

Dispelling the Myth of Home Rule

Local Power in Greater Boston

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1. The Legal Structure of Home Rule in Massachusetts

“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)¹ and a state statute known as the Home Rule Procedures Act.² 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 1966.³

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.”⁴ 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.⁵ 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.⁶

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.⁷ 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.”⁸

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.⁹ Home rule charters may be drafted by a locally-elected charter commission and may take effect if they win approval by a local referendum.¹⁰ 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.¹¹ More than half of home rule charters have also added recall provisions to check elected and appointed officials.¹²

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.¹³ 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.¹⁴ Most home rule charters have been adopted by towns with populations between 10,000 and 25,000.¹⁵

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.¹⁶ 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.¹⁷ 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.¹⁸ But the process is limited by the Home Rule Procedures Act to 18 months.¹⁹ 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.²⁰ The Home Rule Procedures Act thus prevents the charter proposal from being open to debate, negotiation, or amendment once it has been denied.²¹ 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 region²² 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.²³

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.²⁴ 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.²⁵ 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.²⁶ 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.²⁷

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.²⁸ “The state legislature’s authority,” the court said, “includes the power to choose to provide an appointive, rather than elective, form of municipal government.”²⁹

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.³⁰ 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.

Local Understandings of Home Rule

Our survey revealed that, in practice, the shadow of preemption (combined with the independent limits on local power that Section 7 places on many substantive areas) produces a great deal of uncertainty about a city or town's ability to exercise home rule authority. In fact, it produces so much uncertainty that many municipalities refrain from relying on their home rule authority when they want to address a matter of concern to them. It is important to recognize that even if the Home Rule Amendment can properly be interpreted to allow the municipality to take a proposed action—that is, even if there is technical compliance with the requirements of home rule—the locality has to have the confidence to rely on its home authority to take the action it envisions. Without this confidence, the home rule power will not be invoked despite the fact that it could be. Either no action will be taken or efforts will be taken to ensure that specific state statutory authority exists for the action.

Our study of proposed local actions reveals not only that the technical requirement of home rule is lacking in many areas of local concern but also that a belief in the municipality's home rule authority over policy matters is often nonexistent. Almost half of all the responses to questions regarding home rule authority, and more than 80 percent of those that felt home rule power was not important, remarked on how much the state dominated local governance and how little room was left for them to act on their own. These responses described the lack of confidence in home rule power as stemming from two distinct but related attitudes: a cautiousness in asserting independent local power resulting from a lack of clarity about what municipalities are authorized to do and a firm belief that municipalities lack the power to act in most areas in the absence of express state authorization to do so.

The cautiousness in asserting home rule stems from the pervasive ambiguity regarding the meaning of the express prohibitions contained in the Home Rule Amendment and the scope of state legislative preemption. Municipalities often want to pass local laws that may or may not conflict with state statutes. They might want to impose sanctions on a particular activity stricter than the state imposes or regulate a subject matter in a different way. That was the case when one town unsuccessfully sought to regulate the use of pesticides when not used for agricultural or domestic purposes. Even though the town bylaw would not have permitted a use of pesticides contrary to the Massachusetts Pesticide Control Act, the question remained whether localities were impliedly barred from prohibiting the use of pesticides allowed by the state act. In this instance, the town went ahead and enacted the bylaw, but the Supreme Judicial Court concluded that the Pesticide Control Act preempted the local action, albeit only by implication.³¹ Given this kind of judicial decision and the fact that the state has extensive regulations dealing with almost all aspects of local governance, it is difficult for municipalities to enact anything without questioning whether they

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are infringing on state policies. Court decisions dealing with preemption generate further confusion because they often rely on judicial interpretations of what the state intended to do in enacting the legislation in question—an interpretation that is hard to predict in advance.

An official from Duxbury commented on the general confusion regarding home rule authority: “I don’t think most people totally understand what that authority is or what that power may be, real or perceived.” Town officials of Foxborough named state preemption as one of the dominant roadblocks inhibiting their ability to take action because it is so difficult to determine beforehand what has not been preempted by state statute. When one town counsel was asked whether she ever advised town administrators to abandon a course of action because it contravened a state statute, she answered that it “was not at all uncommon” for her to do so. “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.” She added: “You can almost always trace back a connection to state statutes. If the city council asks my office, we want to pass this ordinance on x, is that all right? We have to look and see if there’s state law on that that precludes us from doing anything, certain things, or are we left on our own. They trumpet the home rule idea and you would think that means you can do whatever you like. Far from it. The first inquiry has to be, what’s already there and how much does it confine us.”

To emphasize the degree to which state presence is pervasive, a Gloucester official said: “pooper-scooper laws are also big—that’s an area where municipalities have complete authority. But how important is that?” Comments from a town official from Sherborn cast doubt on the notion that even this area is free of state interference. She suggested that it was difficult for the town to address local issues such as “dog complaints” without consulting with the state because penalties and hearings are heavily regulated by the state. Even town officials who felt home rule established a presumption in favor of local power noted the prevalence and malleability of state preemption. A Sherborn official defended the importance of home rule but commented on how difficult it is to use those powers confidently because of the prevalence of state preemption.

As a result of this ambiguity, localities, whether or not they think they may have power to take a particular action, often file a home rule petition seeking state legislative permission to act—unless, that is, they abandon their intended course of action altogether. An example comes from the town of Arlington. The town wanted to establish a bylaw that would protect certain historic buildings by placing them into a “special places” category. But Arlington did not want to rely on the specific statutes that might have given them the power to do so. It did not want to establish a separate historic district pursuant to its powers delegated by chapter 40C³² because that would require establishing several districts, each of which would encompass only one building. For the same reason it did not

want to establish special zones pursuant to its zoning powers under chapter 40A.³³ Although neither of these statutes expressly prevented the town from acting on its own in the manner it envisioned, fears that a court would hold that its bylaw frustrated these existing state statutes led the town to file a home rule petition seeking legislative authorization of its action rather than going ahead with confidence in its home rule authority. By offering an alternate, but safer, path, the ability to obtain enabling legislation from the state thus discourages municipalities from using their home rule authority.

One legal counsel for towns in the Boston area offered another example of the practice. He noted that towns routinely seek special legislative permission whenever they enter into a long-term lease because “there’s some reference to time limits in the statutes,” even though, in his view, most long-term leases would not be covered by those statutes. Some of the impetus for this caution, he and other respondents noted, may come from the private parties with whom the municipality is dealing. They may be fearful of entering into a loan agreement or a land deal with a municipality without complete assurance about the locality’s authority—assurance that can best be secured through special state legislation.

The internalization of this kind of cautiousness structures the second category of municipal response to the grant of home rule power: communities come to believe that the grant of home rule authority in fact did not turn over any real power to them. To some extent, this sentiment is unwarranted as a legal matter. The legal counsel for two municipalities in the region explained that “there’s still a great tendency on the part of municipalities to assume that they need legislative authority to do things that they probably have the right to do. [There is a] huge number of home rule petitions filed in the legislature, most of which are unnecessary.” Nevertheless, the sense that localities lack legal authority clearly shapes how municipal officials conceive of their legal options. One town administrator told us that towns “do not have home rule powers, the state controls everything that we do.” Another felt that municipalities have home rule in name only. From his own experience and his comparison with other home rule states, he found the traditional concept of home rule flipped in Massachusetts: “If it doesn’t specifically say that you can do it, you can’t.” A third echoed the sentiment by saying: “We interpret [the list of what municipalities can do] as being exhaustive, and we don’t do things that aren’t on the list.” A respondent from Holliston summed up this attitude: “Home Rule is very limited in Massachusetts; the laws define what local governments can and can’t do, not like in other states . . . where local power is the default. In Massachusetts, the state sets the rules and guidelines; it’s a very controlled atmosphere.”

It is important to note that a number of respondents had the opposite view of local home rule authority. They described their home rule experience according to its traditional definition—as a municipality’s power to act whenever the state has not specifically prohibited it from doing so. However, the frequency of

this answer was low—even among the majority of respondents who concluded that home rule was, as an overall matter, strong in the state. The officials that expressed this more positive view of their home rule powers seemed confident that the general grant of home rule authority enabled them to proceed as they saw fit. For example, an official from Bedford noted that, even though there are instances where the state intruded, for the most part a town could proceed “without worrying about what the state says.” A respondent from Littleton stated that home rule was very important because it allowed the town to adopt bylaws, and not just zoning bylaws, to address specific problems rather than relying on the state. An official from Boxborough agreed, calling the authority to adopt by-laws part of what “allows us to avoid a cookie-cutter approach to problems.” An administrator from Nahant further supported municipal independence by stating: “We don’t usually go to the state for anything.” According to him, Nahant’s town meetings and its home rule powers are capable of handling most local issues. As a town official from Hamilton explained: “We have found the basic structure of local government created by the underlying provisions of the Massachusetts General Laws to work well without frequent forays to the legislature to seek additional power. It may be that our Board of Selectmen interprets things so that they can solve local problems with the power they have.”

Some of the municipalities that felt they were able to act independently of state supervision said so, however, not out of confidence in their home rule authority but almost in defiance of state power. One municipal administrator, who wished to remain anonymous, stated that he was able to accomplish all of his municipal objectives not by invoking home rule authority but by taking no notice of potential state interference. Another said that most of the time they “ignore the state and try to maximize the interest of the community.” It is, then, not the home rule authority that instills these officials with the feeling that they can act. On most issues, they feel the state will never check and never know.

HOME RULE PETITION AUTHORITY

One of the traditional reasons given for granting home rule power is to reduce local lawmaking by the state legislature. Perhaps because the general grant of home rule power is perceived to be so narrow, however, the home rule petition process—the process by which individual localities may petition the state for legislation affecting only their locality—was for a large number of respondents the essence of home rule in Massachusetts. As a city official from Medford put it, in the absence of some express state statutory authority: “You don’t have a lot of ways to go without petitions.” It is important to recognize that the term “home rule” has a very different meaning in the home rule petition process than it does for the general grant of home rule authority. The general grant of home rule

authority is designed to allow a municipality to make a decision on its own. The home rule petition process, by contrast, is designed to empower the state legislature to authorize a municipality to act. The home rule petition process, in other words, is not a way of empowering the locality to determine its policies. It puts the critical decision making power in the hands of the state.

Indeed, the home rule petition process, established by section 8 of the Home Rule Amendment, empowers the state to act in a way it could not otherwise act. The state is not generally allowed to pass legislation that governs only one locality.³⁴ Even when the legislature tries to pass a law that affects a general category of municipalities, the state action may be considered unlawful if the category actually consists of only one locality.³⁵ This ban on special legislation is intended to preserve local control by protecting cities from unwanted state legislative interference in local affairs. The home rule petition process grants an exception to this prohibition if the special legislation meets certain conditions. One of these conditions is that the locality must file a home rule petition asking for the special legislation from the state. The idea behind this exception is that, because the special state legislation is requested by the locality, it is likely to take the form of a delegation of power to the locality rather than an unwanted intrusion into local concerns.

Under the home rule petition process, then, the locality seeks out the special legislation, but the power the municipality exercises, if the petition is granted, comes from the state. If the state denies the petition, the municipality has no power to act. Equally importantly, the locality only obtains the power to act in the precise manner set forth in the special legislation. Any deviation from the precise terms would require the locality to return to the legislature for new special legislation—unless they were willing to assert independent home rule authority pursuant to the general grant of power the Home Rule Amendment confers. Of course, were they to follow that route, they would run the risk that the original special legislation might be deemed to preempt such an assertion of the home rule power.

The Importance of the Home Rule Petition Process

In practice, reliance on the home rule petition process is extensive. Because it applies only to one locality, this kind of legislation is called “special legislation.” But there is nothing special about it. Quite the contrary. Special legislation consistently makes up more than 50 percent of all laws passed by the state each year. Many more petitions are filed that do not become law. Almost every municipality we interviewed reported having filed a home rule petition in recent years. For many municipalities in the Boston region, the home rule petition is the central focus of their exercise of their home rule power and the primary, if not the only, avenue for some form of local empowerment apart from more general state

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legislative authorizations. In the municipalities that believed that there is no genuine grant of home rule authority, the home rule petition is treated as the basic tool of empowerment for local initiatives. As an official from Franklin put it: “We can’t do anything outside the laws of the Commonwealth . . . without their permission. That’s why there’s a zillion home rule petitions all the time.” In municipalities that believed that they had the ability to act when no express state preemption exists, the home rule petition frequently is relied on as a guarantee that their legal authority will not be subject to challenge. An official from Everett explained: “Even if there is the slightest gray area, we do go through the home rule petition process.”

Reflecting the importance of the home rule petition process to localities, numerous municipal officials in our interviews, when asked about home rule, immediately identified the term “home rule” with the petition process. These officials understood home rule as providing a direct avenue through which localities can apply for state laws that empower a specific city or town. The widespread identification of “home rule” with the home rule petition process is both ironic and troubling. It is ironic because, even prior to the Home Rule Amendment, localities had the right to seek authorizing legislation from the state legislature. The state constitutional grant of home rule did not confer this power. It is troubling because it testifies to the sentiment expressed by so many of the officials we interviewed that the general grant of the home rule power conferred by the Home Rule Amendment offers much less than it might seem. The home rule petition process is so central, it appears, because many municipal officials believe there are few alternative routes to securing local power tailored to their needs.

Because the home rule petition is the centerpiece of the Home Rule Amendment for most of the municipalities we interviewed, it is also the part of the Home Rule Amendment that invoked the widest range of reactions. This difference of opinion results from distinctive qualities of the petition process itself. For some, the process seems so easy that it has become an integral and conventional part of municipal governance. Officials from Medway, Everett and Arlington noted that their town had never had a problem getting a petition granted. An Arlington official said that the town regularly files a petition to ensure that they have the appropriate legal authority to undertake local initiatives. A respondent from Malden even joked by saying that, with all the petitions the city was filing, it felt like the state legislature was working for them. For many localities, the home rule petition process is thus perceived less as an indication of the state’s control over their activities than as a routine procedure for conducting their business. To quote an official from Westwood, the process is “a way of getting the issue on the table at the state level—to get a homegrown idea into the state legislature.”

Complaints About the Home Rule Petition Process

Important as the home rule petition process is to many municipalities, many of the officials we spoke with described it as anything but a sure thing or a useful source of local empowerment. A clear majority of respondents reported that home rule petitions are not always granted. Many of the town and city officials with whom we spoke stated that the process is so difficult that they have often modified their intended course of conduct or dropped their plans altogether in order to avoid having to go through it. In line with these sentiments, a number of officials we surveyed were quick to point to particularly frustrating episodes. An official from Acton told us how the town had wanted to change the way that it borrowed money to take advantage of falling interest rates. Doubtful that it possessed the home rule authority to make such a change—both because Section 7 of the Home Rule Amendment excludes borrowing from the general grant of home rule authority and because such a change might be preempted by state statutes—the town sought a home rule petition. “The [Joint] Committee loved our idea and said they weren’t going to grant our town-specific petition because they wanted to change the rules for all towns! But guess what happened after that? They never changed the rule” An official from Concord reported a similarly frustrating experience. “We proposed a simple [land] swap . . . [to] get some land next to the pond so we could build a water treatment facility. Unfortunately, state law says the legislature must approve transactions dealing with the water supply. So we had to submit a petition for the swap. Would you believe that the legislature still hasn’t approved it after eight years? Even though both parties agree that it’s a good deal.”

Given the risk that, as an official from Carlisle put it, petitions “will get put on the back burner because they don’t rank very high in [the legislature’s] overall priorities,” municipalities must rely heavily on their state representatives to push their particular petition through. It is not enough that the locality has approved the petition. Without a representative on the floor supporting the petition, petitions often expire without any action being taken. Gaining the support of the state representative elected to represent residents in the locality is often more difficult than one might think. An official from Concord complained that state representatives do not fight for requests coming out of their home areas because they fear political reprisal or because political priorities on the state level deviate from what is requested on the local level. Some municipalities that file many home rule petitions (Malden being one) pointed out that state representatives can be frustrated when they are asked to advocate too many home rule petitions. State representatives are required to expend significant effort to get a petition out of a committee and passed by the state legislature. This effort can strain their resources. The nature of the relationship between the locality and the state representative can also affect the efforts of local home rule petitions. Some

municipal officials reported having a difficult time getting petitions passed because of grudges between their representative and other representatives. Bypassing these political roadblocks requires energy and imagination.

Even if the local representative supports the petition, it may attract opposition from other legislators. One suburban town that wanted to establish a revolving loan fund to subsidize affordable housing—and feared that it lacked authority to do so—sought a home rule petition to secure the necessary power. The official we interviewed said that the “this petition has been tied up in committee for over a year because a legislator thinks that it’s a backdoor attempt to avoid Proposition 2 1/2.” Other local administrators expressed similar frustration with what they characterized as the influence of special interest lobbying on the state legislature. They pointed out that controversial local ordinances and bylaws, such as affordable housing initiatives and municipal employment law modifications, often attract strong challenges from private interest organizations. These challenges make a local petition politically charged and, thereby, dissuade state representatives from even addressing it. They also force localities to allocate time and resources to engage in their own lobbying efforts in order to get the state legislature to act on their petition. Municipalities without the endurance or desire to embroil themselves in such a political fight often just stay away from controversial initiatives in the first place.

There is another problem as well. Home rule petitions sometimes encounter potential difficulties at the state level not because of the substance of the particular petition but because granting it might generate a “slippery slope” of undesirable future consequences. Some respondents stated that the legislature is wary of granting petitions on issues that the state guards closely, such as revenue and finance, due to fears that granting them would encourage other municipalities to ask for the same. State and local officials are also guarded about petitions that might threaten legal or political challenges to the status quo. An official from Boxborough mentioned that, because home rule petitions often seek to address unfairness in the status quo, they draw attention to that unfairness. Drawing attention to these issues, however, could mean potentially expensive lawsuits. Therefore municipal and state governments may steer clear of certain kinds of petitions for fear of exposing the unfairness of the status quo, even when it means preserving that unfairness.

Procedural customs, most of which, while not required by statute, have become standard practice, also shape the home rule petition process. Respondents reported that the state legislature usually will not consider a petition if the membership of the municipal legislature and the state legislature changes between the time the petition was filed and the time the petition is being voted on. If the composition of the state legislature or municipal legislature changes, the petition is usually considered no longer viable. The locality therefore

needs to refile the petition. This means, for many localities, that there is only a small window of time when petitions can be submitted for consideration before the next local election. Moreover, although the Home Rule Amendment does not require anything like local unanimity to put forth a petition, a number of respondents stated that the state legislature was unlikely to approve petitions if there was evidence of a substantial minority within the locality that was opposed to it. “If there is a sizeable opposition—say from a neighborhood group—they make an end-run and brow beat the legislature not to pass it,” a town attorney reported. “This happened to us with a wireless telecommunications plan. We wanted to relocate an easement, but the opposition lobbied against it and we eventually withdrew.”

As this last example illustrates, municipal efforts to support a petition do not end after the home rule petition is filed. The locality often needs to assume the role of active lobbyist in order to encourage the state to consider the petition and to combat opposition that may arise. This practice of post-petition lobbying by municipalities has become such a common tradition that, according to local officials we spoke with, many state officials will assume that the locality does not truly support a petition if it is not constantly followed up. As a result, even the kinds of petitions that are rarely denied may expire in the state legislature without any action being taken on them.

Finally, many petitions are granted on the condition that the proposed action also be authorized by a local referendum.³⁶ This requirement delays the desired results of the petition. Some localities complained that, with the petition process and the necessary referendum, it can take up to three years before a proposal actually becomes approved. Such a delay complicates large development projects involving private developers, especially those projects that require multiple petitions.

From the perspective of many municipalities, most of the difficulties that plague the home rule petition process are the consequence of actions of other interested parties or the state legislature. The difficulties are perceived to be such an integral part of the process that it makes them cautious about submitting a petition. As an official from Boxborough put it, the petition process can be “intimidat[ing].” Or, as another explained: “It’s a god awful process.” As a result, municipal officials sometimes use their understanding of the hazards of the process to reject potentially problematic local petitions before they are considered by the municipality, much less proposed to the state. In the City of Boston, which operates under a generous and powerful special act charter, the mayor sometimes uses his veto power to reject problematic proposals that originate from the city council when he feels that they will not be approved by the state if the city goes forward with the petition. An administrator from Cambridge similarly explained that the city would attempt to determine whether its petition would have any

chance of succeeding before pursuing it: “In every home rule petition, the Council considers the likelihood of passage—just the real politics of the situation. . . . You do not want to be sending up petitions just to have them fail.”

This hesitation to use the process has been ingrained into the system. At the same time, municipalities have internalized the home rule petition as an insurance policy, something they rely on whether they need it or not. Arlington is only one of the many towns that have decided to secure special legislation from the state with a petition instead of risking the possibility of being overturned. In this respect, the home rule petition process may be leading many municipalities to rely too much on the state legislature as opposed to their own independent powers of home rule, even as it fails to provide a ready means of empowering localities to do things that the general grant of home rule power fails to authorize them to do.

HOME RULE IDEOLOGY

Many of the municipal officials to whom we spoke referred to home rule not in terms of the technical ingredients of the Home Rule Amendment—the home rule charter authority, the general grant of home rule authority, and the home rule petition authority—but as an ideological position connected to community identity and self-determination. A Lincoln official said that “home rule power allows the town to pursue its particular vision.” Another town official stated that “implicit in home rule is [a] local community’s character and identity.” A spokesman from Pembroke talked about the sense of community that home rule brings: “When you have home rule, it gives the community a sense of ownership . . . that they control things within their own community.” An official from Gloucester echoed this sentiment. Although he began his answer admitting that he did not know what home rule really meant, he went on to say that if home rule meant internal accountability and having a community “stake in shaping [its] future,” then home rule is important. For these localities, the ideology associated with home rule in the state is just as important, if not more important, than the actual legal powers that home rule provides.

Indeed, this sentiment seemed to underlie the responses of a number of local officials who did not identify the general grant of home rule authority as being of great importance but nonetheless regarded home rule as strong in Massachusetts. The ideological conception of home rule has an existence detached from the actual legal manifestation of home rule supported by the Home Rule Amendment. Very often municipalities that praised and defended home rule as an ideological belief were the very ones that were critical of the Home Rule Amendment for not giving municipalities any home rule. A respondent from Peabody stated that he was for home rule and defined it as the cities’ right to determine their own destiny. Yet he was highly critical of the home rule structure, saying that there was only home rule up to a point because “big

brother [the state] is always looking over [their] shoulders.” An official from Milton expressed similar sentiments. He felt that municipalities had home rule in name only—that he had to ask the state for permission to do anything. Nonetheless, he proclaimed that municipalities would resist regionalism because “no town would want to give up their own sovereignty.” He thus combined references to “sovereignty” with a belief that the town had no inherent authority to do anything without permission. Some municipal officials put the matter somewhat differently. They said that their constituents believed in home rule—that is, that they can control their own destinies—but that the truth was that they did not know how home rule worked. Their strong ideological faith in home rule was premised on a mistaken understanding of the powers that home rule provided cities and towns. As an official from Milford put it: “Do we have strong home rule? No, I don’t think so! Whoever says we’re particularly strong, I don’t think they understand the concept.”

Some respondents who emphasized the strength of home rule ideology in Massachusetts linked it to a pre-Revolutionary War sensibility that they associated with the Bay State. Explaining that “there’s a strong spirit of self-determination” among the state’s localities and that “they think of themselves as sovereign communities,” a respondent from Littleton concluded that this sensibility “dates back to colonial times.” A spokesman from Acton similarly noted a “fierce belief that you should be self-contained.” He then asked, “Why is there this belief in self-containment?” The answer, he suggested, was that “it comes from the history of how towns used to form in Massachusetts. It used to be that as soon as you could afford your own church and preacher, you became a town. Well, that history created a huge emphasis on self-reliance.” As an official from Ashland put it, home rule “is ingrained from how we started, the towns meetings of the Pilgrims.” Interestingly, one official we spoke with conceived of the state’s history quite differently. Arguing that in practice “towns need permission to do anything” and that “they lack the freedom to operate within broad parameters,” an official from Holliston concluded that this situation was “consistent with a different philosophy that’s prevalent in New England—that the state should keep an eye on local government and prevent too rapid change. The town meeting tradition has the backdrop of the state having the final say-so.”

The ideological impressions of home rule’s importance were not entirely positive though they were strongly felt. Municipalities sometimes complained about the parochial attitude that the ideology of home rule fosters. A Wakefield official commented on the hostility and suspicion towards one another caused by home rule parochialism. A Concord official similarly noted the “parochial outlook” resulting from a strong ideological home rule tradition. And another group of municipalities claimed that the lack of actual home rule power undermined the idea that Massachusetts had a strong home rule tradition even in the ideological sense.

These seemingly dichotomous views of home rule—in which municipal officials perceive it to be non-existent yet fundamental, important but problematic—are not necessarily contradictory. Instead, they reveal the complexity of home rule in the Boston region. Beneath the features of the Home Rule Amendment lies an alternate ideological image of home rule that mirrors the Amendment but has a life of its own. To examine what home rule in all its complexity means, we turn from the general provisions of state law that purport to secure home rule to an examination of specific areas of municipal and regional concern. In this way, we can begin to see home rule in action and to get a feel for the kinds of powers that local officials believe they possess and those they believe the state prevents them from asserting. Home rule, in all its various forms, is inscribed in a complex web of state statutes, legal regulations, historical traditions, and public expectations. One can understand the true breadth of state-imposed limitations on home rule only by examining how the powers conferred by the Home Rule Amendment operate in conjunction with these other ingredients of the legal structure. The next three chapters investigate this framework for municipal governance by discussing three traditionally established aspects of municipal governance: revenue and expenditures, land use, and education. This list is not designed to be exhaustive. Our interviews revealed, however, that municipal concerns regarding home rule consistently related to these three issues. In the last section of this report—where we discuss the relationship between home rule and regionalism in the Boston metropolitan area—we will return to the puzzle presented by the combination of ideological belief in home rule's existence, the recognition of the limits of municipal power, and the concerns about parochialism.