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August 12, 2009

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VIA EMAIL TO m.joyal@ci.dover.nh.us
AND HAND DELIVERY
Mike Joyal, City Manager
City of Dover
Municipal Building
288 Central Ave.
Dover, NH 03820

Re: Potential Dover Charter Amendment Concerning City Attorney per your emails of August 4 and 5, 2009

Good Morning Mr. Joyal:

Introduction.

This opinion letter is tendered in our Firm's capacity as Special Counsel to the City as requested by your emails to me of August 4 and 5, 2009. Specifically, you have asked for our opinion concerning the two questions listed below. In the course of preparing this opinion letter, I have reviewed: the proposed text of the Charter Amendment concerning Sections C3-11, C5-1, C5-5, C5-6 and C5-10; the current Charter of the City of Dover and several other municipalities, including the Cities of Keene, Concord, Manchester and Portsmouth and the Town of Durham; the current Administrative Code of the City of Dover; the current employment agreement with Attorney Krans; and various relevant court opinions and statutes as referenced below in the Arguments and Authorities section of this opinion letter. Additionally, I have spoken, at your suggestion, with

Councilmember Callaghan to clarify certain background and language questions that I felt necessary for this opinion letter.

Questions Presented.

1. **Whether the proposed Amendment is allowable under existing law; and,**
2. **If so, whether the Amendment is in the appropriate legal format for action by the City Council.**

Short Answers.

1. **In light of the specific provisions of RSA 49-C, including those concerning the scope of authority of City Managers under the Council-Manager form of government, and of the relevant case law, I believe that a Court would determine that the proposed Amendment is "inconsistent with State statutes" and thus not allowed under existing law.**

In particular, the statutes, as interpreted by existing Court opinions referenced below, create a "comprehensive statutory scheme" that is subject to strict interpretation. This "scheme" provides only two options to cities in NH: either a "strong Mayor" or a "strong City Manager" form of government. In either case, the statutes vest the appointive powers over municipal officers and department heads such as a City Solicitor or City Attorney in the Mayor/City Manager as the "Chief Administrative Officer". Under the "strong City Manager" form of government, the City Council's sole appointee is the City Manager him/herself.

Thus, I believe that, if a Court were asked to rule on the validity of the proposed Amendment, the Court would hold it to be invalid and of no effect even if submitted to the voters and passed by them at a municipal election.

2. **In light of the answer to Question 1, the exact question is irrelevant; however, in light of the relevant statutes and case law and the stated concerns underlying the proposed Amendment, I make suggestions below for a potential simple amendment to the City's Administrative Code to address the crux of those concerns.**

Arguments and Authorities.

A. General Background on Municipal Charter Law.

Prior to 1966, municipal charters, including that of the City of Dover, were the product of acts of the New Hampshire Legislature (also known as "the General Court") referred to as "Special Session Laws". These Laws are designated by year of the legislation and

chapter. See, e.g., Laws 1929, ch. 329; Laws 1949, ch. 430; and Laws 1953, ch. 358. As of November 16, 1966 with the voters' ratification of Article 39, Part I of the New Hampshire Constitution ("Article 39"), the General Court could no longer modify a City's charter without a referendum by the municipal voters approving the change. Accordingly, subsequent Special Session Laws applicable to Dover's Charter were made contingent upon the adoption by the municipal voters. See, Laws 1967, ch. 558; Laws 1971, ch. 585; and Laws 1977, ch. 127.

The language of Article 39 is as follows:

> **[Changes in Town and City Charters, Referendum Required.]** No law changing the charter or form of government of a particular city or town shall be enacted by the legislature except to become effective upon the approval of the voters of such city or town upon a referendum to be provided for in said law. The legislature may by general law authorize cities and towns to adopt or amend their charters or forms of government in any way which is not in conflict with general law, provided that such charters or amendments shall become effective only upon the approval of the voters of each such city or town on a referendum.

The second sentence of Article 39 thus allows the General Court to create general statutes to govern the method and means by which a municipality's charter is adopted and/or amended. This constitutional provision resulted ultimately in the 1979 enactment of RSA 49-B (applicable to all municipalities) and later in 1991 RSA 49-C (applicable only to cities) and RSA 49-D (applicable only to towns). The key provisions of RSA 49-B and RSA 49-C are discussed in more detail below; and highlighted copies of those sections are provided with this letter.

Basically, these statutes provide two "forms of government" available to cities in New Hampshire: (1) a mayor – board of alderman/city council form, which is sometimes referred to as a "strong mayor form"; and (2) a city council/city manager form, which is sometimes referred to as a "strong city manager form". As the above-referenced Special Session Laws indicate, the City of Dover has used each of these two forms of government in alternating succession over the years.

Under each of these forms, there is a single individual charged as the "chief administrative officer" of the city to handle the day to day administrative needs of the city government and to carry out the policies enacted by the board of aldermen/city council, which serves as the legislative/governing body of the municipality. Note, however, that under these statutory provisions, there is not a "strong board/council form". As will be discussed in detail below, this is an important omission since NH municipalities "are but subdivisions of the State and have only the powers the State grants to them." Girard v. Town of Allenstown, 121 N.H. 268, 270 (1981); and Town of Hooksett v. Baines, 148 N.H. 625, 628 (2002); see also, City of Concord v. William Gardner, et al., Order of Merrimack Superior Court (Docket No. 08-E-406; Issued March 19, 2009); and Loughlin, 13 New Hampshire Practice: Local Government Law, §§61 and 63.

B. Provisions of RSA 49-B and RSA 49-C.

As noted in the text of RSA 49-B:1, the purpose of this chapter is to "implement the home rule powers recognized by [Article 39]" and to provide "uniform procedures and practices" and a "procedural framework by which a city or town may amend its actual form of government." Additionally, RSA 49-B:1 provides that "this chapter shall be strictly interpreted to allow…cities to adopt, amend or revise a municipal charter relative to their form of government so long as the resulting charter is neither in conflict with nor inconsistent with the general laws or the constitution of this state.

Additionally, RSA 49-B:2, III provides that when the municipality is a city, "the charter shall be prepared pursuant to RSA 49-C." Included within the definitions for RSA 49-B:2, IV are the following:

(a) "Amendment" means the enactment or repeal of a single section or subsection of a charter pertaining to any one subject matter, and any related section the meaning or operation of which is changed as a result of the enactment or repeal.
(b) "Elected body" means…city council in a city adopting a charter under RSA 49-C….
(c) "Governing body" means…the council in a city….
(d) "Legislative body" means a…city or town council, [and] mayor and council….
(f) "Municipal officers" means the…city council in a city….
(i) "Revision" means multiple changes in the basic form of government proposed by several enactment or repeals….

Concerning the procedures by which charter amendments are instigated, RSA 49-B:5 provides two avenues: either at the suggestion of the municipal officers or by citizen petition. Moreover, in conjunction with the definition of "amendment" cited above, RSA 49-B:5, I provides additional emphasis and clarification:

(a) Each amendment shall be limited to a single subject, but more than one section of the charter may be amended as long as it is germane to that subject.
(b) Alternative statements of a single amendment are prohibited.

On point to the discussion below concerning an alternative means to address the concerns underlying the proposed Amendment, RSA 49-B:8 provides:

> Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function granted to a municipality by the constitution or general law. No change in the composition, mode of election or terms of office of the legislative body, the mayor or the manager of any municipality may be accomplished by bylaw or ordinance.

Thus, the City is authorized to exercise its various powers through the adoption, amendment or repeal of ordinances or bylaws. However, changes to the composition, election and/or term of office of council members, the mayor and/or the city manager must be done via amendments/revisions to the charter rather than to ordinances/bylaws.

Turning to RSA 49-C:1, a purpose similar to RSA 49-B is presented:

> The purpose of this chapter shall be to implement part I, article 39 of the New Hampshire constitution enabling municipalities to draft city charters within the framework of the statute without the need for creating special charters by action of the general court.

The existing status of each city as a "body politic and corporate" is recognized and its property and obligations remain in place pursuant to the language of RSA 49-C:2

Key to the issue at hand, RSA 49-C:8 recognizes under the sub-heading "Elections" the "two forms" available to cities as discussed above:

> The governing and legislative body under the mayor-aldermen plan shall be a principal officer called the mayor and a board of aldermen; and, under the council-manager plan shall be a city council, all of whom shall be elected.

Furthermore, RSA 49-C:11 provides that under the council-manager form, the mayor shall not be full-time as to the daily administrative responsibility, and authority for city operations shall be vested in the city manager.

Additionally, RSA 49-C:15 sets forth the broad "general powers" of the city council, where applicable, with an important limitation – "[e]xcept as otherwise provide". The next sections, under the subheading of "Administrative Service", provide several key "exceptions".

First, RSA 49-C:16 mandates that:

> The charter shall specify a mayor or city manager who shall be the chief administrative officer and head of the administrative branch of the city government, supervising the administrative affairs of the city and carrying out the policies enacted by the elected body.

The remainder of this statute is tracked in Dover Charter Section C5-5.

Second, RSA 49-C:18 describes the appointive powers of the Chief Administrative Officer which is similar in text to portion of both Dover Charter Sections C5-6 and C5-7:

> Subject to the provision of the charter, the chief administrative officer shall have the power to appoint and remove all officers and employees in the administrative services of the city

In the context of the statutory scheme established by RSA 49-C as a whole, I believe that a Court would interpret the phrase "subject to the provision of the charter" to refer to which departments and officers are provided for in the charter rather than to a limitation on the Chief Administrative Officer's appointive power. However, I note that no NH Court decision has directly interpreted this section of RSA 49-C; and I have been unable to date to ascertain if any legislative history exists discussing this section.

Third, similar to Dover Charter Section C5-8, RSA 49-C:19 provides for "non-interference by the elected body":

> The elected body shall act in all matters as a body, and shall not seek individually to influence the official acts of the chief administrative officer, or any other official, or to direct or request, except in writing, the appointment of any person to, or his removal from, office; or to interfere in any way with the performance by such officers of their duties.

To add "teeth" to this statute, the legislature provided that any member of the elected body "violating the provisions of this section, as determined through procedures established in the charter, shall forfeit his office."

Fourth, RSA 49-C:20 requires that charters "shall provide for the appointment" of various municipal officers, including "a city solicitor" (an old English term for a transactional or "in-house" attorney) and "such other officers as may be necessary to administer all departments which the elected body and the charter shall establish...." Additionally, this statute states that the "powers and duties of appointed officers and heads of departments shall be those prescribed by state law, by the charter or by ordinance." Thus, while the City Council and/or the Charter may establish (or disestablish) a particular department and even circumscribe the powers and duties of an appointed officer, it appears that the appointive power to fill those necessary roles resides with the Chief Administrative Office. See also, RSA 49-C:21 and its mandate for an "Administrative Code", which itself can be subsequently modified by the elected body "upon recommendation of the chief administrative officer".

Fifth, RSA 49-C:33 provides three optional provisions which city charters may, but are not required to, include; however, none of the three concern limitations on the chief administrative officer's appointive powers.

As is so often the case concerning New Hampshire Statutes, there is very little case law giving the Court's guidance on the subject of city charter issues. In this instance, we have only two Supreme Court decisions and one recent Superior Court decision (which tangentially address the powers of a city manager but which has not been appealed up the

NH Supreme Court) which would be considered even remotely "on point". The import of each are discussed below.

In the case of Claremont v. Craigue, 135 N.H. 528 (1992), the Court interpreted the provisions of Article 39 and the predecessor version of RSA 49-B to hold that a voter approved charter amendment calling for voter approval of the City's annual budget was "inconsistent with State statutes", invalid and of no effect. At the time of this decision, the text of RSA 49-B:2 was quite different from the current text:

> 49-B:2 Scope of Authorization.
> I. Any incorporated town or city, regardless of population, shall be entitled to exercise the home rule powers recognized by article 39, part first, of the New Hampshire constitution, and implemented through this chapter, to create a charter commission and to present to its inhabitants by referendum a municipal charter, in which they may establish either a town or city government.
> II. If the proposed charter denominates the municipality as a town, the charter shall designate one of the following forms of town government:
> (a) Board of selectmen---town meeting.
> (b) Town council---town manager and mayor, with or without budgetary town meeting.
> (c) Town council---town manager or mayor, with or without budgetary town meeting.
> III. If the proposed charter denominates the municipality as a city, the charter shall designate one of the following forms of city government:
> (a) Mayor---board of aldermen or mayor---city council.
> (b) City council---city manager.
> IV. While limited to the adoption of one of the above-listed forms of city or town government, the voters of a municipality may choose a form of government which, in their opinion, specifically meets the needs of their municipality. Any charter may address such matters of local concern as number of elected officials; at-large or district representation; manner of filling vacancies; powers of nomination, appointment, and confirmation; and terms of office, so long as the provisions of the charter are not contrary to current state law.

Id., at 530-531. Note that this prior version of RSA 49-B:2, IV contains the express authority that the charter "may address...powers of nomination, appointment and confirmation" which the current version of RSA 49-B:2, IV no longer contains. See, attached. Rather, with the adoption of RSA 49-C, those appointive powers appear to reside solely with the chief administrative officer without interference from the elected body pursuant to RSA 49-C:18, :19 and :20. A Court would likely find this legislative change significant if called upon to consider the proposed Amendment.

The second Supreme Court decision of potential import is City of Manchester School District v. City of Manchester, 150 N.H. 664 (2004). In that case, the school district had brought a declaratory judgment action in 1999 seeking to confirm that it was not a city department; and the trial court held that, based on the language of the city charter, the

school district was a "substantially independent governmental entity" and not a city department. That decision was apparently not appealed by the city. Subsequently, the mayor and aldermen proposed an amendment to the city charter in an effort to make the school district a department of the city; and that charter amendment was approved by the voters of Manchester. The school district filed a second petition for declaratory judgment seeking a declaration that the charter amendment was unlawful; and the trial court agreed holding that "a specific legislative act must be in effect for a City to create a school department in derogation of general law on the issue". Id., at 665.

In so doing, the Court noted that the combined effect of RSA 49-B, 49-C and 49-D:

> constitute a detailed, comprehensive scheme for the establishment and operation of local government. RSA chapter 49-B gives municipalities explicit authority to choose a form of government. Their choices, however, are limited. RSA 49-B:2, III (2003) limits a city's choice to the forms of government outlined in RSA chapter 49-C. See RSA 49-C:8 (2003) (explaining mayor-aldermen and council-manager plans). Likewise, RSA 49-B:2, II (2003) limits a town's choice to the forms of government outlined in RSA chapter 49-D. See RSA 49-D:2, :3 (2003 & Supp. 2003) (explaining town council-town manager plan and optional types of legislative bodies). Similarly, the structure of the form of government selected is dictated by RSA chapters 49-C and 49-D.

Id., at 667. In holding that theses statutes did not allow the City to amend its charter to create a department of the independent school district previously created by the General Court, the Supreme Court summarized that:

> our cases have narrowly construed the scope of authority conferred upon municipalities by RSA chapter 49-B in light of the legislative directive that it be strictly interpreted. To construe the home rule statutes as broadly as the city suggests would run afoul of our previous decisions holding that RSA chapter 49-B only provides municipalities with the statutory framework through which they can choose and amend their form of government. See, [Town of Hooksett v.] Baines, 148 N.H. at 628. "RSA chapter 49-B in no way provides or suggests that the towns, cities or other subdivisions of this State should have the right to exercise supreme legislative authority." Id. (quotation omitted).

City of Manchester, 150 N.H. at 672. Thus, a Court could well strictly interpret these statutes to find that the proposed Amendment to Dover's Charter as something beyond the scope of the statutes' authority.

Finally, the Merrimack County Superior Court's decision in City of Concord v. William Gardner, et al., (Docket No. 08-E-406; Issued March 19, 2009) provides some insight into how a Court could interpret Dover's proposed Amendment. In that case, the City challenged the determination of various State agencies that a citizen's petitioned "tax cap" charter amendment did not violate the New Hampshire Constitution and the general laws of the State. In finding that the amendment did violate the Constitution and laws,

the Superior Court analyzed Article 39 and various provisions of RSA 49-B and 49-C. In particular, the Court pointed to the language of RSA 49-C:11 that "the authority for city operations shall be vested in the city manager" as the chief administrative officer of the city and the budgetary process of RSA 49-C:23 to find that the "legislature has created a comprehensive statutory scheme for the budget process…[and] for the general powers and duties of the City Manager." Id., p. 14. The Court further found that the proposed "tax cap" amendment went beyond the "narrow scope of the legislature's intent in RSA 49-B" since the amendment is not "amending the form of government" but "legislating, which is expressly prohibited by the statute. Id., p. 15.

In short, these cases provide the best indication of how a Court would interpret these statutes if asked to consider the validity of the proposed Amendment. The change in the text of RSA 49-B:2, IV from the time of the Claremont decision to present could be viewed as a strong indication of the Legislature's intent to clarify the location of appointive powers in the Chief Administrative Officer. The Manchester decision confirms that these statutes are to be strictly interpreted and that neither the Council nor the voters have ultimate legislative authority over the subject matters (including appointive powers) covered by these statutes. Finally, the Concord decision confirms that the statutes will be viewed as a "comprehensive statutory scheme" which means that the Legislature will be considered to have "pre-empted" the field preventing local legislative acts on the subject.

In light of this "comprehensive statutory scheme" for the powers and duties of a city manager, I believe that a Court would find that the proposed Amendment to the Dover City Charter to remove the City Manager's appointive power over the City Attorney would be "inconsistent with State statutes" and would thus be invalid and of no effect even if submitted to the voters and passed by them at a municipal election.

Accordingly, I have not addressed the actual language of the proposed Amendment in detail; although I note that the use of the phrase "General Legal Counsel" rather than "City Attorney" as used elsewhere in the Charter and Administrative Code creates unnecessary confusion[1] – as does the rather disjointed nature of the "exception" clauses used throughout the proposed Amendment.

C. Potential Amendment to Dover Administrative Code

Based upon the materials provided in the emails of August 4th and 5th, together with my conversation with Council Member Callaghan, it is my understanding that the proposed Amendment was sparked by "the perception of some" that the City Attorney "works for the City Manager" and that the City Manager would be able to use the City Attorney if there was an employment dispute between the Manager and the Council. Additionally, there is a "perception" that the organizational chart of the City has "too much" flowing through the City Manager as the "sole employee" of the Council. My hope is that my

[1] E.G.: My Firm serves as "Special Counsel", a term in the legal world meaning we are not the City's full time attorney, who in turn is referred to as "General Counsel". Is the proposed Amendment not intended to cover my Firm and others hired as "Special Counsel" to represent the City?

comments in this section will provide some guidance to the City to overcome those "perceptions" without running the risks of litigation over the proposed Amendment or its potential impacts on the existing employment agreement with Attorney Krans.[2]

First, as with any attorney in the State of New Hampshire, the City Attorney's ethical duties and obligations are governed by the New Hampshire Supreme Court Rules of Professional Conduct ("the Rules"). In particular, Rule 1.13 governs the question of "who is the client" of an attorney working for an organization such as the City:

> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

Much like when an attorney represents any corporation, the client is the organization as a whole; but instructions are usually channeled to the attorney through one person – be it the president, manager or CEO. From the lawyer's perspective, it is best to have instructions come to and from one individual rather than a group if only for the ease of transmission; but that administrative convenience does not change "who is the client". See also, Franklin v. Callum, 148 N.H. 199, 202 (2002)(generally, an attorney retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents).

Moreover, the Rules clearly govern what an attorney must do when a conflict arises between two clients or between an organization and one of its members/employees. See, Rule 1.13 (b) – (g) and Rule 1.7. In the municipal realm, attorneys representing towns and cities frequently have to refer matters to outside counsel where there is either a direct conflict (such as where the attorney has represented one land use board whose action is now being challenged by another board) or an "appearance of impropriety" due to the subject matter involved (such as this current assignment). If an employment dispute arose between the Council and the City Manager, I can well imagine that the City Attorney would have to recuse himself from representing either side in the dispute under the Rules. Since the City uses numerous "Special Counsel", including but not limited to my Firm, for various special assignments, this use of someone other than the City Attorney should not be viewed as either unusual or burdensome to the City.

As for the perception that "too much" flows through the City Manager, the City has only the two statutory options discussed at length above – either the flow is through a "strong Mayor" or through a "strong City Manager". Currently, the City Charter establishes the "strong City Manager" form of government; and it would take a substantial revision to the Charter to switch to a "strong Mayor" form. In either instance, however, there is that same hierarchical flow from all the departments and employees, through the individual

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[2] Section 3 (C) of the November 10, 2005 Contract between the City and Attorney Krans contains the phrase "or if the City abolishes the position of City Attorney or similar action, the Employee may, at his option, deem himself to have been terminated without cause...." (emphasis added). While a detailed analysis of any contractual implications of the proposed Amendment is beyond the scope of this Opinion, given the underlined phrase, there may be contractual implications for the City if the proposed Amendment were to pass.

Mayor/Manager, and to the Board of Aldermen/Council. There is just not a "middle ground" of a "strong Council" form allowed under the statutes.[3]

If the Council still believes that some written action is necessary to overcome the above-referenced "perceptions", then I believe the appropriate place for such action is in an amendment to Section 3-5 (D) of the City's Administrative Code ("the Code"). A highlighted copy of the key provisions of Section 3-5 of the Code is attached. In particular, Subsection (D)(7) could be modified via the **bold text** to read:

> Perform all other related functions as required by the City Manager**; however, in any employment dispute between the City Manager and the City Council, the City Attorney shall not represent either side**.

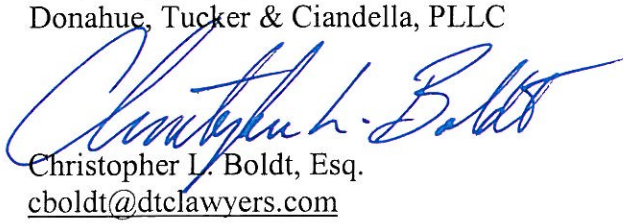
Such a modification is clean, clearly allowed under the above-referenced RSA's, and avoids both any potential challenge to the ability to enact the proposed Amendment and any potential contract dispute under the existing employment agreement with the City Attorney.

Conclusion.

In light of the "comprehensive statutory scheme" and limited case law referenced above, I believe that a Court would find the proposed Amendment would be "inconsistent with State statutes" and would thus be invalid and of no effect even if submitted to the voters and passed by them at a municipal election. Additionally, as set forth above, there is a clearer and cleaner avenue available to the City Council to address the "perceptions" that appear to form the basis of the proposed Amendment.

If you or the members of the City Council have any questions, please do not hesitate to call or email me. Additionally, if you or the Council wish me to attend any portion of the Council meeting on August 12 or a "non-meeting" with counsel before hand, please let me know that immediately.

Very truly yours,
Donahue, Tucker & Ciandella, PLLC



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[3] I am aware of the differing placement of the City Attorney under the Charters of Keene, Londonderry and Durham, but I have not been able to confirm within the time constraints allotted whether these provisions were established by Special Session Laws that predated Article 39 and RSA 49-B, 49-C and 49-D. Regardless of how these municipalities' charters were originally established, any changes to the Dover Charter would be governed by the statutes and case law referenced above.