

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM COUNTY

SUPERIOR COURT

Alan Bailey, et al

v.

Town of Exeter

Docket No: 218-2011-CV-203

**FINAL ORDER**

The events that precipitated this litigation began in February of this year. The Town of Exeter is a so-called SB2 municipality. That law requires a deliberative session be held prior to voting day. At the Deliberative Session held on February 5, 2011, all of the Warrant Articles prepared and published were discussed. Among those under consideration were two petitioned Warrant Articles given the numbers Article 17 and Article 18. Those Articles were drafted as follows:

"Article 17: Shall the Town of Exeter establish and adopt a Budget Committee consistent with the mandates of RSA 32:14 and 15, with the said Committee having twelve (12) at large members who shall be elected initially for a term of one year, as required by RSA 32:15III.

Article 18: Shall the following twelve (12) be nominated to serve on the Budget Committee and elected immediately upon the passage of the Budget Committee? Christopher Moutis, James Knight, Deborah Johnson, Jay Childs, Anne Surman, Renee O'Barton, Frank Ferraro, Gerard "Gerry" Hamel. "

After discussion of these two Articles, amendments were made and approved by the majority of those citizens attending the Deliberative Session:

"Article 17: To see if the Town of Exeter will not establish an official Budget Committee consistent with the Municipal Budget Law, RSA 32:14 and 15. Further, shall the Town continue with Budget Recommendations Committee currently in place, created by a vote of the 1857 Town Meeting with said committee having not more than twelve (12) at large members.

Article 18: Shall all members of the Municipal Budget Committee be appointed by the Moderator.”

The popular vote on the official ballot was to take place on March 8, 2011. The plaintiffs herein, who were in favor of the establishment of a Budget Committee and who drafted the original articles that were subsequently amended, retained counsel and filed a Petition for Injunctive relief with this Court on February 17, 2011. They argued that the amendments made to the two petitioned Warrant Articles at the Deliberative Session were illegal, and that those amendments should not appear on the ballot for voting.

This Court issued two orders in this case prior to the popular vote taking place, one dated February 23, 2011 and one dated March 4, 2011. In essence the Court found that a preliminary injunction could not be issued given the short time frame before voting day and also given the fact that absentee ballots had already been distributed and received. Moreover if the plaintiffs ultimately prevailed in this case, a remedy was available to them in the form of the scheduling of another Deliberative Session and Special Town Meeting in order to consider amending or passing the two Warrant Articles initially drafted. The amended Articles appeared on the ballot with both “yes” and “no” alternatives receiving several hundred votes each.

A Final Hearing was held regarding the validity of the amendments to Article 17 and 18 on May 23, 2011. Counsel for both parties appeared and made oral arguments to the Court in support of their respective positions. They also submitted Memorandums for the Court’s consideration. The Court learned that there are some common beliefs shared by the parties. First, they agree that the amendment at the Deliberative Session wherein the word “not” was inserted into Article 17 rendered that Article moot. No matter how a voter addressed that Article, the original Warrant Article seeking adoption of a Budget

Committee would not be passed. They also agree that the effect of adding the word "not" in Article 17 meant that the amendment in Article 18 made that Article a nullity.

Counsel also agree that the recent case of Grant v. Town of Barrington, 156 N.H. 807 (2008), involving the same two lawyers as appears in this case, was the primary reason for the Legislature enacting House Bill 77 amending RSA 40:13 IV by adding subsection (c) which reads:

"No warrant article shall be amended to eliminate the subject matter of the article. An amendment that changes the dollar amount of an appropriation in a warrant article shall not be deemed to violate this sub paragraph. "

While counsel for both parties argue that the amended language is unambiguous, each assigns a different meaning to that language. In Grant our Supreme Court held that an amendment which left a warrant article with the words "to see" with no other wording was a valid amendment, given the fact that the subject matter of the article had been noticed to be discussed at the deliberative session. In this case the plaintiffs' argue that the Legislature believed Grant authorized amendments to purposed warrant articles that have no meaning and would end in no actionable vote. Thus it wanted to correct that purported absurd result. Therefore it passed an amendment to the statute which took effect a few days before the Deliberative Session in this case on February 5, 2011. The plaintiff's maintain that Paragraph (c) made it clear that whatever amendment is made, that amendment must leave the voter with a clear choice.

The plaintiffs' conclude that while a deliberative session may change the wording of a particular warrant article, in the end after the amendment is made the voter must be able to read the amendment and exercise his or her right to make an informed meaningful decision. While putting the word "not" in an amendment of Article 17 and allowing the remainder of the Article to remain in place did not eliminate the subject matter per say, it

did leave the voter with no opportunity to make an informed decision. Thus the inclusion of the word "not" in the amended Article had the same effect as leaving an article with only the words "to see" remaining. Since the Legislature, according to the plaintiffs', was desirous of changing the nullity of a "to see" amendment, it clearly did not intend to allow a similar nullity by inserting or deleting a word or words that would not give the voter a clear choice.

It is the defendant's position that any amended legislative language must be read narrowly. While the citizens amendment of Article 17 at the Deliberative Session may have had the same effect of frustrating a meaningful vote on the proposed Article as the use of the words "to see" would have before the Statute was amended, because the Deliberative Session did not eliminate the subject matter of the Article, namely the issue of the adoption of a Budget Committee, placing the word "not" in the Article was legal. The defendant emphasized that the Legislature did not use language prohibiting the amendment of an article so as to change what action could be taken to the subject matter, only that the amendment could not remove the subject matter. This is true, the defendant argues, even if the amendment had the effect of eliminating a meaningful vote on the subject matter therefore prohibiting its passage. All the amended language did was to disallow amendments at a municipality deliberative session wherein the remaining article would only have the words "to see".

In support of their position the plaintiffs also argue that if the defendant's view of the limited scope of the amendment to Section (c) were true, then the Legislature would not have had to have added a second sentence to the amendment. In other words the plaintiffs argue that if voters at a deliberative session merely wanted to negate the meaning of a warrant article by placing the word "not" in it, then there would be no reason

for the Legislature to include an exception. Therefore the adding of the words of "an amendment that changes the dollar amount of an appropriation in a warrant article shall not be deemed to violate this sub paragraph" has independent meaning. It permits the so-called zeroing out of a particular warrant article containing a cost component without having such an amendment be deemed to be prohibited. Thus because the second sentence was added, the Legislature in the first sentence intended any amendment to be constructive not destructive. In other words, the only permitted amendment to a warrant article that rendered it a nullity would be in so-called money matters. The Court finds merit in the plaintiffs' position in this regard.

The Court agrees with the parties that the language of the amendment recently enacted to RSA 40:13 IV (c) is not ambiguous. The phrase "shall not be amended to eliminate the subject matter" does not mean that any change in the wording is permissible even though it renders the article senseless. It appears the Legislature was trying to address a problem that had existed with the "to see" amendments that deliberative sessions in many Towns were passing. Such amendments did disenfranchise voters. In this case while the defendant conceded that the addition of the word "not" had the same effect as the use of the words "to see" in nullifying the intent of voters, nevertheless it argued that the plain meaning of the words used in the amendment meant that the Legislature in effect authorized this disenfranchisement. The Court cannot accept that rationale.

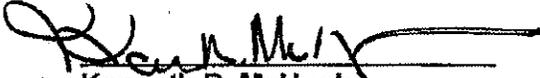
In summary, the Court finds and rules that the only way the phrase "no warrant article shall be amended to eliminate the subject matter of the article" can be logically read is to conclude that any amendment that made the subject matter of the article a nullity was forbidden. Merely because the majority of the voters at the Deliberative Session were

more clever in the way the amendment was worded to create the nullity does not mean that their action was not violative of the new statute. Furthermore, as the plaintiffs argue, by adding the second sentence of "an amendment that changes the dollar amount of an appropriation in a Warrant Article shall not be deemed to violate this subparagraph" has clear meaning. It permits the creation of a nullity only when dollars and cents are contained in the warrant article under consideration. All other attempts to render an article void are prohibited.

The plaintiffs having prevailed in this litigation are entitled to an award of reasonable attorney fees which the Court orders. Moreover the plaintiffs have the right now to have a deliberative session scheduled on the limited issue of the two proposed Warrant Articles that are the subject of this litigation, and thereafter have the defendant arrange for a popular vote on these Articles. The Court orders the Town of Exeter to schedule these events as reasonably soon as possible.

So Ordered.

DATED: May 27, 2011

  
Kenneth R. McHugh  
Presiding Justice