THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF DECISION

File Copy

Case Name: **Daniel Moriarty v Jim Donchess, Mayor, City of Nashua, et al**
Case Number: **226-2017-CV-00221** ***226-2017-CV-00160***

Enclosed please find a copy of the court's order of February 12, 2018 relative to:

ORDER ON STANDING

February 13, 2018

Marshall A. Buttrick
Clerk of Court

(293)

C: Seth J. Hipple, ESQ; Steven A. Bolton, ESQ; Fred S Teeboom

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 226-2017-CV-00160
No. 226-2017-CV-00221

Fred S. Teeboom

v.

City of Nashua

&

Daniel Moriarty

v.

Jim Donchess, Mayor of the City of Nashua, and the City of Nashua

ORDER ON STANDING

This consolidated action centers around the proper interpretation and application of a budget spending cap adopted by the voters of the City of Nashua (the "City"). See Section 56-c of the City Charter (the "Charter"). The plaintiffs, Fred S. Teeboom and Daniel Moriarty,[1] allege that the City and/or Jim Donchess, the City's Mayor (the "Mayor") (collectively, the "defendants") have violated the spending cap by exempting certain funds from the limits set by the spending cap, and failing to account for that exemption when calculating the maximum permissible budget for the 2018 fiscal year.

[1] Teeboom and Moriarity (collectively, the "plaintiffs") filed their cases separately. Teeboom's April 12, 2017 Complaint sought "declaratory relief, injunctive relief or, in the alternative, a Writ of Mandamus for the City . . . to fully and faithfully comply with . . . [C]ity [C]harter par[agraph] 56-c when preparing and adopting its annual budget. . . ." See Court Index # 1 in case number 226-2017-CV-00160 (hereinafter "Teeboom's Compl.") at 4. Moriarty's May 9, 2017 Petition sought essentially the same relief. See Court Index # 1 in case number 226-2017-CV-00221 (hereinafter "Moriarty's Pet.") at 11 (requesting that the Court: order the defendants to propose a new budget . . . that complies with the spending cap; declare that Ordinance O-17-031 violates the Charter; reform Ordinance O-17-031 to comply with the Charter; and/or enjoin the defendants from acting pursuant to Ordinance O-17-031). The Court consolidated the cases due to the similarity of their issues on June 9, 2017. See Court Index # 14 in case number 226-2017-CV-00221.

Because the plaintiffs brought suit before the City had officially adopted a budget for the 2018 fiscal year, the matter was stayed "until the City t[ook] action on the budget." See Court Index # 9 in case number 226-2017-CV-00160 at 7 (June 9, 2017 Order). After the City's Board of Aldermen (the "BOA") adopted the Mayor's proposed budget for the 2018 fiscal year by a vote of 10 to 5, the defendants argued that the plaintiffs' claims should be dismissed as moot, opining that even if the proposed budget exceeded the spending cap, the Charter permits the City to exceed the spending cap with a supermajority vote of the BOA. See Court Index # 17 in case number 226-2017-CV-00160 (Defs.' Obj. Pls.' Mot. For Relief From Stay), ¶ 3 (contending that "[t]he [C]harter provides that the budget may exceed the 'cap' when 10 aldermen vote to exclude all or part of the expense for debt service or capital improvements"); see also id. at Court Index # 21 (August 28, 2017 Order denying the defendants' motion to dismiss because several "legal issues remain[ed] regardless of the outcome of the June 13, 2017 vote" and thus the Court could not "conclude" that the plaintiffs' claims were "academic or dead" (citation omitted)). Because the matter had become ripe for adjudication, the Court scheduled a hearing on the merits for October 23, 2017.

During the October 23, 2017 merits hearing, the Court heard testimony from Teeboom, the Mayor, and City Treasurer/Tax Collector David Fredette. In addition, the defendants and Moriarty submitted proposed findings of fact and rulings of law. See Court Index ## 24–25 in case number 226-2017-CV-00160.[2] In their submission, the

[2] The Court's findings and rulings are in narrative form in this Order. Therefore, any requests of the parties for findings and rulings are granted, denied, or determined to be unnecessary, consistent with the following narrative. See Geiss v. Bourassa, 140 N.H. 629, 632–33 (1996); Howard v. Howard, 129 N.H.

defendants questioned (with little supporting legal argument) whether the plaintiffs have standing to bring this action. See Defs.' Req. Findings and Rulings ¶¶ 40–41. In response, the Court ordered "the parties to submit additional briefing . . . on the issue of standing . . . ." See Court Index # 26 in case number 226-2017-CV-00160; see also Hughes v. N.H. Div. of Aeronautics, 152 N.H. 30, 35 (2005) ("[A] party's standing to bring suit is a question of subject matter jurisdiction, which may be addressed at any time."). Consistent with the Court's instructions, the parties submitted memoranda of law addressing that issue on January 19, 2018. See Court Index ## 27–29 in case number 226-2017-CV-00160. After considering the evidence (including testimony) and arguments presented during the October 23, 2017 hearing, the arguments presented in the parties' post-hearing memoranda, and the applicable law, the Court finds and rules as follows.

Background

The spending cap was added to the Charter by municipal election in November of 1993. As a result, the BOA first applied the spending cap to the budget for the 1995 fiscal year (and has continued to apply it to every subsequent fiscal year). In its current form, Charter section 56-c provides:

> Recognizing that final tax rates for the City . . . are set by the New Hampshire Department of Revenue Administration pursuant to RSA 21-J:35(1), the [M]ayor, the [BOA], and all departments in the City . . . including the [M]ayor's office, aldermanic office, legal department, administrative services division, community services division, community development division, school department, public works division, fire department, police department, public libraries, parking garages and

---

657, 659 (1987).

> cemeteries shall prepare their annual budget proposals and the [BOA] shall act upon such proposals in accordance with the mandates in this paragraph.
>
> In establishing a combined annual municipal budget [("CAMB")] for the next fiscal year, the [M]ayor and [BOA] shall consider total expenditures not to exceed an amount equal to the [CAMB] of the current fiscal year, increased by a factor equal to the average of the changes in the Gross Domestic Product Implicit Price Deflator (IPD) for State and Local Government Consumption Expenditures and Gross Investment of the three (3) calendar years immediately preceding budget adoption as published by the Bureau of Economic Analysis.
>
> This provision shall not prevent the [M]ayor and [BOA] from establishing a [CAMB] below this limit.
>
> This provision shall not prevent the [M]ayor and the [BOA] from appropriately funding any programs or accounts mandated to be paid from municipal funds by state and federal law.

Pls.' Ex. 1. Section 56-d of the Charter outlines "exceptions" to the spending cap:

> The total or any part of principal and interest payments of any municipal bond, whether established for school or municipal purposes, may be exempted from the limitation defined in paragraph 56-c upon an affirmative vote of at least ten (10) aldermen. This decision shall be made annually.
>
> In addition, capital expenditures deemed necessary by the mayor and the board of aldermen, subject to recommendation by the capital improvements committee (ref. Paragraph 77-a of the City Charter) may similarly be exempted from this limitation upon an affirmative vote of at least ten (10) aldermen.

Id.

Since the City first adopted the spending cap, the BOA has adopted several ordinances which impacted the spending cap. See Pls.' Ex. 4; Defs.' Ex. A. During the same period of time, other cities and towns drafted and/or adopted similar budgetary caps. In 2009, several citizens of the City of Manchester "challeng[ed] the legality of a

proposed amendment to the City of Manchester's charter" which, if adopted, would have imposed a similar spending cap on the City of Manchester's annual budget. See City of Manchester v. Sec'y of State, 161 N.H. 127, 128 (2010). The proposed spending cap included a provision which required "a two-thirds majority" vote by Manchester's Board of Aldermen in order "to override the cap." Id. at 133. After the trial court "transferred" several "questions of law" to the New Hampshire Supreme Court, the court "ordered supplemental briefing to address the added question" of "[w]hether the two-thirds override provision of the proposed charter amendment conflicts with RSA 49-C:12, I." Id. at 129; see also RSA 49-C:12, I ("The elected body shall establish its own rules, and a majority shall constitute a quorum for the transaction of the business of the board . . . In cases where the mayor is directly elected, the mayor shall not be counted to make a quorum of such board, nor vote as a member of the board except in case of equal division.") After reviewing the existing statutory scheme, the court "interpreted RSA 49-C:12, I to require a simple majority vote unless otherwise specified by statute." City of Manchester, 161 N.H. at 133–34. Accordingly, the court "conclude[d] that the proposed charter amendment [wa]s inconsistent with state law" because it "constrain[ed] the board to either abide by the spending cap or act by a two-thirds majority to override it," in direct conflict "with the board's authority to adopt a budget, see RSA 49-C:23, by the vote of a simple majority, see RSA 49-C:12, I." Id. at 134.

In response to this ruling, each chamber of the New Hampshire Legislature drafted a bill aimed at authorizing New Hampshire municipalities to adopt spending and/or tax caps. See N.H.H.R. Bill 341 (2011) (hereinafter "HB 341"); N.H.S. Bill 2

(2011) (hereinafter "SB 2").[3] In its amended form, HB 341 included, inter alia, the following provisions:

> 49-C:23-a Limitations on the Growth of Budgets and Taxes. A city charter may provide for limitations on the growth of one or more of the following: the annual city budget, the annual school budget if the city and the school district have the same legislative body, or taxes assessed by the city. Such charter may exclude certain expenditures or appropriations from limitations imposed by the charter. Any charter adopting such limitations shall authorize the elected body to override any such limitation by a 2/3 vote of all members of the elected body or a 2/3 vote of all members of the elected body present and voting.
>
> . . .
>
> 4 Applicability. Any municipal charter provision adopted, amended, or revised prior to the effective date of this act which authorizes a 2/3 vote of the elected body to override any provision limiting the growth of budgets or taxes shall remain in effect on the effective date of this act.

See N.H.H.R. Jour., March 16, 2011, pp. 912–13. In delivering the recommendation of the House Committee on Municipal and County Government (the "House CMCG") that HB 341, as amended, "ought to pass," Representative Betsey L. Patten explained, "[s]ince there have been lawsuits prohibiting the tax caps, this bill is required to declare local spending caps are lawful." Id.

While considering HB 341, the legislature was also considering SB 2, and weighing the relative merits of the two bills. As of March of 2011, SB 2 would have amended RSA 49-B:13 ("Separability; Preservation") as follows (adding the bolded, italicized language, and removing the language that is struck through):

---

[3] As set forth below, this legislative history provides insight into the legislature's intent when passing SB 2. Because the Court must resolve an apparent conflict between the statutory changes resulting from SB 2 (specifically, the addition of paragraph II-a to RSA 49-B:13) and the New Hampshire Supreme Court's holding in City of Manchester, 161 N.H. at 133–34, the Court looks to the legislative history of SB 2 to aid in its analysis. Cf. Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015) ("In the event that the statutory language is ambiguous," courts "resolve the ambiguity by determining the legislature's intent in light of legislative history.").

> II. All town and city charters which have been adopted, revised or amended; all charter commissions which have been properly established and elected; all elections properly held; and actions properly taken pursuant to such charters are hereby ***endorsed, ratified, validated, and*** legalized, [~~provided that such charters at the time of their adoption were not contrary to the general laws and constitution of the state~~] ***and are fully enforceable***.

See Amendment to SB 2, #2011-1149s (March 22, 2011). After SB 2 was sent over for consideration by the House of Representatives, the House CMCG recommended that an amended version of SB 2 "ought to pass." The recommended amendment eliminated the proposed changes to paragraph II of RSA 49-B:13 in exchange for the addition of the following new paragraph:

> ***II-a. All town or city charters which have been adopted, revised, or amended to include a tax or spending cap of any kind and all charter commissions which have been properly established and elected; all elections properly held; and all actions properly taken related to the tax or spending cap in such charters are hereby endorsed, ratified, validated, and legalized and are fully enforceable, without regard to whether such entities or actions were authorized by law at the time they were established or taken.***

See Laws 2011, 234:7 (emphasis in original to indicate that it is an addition to the existing law). In delivering the House CMCG's recommendation to the full House of Representatives, Representative Franklin W. Sterling explained:

> The purpose and intent of SB 2 is to provide a process by which any municipality may adopt a tax/spending cap. The bill amends RSA 49-C and RSA 49-D so that cities or towns that are governed by a town or city council can amend their charters to include spending caps. The legislation provides a clear process by which a charter can be amended and it provides the language necessary to comply with [the] recent supreme court ruling. Further SB 2 includes amendments to RSA 32 that contain a process and rules governing the adoption of a tax cap by municipalities that have a traditional town meeting form of government and those towns which have adopted the official ballot form of government.

Also included in the legislation is a provision to ratify and declare valid other spending caps adopted prior to the enactment of this bill.

See N.H.H.R. Jour., June 1, 2011, pp. 1649–54 (emphasis added). This amended version of SB 2, which added paragraph II-a to RSA 49-B:13, was ultimately passed, while HB 341 was "laid on the table." See N.H.S. Jour., September 7, 2011, pp. 747–49. The statutory changes enumerated in SB 2 became effective on July 5, 2011.

As enacted, SB 2 also included several other amendments to RSA chapter 49-C. One such change was the addition of paragraph III to RSA 49-C:12, which provides:

> I. . . . The elected body shall establish its own rules, and a majority shall constitute a quorum for the transaction of the business of the board. The mayor shall have the right to introduce bills and initiate other measures at the meetings and to speak at meetings upon pending measures without resigning the chair. In cases where the mayor is directly elected, the mayor shall not be counted to make a quorum of such board, nor vote as a member of the board except in case of equal division.
>
> II. Notwithstanding paragraph I, a city may, pursuant to the procedures for adoption of charter amendments and submission to the voters under RSA 49-B:5 and 49-B:6, vote to allow the mayor to vote and be counted for purposes of a quorum at meetings of the city council, despite such mayor having been directly elected.
>
> III. Notwithstanding any contrary provision in paragraph I, the adoption of an override threshold provision to a tax cap included in a charter pursuant to RSA 49-C:33, I(d) **shall** provide for a supermajority vote of the elected body to adopt the annual budget.

RSA 49-C:12 (emphasis added). In addition, SB 2 amended RSA 49-C:33, I, by inserting new subparagraph I(d):

> I. City charters may include provisions relating to. . .
> (d) A limit on the annual spending increases that increase the amount raised by taxes under the city budget adopted pursuant to RSA 49-C:23. **Such a tax cap shall provide for an override threshold on a vote to exceed the limit on annual increases which shall be by a**

> **supermajority as determined in the charter.** A tax cap provision in the city charter may provide for specific exclusions for dedicated, enterprise, or self-supporting funds or accounts, capital reserve funds, grants, or revenue from sources other than local taxes.

RSA 49-C:33, I(d) (emphasis added).

Facts Giving Rise to This Action

On April 11, 2017, by a vote of 9 to 6, the BOA passed O-17-031, thereby exempting the entire "wastewater system fund (sewer fund)" from the CAMB. See Pls.' Ex. 5, at 2; compare Moriarty's Pet., ¶ 20 (alleging that the BOA passed O-17-031 "by a vote of 9 to 6") with Court Index # 4 in case number 226-2017-CV-00221 (Defendants' Answer), ¶ 20 (admitting "[t]he allegations of section 20" of Moriarty's Petition). Prior to April of 2017 (and since April of 2007), the "wastewater treatment . . . enterprise fund[]" had been split in two, with the sewer use fees excluded from the CAMB and wastewater treatment operation and management enterprise funds ("wastewater treatment funds") included in the CAMB. Compare Pls.' Ex. 4, at 2 with Defs.' Ex. A, at 1.[4]

On April 25, 2017, the Mayor proposed a budget to the BOA for fiscal year 2018. This budget utilized the recently enacted amendment under O-17-031, removing the entire wastewater treatment fund ($8.1 million) from the spending cap calculations. In comparing the 2018 CAMB to the 2017 CAMB, the Mayor did not adjust for the fact that the 2017 CAMB included $8.1 million of wastewater treatment funds which were not included in the 2018 CAMB. This had the effect of permitting the Mayor to allocate a significant amount of additional funds to other areas without running afoul of the

[4] Prior to April of 2007, the entire "wastewater treatment . . . enterprise fund[]" had been included in the CAMB. See Defs.' Ex. 1.

spending cap. In other words, if no other changes were made to the 2017 CAMB when setting the 2018 CAMB, the 2018 CAMB would have been $8.1 million lower than the 2017 CAMB because that was the amount of the wastewater treatment funds that had just been exempted from the CAMB. Instead, the 2018 CAMB was $265,598,979, whereas the 2017 CAMB was $263,823,554, and thus the 2018 CAMB was $1,775,425 more than the 2017 CAMB. Pls.' Ex. 8, at 15 of 321.

On the surface, the 2018 CAMB appeared to comply with the spending cap, as the reported "Maximum Budget Allowed" for 2018 was $267,517,084. See Pls.' Ex. 1 (limiting the upcoming fiscal year's budget to an amount no more than the previous year's budget plus a specified "factor"); Pls.' Ex. 8, at 15 of 321 (noting that the "factor" for the 2018 budget was 1.4%, and thus the "Maximum Budget Allowed" for 2018 was $267,517,084 [$263,823,554 x 1.014]). Having been presented with a proposed budget for the 2018 fiscal year that purported to be $1,918,105 below the spending cap, on June 13, 2017, the BOA voted, ten to five, to adopt that budget. Cf. id.; Pls.' Ex. 12 (BOA Resolution adopting the proposed 2018 budget and noting that "[t]he FY2018 dollar amount under the limit established by City Charter Section 56-c is $1,918,105").

Analysis

As noted above, the plaintiffs contend that the defendants violated the spending cap by impermissibly exempting certain funds from the limits set by the spending cap (which only applies to amounts included in the CAMB), and by failing to account for that

exemption when calculating the maximum permissible CAMB for the 2018 budget year.[5] In essence, the plaintiffs ask the Court to enforce the spending cap (consistent with their promulgated interpretation thereof). The defendants contend that O-17-031 was validly enacted and applied according to the Charter, but that even if the Court finds that O-17-031 violates the spending cap (as set forth in the Charter), the 2018 budget is valid because a supermajority of ten aldermen implicitly voted to override the spending cap in the BOA's June 13, 2017 vote to adopt the Mayor's proposed budget.[6] Lastly, the defendants argue that the plaintiffs lack standing to bring this action.

I. Whether the Plaintiffs Have Standing to Bring this Action

If (as the defendants argue) the plaintiffs do not have standing in this matter, then the Court cannot reach the merits of the case. See Birch Broad. v. Capitol Broad. Corp., 161 N.H. 192, 199 (2010) (explaining "[t]he requirement that a party demonstrate harm to maintain a legal challenge"). Thus, the Court addresses that issue first.

---

[5] Specifically, the plaintiffs argue that O-17-031 violates the Charter because it removes the wastewater treatment fund from the spending cap calculations under Charter section 56-c, but the wastewater treatment fund does not qualify for an exemption under section 56-d, which states that only debt repayment and capital improvements are eligible for such exemptions. The plaintiffs further argue that even if the wastewater treatment fund was eligible for such an exemption, section 56-d still requires that such an exemption be made only by an annual vote of a supermajority of ten aldermen. Because the BOA adopted O-17-037 by a vote of 9 to 6, that vote would not satisfy this supermajority requirement.

[6] In the plaintiffs' view, although ten members of the BOA voted to adopt the Mayor's proposed 2018 budget on June 13, 2017, this did not amount to a valid vote to exempt the wastewater treatment fund from the spending cap calculations, because the vote was not labeled as such. Rather, as noted above, the 2018 budget purported to be $1,918,105 under the applicable cap. The Court finds the plaintiffs' arguments on that point persuasive. Even if the BOA could have cured a spending cap violation by exempting additional funds pursuant to Charter section 56-d, the Court could not reasonably construe the BOA's vote to adopt a budget which purported to be more than $1 million below the spending cap as a vote to cure a spending cap violation by "exempt[ing]" additional "municipal bond" "principal and interest payments" or "capital expenditures." See Charter § 56-d; see also Stamper v. Selectmen, Town of Hanover, 118 N.H. 241, 243 (1978) (declining to "read into" a town "voice vote" "an intention to withdraw the powers previously delegated to" the town's selectmen where "[t]he original motion clearly did not purport to withdraw that power" and "[t]he amendment which was passed only 'advised' the selectmen of the 'sense of the meeting'").

"[S]tanding . . . requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642 (2014) (citations omitted) (explaining that, "Part II, Article 74" of the New Hampshire Constitution "imposes standing requirements that are similar to" federal standing requirements). "In evaluating whether a party has standing," courts "focus on whether the party suffered a legal injury against which the law was designed to protect." O'Brien v. NH Democratic Party, 166 N.H. 138, 142 (2014) (quotation omitted). In order to "keep[] the Judiciary's power within its proper constitutional sphere, [courts] must put aside the natural urge to proceed directly to the merits of an important dispute and to 'settle' it for the sake of convenience and efficiency." Id. (quotation omitted); see Duncan, 166 N.H. at 643 ("The requirement that" plaintiffs have "personal . . . rights . . . capable of being redressed by the court tends to assure that the legal questions . . . will be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." (quotations and citation omitted)); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) ("[I]t must be 'likely,'" not "merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" (citation omitted)).

Here, the plaintiffs claim that the defendants have violated the spending cap. Even if the Court were to issue "a favorable decision" on that point, see Lujan, 504 U.S. at 561, such a decision would only provide "redress" for the plaintiffs' claimed injuries—that is, their respective higher tax burdens—if the spending cap itself is enforceable. See Duncan, 166 N.H. at 642. In other words, if the spending cap is unenforceable,

then the Court could not provide the plaintiffs a remedy for the defendants' alleged spending cap violation(s). For the reasons set forth below, the Court finds that the current version of the spending cap, as enumerated in Charter sections 56-c and 56-d, violates State law and is therefore unenforceable. Accordingly, the Court cannot provide any redress for the plaintiffs' claims, and thus the plaintiffs lack standing to pursue their claims in the context of this action. See id.

A. A Spending Cap Must Include Certain Provisions to Comply With State Law

As set forth above, in City of Manchester, the New Hampshire Supreme Court "interpreted RSA 49-C:12, I to require a simple majority vote unless otherwise specified by statute," City of Manchester, 161 N.H. at 133–34, and therefore "conclude[d] that [Manchester's] proposed charter amendment [wa]s inconsistent with state law" because it "constrain[ed] the board [of aldermen] to either abide by the spending cap or act by a two-thirds majority to override it," in direct conflict "with the board's authority to adopt a budget, see RSA 49-C:23, by the vote of a simple majority, see RSA 49-C:12, I." Id. at 134. In response, the legislature "specified by statute"—RSA 49-C:12, III—that "the adoption of an override threshold provision to a tax cap included in a charter pursuant to RSA 49-C:33, I(d) **shall** provide for a supermajority vote of the elected body to adopt the annual budget." (Emphasis added); see also RSA 49-C:33, I(d) ("City charters may include provisions relating to any or all of the following matters . . . [a] limit on the annual spending increases that increase the amount raised by taxes under the city budget adopted pursuant to RSA 49-C:23. **Such a tax cap shall provide for an override threshold . . . which shall be by a supermajority as determined in the charter.**"

(emphasis added)). These clear statutory provisions squarely address the issues identified in City of Manchester and therefore permit municipalities to lawfully adopt a spending cap so long as the adopted spending cap "provides for an override threshold . . . by" "a supermajority vote of the elected body." RSA 49-C:33, I(d); RSA 49-C:12, III; cf. Ocasio v. Fed. Exp. Corp., 162 N.H. 436, 443 (2011) (noting that "[t]he legislature's response to" decisions of the New Hampshire Supreme Court, "although not controlling, is instructive"); Polizzo v. Town of Hampton, 126 N.H. 398, 402 (1985) (noting that "[t]he legislature" had enacted a new statute "only one year after" a particular New Hampshire Supreme Court decision, "and evidently in response to" that decision").

In addition to authorizing such spending caps on a prospective basis, the legislature further sought to "ratify and declare valid other spending caps adopted prior to the enactment of" SB 2. See N.H.H.R. Jour., June 1, 2011, pp. 1649–54; see also RSA 49-B:13, II-a ("All town or city charters which have been adopted, revised, or amended to include a tax or spending cap of any kind and all charter commissions which have been properly established and elected; all elections properly held; and all actions properly taken related to the tax or spending cap in such charters are hereby endorsed, ratified, validated, and legalized and are fully enforceable, without regard to whether such entities or actions were authorized by law at the time they were established or taken."). The defendants contend that this language did not ratify, validate, or legalize existing spending caps "without regard to whether they have now been authorized," and thus "such previously adopted tax or spending caps must" comply with "RSA 49-C:33[, I](d)"—i.e., pre-existing spending caps must include an

override provision in order to be valid. See Defs.' Req. Findings and Rulings ¶¶ 31–34. This contention is in furtherance of the defendants' claim that, because ten aldermen voted to adopt the Mayor's proposed budget for the 2018 fiscal year, the BOA implicitly voted to override the spending cap.

In order to assess the merits of the defendants' argument, the Court must determine the correct interpretation of RSA 49-B:13, II-a. "Statutory interpretation is a question of law." Hogan, 168 N.H. at 73 (quotation omitted). When interpreting a statute, courts determine "the intent of the legislature" by examining "the words of the statute considered as a whole." Id. (quotation omitted) (explaining that courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result"). In doing so, courts "first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Id. (quotation omitted) (noting that courts "interpret legislative intent from the statute as written"). Courts "do not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. (quotation omitted). "In the event that the statutory language is ambiguous," courts "resolve the ambiguity by determining the legislature's intent in light of legislative history." Id. (citation omitted); see also State v. Lambert, 119 N.H. 881, 884 (1979) (finding that the relevant "[l]egislative history" made "it clear that the purpose of" a particular statutory change "was to promote public health, safety and welfare"). In addition, if there is a conflict between multiple statutory provisions, "the specific statute controls over the general statute." In re Pennichuck Water Works, Inc., 160 N.H. 18, 34 (2010) (citation omitted).

As set forth above, the plain language of RSA 49-B:13, II-a appears quite sweeping, purporting to endorse, ratify, validate, legalize, and render "fully enforceable" all previously-adopted "tax or spending cap[s] of any kind. . . ." However, this sweeping, general language necessarily gives way to the specific language of RSA 49-C:23 and RSA 49-C:12, I (as interpreted by the New Hampshire Supreme Court in City of Manchester, 161 N.H. at 134). See City of Manchester, 161 N.H. at 133–34 (finding that these two statutory provisions empowered a board of aldermen "to adopt a budget . . . by the vote of a simple majority" "unless otherwise specified by statute"); see also In re Pennichuck Water Works, Inc., 160 N.H. at 34 (explaining that where statutory provisions conflict, "the specific statute controls over the general statute"). In short, any spending cap that does not contain the "override" provision mandated by RSA 49-C:33, I(d) would impermissibly restrict the elected body's authority to adopt a budget by a simple majority, because there is no other statute which "specifie[s]" that such a restriction is permissible. See City of Manchester, 161 N.H. at 133–34.

In light of the foregoing, although the language of RSA 49-B:13, II-a does not expressly require pre-existing spending caps to include the override provision mandated by RSA 49-C:33, I(d), the above-described "statutory scheme" compels the Court to interpret the sweeping language of RSA 49-B:13. II-a narrowly, as follows: RSA 49-B:13, II-a applies the other statutory changes resulting from SB 2 retroactively, but does not exempt pre-existing spending (or tax) caps from complying with current laws. SB 2 did not alter the language of RSA 49-C:23 or RSA 49-C:12, I (as interpreted by the court in City of Manchester, 161 N.H. at 134), and because the current language of those

provisions remains the same as it was when the New Hampshire Supreme Court decided City of Manchester, this Court must follow that court's interpretation of those provisions. See City of Manchester, 161 N.H. at 133–34. Having done so, the Court finds (consistent with the holding in City of Manchester) that spending and/or tax caps may not infringe upon the elected body's ability to adopt a budget by a simple majority "unless" such a restriction is "specified by statute." Id. at 134.

RSA 49-C:33, I(d) affirmatively authorizes a city charter to infringe upon the elected body's ability to adopt a budget by a simple majority via a tax cap, but it requires any such cap to "provide for an override threshold on a vote to exceed the limit on annual increases." See also RSA 49-C:12, III ("Notwithstanding any contrary provision in paragraph I, the adoption of an override threshold provision to a tax cap . . . shall provide for a supermajority vote of the elected body to adopt the annual budget."). Absent any statutory provision which expressly authorizes a tax or spending cap to infringe on the above-described power of the elected body without an override provision, the Court finds that only those pre-existing spending and/or tax caps which included the override provision required by RSA 49-C:33, I(d) were rendered "valid[]" and otherwise enforceable through the enactment of RSA 49-B:13, II-a.[7,8]

---

[7] The Court is mindful that the retroactive provision in HB 341 expressly required the inclusion of an override provision, see N.H.H.R. Jour., March 16, 2011, pp. 912–13 ("Any municipal charter provision adopted, amended, or revised prior to the effective date of this act which authorizes a 2/3 vote of the elected body to override any provision limiting the growth of budgets or taxes shall remain in effect on the effective date of this act."), whereas the retroactive provision in SB 2—the bill the legislature chose to enact—did not. However, apart from this difference in the language of the two bills, nothing in the legislative history suggests that the legislature intended to exempt pre-existing spending caps from the override requirement and/or the New Hampshire Supreme Court's holding in City of Manchester. See N.H.H.R. Jour., June 1, 2011, pp. 1649–54 (Representative Franklin W. Sterling explaining, inter alia, that SB 2 "provides a clear process by which a charter can be amended and it provides the language

B. The City's Spending Cap is Missing an Essential Provision

The next logical question the Court must consider is whether Nashua's spending cap contains the requisite override provision. (For the reasons outlined above, if it does not contain such an override provision, then the spending cap is not valid under State law.) In order to answer this question, the Court must again employ the above-described principles of statutory construction. See Bd. of Ed. of Nashua v. Vagge, 102 N.H. 457, 460 (1960) ("Applying [a] principal of statutory construction" when interpreting Nashua's "city charter"); City of Portsmouth v. Ass'n of Portsmouth Teachers, NEA-N.H., 134 N.H. 642, 649 (1991) (explaining that if a charter amendment's "language clearly and unambiguously conflicts with [a] statute," the New Hampshire Supreme Court "will not engage in judicial construction to modify the amendment so as to make it

---

necessary to comply with recent supreme court ruling. . . [a]lso included in the legislation is a provision to ratify and declare valid other spending caps adopted prior to the enactment of this bill."). Rather, it appears that the relevant language contained in SB 2 was based upon the then-existing version of RSA 49-B:13, II. See Amendment to SB 2, #2011-1149s (March 22, 2011) (which would have amended RSA 49-B:13, II as follows: "II. All town and city charters which have been adopted, revised or amended; all charter commissions which have been properly established and elected; all elections properly held; and actions properly taken pursuant to such charters are hereby ***endorsed, ratified, validated, and*** legalized, ~~[provided that such charters at the time of their adoption were not contrary to the general laws and constitution of the state~~] ***and are fully enforceable***.") (alteration in original, as noted supra). Ultimately, the language in that proposed amendment formed the basis of the newly-created RSA 49-B:13, II-a, and thus the language used in the enacted legislation does not evince a legislative purpose to do anything other than render the other changes resulting from SB 2 retroactive. Furthermore, even if the legislature had intended to ratify all pre-existing restrictions on the elected body's budgetary powers (regardless of the type or scope of such pre-existing restrictions), for the reasons outlined above, the broad, general language used by the legislature would be insufficient to effectuate such a purpose. See In re Pennichuck Water Works, Inc., 160 N.H. at 34; cf. State v. Brosseau, 124 N.H. 184, 193 (1983) (Douglas, J. and Batchelder, J., concurring specially) (noting that because the legislature "ha[d] not responded satisfactorily to the problems that cases such as the ones" before the court "represent[ed] . . . the time for judicial deference ha[d] passed"); Hogan, 168 N.H. at 73 (explaining that courts "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result").

[8] During his October 23, 2017 hearing testimony, the Mayor indicated that he had presented the BOA with a budget that exceeded the spending cap because he did not believe he could provide the City with all necessary services while keeping the budget under the spending cap. This concern illustrates the reason why an override provision is an essential component of a valid spending cap.

consistent with the law.").

As noted above, Nashua's spending cap is set forth in Charter section 56-c. A plain reading of the relevant language reveals that the Charter does not expressly contain an override provision. See Charter § 56-c; see also Hogan, 168 N.H. at 73 (noting that courts "interpret legislative intent from the statute as written"). Indeed, the only clause in Charter section 56-c which could theoretically be construed as permitting a spending cap override states: "This provision shall not prevent the [M]ayor and the [BOA] from appropriately funding any programs or accounts mandated to be paid from municipal funds by state and federal law." Id. Assuming dubitante that this provision intended to authorize a spending cap override (as opposed to simply requiring the BOA to make adjustments to the CAMB so that, while complying with the spending cap, the CAMB included such "mandated" funding), this clause would nevertheless fail to satisfy RSA 49-C:33, I(d) and RSA 49-C:12, III because it does not "provide for an override threshold on a vote to exceed the limit on annual increases . . . by a supermajority as determined in the charter." See RSA 49-C:33.

Although the defendants concede that the spending cap must contain an override provision, see Defs.' Req. Findings and Rulings ¶¶ 30–34, they suggest that the "exceptions" or exemptions listed in Charter section 56-d satisfy that requirement because the BOA can "exempt so much of the expenditures for bonded debt service or capital improvements," id. at ¶ 39.[9] Charter section 56-d does specify that a

[9] During his October 23, 2017 hearing testimony, the Mayor referred to the exemption/exception process outlined in Charter section 56-d as an override. Moriarty's legal counsel challenged the Mayor's characterization, asking the Mayor where the Charter permitted an override. The Mayor thereafter

supermajority of the BOA—specifically, "at least ten" out of a total of 15 "aldermen"—may exempt certain classes of expenses from the CAMB. However, the plain language of RSA 49-C:33, I(d) illustrates that the power to make certain "exclusions" from the CAMB is not the same as the power to override a spending cap. See RSA 49-C:33, I(d) (providing that city charters may include tax caps, but that when they do, such charters "**shall provide for an override threshold** . . ." and "**may provide for specific exclusions** for dedicated, enterprise, or self-supporting funds or accounts. . . ." (emphases added)). Because the legislature plainly indicated that an override provision is **required** whereas a list of specific exclusions is **merely permissible**, see Town of Nottingham v. Harvey, 120 N.H. 889, 895 (1980) ("The general rule of statutory construction . . . is that the word 'may' makes enforcement . . . permissive and that the word 'shall' requires mandatory enforcement."), the Court cannot construe those two opportunities as being one in the same. See Cook v. Town of Sanbornton, 118 N.H. 668, 671 (1978) ("When possible," courts must "interpret a statute so that all the words have meaning."). Thus, the Court finds that Charter section 56-d, which empowers the BOA to exempt certain classes of funds from the CAMB, does not satisfy the override requirement of RSA 49-C:33, I(d).

C. The Court Cannot Read the Missing, Essential Provision into the City's Existing Spending Cap

The Court is unaware of any other provision in the Charter which could arguably

---

acknowledged that this provision is not technically an override provision, but asserted that it has been treated as such for years, and that Charter section 56-d is commonly called "an override provision." Indeed, early in the hearing, Teeboom himself referred to the process outlined in Charter section 56-d as an override.

satisfy the override requirement of RSA 49-C:33, I(d). Accordingly, the Court finds that the Charter does not currently contain an override provision. For the reasons outlined above, unless the Court were to read such a provision into the Charter, the spending cap violates State law. The Court declines to read such a provision into the Charter. Pursuant to RSA 49-C:33, I(d), an override provision must require a "supermajority" vote, but each charter may "determine[]" what constitutes a supermajority for this purpose. In other words, RSA 49-C:33, I(d) permits each municipality to specify in its charter the precise supermajority—i.e., two-thirds, three-fifths, etc.—required to override the spending cap. Because the statute does not require a specific "supermajority" margin, it would be inappropriate for this Court to set such a margin on behalf of the voters of the City. Indeed, it is clear from the legislative history of SB 2 and HB 341 that the purpose behind the relevant statutory changes was to empower municipal voters to determine whether a spending or tax cap was a sound limitation on their local government's spending. Cf. Lambert, 119 N.H. at 884. Against that legislative backdrop, which plainly favored voter choice, this Court cannot deprive the City's voters of their statutorily-mandated opportunity to "determine[]" the requisite "supermajority" for themselves.

Conclusion

Consistent with the foregoing, because the City's spending cap does not contain an override provision, it violates State law and is therefore unenforceable. Thus, even if the Court were to issue a favorable decision" with respect to the plaintiffs' claim that the defendants have violated the spending cap, see id., such a decision

would not provide any "redress" for the plaintiffs' claimed injuries.[10] See Duncan, 166 N.H. at 642. Accordingly, the plaintiffs lack standing to pursue their claims in the context of this action, see id.,[11] and the plaintiffs' claims are therefore **DISMISSED**.

So ordered.

Date: February 12, 2018

Charles S. Temple,
Presiding Justice

[10] Notwithstanding this conclusion, the Court declines, at this juncture, to affirmatively strike down the spending cap. Neither party has requested such relief, nor have the parties fully litigated the relevant legal issues. Accordingly, the Court "must put aside the natural urge to proceed directly to the merits of [this] important dispute and to 'settle' it for the sake of convenience and efficiency." O'Brien, 166 N.H. at 144 (quotation omitted). However, the Court notes that, according to the defendants, the BOA adopted multiple ordinances purportedly aimed at "mak[ing] clear how some matters should be considered" in relation to the spending cap. See Defs.' Req. Findings and Rulings ¶¶ 10–14; see also id. at ¶ 15 (opining that the spending cap is "still not a model of clarity"). During the October 23, 2017 hearing, the defendants' legal counsel even suggested that a literal, word-for-word application of the spending cap would lead to "an absurd result." In addition, it was suggested during the hearing that, if he so chose, the Mayor could circumvent the spending cap by reorganizing City departments to remove certain divisions from the list of departments covered by the spending cap (as enumerated in Charter section 56-d). In light of these concerns, it appears that if an override provision is put before the voters of the City, some additional changes to the spending cap should also be considered in conjunction with that process in order to provide clarity and consistency.

[11] The Court notes that, even if the plaintiffs' claims were "capable of being redressed by the [C]ourt" in this action, see Duncan, 166 N.H. at 643, it is unclear that the plaintiffs have "articulate[d] a personal injury" as opposed to "the same, indistinguishable, generalized wrong allegedly suffered by the public at large." See id. at 646. Although the plaintiffs are able to identify the precise amount of their respective higher tax burdens, that ability is merely a function of the fact that "the City's tax rate" is set "by the Department of Revenue Administration," and thus the amount of taxes owed by each taxpayer "is calculated as the tax rate multiplied by the assessed value" of his or her property. See Moriarty's Mem. Standing 1; see also RSA 21-J:35. The Court is not convinced that the availability of such a "straightforward mathematical calculation" renders the plaintiffs' injuries "personal" as opposed to being "the same, indistinguishable, generalized wrong allegedly suffered by" all taxpayers in the City. See Duncan, 166 N.H. at 646. Nevertheless, because the Court has found that the plaintiffs lack standing for other reasons, the Court need not (and affirmatively declines to) reach this issue. See Canty v. Hopkins, 146 N.H. 151, 154 (2001) (declining to "reach" an issue that did "not alter" the court's "conclusion").