IN THE MAINE SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

Law Court Docket No. Han-23-317

Michael Good, et al.

v.

Town of Bar Harbor

On Appeal from the Hancock Superior Court

Brief of Plaintiffs/Appellees

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INTRODUCTION

This appeal presents a concise question of law: did the Town of Bar Harbor (The Town) violate the Home Rule Act when it attempted to make certain changes to its municipal charter in November 2020. The Superior Court answered in the affirmative and the Plaintiffs/Appellees here ask this Court to AFFIRM that sound decision.

The heart of the issue is whether the proposed changes – which were presented to the voters as nine separate ballot questions – were required to be presented as a single up or down vote. The Home Rule Act clearly and plainly requires that charter revisions of this type be presented as a single ballot question. The Town did not have the authority to do what it did by splitting the proposed changes into separate questions.

After granting summary judgment in favor of the Plaintiffs and invalidating the improperly enacted charter revision, the Superior Court exercised its sound discretion and declined to order the proposed changes resubmitted to the voters as requested by the Town.

Plaintiffs/Appellees respectfully request that the Superior Court's exercise of discretion be AFFIRMED.

STATEMENT OF THE FACTS

Plaintiffs/Appellees agree with the Town's recitation of the facts and procedural history. There are no genuine issues of material fact and the documents in the record speak for themselves.

STATEMENT OF THE ISSUES PRESENTED

1. **The Home Rule Act requires that municipalities follow certain procedures in enacting and making changes to their charters. Did the Town of Bar Harbor violate the Home Rule Act's procedural requirements in a manner that materially and substantially affected the revision of its charter?**

Appellant Answers: No
Appellees Answer: Yes
Superior Court Answered: Yes

2. **When, as here, the court has invalidated a charter revision because the municipality has failed to comply with the Home Rule Act's procedural mandates, the court may, in its discretion, order resubmission of the proposed changes to the voters. Did the court exercise its sound discretion and decline to order such a resubmission?**

Appellant Answers: No
Appellees Answer: Yes
Superior Court Answered: Yes

LAW AND ARGUMENT

1. **The Home Rule Act requires that municipalities follow certain procedures in enacting and making changes to their charters. The Town of Bar Harbor violated the Home Rule Act's procedural requirements in a manner that materially and substantially affected the revision of its charter.**

Preservation and Standard of Review

Plaintiffs/Appellees agree with the Town's statement that an appeal from a motion for summary judgment is reviewed de novo. Likewise, questions of statutory interpretation are reviewed de novo.

A. The Home Rule Act requires that municipalities follow certain procedures in enacting and making changes to their charters.

Maine's Municipal Home Rule Amendment to its Constitution states: "The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act." Me. Const. art. VIII, pt. 2, § 1 (emphasis added). The power to enact, revise, amend, or make minor modifications to a charter always lies with the voters or inhabitants of a town, not with its elected officials. In enacting Title 30-A Chapter 111, the legislature has prescribed those procedures and also provided a mechanism for enforcement and judicial review. The relevant statute reads, "Any 10 voters of the municipality, by petition, may obtain judicial review to determine the validity of the procedures under which a charter was adopted, revised, modified or amended." 30-A M.R.S.A. § 2108(3).

Under the Home Rule statute, the terms "adopted, revised, modified, [and] amended" each relate to changes to the municipal

charter. However, each term has a distinct meaning and specific procedural requirements associated with it. Adoption of a new charter or revision of an existing charter requires the creation of a charter commission. 30-A M.R.S.A. § 2102. The Home Rule statute provides a specific procedure for the commission's creation, its duties while it is in existence, and the method by which it submits its recommended revisions to the voters. *Id*.

Here, the Town of Bar Harbor created a charter commission for the purpose of revising its charter by ballot vote in November 2018 (SMF ¶ 7; A 104, 155)[1]. The commission was created for "consideration of electronic voting at town meeting; streamlining the budget process, and the purpose, function, and structure of the Warrant Committee." (Special Town Meeting Minutes November 6, 2018, A 155, emphasis added). The commission's recommended changes to the municipal charter were ultimately voted on in November 2020 (SMF ¶ 4; A 103).

In their complaint dated December 1, 2020, and first amended complaint dated December 30, 2020, plaintiffs raised four challenges to

[1] SMF = Statement of Material Facts to Plaintiff's Motion for Summary Judgment; A 102-109).
A = Appendix

the procedures used by Defendant/Appellant Town of Bar Harbor in enacting these changes (SMF ¶ 5; A 103). Each of these four procedural defects individually and together are grounds to set aside the revisions to the charter.

B. The Proposed changes to the Charter constituted a "revision" — not mere "minor modifications" — and should have been presented to the voters in a single question as required by statute.

State law is clear that major changes in a town's charter must be presented to the voters in a single up or down vote, not in the piecemeal fashion the Town used here. 30-A M.R.S. § 2105(1). The one exception to a presentation of a charter revision as a single up or down vote is when the "charter commission, in its final report . . . recommends that the present charter continue in force with only minor modifications." 30-A M.R.S. § 2105(1)(A) (emphasis added).

The heart of this issue is whether the changes to the charter that were voted on in November 2020 were "minor modifications" or changes constituting a "revision" of the charter.

The Home Rule Statute places the adoption and revision of a municipal charter in the same category, requiring such major changes

to town governance to be considered by a specially formed charter commission. § 2102. By contrast, amendments to a municipal charter can be placed directly before voters where they are "limited to a single subject." § 2104. Even when the charter commission procedure is used, the proposed changes can be submitted to the voters as separate questions, but only if those changes are "minor modifications." § 2105(1)(A). The statute does not explicitly provide definition or guidance as to the standards regarding what constitutes a minor modification as opposed to a revision.

However, this Court recently addressed the related question of a charter amendment versus a charter revision in *Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, 252 A.3d 504. There, citizens had proposed a charter amendment calling for public financing of municipal elections. The City's attorney had advised in writing that such a change to the charter was so fundamental that it could only be accomplished via a charter revision process which would involve the creation of a charter commission. The City Council made no findings whatsoever and voted not to present the matter to the voters. On appeal, this Court set this decision aside, given the absence of factual

findings, and remanded the matter to the City Council for further proceedings. This Court held that the meaning of the words "amendment" and "revision" were "issues of law requiring statutory interpretation and de novo review." 2021 ME 32, ¶ 27. It held that a revision is more substantial than an amendment, *Id*. at ¶ 29, and cited with approval a Michigan Supreme Court case that held that a proposal to abolish the office of city manager was a revision, not an amendment. *Id*. at ¶ 31. Finally, it held that either the breadth of the changes or the depth of the changes would constitute a revision, not an amendment. *Id*. at ¶ 32.

The Home Rule Act itself limits amendments to a single subject, Section 2104(1)(B). However, unlike "modifications," amendments are not required to be "minor." Here, however, the operative phrase is "only minor modification." Minor is a significant adjective. The Law Court has stressed that when the "legislature uses different words within the same statute, it intends for the words to have different meanings." 2021 ME 32, ¶ 29. This suggests a hierarchy in descending level of importance of adoption, revision, amendment and minor modifications.

To avoid the mandate of a single up or down vote on a revision, every modification must truly be minor.

Common sense would suggest that the phrase "If the charter commission, in its final report under section 2103, subsection 5, recommends that the present charter continue in force with only minor modifications" means that the commission has expressly determined in its final report that a true revision to the charter was unnecessary and that any proposed changes involved neither the breadth nor depth of change the Law Court has ruled would mandate a revision. Minor modifications can be even less substantive than amendments, given that carefully chosen adjective, "minor." Only when a charter commission expressly decides not to revise the charter but only to make "minor modifications," can these modifications potentially be presented to the voters as separate items. And, crucially, even when the charter commission describes the relevant changes as "minor modifications," they must truly be minor to survive judicial review.

Here, the final report of the charter commission makes absolutely no such express finding. The failure to make such a finding dooms the attempt to present these significant changes as individual questions.

Nor can this Court assume that the charter commission made such a finding. 2021 ME 32, ¶ 36. It initially made a contrary finding. On page 3 of its October 15, 2019 draft report, the charter commission noted that it had "recommended changes both minor and substantive to 19 sections of the current Charter." (emphasis added) (SMF ¶ 26; A 107).

Here, the Charter Commission's final report begins by stating that its recommendations represent a "vision for the future of our town's governance." (SMF ¶ 9; A 104). It also states that it recommends "changes to 19 areas within the structure of the charter," dropping the language in its draft report characterizing many of these changes as substantive, not minor. (SMF ¶ 10, 26; A 104, 107). Looking at the volume of text proposed to be changed, it is hard to describe these changes as "minor modifications." The reprinted copy of the charter attached to the charter commission report shows the proposed changes highlighted and there is highlighted text on nearly every page in nearly every section of the charter (SMF ¶ 7; A 104, 191-211). As the Law Court noted in F*air Elections Portland*, the breadth of proposed changes may require a revision. 2021 ME 32, ¶ 32.

The legislature enacted the Home Rule Act "to implement the home rule powers granted to municipalities by the Constitution of Maine Article VIII, Part Second." 30-A M.R.S.A § 2101. If the Legislature had wanted to simply grant the charter commission and the Town the power to present a charter revision in as many separate questions to the voters as it saw fit, the Legislature could have simply done that. But it did not. It prescribed the method that a charter revision must be presented to voters as a single question.

The Legislature did however narrowly prescribe a method for proposing changes to a municipal charter when the commission wanted to make only minor modifications. This law contemplates the scenario when a charter commission is created and, after the intensive and possibly years-long process of reviewing the charter, decides that the current charter should remain in force with only minor modifications. That scenario is very different from one in which a charter commission describes the proposed changes as "a vision for the future."

The town argued below and argues here that the charter commission's decision to split the proposed changes into a series of ballot questions is entitled to "deference." The town cites *Friends of*

Lamoine v. Town of Lamoine, 2020 ME 70, ¶ 20, 22 for the proposition that the factual findings of a municipality are entitled to deference. That case and the cited proposition are not on point. The determination that the proposed changes were "only minor modifications" is a legal conclusion. A reviewing court should give it de novo review. Again, the Town wants this Court to accept the rule that any town can, merely by presenting the proposed charter changes to the voters as separate questions, be given deference regarding its determination that the changes are "minor modifications." Given the plain language of the Home Rule Act, this Court should decline that invitation.

C. The substantive changes proposed in this case cannot be said to be truly minor.

From a structural point of view, it cannot fairly be said that the proposed changes to the charter were all "only minor modifications." Notably, what became charter modification number 3 provided for certain changes to the land use ordinance to be made by the town council (SMF ¶ 14; A 105), not by the voters at the town meeting. Changes to the land use ordinance have always been within the exclusive power of the citizens through direct democracy at town

meeting. (See Charter Commission Final Report, Minority Opinion, exhibit 7, to the SMF, p 24-25; A 189-190). Nowhere in the language of the ballot questions was it explained to voters that they, as the voting public, were being asked to give up their exclusive power over land use ordinance changes (Exhibit 4 to the SMF; A 259).

Another fundamental change proposed by the commission was to alter the purpose, function, and structure of the elected warrant committee by reducing its numbers from 22 to 15 and dramatically changing its duties. Because one of the articles failed (Article 2), the warrant committee is limited to reviewing only the municipal budget by one article, (A 204-205) but must still make a recommendation on the school budget to the voters, despite having no authority to review that budget. The stated rationale for reducing the number of warrant committee members from 22 to 15 was <u>because</u> the committee's duties were being changed by Article 2. (SMF ¶ 18; exhibit 7 to SMF; A 106). Because Article 2 failed, the rationale for requiring a single up or down vote is clearly on display. Changing the number of warrant committee members and changing the duties of the warrant committee were

interlocking proposals that were being recommended as an overall structural change to the charter.

Any after-the-fact effort to categorize these changes as minor modifications is without merit based on that fact alone. State law requiring an up or down vote on an entire charter revision is meant to prevent just such an absurd result. Because these proposed changes to the charter were submitted to the voters piecemeal, the number of members of the warrant committee was reduced from 22 to 15 and it may no longer have enough members to staff its subcommittees. (A 204-205). Had the revision to the charter been presented as a single up or down vote — as the law requires — this inconsistent result would have been avoided.

Even individually, the majority of the proposed charter changes could not be characterized as minor modifications. Article 2 (which was defeated) would have made major changes to the duties of the warrant committee (for example, it would no longer make recommendations on the school budget). (A 261). Common sense would suggest that changing the duties of an elected body should be part of a larger revision to a municipal charter — not a mere minor modification of the charter.

Article 5 makes structural changes to the Superintending School Committee and adds an entirely new position — "planning director" — to the town charter (SMF ¶ 15; A 105, 266-267). Article 6 empowers the Annual Town Meeting to set salaries for the town council and the school committee (SMF ¶ 16; A 106, 268). Prior to this change, that salary was provided in the charter itself and, presumably, could only be changed by charter amendment (or as part of a revision). The proposed modification goes beyond merely making a change to salary of elected officers, and fundamentally changes who gets to make those changes going forward. That kind of structural change cannot be fairly said to be "minor" in any sense of the word. Article 7 on its face creates an entirely new process for the development and adoption of the annual budget (SMF ¶ 17; A 106, 269).

By contrast and by way of example, Article 9 was clearly a "minor modification" — a simple change of a nomination deadline from 45 days to 60 days before an election (SMF ¶ 19; A 106, 273). This is the type of change that the legislature has determined does not require a single up or down vote as with a charter revision and has provided the charter commission with an escape valve to present such minor modifications to

the voters as individual questions. Had the charter commission met and determined that only such minor modifications were necessary, it would have made perfect sense to present them as separate articles (as State law allows).

Here, in stark contrast, the charter commission clearly and expressly was attempting to implement a revision — "a vision for the future of our town's governance." It chose to place this proposed vision before the voters as separate questions. State law simply does not grant the commission this discretion. A revision to the town charter must be presented to the voters as a single question unless, and only unless, "the charter commission, in its final report under section 2103, subsection 5, recommends that the present charter continue in force with only minor modifications." As noted above, no such finding was ever made. And even if it were, the proposed changes cannot be said to have been all truly minor.

If a charter commission can, in its sole discretion, decide whether to submit a revision to the charter as a single up or down vote or as several questions simply by calling them "modifications," then § 2105 is rendered nugatory.

What is the limit to the Town's logic? Could a commission propose to change half of the entire charter in this fashion so long as they called the changes "modifications"? How much of the charter can be replaced and still have it be said that the charter "remains in full force and effect with only minor modifications"? What if the changes were presented as 15 ballot articles, or 30, or 100? The Town's position is unworkable because the statute makes it clear that the only permissible way a charter commission can present its recommended changes as separate questions is when they are "only minor modifications." Both the words "only" and "minor" have significance.

The Superior Court, in granting summary judgment to the plaintiffs, agreed with the above reasoning and stated as follows: "Given that the changes here so thoroughly modify the existing charter, rewriting, deleting, or adding to large swathes of eight of its 11 articles, fundamentally changing how a number of Town officeholders operate, creating new Town officeholder positions, and even adjusting the Town's land use ordinance, the Court cannot find that these changes were collectively minor." (Order Granting Summary Judgment, p 12; A 23.) The Superior Court's reasoning is sound and comports with

generally accepted principles of statutory interpretation. It should therefore be affirmed.

D. Failure to present the entire proposed charter revision as a single up or down vote materially and substantially affected the revision.

This error — the failure to present the entire proposed charter revision as a single up or down vote — materially and substantially affected the revision of the charter because it allowed for an outcome that would have been impossible had the Town followed the required procedures. The legislature intended that citizens of a municipality be presented with a single proposal for either the adoption of a new charter or the revision of their existing charter.

That the voters could have, and in fact did not enact all of the proposed changes materially and substantially affected the entire process. The warrant committee has too few members to perform all of its duties preserved by the rejection of Article 2 and further expanded by article 7. The rejection of Article 2 means the warrant committee must make recommendations to the voters on matters it is potentially not empowered to review.

But the result that occurred here is only one of many possible absurd results that could occur when a municipal charter is allowed to be overhauled in piecemeal fashion. The legislature plainly did not want to permit such revisions and required that revisions be presented in a single vote – unless, of course, the recommendation is for "only minor modifications."

Plaintiffs/Appellees agree with the Town on pages 28-29 of their brief regarding examples of what might constitute "major deviations from the requirements of the Home Rule Act [that] might satisfy section 2108(3)'s materiality and substantiality standard…" (Blue Brief p. 28-29). However, Plaintiffs/Appellees argue that the error found by the Superior Court here also belongs in that category. The Town argues that erroneously placing the charter revision before the voters as separate questions only served to give the voters "more granular choice." (Blue Brief p. 29). This argument assumes that more granular choice is always a good thing. The legislature clearly believed that when changes to a municipal charter rise to the level of a revision that such changes are required to be presented to voters as a coherent whole and not as "granular" choices. This forces the charter commission to make a

coherent proposal that it believes will garner the support of a majority of the municipal electors. It also avoids situations, like this one, where part of proposed revision is rejected, potentially leaving inconsistent provisions in the municipal charter. If the Town's view of this issue is the law, then municipalities are always free to ignore this statutory mandate and present any charter revision in as many separate articles as it wants. The legislature did not enact this provision without reason or purpose. This is not, as the Town argues, a "fundamentally harmless procedural error." (Blue Brief p. 30). It is a central requirement of the charter revision process and should be enforceable by judicial review.

The Superior Court recognized that this Court has not had occasion to address what constitutes an error that materially and substantially affects a charter change under the Home Rule Act. The Superior Court adopts a simple bright-line test that can and should be adopted by this Court as well. The Court stated:

> Had all of the questions been presented together [as required by the Home Rule Act] only two outcomes would have been possible. Either all the changes would have passed, or none would have passed. … So, had the proper procedure been followed here, the outcome of the vote would necessarily have been materially different… [Order Granting Summary Judgment, p 14; A 25].

The examples of "major deviations" that the Town argues "might conceivably satisfy [the] materiality and substantiality standard" would undoubtably run afoul of the Home Rule Act and likely fail to comport with due process. However, the Town is attempting to set the bar too high to evade its own failure to comply with the Home Rule Act in a manner that materially and substantially affected the revision. The simple test adopted by the Superior Court does not require a reviewing court to conduct such a searching analysis to determine whether the error constitutes a "major deviation." If the error leads to an outcome that could not have otherwise occurred, it follows logically that the error materially and substantially affected the process. The Town is rightly concerned about elevating form over substance, however such concerns should not be used to completely eviscerate meaningful review and enforcement of the procedural mandates in the Home Rule Act.

E. 30-A M.R.S.A § 2103(6) requires that "When the final report is filed, the municipal officers shall order the proposed new charter or charter revision to be submitted to the voters at the next regular or special municipal election held at least 35 days after the final report is filed." The Town Council violated the plain language of this statute by placing the proposed charter revision on the November 2020 ballot rather than on the June 9, 2020 town meeting warrant.

Aside from the issue presented above which was the basis of the Superior Court's ruling granting summary judgment in favor of the Plaintiffs, the Town violated the procedural requirements of the Home Rule Statute in other ways as well. Individually and as a whole, these violations form alternative bases to affirm the Superior Court's ruling. Quite simply, the plain language of the statute required the proposed changes to be submitted to the voters at the "next regular or special municipal election held at least 35 days after the final report is filed." The report was finalized on February 28, 2020 and submitted to the town Council on April 7, 2020. (SMF ¶ 23, 24; A 107). The next town meeting 35 days after the report was filed was on June 9, 2020. (SMF ¶ 22; A 107). On April 7, 2020, without explanation, the Town Council voted to submit the proposed changes on the November ballot at a future meeting (SMF ¶ 24; A 107). Next means next and the Town

Council had no discretion to present this matter to a later town meeting.

This timing requirement ensures that the voters both have an opportunity to review the proposed changes (at least 35 days) and that the proposed changes will be voted on in a timely manner after the final report is filed. Just as the charter commission decided to submit the revision to the voters in piecemeal fashion in violation of the plain language and structure of the statute, here the Town Council ignored the plain language of the statute and decided without explanation to place the proposed changes before the voters in November rather than at the next town meeting in June. If the legislature did not wish to impose this type of proximity requirement, it could have simply said "submitted to the voters at least 35 days after the final report is filed" and omitted the phrase "next regular or special town meeting."

F. The Town did not comply with 30-A M.R.S.A. § 2013(1)(A) and its own charter when it elected the members of the charter commission in November 2018.

State law requires that the 6 elected members of the Charter Commission should be "elected in the same manner as the municipal

officers." 30-A M.R.S.A. §2103 (1)(A)(1). Bar Harbor's current Charter gives the Annual Town Meeting (which meets on the first and second Tuesdays of June) the exclusive power to elect "all necessary Town Officers and committees." Bar Harbor Charter, §C-6 (a)(1). Bar Harbor's Charter further provides that the election of municipal officers shall be held "on the second Tuesday of June." Bar Harbor Charter, §C-39 (A). In contravention of these two express provisions of Bar Harbor's current Charter, these 6 Charter Commission members were elected at a Special Town Meeting in November of 2018 rather than the Annual Town Meeting the following June of 2019 (SMF ¶ 25; A 107). Accordingly, from its inception, the charter commission was improperly constituted. Charter Commission members are necessary officers and the fact that the Statute makes permissive the election of charter commission members at the same time as the charter revision process is established cannot trump the mandatory language of Bar Harbor's charter and the mandatory "same manner" requirement of the Statute. Once again, the Town Council could not change the date of an election to present the matter to a different electorate.

G. The Town Council did not comply with the Home Rule Act in changing the questions presented to the voters long after the charter commission ceased to exist and never informing the voters that they were surrendering their exclusive power to amend the Land Use Ordinance.

Per 30-A M.R.S. Section 2103(8), the charter commission ceased to exist 30 days after it issued its final report to the Town Council. Thus, its legal existence ended on May 7, 2020. In August of 2020, the Warrant Committee discovered that Article 3, ostensibly dealing only with electronic voting, also stripped Bar Harbor voters of their exclusive power to amend the land use ordinance. (SMF ¶ 29; A 108). That Article changed charter section C-6(B)(3) to strike the words "pertaining to the Town's Land Use Ordinance" from that section but omitted the prefatory language of section C-6(B) which made it clear that each of the seven listed powers found within that subsection were "the exclusive power and responsibility" of Annual and Special Town Meetings of Bar Harbor's voters. On August 28, 2020, the former Chair of the defunct charter commission, on his own initiative, moved this language stripping the Town Meetings of their "exclusive power and responsibility" to amend the land use ordinance from Article 3 to Article 4. (SMF ¶ 30; A 108). The Town Council approved this *ultra vires*

change. (SMF ¶ 31; A 108). However, both the ballot question presented to the voters and the explanatory Warrant Article available to the voters omitted the prefatory language of charter section C-6(B) that made clear that this change dealt with a power that had exclusively been that of Bar Harbor voters. Exhibits 4, 5 to the SMF.

By statute, the Town Council's mandatory duty upon presentation of the final report on April 7, 2020 was to "order the proposed new charter or charter revision to be submitted to the voters," not to amend the proposed charter revision. 30-A M.R.S. Section 2103(6). The Council had the limited power under 30-A M.R.S. Sections 2103(7) and 2104(6) to change the questions presented to the voters to more accurately describe what changes were being proposed. The Council, however, made no changes to either the ballot questions or the Warrant Articles to inform the voters that they were surrendering this exclusive power. (SMF ¶ 31; A 108).

This change without notice to the voters materially and substantially affected the adoption of the charter provisions, as Article 4 passed very narrowly with but 52% of the vote.

2. When, as here, the court has invalidated a charter revision because the municipality has failed to comply with the Home Rule Act's procedural mandates, the court may, in its discretion, order resubmission of the proposed changes to the voters. The Superior Court exercised its sound discretion and declined to order such a resubmission.

Preservation and Standard of Review:

The Plaintiffs/Appellees agree with the Town that this issue is reviewed for abuse of discretion. Where, as here, the court's factual findings are supported by the record and the court below understood the applicable law, the judgment of the lower court should only be disturbed if it is outside the bounds of reasonableness. *Marks v. Marks*, 2021 ME 55, ¶ 15, 262 A. 3d 1135.

A. The Superior Court exercised its sound discretion and declined to order resubmission.

By way of a motion to alter or amend the judgment, the Town proposed to resubmit the charter revision at issue in this matter to the voters as a single question. Such relief is authorized but not required under 30-A M.R.S.A § 2108(4). Crafting a remedy under subsection 4 (or declining to do so as the Superior Court did here) was entirely within the Superior Court's discretion.

Curiously, the Town asked the court to allow it to omit proposed article 2 on the warrant which the voters previously rejected. Its reasoning was that "Inclusion of this rejected modification would only serve to compel voters to adopt changes they do not favor in order to retain those changes they did favor, or else reject all the changes, the vast majority of which they did favor." (Town's motion at 11-12; A 99-100). This result — a piecemeal adoption of the charter commission's recommended changes — was precisely what the Superior Court found to be the material and substantial effect on the outcome of the process due to the improper submission of a charter revision as separate ballot questions. The Town's requested relief would have compounded the initial error. In accord with the applicable provisions of the Home Rule Act, the Superior Court properly and reasonably denied the Town's motion.

B. There is no danger of "sudden invalidation" of actions taken by the Town Meeting over the past three years.

The Town's argument that the "sudden invalidation" of the improperly revised charter will call into question actions taken by the voters at the recommendation of the Warrant Committee is without

merit. Likewise, affirming the Superior Court's order granting summary judgment will not, as the Town suggests, "upend more than three years of good faith governance under the modified charter." (Blue Brief p. 36). Section C-38 of both the revised charter and the original charter specify that "The failure of the Warrant Committee to comply with any of the provisions of this article shall not be deemed to render invalid any action taken by the voters of the Town of Bar Harbor at any Annual or Special Town Meeting." (Bar Harbor Town Charter, §C-38). In other words, to the extent the Warrant Committee was out of compliance with the previously existing charter over the past three years, its recommendations did not alter the legality of the actions taken by the voters. As provided in the Bar Harbor Charter § C-5, "the legislative authority of the Town of Bar Harbor shall continue to be vested in the inhabitants of the town of Bar Harbor acting by means of Town Meetings." (Bar Harbor Town Charter, §C-5). This comports with common sense because the Warrant Committee makes recommendations that are ultimately voted on by the electors who hold the actual decision-making authority. Accordingly, the improperly

constituted Warrant Committee that has been operating for the past three years does not impair the actions taken by town meeting.

More importantly, the challenged revised charter has legally been in effect during the pendency of this litigation. If this Court affirms the Superior Court's judgment, the automatic stay will end and the judgment invalidating the revised charter will go into effect. The town's concern that its own actions taken under the revised charter will be called into question is purely speculative and does not warrant reversal of the Superior Court's judgment.

C. Invalidation of the improperly enacted charter changes will not leave the Town unable to comply with State Law.

Bizarrely, the Town continues to insist that invalidation of the revised charter "without the opportunity to cure would have rendered the Town unable to comply with a statutory deadline to amend its zoning ordinance in compliance with a recent state law addressing the housing crisis." (Blue Brief p. 33). This argument was without merit when it was made to the Superior Court and continues to be without merit today.

At the time the Town filed its motion to amend the judgment, the Town's affiant, Kevin Sutherland, opined that it would not be possible under the charter that existed prior to November 2020 to bring the Town into compliance with State law because there was insufficient time to complete the process prior to the June 2023 town meeting. Sutherland stated that under the charter "as modified" this action could be accomplished "by recommendation of the Planning Director, supermajority vote of the Planning Board, and supermajority vote of Town Council."

This argument is unfounded and contradicted by decades of successful governance — including amendments to bring ordinances into compliance with state law — under the prior charter. (See Jagel Aff, ¶¶ 9, 10; A 285). Even if the zoning changes required by LD 2003 could be "implemented by recommendation of the Planning Director, supermajority vote of the Planning Board, and supermajority vote of the Town Council" as the affidavit asserted, it was not clear from the record why this process would have been more expedient than submitting the amendment to the voters at the June 2023 town meeting. All the

drafting and legal review would still need to have been accomplished before the zoning ordinance amendments were adopted.

By the Town's own admission, LD 2003 was enacted in April 2022 — 15 months before the required zoning amendments were required to be enacted. Arguing in November 2022 that it would be impossible for the town to submit the necessary amendments to comply with LD 2003 by July 1, 2023, the Town ignored the fact that it had already had plenty of time, and still did have time, to adopt the necessary amendments. This was a false emergency that did not require the court to take action and it remains an unpersuasive reason to disturb the Superior Court's sound judgment. As the Town states in its brief, both the automatic stay imposed pending this appeal and the legislative extension of the deadline to comply with LD 2003 prevented any catastrophe. Blue Brief, p 33, n. 10.

D. Contrary to the Town's argument, the Superior Court did not find that the all other procedures were "properly conducted."

The Town argued below that the minimum procedures necessary to cure the error would be to simply resubmit the improperly presented charter changes as a single ballot question. The Town argued that it

would not be "appropriate to repeat the properly conducted procedures leading up to this point." (A 99). However, the Superior Court did not find that those procedures were "properly conducted" — only that it need not reach them because the issue of whether the articles should have been submitted as a single up or down vote was sufficient to decide the case. (Order Granting Summary Judgment, p.4. fn. 2; A 15). If the Superior Court had been inclined to craft a remedy under subsection 4 as the Town invited it to do, the Plaintiffs maintain that the other procedural defects would need to have been considered. The Court could not effectively decide what the minimum procedures necessary to cure the defect are without fully addressing the defects throughout the process.

As stated in the Plaintiffs/Appellees' complaint and argued both here and in their motion for summary judgment, the charter revision process was flawed in several important ways that individually and as a whole required the revision to be set aside. The court invalidated the revision based on only one of the procedural defects, but that decision should not be interpreted as a stamp of approval of the other deficiencies.

As the Town argues, courts "must be sensitive to the need for stability and finality in changes to municipalities' governing documents adopted under their constitution home rule authority." (Blue Brief p. 36). Affirming the Superior Court's judgment in all respects provides just such finality.

CONCLUSION

The Superior Court correctly granted summary judgment in favor of Plaintiffs/Appellees and struck down the changes to the Bar Harbor Charter enacted in 2020. The Superior Court further exercised its sound discretion in declining to order resubmission of the proposed changes to the voters. Accordingly, Plaintiffs/Appellees respectfully request this Court AFFIRM the Superior Court's judgment in all respects.

Respectfully submitted this 5th of March, 2024

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