

# **Dispelling the Myth of Home Rule**

*Local Power in Greater Boston*

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**This is the “Municipal Charter” related excerpt from the 100+ page report on Home Rule in Massachusetts. The full report can be downloaded at –**

**<http://www.ksg.harvard.edu/rappaport/research/homerule1.htm>**

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# 1. The Legal Structure of Home Rule in Massachusetts

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*“Whatever the particular issue is, [the town] has to understand that although there is home rule, [it only exists] within this framework. It really isn’t true home rule.”*

—Town official in Greater Boston

Home rule in Massachusetts is more than a strictly legal concept, but an understanding of it requires some familiarity with certain foundational legal provisions. Two provisions in particular are key: Article 89 of the State Constitution—better known as the Home Rule Amendment (see Appendix D for the text of the Home Rule Amendment)<sup>1</sup> and a state statute known as the Home Rule Procedures Act.<sup>2</sup> These two provisions were adopted less than forty years ago with the intention of establishing home rule as a legal matter in the state for the first time.

Massachusetts’s adoption of the Home Rule Amendment came relatively late. The first wave of home rule reform in the United States started in 1875 and lasted through the 1930s. Massachusetts missed this first wave, but it joined other states in passing a constitutional guarantee of home rule in a second wave of adoptions that began in the post-World War II era. The increasing demand upon municipal governments in Massachusetts, along with the time-consuming methods of reacting to these demands through special enabling legislation, prompted the Massachusetts legislature to adopt—with important restrictive modifications—the Model Constitutional Provisions for Municipal Home Rule that had been proposed by the National League of Cities (then known as the American Municipal Association). Formally adopted in 1963 and 1965 by the Massachusetts legislature, and approved by the people in 1966, the Home Rule Amendment became effective in 1967. To complement the constitutional amendment and promote “uniform standards . . . setting forth in greater the detail the procedure to be followed” in adopting a home rule charter, the Home Rule Procedures Act was enacted by the legislature in 1966.<sup>3</sup>

The purpose of the Home Rule Amendment is, by its own terms, to “grant and confirm to the people of every city and town the right of self-governance in local matters.”<sup>4</sup> The actual power granted by the Amendment can be classified in three ways: Home Rule Charter Authority, General Home Rule Authority, and Home Rule Petition Authority. The term “home rule” is used in Massachusetts to refer to all three of these features of the Home Rule Amendment. The term is

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also used to refer to the general concept of local autonomy embraced by the “purpose” section of the Home Rule Amendment just quoted, and we will make reference to that sense of home rule throughout the report as well. Even though these elements of home rule invoke the same term, they play dramatically different roles in shaping both the practice of municipal governance and the perceptions of the degree of local power held by those charged with exercising it.

### **HOME RULE CHARTER AUTHORITY**

Many of the local officials we surveyed associated the primary value of having home rule with the process, set forth in the Home Rule Amendment and the Home Rule Procedures Act, for obtaining a home rule charter. To understand what a home rule charter is, some general background on local governmental charters is necessary.

A municipality’s charter establishes the framework for its government. The charter defines the municipality’s organization, the responsibilities of its officials, many of its powers, and its relationship to its constituents. Among the things a charter typically determines is whether a municipality is a city or a town, a classification that, in turn, affects the organization of local governance and the relationship between the municipality and the state. Under state law, cities and towns have different governmental structures. Cities are managed by a city council and an executive official (a mayor or a city manager). Towns, by contrast, preserve the open town meeting or the representative town meeting as their governing body.<sup>5</sup> This difference in classification is important in Massachusetts. The impact of state statutes and procedural regulations may differ depending on the municipality’s classification as a city or town. Town by-laws, for example, require the approval of the state Attorney General, whereas city ordinances do not.<sup>6</sup>

### **Benefits of Home Rule Charter Authority**

Prior to the adoption of the Home Rule Amendment and the Home Rule Procedures Act, local governments could not adopt charters without obtaining state legislative approval. The home rule grant changed this situation by authorizing municipalities to adopt new charters on their own; these are the charters now known as home rule charters. Notwithstanding this new option, many municipalities continue to rely on non-home rule charters. Some municipalities have “special act charters”—charters adopted by the state legislature for the municipality in question, usually at local request. These special act charters, such as the one that governs the City of Boston, often pre-date the Home Rule Amendment. Other non-home rule charter municipalities have charters adopted pursuant to Chapter 43 of the Massachusetts General Laws, a section that sets forth various “model government plans” that local voters may select.<sup>7</sup> This method of adopting a charter is applicable only to municipalities wanting a city, rather than a town, form of government. Finally, some towns have no charter.

These towns instead operate under “a series of general laws, acceptance statutes, bylaws, and special acts that define the town’s corporate identity.”<sup>8</sup>

Against this background, the state constitutional grant of the home rule charter-making power is not without significance. A home rule charter needs no state legislative stamp of approval to become law; it is entirely a product of local decision.<sup>9</sup> Home rule charters may be drafted by a locally-elected charter commission and may take effect if they win approval by a local referendum.<sup>10</sup> A number of respondents identified the grant of home rule charter authority as an important means by which municipalities could professionalize (Boxborough), consolidate (Cohasset), and clarify (Boxborough) their governmental structure. Several interviewees reported that their municipalities used the process to change elected positions to appointed positions without seeking state approval (Ashland). According to the Department of Housing and Community Development, the trend of home rule charters has been to consolidate the power of municipal governments. These changes include reducing the size of representative town meetings, changing traditionally elected offices to appointed status, creating or strengthening management positions, and consolidating related departments.<sup>11</sup> More than half of home rule charters have also added recall provisions to check elected and appointed officials.<sup>12</sup>

Still, if the state constitutional grant of home rule amounted only to the conferral of the home rule charter-making power, it would not be surprising to find, as we did, that many local officials regard home rule in Massachusetts as weak. The adoption of a home rule charter does not give a municipality any authority that it would not otherwise be able to obtain. Regardless of what kind of charter they possess—or even whether they have a charter at all—all municipalities can exercise the general grant of home rule authority and utilize the home rule petition process authorized by the Home Rule Amendment. Indeed, a city with a home rule charter can end up being just as constrained in its actual authority—even more constrained—than a city that traced its charter to a special act from the state legislature. The significance of the home rule charter is purely procedural. An official from Millis summed up the situation this way: “Home rule is good in terms of town organization, but in terms of taxation and regulation, it’s all driven by the state.” An official from the town of Franklin agreed with that assessment: “You have the right to establish your own form of government here in Massachusetts, but even that’s constrained, to a certain degree, by what the [Home Rule Procedures Act] says. . . . So they say, ‘well, you’ve got home rule.’ But even though we have home rule we have to do a lot of things the way that they want [us] to do it.”

### **Limits on Home Rule Charter Authority**

As the Franklin official indicated, the degree of procedural freedom that the home rule charter-making power confers can be overstated. Many non-home

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rule charter municipalities that we surveyed were not eager to pursue the path for charter adoption, revision, or amendment that the Home Rule Amendment has made available. These respondents noted that it is often easier to secure charter changes from the state legislature, by special petition, than it is to adopt an entirely new home rule charter or to hold a referendum to amend an existing one. Bearing out this sentiment, as of May, 2000, only 30 of the 101 municipalities in the Boston metropolitan area had adopted a home rule charter.<sup>13</sup> More towns (25/79 or 32 percent) than cities (5/22 or 23 percent) had done so, perhaps because the towns perceived a need to professionalize their governance structure more often than cities, which may already have done so.<sup>14</sup> Most home rule charters have been adopted by towns with populations between 10,000 and 25,000.<sup>15</sup>

The complicated process that state law sets forth for home rule charter adoption, revision, or amendment plays a role in ensuring that the state legislative petition route for charter-definition remains attractive. The state-mandated procedure for home rule charter adoption not only requires local voters to approve the final charter in a referendum but also requires them to nominate, approve, and select a charter commission responsible for drafting the new charter. In the interest of democratic efficiency, the establishment and selection of the commission is done simultaneously. The voters are thus confronted with a ballot that first asks them whether the town should adopt a charter commission, and, if they answer “yes,” continues on to ask them to select who should be on the commission.<sup>16</sup> Malden is one of the municipalities whose attempt to form a charter commission was denied in local referendum. A Malden official told us that the denial had more to do with the complexity of the process than a genuine local belief that a new charter was unnecessary.

The denial of Malden’s charter was by no means a unique event. Between 1983 and 1993, only 25 of the 44 charter commissions that were elected statewide produced a final charter that was ultimately approved—an adoption rate of only 57 percent.<sup>17</sup> Thus, a locality contemplating whether to adopt its own charter locally must weigh the time and expense of the effort involved in formulating a home rule charter against the reality that the process may not produce any change in the governmental structure.

In addition to confusion about process or disagreement with the substance of proposed charter provisions, one explanation for the significant number of defeats for home rule charter proposals may be the structured rigidity of the home rule charter procedure. The process for adopting a new charter is time-consuming and can be a significant drain on a locality’s resources. The charter commission is allowed to define its own internal procedure and structure, and this, in turn, allows it to hire personnel and prepare commission reports at the expense of the municipality.<sup>18</sup> But the process is limited by the Home Rule Procedures Act to 18 months.<sup>19</sup> If within that time period the commission fails

to produce a charter proposal, or produces a charter proposal that is not approved by the local legislature and general electorate, all expenses are wasted.

Relatedly, the home rule charter process subjects any charter proposal to a binary yes/no approval process. If any element of the charter proposal is unacceptable to the local legislature or the electorate at large, no options are available that would allow the municipality to negotiate and change that element in order to salvage what has already been done without going through the entire charter adoption process all over again.<sup>20</sup> The Home Rule Procedures Act thus prevents the charter proposal from being open to debate, negotiation, or amendment once it has been denied.<sup>21</sup> Of course, open hearings and preliminary reports provide opportunities for the municipality to influence the drafting of the final report. Still, the mandated time frame of the home rule charter procedure provides only a limited period within which compromises can be made before the whole process is lost.

### **Advantages of Petitioning the State and Foregoing Home Rule Charter Authority**

These state-mandated constraints might explain why eight municipalities in the region<sup>22</sup> sought special act charters, instead of going through the home rule charter process, *after* the Home Rule Amendment was passed. Even though a special act charter requires state legislative approval, a municipality could well decide that obtaining state approval need not be more time consuming or invasive of local control than the home rule charter process. According to several respondents, special act charters, which are initially formulated locally, often pass through the state legislature with little controversy and debate if the charter does not infringe on state power. Moreover, if there are problems with the charter that the state legislature identifies, the municipalities can be told what part to amend and be given an opportunity to do so without having to start all over. Even though the state often requires special act charters to be approved through referendum, in the end the municipal government might still have more control over the drafting, timing, and management of the charter proposal than it would through the home rule charter process, with its limited time frame and delegation of the drafting process to a separately elected commission.<sup>23</sup>

The state legislative petition route may turn out to be more empowering when it comes to amending a charter as well. The state constitutional grant of home rule permits home rule charters to be amended locally by referendum. The state has also granted non-home rule municipalities the permission to make charter amendments without state approval through a local referendum.<sup>24</sup> These grants of the power to amend a charter locally are designed to free localities from seeking out state legislative permission for changes in municipal structure that may become desirable. Yet, whether or not the amendment is to a home rule

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charter, state law requires that even minor local amendments be adopted through a local referendum. For that reason—and because most charter amendments proposed to the state legislature pass—many officials told us that it often seems easier to pursue the special legislation route for amendment rather than the supposedly more empowering one that the state constitutional grant of home rule purported to secure.

The referenda requirement for enacting or amending home rule charters illustrates a more general point that is critical to understanding how home rule functions in Massachusetts. The laws granting home rule power often limit local decision making in the very process of authorizing it. The charter provisions of the Home Rule Amendment, for example, do not empower municipal *governments*. Instead, the home rule charter procedure transfers the final authority for approval of a charter from the state to the municipality's constituents, bypassing municipal governments. The main control that municipal governments possess over the charter adoption process is to act in an advisory capacity to the charter commission. Unlike the special act charter legislation, the municipal government has little power over the actual drafting of the charter and lacks the ability to make changes to it without having to reject it completely. Instead, it must submit the charter commission's final proposal to the electorate for a vote.<sup>25</sup> Although the Home Rule Amendment makes control over the charter adoption process more "local" in one definition of the term, in other words, the definition of "local" as the voters acting in a referendum can make the process more unpredictable and less efficient than special act charter legislation. Of course, for some municipalities, having the involvement of the community in public hearings and casting votes is more than an adequate reason to undergo the home rule charter process rather than to petition the state for charter approval or amendment. For others, however, it may seem like a great burden, particularly when the issue at stake is a relatively discrete one. In such instances, the state legislative petition route—for all the risks that attend the involvement of the state in such local matters—may prove to be more inviting, even more empowering, for a local community that wishes to reorganize its governmental framework.

Finally, localities might turn to the state petition process because they have no other choice. The power to amend a charter locally does not include the power to disregard conflicting state legislation.<sup>26</sup> If state law dictates certain aspects of internal municipal structure that local officials wish to change, there may be no means of changing those aspects without seeking state legislative assistance. In fact, even if towns or cities are merely worried that state statutory requirements might conflict with their proposed charter changes, they may be hesitant to risk taking action locally. Local officials, therefore, do not always experience the process of obtaining state legislative permission for charter amendments as a freely chosen one. Nor, for that matter, do they always experi-

ence that process as a pleasant or empowering one. An official from Malden complained: “Every time we make a change to our charter we have to do a home rule petition, and it’s a pain most times. . . . It takes too much time to get these changes through—too many stages in the process. And it’s wrong that people from Longmeadow have control over what’s going on here in Malden. These were internal structural changes and we still have to go before a committee because a representative not from Malden was concerned that the people didn’t know about it. It’s a cumbersome process and it bothers me that people can question what’s best for Malden when they might not even live close to here.”

## **GENERAL GRANT OF HOME RULE AUTHORITY**

While much of the Home Rule Amendment focuses on organizing municipal government, section 6 focuses on the substance of what cities and towns may do once organized. At first blush, section 6 appears to grant Massachusetts’ cities and towns the ability to exercise power in very broad terms: without any specific state legislative delegation of authority, cities and towns can exercise any power that the state legislature could lawfully delegate to them. Focusing simply on this introductory delegation of power, one might conclude that the Home Rule Amendment grants a great deal of authority to the state’s municipalities. It would seem to establish a broad presumption in favor of local power. Such a conclusion would, however, be wrong.

### **Limits on the General Grant of Home Rule Authority**

The Home Rule Amendment’s broad constitutional delegation of power is limited in two significant respects. One of these limitations, largely detailed in section 7, establishes a list of topics over which cities and towns have no home rule authority. These exceptions to the municipal home rule authority are the power to (1) regulate elections; (2) levy, assess and collect taxes; (3) borrow money or pledge the credit of the city or town; (4) dispose of park land; (5) enact private or civil law governing civil relationships except as incident to an exercise of municipal power; and (6) define and provide for the punishment of a felony or to impose imprisonment. The Massachusetts Supreme Judicial Court has also carved out other areas as being of insufficiently “local” concern to fall within the general home rule grant. For example, invoking the principle that that localities lack home rule power to regulate “areas outside a municipality’s geographical limits,” the court has invalidated a town by-law that barred the removal of gravel from its territory because of its impact on road construction throughout the Commonwealth.<sup>27</sup>

These restrictions have prevented municipal home rule from conferring local autonomy, as both a survey of the relevant case law and our interviews with local officials revealed. Two of the limitations mentioned in section 7—limitations not

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contained in the state constitutional grants of home rule in many other states -- have been particularly significant. The prohibition against levying and assessing taxes restricts a municipality's ability to generate revenue-- and lack of money is one of the principal concerns of city and town officials in Massachusetts. The inability to govern private or civil relationships, a conveniently broad concept, has served to curb the exercise of municipal power in many important ways. The impact of these limitations on home rule authority is examined in more detail in later sections of this report.

Another major limitation imposed by the Home Rule Amendment has been equally important. Section 6 enables cities and towns to exercise their home rule power only to the extent their actions are "not inconsistent with the [state] constitution or [the] laws" enacted by the state legislature. The Home Rule Amendment, in other words, permits the state to overrule any local decision on any matter at any time. There is, then, no local autonomy in Massachusetts if "autonomy" means the ability to determine local policy without state control. So strong is the state's ultimate power to overrule local action that it may even deny a city or town the ability to elect its own government. As the Supreme Judicial Court has explained, home rule notwithstanding, there is no state "constitutional right to an elected form of municipal government" in Massachusetts.<sup>28</sup> "The state legislature's authority," the court said, "includes the power to choose to provide an appointive, rather than elective, form of municipal government."<sup>29</sup>

The state's virtually unlimited power to overrule local action becomes important whenever a city or town wants to exercise the power granted it by the Home Rule Amendment. A key question for a municipality contemplating such an action is whether the state legislature has enacted legislation that would conflict with its proposed policy. If the state legislature has done so, the state prevails. As an official from Medfield put it: "[The] legislature, by taking action, can preclude the local community from using the Home Rule Amendment to accomplish anything. . . . Local governments are creatures of the Commonwealth of Massachusetts. They have not been able to exercise independent authority beyond the rope that the legislature will allow them to extend themselves on."

The legal term for determining whether the state has adopted conflicting legislation is "preemption." Every state in the nation empowers its state legislature to preempt local ordinances. But many states limit preemption more than Massachusetts does. The state's power to preempt is particularly significant in Massachusetts because, as construed by the state courts, a local ordinance can be found inconsistent with state law--and thus preempted--even without a specific state statute overriding it. It is enough if the state is found to have dealt with the general subject matter in a manner that, by implication, denies local power to act.<sup>30</sup> Even state statutes that authorize local governments to act may be construed by courts--or interpreted by local officials--as impliedly preempting other actions that the state has not already authorized.

## Appendix D

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### ARTICLE LXXXIX

#### (Home Rule Amendment)

Article II of the Articles of Amendment to the Constitution of the Commonwealth, as amended by Article LXX of said Articles of Amendment, is hereby annulled and the following is adopted in place thereof:

**ARTICLE II. SECTION 1. RIGHT OF LOCAL SELF-GOVERNMENT.** It is the intention of this article to reaffirm the customary and traditional liberties of the people with respect to the conduct of their local government, and to grant and confirm 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 by law in accordance with the provisions of this article.

**SECTION 2. LOCAL POWER TO ADOPT, REVISE OR AMEND CHARTERS.** Any city or town shall have the power to adopt or revise a charter or to amend its existing charter through the procedures set forth in sections three and four. The provisions of any adopted or revised charter or any charter amendment shall not be inconsistent with the constitution or any laws enacted by the general court in conformity with the powers reserved to the general court by section eight.

No town of fewer than twelve thousand inhabitants shall adopt a city form of government, and no town of fewer than six thousand inhabitants shall adopt a form of government providing for a town meeting 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.

**SECTION 3. PROCEDURE FOR ADOPTION OR REVISION OF A CHARTER BY A CITY OR TOWN.** Every city and town shall have the power to adopt or revise a charter in the following manner: A petition for the adoption or revision of a charter shall be signed by at least fifteen per cent of the number of legal voters residing in such city or town at the preceding state election. Whenever such a petition is filed with the board of registrars of voters of any city or town, the board shall within ten days of its receipt determine the sufficiency and validity of the signatures and certify the results to the city council of the city or board of selectmen of the town, as the case may be. As used in this section, the phrase "board of registrars of voters" shall include any local authority of different designation which performs the duties of such registrars, and the phrase "city council of the city or board of

selectmen of the town" shall include local authorities of different designation performing the duties of such council or board. Objections to the sufficiency and validity of the signatures on any such petition as certified by the board of registrars of voters shall be made in the same manner as provided by law for objections to nominations for city or town offices, as the case may be.

Within thirty days of receipt of certification of the board of registrars of voters that a petition contains sufficient valid signatures, the city council of the city or board of selectmen of the town shall by order provide for submitting to the voters of the city or town the question of adopting or revising a charter, and for the nomination and election of a charter commission.

If the city or town has not previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to frame a charter for (name of city or town)?" If the city or town has previously adopted a charter pursuant to this section, the question submitted to the voters shall be: "Shall a commission be elected to revise the charter of (name of city or town)?"

The charter commission shall consist of nine voters of the city or town, who shall be elected at large without party or political designation at the city or town election next held at least sixty days after the order of the city council of the city or board of selectmen of the town. The names of candidates for such commission shall be listed alphabetically on the ballot used at such election. Each voter may vote for nine candidates.

The vote on the question submitted and the election of the charter commission shall take place at the same time. If the vote on the question submitted is in the affirmative, the nine candidates receiving the highest number of votes shall be declared elected.

Within [ten months] after the election of the members of the charter commission, said commission shall submit the charter or revised charter to the city council of the city or the board of selectmen of the town, and such council or board shall provide for publication of the charter and for its submission to the voters of the city or town at the next city or town election held at least two months after such submission by the charter commission. If the charter or revised charter is approved by a majority of the voters of the city or town voting thereon, it shall become effective upon the date fixed in the charter. [See Amendments, Art. CXIII.]

#### **SECTION 4. PROCEDURE FOR AMENDMENT OF A CHARTER BY A CITY OR TOWN.**

Every city and town shall have the power to amend its charter in the following manner: The legislative body of a city or town may, by a two-thirds vote, propose amendments to the charter of the city or town; provided, that [1] amendments of a city charter may be proposed only with the concurrence of the mayor in every city that has a mayor, and [2] 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 shall be made only by the procedure of charter revision set forth in section three.

All proposed charter amendments shall be published and submitted for approval in the same manner as provided for adoption or revision of a charter.

**SECTION 5. RECORDING OF CHARTERS AND CHARTER AMENDMENTS.** Duplicate certificates shall be prepared setting forth any charter that has been adopted or revised and any charter amendments approved, and shall be signed by the city or town clerk. One such certificate shall be deposited in the office of the secretary of the commonwealth and the other shall be recorded in the records of the city or town and deposited among its archives. All courts may take judicial notice of charters and charter amendments of cities and towns.

**SECTION 6. GOVERNMENTAL POWERS OF CITIES AND TOWNS.** Any city or town may, by the adoption, amendment, or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court in conformity with powers reserved to the general court by section eight, and which is not denied, either expressly or by clear implication, to the city or town by its charter. This section shall apply to every city and town, whether or not it has adopted a charter pursuant to section three.

**SECTION 7. LIMITATIONS ON LOCAL POWERS.** Nothing in this article shall be deemed to grant to any city or town the power to (1) regulate elections other than those prescribed by sections three and four; (2) to levy, assess and collect taxes; (3) to borrow money or pledge the credit of the city or town; (4) to dispose of park land; (5) to enact private or civil law governing civil relationships except as an incident to an exercise of an independent municipal power; or (6) to define and provide for the punishment of a felony or to impose imprisonment as a punishment for any violation of law; provided, however, that the foregoing enumerated powers may be granted by the general court in conformity with the constitution and with the powers reserved to the general court by section eight; nor shall the provisions of this article be deemed to diminish the powers of the judicial department of the commonwealth.

**SECTION 8. POWERS OF THE GENERAL COURT.** The general court shall have the power to act in relation to cities and towns, but only 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, and by special laws enacted (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; (3) to erect and constitute metropolitan or regional entities, embracing any two or more cities or towns or cities and towns, or established with other than existing city or town boundaries, for any general or special public purpose or purposes, and to grant to these entities such powers, privileges and immunities as the general court shall deem necessary or expedient for the regulation and government thereof; or (4) solely for the incorporation or dissolution of cities or towns as corporate entities, alteration of city or town boundaries, and merger or consolidation of cities and towns, or any of these matters.

Subject to the foregoing requirements, the general court may provide optional plans of city or town organization and government under which an optional plan may be adopted or abandoned by majority vote of the voters of the city or town voting thereon at a city or town election; provided, that no town of fewer than twelve thousand inhabitants may be authorized to adopt a city form of government, and no town of fewer than six thousand inhabitants may be authorized to adopt a form of town government providing for town meeting 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.

This section shall apply to every city and town whether or not it has adopted a charter pursuant to section three.

**SECTION 9. EXISTING SPECIAL LAWS.** All special laws relating to individual cities or 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 powers reserved to the general court by section eight.

## ABOUT THE AUTHORS

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# NOTES

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## CHAPTER 1

1. Mass. Const. art. LXXXIX (amended 1966) (amending Mass. Const. amend. art. II, § 2).
2. **Mass. Gen. Laws** ch. 43B (2003).
3. John W. Lemega, *State and Municipal Government: Home Rule*, in **1967 Annual Survey of Massachusetts Law**, § 16.2, at 264 (quoting Governor Volpe). See also *Bloom v. City of Worcester*, 363 Mass. 136, 143, 293 N.E.2d 268, 273 (1973) (describing the history of the Home Rule Amendment).
4. Mass. Const. art. LXXXIX, § 1.
5. State law prohibits any municipality with less than 12,000 residents from classifying itself as a city. *Id.* at § 2. It also prohibits any municipality with less than 6,000 residents from using the representative town meeting form of local government, in which the town meeting acts through representatives elected by town residents. *Id.*
6. The issue is not entirely free of complication. Although Massachusetts law specifically states that “by-laws” require the approval of the Attorney General, **Mass. Gen. Laws** ch.40, § 32 (2003), the Massachusetts Supreme Judicial Court explained that this statute was equally applicable to city ordinances. See *Forbes v. Woburn*, 306 Mass. 67, 69, 27 N.E.2d 733, 734 (1940) (noting that “towns” and “by-laws” are to be treated synonymously with “city” and “ordinances” respectively “unless such construction would be repugnant to the provision of any act, especially relating to such cities or districts.”); see also **Mass. Gen. Laws** ch. 40, § 1 (2003) (“Except as otherwise expressly provided . . . all laws relative to towns shall apply to cities.”); **Mass. Gen. Laws** ch. 4, § 7(22) (“‘Ordinance’, as applied to cities, shall be synonymous with by-law.”). Nevertheless, the court found that Woburn, the city in question, was not bound by the approval requirement for two reasons. First, the court noted that a separate provision of the general laws granting mayors veto power over ordinances states that if there is no objection to an ordinance by the mayor within ten days, or if the veto is overturned by a two-thirds vote of the local legislative authority, then the ordinance “shall be in force.” See *Forbes*, 306 Mass. at 71–72 (quoting **Mass. Gen. Laws** ch. 39, § 4). The court noted that the subsequent statute regarding the mayoral veto power impliedly did away with the Attorney General approval requirement since there is no time for an approval if the ordinance is “in force” immediately upon the absence of a veto within ten days or the veto being overturned. *Id.* Second, the court found that city charters adopted by almost all cities adopt, alter, or reject the veto power provision of section 4 of chapter 39 for ordinances passed by a single legislative body. See *id.* at 71–73. And in doing so, Woburn, along with possibly all other cities that took such action in their charters, also dispensed with the Attorney General approval requirement by indirectly stating when laws would come into effect and foreclosing the opportunity for an approval by the state official. Although the court explained that their “review of legislation shows that it is impossible, without examining every city charter, to be sure that there is no city to which” the Attorney General approval requirement is

applicable, analysis indicates that this may indeed be the case. *Id.* at 74.

The court's decision in 1940 reflected the legal structure then in place. Since city charters at that time were all special legislative acts passed by the state, it made sense to conclude that provisions in a charter could trump requirements set forth in a general state statute. Nevertheless, considering that, under the Home Rule Amendment, charters can be adopted locally without state participation, it is not clear whether cities can still include language in their charter to avoid the approval requirement of chapter 40, section 32. Indeed, it can be argued that any home rule charter that includes language similar to that which exempted Woburn from the approval requirement would be invalid for conflicting with existing state law, which means that existing state law would have to prevail. See Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 9(b) (requiring the Attorney General to file a report documenting any conflicts between the Charter and the state constitution or existing state law).

7. **Mass. Gen. Laws** ch. 43. The sections in this chapter describe six model city governments that can be adopted—labeled “A” through “F.” The Home Rule Procedures Act places an effective “freeze” on the adoption of these model governments according to the procedures outlined in chapter 43 after 1966. See Home Rule Procedures Act, **Mass. Gen. Laws** ch.43B, § 18.
8. Massachusetts Municipal Association, *Ask the MMA*, at [http://mma.org/local\\_government/ask\\_mma/change\\_government.html](http://mma.org/local_government/ask_mma/change_government.html) (last visited November, 6, 2001) and copy on file with authors.
9. The Home Rule Charter does not eliminate a locality's ability to petition the state legislature for a special act to accomplish the same ends. In *Bd. of Selectmen of Braintree v. Town Clerk of Braintree*, the court ruled that there was no evidence to indicate that section 4 of the Home Rule Amendment, which outlines the charter amendment procedure, is a limitation on, or exception to, a municipality's power to petition the general court for the same result through the state legislature as outlined in section 8. 370 Mass. 114, 117–18, 345 N.E.2d 699, 701 (1976). Indeed, the Home Rule Amendment reserves for the state the power to pass acts “for the incorporation or dissolution of cities and towns as corporate entities.” Home Rule Amendment, Mass. Const. art. LXXXIX, § 8.
10. Sections 2, 3, and 4 of the Home Rule Amendment, along with the Home Rule Procedures Act, outline the requirements for adopting, revising, or amending a home rule charter. See Home Rule Amendment, Mass. Const. art. LXXXIX, §§ 2–4; Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B (2003). Any municipality can adopt a home rule charter by first having fifteen percent of its registered voters sign a petition putting the question of electing a charter commission on the ballot. See Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 3. If the charter commission is approved, it will then be responsible for drafting a new charter, which will be voted upon again by the electorate. The only role the state plays in this process is a legal review of the new charter by the state Attorney General to make sure that there is no conflict with existing state law. *Id.* at § 10(c). If the charter is approved, it is recorded and effective on the date specified in the charter.
11. See Massachusetts Department of Housing and Community Development, *Home Rule Amendment and the Home Rule Procedures Act—Summary*, 12 (2000), at <http://www.state.ma.us/dhcd/publications/hraps.pdf> (last visited August 21, 2003) [Hereinafter DHCD Home Rule Summary].

12. *See id.*
13. *See id.* at 7.
14. *See id.* at 1.
15. *Id.* at 12.
16. *See* Home Rule Amendment, Mass. Const. art. LXXXIX, § 3 (“The vote on the question [of whether to adopt or amend a Home Rule Charter] and the election of the charter commission shall take place at the same time. If the vote on the question submitted is in the affirmative, the nine candidates receiving the highest number of votes shall be declared elected.”).
17. *See* DHCD Home Rule Summary, *supra* note **Error! Bookmark not defined.**, at 12.
18. *See* Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 8(a)
19. *See id.* at § 9(c); *see also* Home Rule Amendment, Mass. Const. art. LXXXIX, § 3.
20. Once the final report for the adoption of revision of a charter is submitted by the charter commission, the question of whether to adopt the proposed charter is “submitted to the voters as a single question unless the charter commission provides for the separate submission of proposed revisions.” Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 11. Therefore, even though multiple proposals may be presented to the electorate, whether there are alternatives at all, or what forms those alternatives take, are decided entirely and independently by the charter commission. Furthermore, if the charter commission recommends that a home rule charter not be adopted or revised, then the process is also terminated without any opportunity for the municipal government or the voters to intervene. *See id.* (“[A] charter commission report which does not recommend the adoption or revision of a charter shall not be submitted to the voters.”).
21. A charter proposal that has been denied by the electorate, but managed to receive thirty-five percent of the affirmative vote, can be resubmitted through a petition by the voters. *See id.* at §12A. Nevertheless, there is no authority in this section that allows any party to alter or amend the charter proposal for resubmission. The only changes that can be made are to the dates in the original charter proposal. *Id.*
22. *See* DHCD Home Rule Summary, *supra* note 10, at 7. The municipalities in the Boston region that have received special act charters after the passage of the Home Rule Amendment are Burlington, Duxbury, Framingham, Hull, Needham, Lexington, Stoneham, and Weymouth. *See id.*
23. Indeed, some municipalities with home rule charters continue to petition for special acts to amend their charter even though they have the power to change it locally. For example, the town of Acton has a home rule charter, which allows it to amend its charter to change the position of police chief to an appointed position. *See* Mass Const. amend. art. 2, § 4 (describing the procedure for amending a city or town charter). Municipalities in general are also enabled to do the same thing through a local referendum according to the Massachusetts General Laws. *See* **Mass. Gen. Laws** ch. 41, § 1B (2003). Nonetheless, Acton petitioned for and received a special legislation to convert the police chief position to an appointed office in 1998. It is not entirely clear why it petitioned for special legislation to enact this amendment, but there are two possible reasons. First, the police chief position in Acton was actually governed by previous special act legislation passed in 1938. The Home Rule Procedures Act does allow municipalities to amend or repeal special act legislation affecting only their municipality, but only if the special act legislation does not state otherwise and was enacted subsequent to the passage of the Home Rule

Amendment. See Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 19. Since the special act legislation was passed prior to the Home Rule Amendment, arguably only another act of special legislation could alter it. Indeed, the specific language of the 1998 Acton special legislation simply stated that it repealed a previous act. Second, even if the special legislation could have been altered through the process outlined in the Home Rule Procedures Act or pursuant to the more specific authority granted by Chapter 41, § 1B of the general laws, both of those provisions require referendum approval, which is arguably more time- and resources-consuming than simply asking for a stamp of approval by the state, especially when the proposed change is relatively minor.

24. See, e.g., **Mass. Gen. Laws** ch. 41, § 1B (allowing all towns to change certain elected positions to appointed positions through referendum); **Mass. Gen. Laws** ch. 41, § 21 (allowing all towns to either allow their selectmen to act as certain officers or empower them to appoint those positions through referendum).
25. See Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 11 (“Upon submission of the final report of a charter commission under section nine, the city council or board of selectmen shall order the proposed charter or charter revision to be submitted to the voters . . . .”); see also Massachusetts Department of Housing and Community Development, *The Home Rule Amendment and The Home Rule Procedures Act 4 (2001)* (“The city council or board of selectmen upon receipt of the final charter commission report *must* order the charter proposal or charter revision to appear on the ballot . . . .” (emphasis in original)).
26. See Home Rule Procedures Act, **Mass. Gen. Laws** ch. 43B, § 10(c) (“If the attorney general reports that the proposed amendment conflicts with the constitution or laws of the commonwealth, the order proposing such amendment shall not take effect . . . .”).
27. See *Beard v. Town of Salisbury*, 378 Mass. 435, 441, 392 N.E.2d 832, 836 (1979).
28. *Powers v. Secretary of Administration*, 412 Mass. 119, 129, 587 N.E.2d 744, 750 (1992).
29. *Id.* (citing *Opinion of the Justices*, 368 Mass. 849, 854, 332 N.E.2d 896 (1975)).
30. See *Boston Gas Company v. City of Somerville*, 420 Mass. 702, 704–05, 652 N.E.2d 132, 134 (1995) (finding state regulation on manufacture and sale of gas and electricity by public utilities to be so comprehensive as to preempt localities from regulating in this area).
31. See *Town of Wendell v. Attorney General*, 394 Mass. 518, 476 N.E.2d 585 (1985).
32. **Mass. Gen. Laws** ch. 40C (“Historical Districts”).
33. **Mass. Gen. Laws** ch. 40A (“Zoning”).
34. See Home Rule Amendment, Mass. Const. art. LXXXIX, § 8. Without the local government’s consent, the state can pass special legislation by a two-thirds vote following a recommendation by the governor. *Id.*
35. See *Belin v. Secretary of the Commonwealth*, 362 Mass. 530, 534–35, 288 N.E.2d 287, 289 (1972) (holding legislation affecting municipalities with proportional representation voting void because Cambridge was the only municipality that fits that classification).
36. See, e.g., 2003 Mass. Acts 10 (special legislation removing the town of Oak Bluffs from the Martha’s Vineyard commission upon ballot approval by the voters); 2002 Mass. Acts 20 (special legislation amending charter to establish a director of finance