define the scope of municipal authority. The state courts, when faced with the necessity of developing such a definition, ignored what appeared to be the intent of the constitutional provisions, and vitiated the municipal home rule power with a narrow definition of "property, affairs or government."

As stated earlier, the purpose of Section 6 of Article 89 is to reverse the traditional view that a municipal corporation may exercise only those powers specifically granted by the Legislature. Subject to the exclusions of Section 7 of Article 89,\(^9\) Section 6 effectively allows the municipality, by by-law or ordinance, to exercise any power which the General Court could have granted to it. Section 6, however, contains two limitations upon the exercise of this power. The by-law or ordinance may not be "inconsistent with the Constitution or laws enacted by the general court in conformity with the powers reserved to the general court by section eight of Article LXXXIX ... and [may not be] denied, either expressly or by clear implication, to the city or town by its charter."

These limitations are not novel ones in Massachusetts; nor are they necessarily in derogation of home rule powers. The Massachusetts rule traditionally has been that any local ordinance must comply both with the General Laws\(^10\) and with the city or town charter.\(^11\) Such a rule is a logical necessity to prevent the municipality from passing an ordinance which authorizes activity which the General Court has forbidden, or forbidding activity which the General Court has authorized.

To this point the limitations on the home rule powers of municipalities have been negative, consisting of specific exclusions and narrow constructional rules. Section 8 of Article 89, however, places in the General Court the affirmative authority to regulate municipal powers and functions "by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. . . ." Thus, the state retains the authority to preempt by General Law any municipal power or function. Section 8 also allows the General Court to regulate municipal affairs by passage of special laws, applicable to a specific municipality, either on petition of the executive and legislative branches of the municipality or on the recommendation of the Governor and a two-thirds vote of the General Court. The inclusion of this municipal right to petition the General Court for a special act presents a means by which a municipality may petition the legislature for authority to exercise some power or function which a general law precludes. This could make the city or town

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\(^8\) Newport Amusement Co. v. Maher, 92 R.I. 51, 166 A.2d 216 (1960).
\(^9\) See §16.3, note 14 supra.
more responsive to local needs and desires and would not necessarily be inconsistent with the earlier requirements that the General Court pass only general laws in relation to the cities and towns.

The inclusion of the right in the General Court to pass special acts without the consent of the municipality, by a two-thirds vote on recommendation of the Governor, is more difficult to reconcile with the concept of home rule. Under this provision, the possibility exists that the General Court could interfere in municipal affairs to the same extent as before the passage of Article 89 and the HRPA. This inclusion of the authority to pass special acts without local consent is in derogation of home rule power and leaves open an avenue of legislative infringement upon home rule.

Ironically, however, the inclusion of this right in the General Court may be the single factor which could save Massachusetts home rule from a narrow judicial definition of “local matters.” Although this provision raises the possibility of a legislative interference in municipal affairs which would be in derogation of the home rule power, its aim appears to be to vest in the General Court ultimate veto power over any municipal act. In this regard, the Massachusetts home rule structure differs from that of both New York and Rhode Island. In New York, the legislature may pass such special laws only when requested to do so by the mayor of the municipality and a majority of the municipal legislative body. In Rhode Island, the legislature retains the power to pass special laws relating to a municipality only upon the approval of a majority of the municipality’s electorate. Thus, there would exist an area of municipal sovereignty, the breadth of which would be determined by a judicial definition of “property, affairs and government,” in which the legislature could act neither by general nor special law. It is understandable, then, that the New York and Rhode Island courts would narrowly define an area of municipal authority over which the state would have no effective check. In Massachusetts, however, the inclusion of the right in the General Court to pass special acts without the consent of the municipality creates just such a check upon municipal power. Upon recommendation of the Governor and a two-thirds vote of the General Court, the state may exercise ultimate veto power over any municipal act, thereby protecting its own interests. It is submitted, therefore, that the existence of such a veto power in the General Court would eliminate the primary reservation which a court would have in broadly defining “local matters” — protection of the sovereign's interest.

§16.7. Conclusions. The general purpose of the HRPA is to detail simple procedures whereby the constitutional grant of home rule power, found in Article 89 of the Amendments to the Constitution, may be effectuated by any municipality of the Commonwealth. Since

12 N.Y. Const. art. IX, §11.
the HRPA was passed specifically to implement Article 89, most of the difficulties which arise with the act find their source in Article 89.

Article 89 outlines the rigid procedures which must be followed to utilize the home rule power. The elements of this rigid structure are: (1) the initiative for adoption or revision of a municipal charter under home rule must come from the electorate;¹ (2) the charter commission has ten months within which it must complete its task;² and (3) the home rule procedures are strictly nonpartisan.³

Article 89 provides that the initiative for a charter adoption or revision must come from the electorate. There is no provision whereby the legislative body of a municipality may initiate the process. There appears to be no valid reason why such authority should be withheld from the legislative branch of the municipality. Voter apathy, reluctance to sign any petition, and unfamiliarity with the technical changes which may be required in a city or town charter could make obtaining the necessary fifteen percent of registered voters difficult and could, therefore, lessen the practical value of the HRPA. Further, there are difficulties which may arise when a conflict between a mayor and council requires the election of a charter commission to accomplish limited charter change. Several states have adopted the more flexible alternative of having the charter revision process initiate from either the electorate or the legislative body.⁴

Article 89 further establishes a ten-month limit within which the charter commission must develop the changes which will be submitted to the electorate. The adequacy of this period is questionable in light of the fact that the commission members receive no compensation, and that in this interval the commission must hold at least one public hearing on the proposed changes. The intent of the General Court in setting up these time limits seems to have been to prevent the home rule process from becoming interminable. Once begun, the adoption or revision process must attain some conclusion. It is submitted that a too hasty conclusion could be just as damaging as one which is delayed.

Perhaps the most severe objection which can be levied at Article 89 is that it makes a nonpartisan charter commission mandatory. It is conceded that a nonpartisan charter commission would be ideal. The thought of responsible citizens engaged in deliberations which are untainted by politics is an alluring one. But the charter commission will discuss questions which are inherently political—ward distribution, mode of election of officials, etc. It would appear that the deliberations of the commission might be more meaningful if there were the adversary system which a division along political lines would probably insure. The electorate should be confronted with the alterna-

¹ Mass. Const. amend. art. LXXXIX, §3.
² Id.
³ Id.
tives which a political confrontation would engender. Further, this nonpartisan organization would complicate the revision process in a city which had a Plan F form of government. This plan provides for a partisan government with a primary system. Such a city, under Article 89, would be forced to utilize a nonpartisan method to achieve charter revision. This would create an anomaly since the purpose of Article 89 is “to grant . . . to the people of every city and town the right of self-government in local matters. . . .”

There remain, however, specific difficulties which arise in the HRPA and which cannot be attributed to Article 89. The principal difficulty is the apparent conflict which exists between Sections 10 and 18 of the act. Section 10 appears to exclude Chapter 43 charters from the amendment process of the HRPA, while Section 18 explicitly includes them. Although the suggested resolution of this conflict would be in favor of the Section 18 inclusion of Chapter 43 charters, it is conceivable that a court could hold that, since Section 10 is the sole section of the HRPA which deals specifically with charter amendments, its provisions must control. This would then place Chapter 43 charters without the ambit of Section 10. The municipality would be able to amend its Chapter 43 charter under the HRPA only if it first “adopted” it in conformity with the adoption and revision procedures of the Act. It is submitted that this confusion and possible conflict could have been avoided if Section 10 had included a subsection 10(f) which specifically included Chapter 43 charters within the scope of Section 10.

Section 14(3) of the HRPA establishes a thirty-day statute of limitations on judicial challenges of the procedures by which any charter adoption, revision or amendment is approved. This section is open to two possible interpretations. The first is that, since Section 14(3) makes no provision for a challenge of procedures where the charter change has been rejected, the HRPA precludes a procedural challenge of a rejected charter change. This reading, however, would appear to conflict with Section 14(1). This section grants to the Superior Court equity jurisdiction “to enforce the provisions” of the HRPA. It would appear reasonable to read this section to allow such enforcement whether a given charter change is ultimately adopted or defeated.

A more reasonable reading of Section 14(3), however, is that it creates a short statute of limitations and makes it applicable only to challenges of approved charter changes. This would protect the municipality, which has acted to effectuate a change in its charter, from having its government overturned by a subsequent finding that the change was improperly enacted. Under such a reading, however, a challenge of procedures by which a charter change has been rejected could be made at any time subsequent to the election. Although the time lapse between the rejection and the challenge would be subject

5 Mass. Const. amend. art. LXXXIX, §1.
to the discretion of a court of equity, there appears to be no valid reason why this short statute should not also apply to instances where the charter change is rejected. In this way, all procedural challenges, with their ensuing litigation, would be cut off thirty days after the election, whether the change is approved or rejected.

In spite of these criticisms, the HRPA does present to the municipalities of this Commonwealth the procedures by which they may modify their forms of government. Under the suggested resolution of the conflict between Sections 10 and 18, this power of modification exists as to any charter, whether its source is the General Laws or special acts. In detailing these procedures the HRPA has given effect to Article 89's shift of municipal authority from Beacon Hill to City Hall. Under the HRPA, the procedures now exist through which local government may become effective, responsive, government.

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