

COMMITTEE ON BILLS ON SECOND READING

July 31, 2000

Upon Conclusion of Public Hearing

Chairman Wihby called the meeting to order.

The Clerk called the roll.

Present: Aldermen Wihby, Sysyn, Clancy, Pinard, Cashin

Messrs: Atty. Eggert, Deputy Solicitor Arnold, R. MacKenzie

Chairman Wihby addressed Item 3 of the agenda:

Proposed Amendment to the City Charter:

Amend the Charter of the City of Manchester, New Hampshire to provide that the school district shall be a department of the City and that the mayor shall have control over the form and procedures for preparation and adoption of the school department budget.

Article IV. School and School Committee, section 4.01 school district shall be amended to read as follows:

The City of Manchester, a municipal corporation, shall continue to constitute a single school district, administered by the board of school committee as a department of the City of Manchester. Wherever this charter refers to the school district, school district shall also mean school department. Except as otherwise provided in this charter the board of mayor and aldermen and the school committee shall continue to exercise such power in relation thereto as these respective bodies exercised at the time of the adoption of this charter.

Article VI. Budgets and Appropriations, section 6.03 (a) Budget Formulation, Submission and Message shall be amended to read as follows:

The mayor shall establish the form and organization of procedures for preparation and adoption of the annual budget, including the

school department budget, the capital improvement budget, and other budget instruments and plans for future fiscal periods as the mayor deems appropriate and which shall conform to all city ordinances concerning budgets and fiscal matters. Such procedures shall require that all budgets include all proposed expenditures according to general objects of expenditure and the proposed use and all anticipated revenue.

Article VI. Budgets and Appropriations, section 6.06 School District Budget shall be amended to read as follows:

The school committee shall prepare and submit its budget proposal. The budget shall be subject to the approval of the board of mayor and aldermen. The budget shall be submitted in accordance with the budget form, organization of procedures and schedule established by the mayor under Section 6.03 (a). The board of mayor and aldermen shall accept such budget as submitted, or reject it and return it to the school committee along with the explanation for rejection and the maximum dollar amount which the board of mayor and aldermen will approve. The school committee shall then submit a revised budget, which shall not exceed the maximum dollar amount established by the board of mayor and aldermen. The school committee shall administer, expend and account for the funds approved by the board of mayor and aldermen and shall have the exclusive authority to transfer funds among line items in the school budget.

Article VI. Budgets and Appropriations, Section 6.08 shall be amended to read as follows:

The board of mayor and aldermen may provide by ordinance any additional procedures for administering of the budget, including the budget of the school department.

(Public hearing held July 31, 2000.)

Chairman Wihby talked about School Committee Member McDonough's lawsuit. What the Charter Commission did was went ahead in the new Charter and changed that so in court he won the decision and then the Charter Commissioners decided that wasn't right so they changed it in the Charter so that it would allow him to run. That is what we are doing here now. We are not going anything

different. We are trying to change the Charter to make it better as they did that day that they felt that they did that day.

Alderman Levasseur stated I would like to ask a question of Dean Eggert since he wrote the opinion for the School Board. When I read Judge Nadeau's opinion, really it seemed to me that he was basing it mostly on the fact that by omission that is really the reason he had to go with the School District on that whole occasion. There was no actual mention of the School Board being a department and in his own words it laid out what the other departments had for responsibilities and such. Since there was no mention of the School Board being a department, he based his decision on that. If I am correct in that assumption, is there something overriding the Charter. I know that we keep talking about the State statute, but if we were to change the amendment and it were to go to the...you know if we got the amendment passed by the majority of the people would the decision be changed based on the Charter now being changed? Would the judge make a different determination?

Atty. Eggert replied I don't think that the scope of the amendment that has been proposed by the Board would be sufficient because while Judge Nadeau did take a significant look through the whole Charter and his first inquiry was what do they call it and that is obviously the first thing you are going to look at. If you look at pages 6 and 7, he set out seven key factors that helped him answer the question whether or not it is a City department or a district. This amendment does not purport to change any of those seven factors so my concern is...I kept using that allusion to a rose by any other name is still a rose because what is probably being achieved here at best is giving someone a false comfort level of labeling this a department but not effectuating the changes that are necessary to make it a department. Judge Nadeau goes on, on Page 6 and 7 of his decision and I know that you have taken a look at that and you will see seven factors that would need to change before we would have a comfort level as a City that we had created a department.

Alderman Levasseur asked in other words, as written, you don't think that the language is strong enough in the amendment itself to warrant enough of a change of these seven. Is that what you are saying? It is just not written strong enough?

Atty. Eggert answered you would have to get rid of a majority of those seven factors to have a fighting chance to have the District actually subject to the degree of control that you would call departmental control. I think the difficulty is that nobody knew the answer for certain whether or not this was a District or a department in the eyes of the law. We went to Judge Nadeau and asked him and you are correct that a Charter can be amended, but the problem is that once you get rid of all of those seven factors you have run afoul of the State legislative

grant, which is to the District, creates the District, and makes an answer to the State Department of Education so it creates a little bit of a legal Catch-22 because to make it a department in my opinion you have to get rid of the factors that Judge Nadeau discusses on Pages 6 and 7, which are pretty key factors to the structure of a district. Once you do that, you have probably created a department but then you get to the question now we have done that do we comply with home rule and the problem is that if you look at the cities where they have a school district truly merged with a city, that was by legislative act. That was by legislative act 100 years ago and the problem is that if you then amend a Charter that supercedes that and Judge Nadeau found that back as early as maybe even before 1986 we clearly created that separation. The Legislative Acts no longer exist so we are sort of in a situation where could you create a district as a department, maybe you could by legislative act number one. Number two, you could try by getting rid of the seven factors that you see that Judge Nadeau pulled out of the Charter that made this a district as opposed to a department but short of that, I guess my concern is that people may be deluding themselves by amending 4.01 to call it a department when it goes on to say that we aren't changing any of the elements and I believe that Alderman Wihby even made that point that we are not changing a lot of the relationship. Well if the goal is to indeed make it a department, a true department, that is not going to be achieved.

Chairman Wihby stated that, of course, is a different opinion from our City Solicitor and Dean you talked to the City Solicitor about this a long time ago when we first drafted it and I guess you have had two different themes of thought on that issue. Is that true to say?

Atty. Eggert replied Tom and I have not spent a lot of time...

Chairman Wihby interjected actually things were changed to make you a little happier.

Atty. Eggert replied Tom and I have not spent a lot of time in conversation about this. I do want to clarify as well for the benefit of the Board that when you did go to the Attorney General the first time that was outside of the statutory process. Let's assume that you as a Board do vote to order this onto the ballot. The Statute then requires that within a very short period of time the City Clerk turn that around and send it up to the Office of Attorney General for an opinion.

Chairman Wihby asked before the vote.

Atty. Eggert answered yes, Sir.

Chairman Wihby stated so if we want an opinion from the Attorney General we should vote this in today and then send that vote to the Attorney General and we would have an answer before the vote in which case if the Attorney General came back and said you shouldn't do it, we could not have it on the ballot. Is that true?

Atty. Eggert replied there are two possibilities, Sir. One possibility is they will say nothing and the State Statute says that if they are silent then that is applied acquiescence in the lawfulness. If they say something then the City has an opportunity to challenge that opinion. Any third party has an opportunity to challenge that opinion. It would be my anticipation that...just so we are very clear you have not yet given the Attorney General the statutory opportunity to comment. It went up early for an advisory opinion and I have had a real tough time and I think everybody has in getting advisory opinions out of the AG.

Chairman Wihby responded well we were hoping to get one. That was the intent. We held it up a whole month waiting for their decision.

Alderman Levasseur stated you bring up a good point. Now you say if it comes back and it is by acquiescence then we have a right to...would that be the same thing to go for a Declaratory Judgment again based on the fact that they didn't reply to a court?

Atty. Eggert replied the absence of a reply means that the AG doesn't have a problem or assuming that it was diligently looked at because they have a very short period of time in which to respond to you under the Statute, but assuming that it is diligently looked at and there is no response, the Statute says that means you as a City can go ahead. Now the Statute does lay out a vehicle to then contest the legitimacy of that and it would be prudent to get that determination before it goes on the ballot rather than to put the citizens in a position of voting on something that they are not sure whether or not is lawful.

Alderman Levasseur asked so the School Board would then seek a Declaratory Judgment prior to its being put on the ballot.

Atty. Eggert answered it probably would be wise because I don't think anybody would want the cloud of that question looming and we would encourage and probably through a joint process could ask the court to rule on that well before it reaches the citizens.

Chairman Wihby stated so you are saying and I just want to get this straight, that if this Board was to vote to send it to the full Board at the next meeting that we continue and put it on the ballot. The City Clerk then would have to send

something to the Attorney General's Office. The Attorney General would have a short time to respond to us or not respond to us and if they didn't respond to us we would just continue going putting it on the ballot and the citizens could answer the question. If they did respond saying you shouldn't do it, the Aldermen could take it off the ballot, right, at that point?

Atty. Eggert replied at that juncture it is off the ballot unless you challenge it.

Chairman Wihby asked so if he said no, it is off the ballot automatically.

Alderman Levasseur answered we would challenge it. We would go to court just like they will go to court.

Chairman Wihby stated or we could accept his view and then it is off the ballot. Is that true? If we accept his view that it is not right then it just wouldn't be on the ballot.

Atty. Eggert replied yes. There is another factor. Usually as you know in the context of the Charter amendment you can seek the opinion of private counsel and you have your in-house counsel and I would encourage you to solicit a written opinion from your City Solicitor on this matter because that will give you some idea of the strength or weakness of the position rather than a broad affirmation.

Alderman Levasseur asked, Tom, since you were the one who went to this in the first place and you went into the chambers without any bullets in your gun, if we had a Charter amendment and it did say that we included the School as a department, how many bullets would you have in your gun if you went up to a judge.

Deputy Solicitor Arnold replied that is a tough question to answer.

Alderman Levasseur stated well we are asking you now because if you think that this is a waste of time you should tell us because we are going to rely on you by getting a Charter amendment and you are going to have to go fight it one way or the other. Do you feel stronger with it written into the Charter then you did before that?

Deputy Solicitor Arnold replied I feel that an explicit reference to the School District being a department of the City run by the Board of School Committee would be a statement by the voters as to how they wish this to be structured and would most likely be upheld by the court.

Alderman Vaillancourt stated I am in a blissful state because I was truly undecided. Usually having made up my mind long in advance, I just ask questions that are designed to seek one point of view but tonight I get a chance to ask a question that will really help me make up my mind. Unusual position, but you referred to this home rule and I am a little confused because the home rule that overwhelming passed the Senate and the House and will go before voters this fall, as I understand it, was meant to have cities and towns not have to come to the State to get enabling legislation and you referred to how this couldn't have happened if it happened in the past or something. Now, it seems to me clear then that if this home rule thing passes this November, I believe by a 2/3 vote, then you have no problem then. Is that correct?

Atty. Eggert responded I am saying that the home rule amendment goes a long ways to enable cities, but it still is limited by the general laws of the State and we didn't amend the Constitution so what I am saying is that the home rule amendment is a step in the right direction if you are going to give cities broader authority and it has to do with such things as any type of remediation program or any type of industrial authority outside of the scope of an industrial development authority, but that grant of home rule still doesn't change the statutes with regard to the School District authority and the City's authority vis a vie a district. So, what I am saying is that we start off with a premise that we are not a home rule State. There is an amendment to change it to a home rule State, but I didn't want people to be under the misperception that the amendment to a home rule State necessarily meant that we were discarding the relationship between a district and a city. Arguably, it also gives districts some degree of longitude.

Alderman Vaillancourt asked so if we take two steps could we not get there in a compromise if the home rule amendment passes and if the Attorney General does not strike this down. Then might we not be free to simply let the voters decide?

Atty. Eggert answered I think you just placed two bullets in your gun but there are still seven loaded in the district's.

Alderman Vaillancourt replied I thought the home rule was going to get rid of those seven.

Atty. Eggert responded I don't think the home rule is going to be broad enough. I think what I indicated earlier was that we are not a home rule State and steps have been taken to give better local control to cities but I don't perceive that amendment as going beyond the State statutes that limit the scope of, for example, the City's authority vis a vie a district.

Alderman Vaillancourt replied but that is where the Attorney General's ruling would overcome that.

Atty. Eggert stated that would be very important.

Alderman Vaillancourt asked so we would be in no jeopardy.

Atty. Eggert answered at this juncture you are in no jeopardy at all. The jeopardy that arises is when the Attorney General renders or does not render an opinion.

Alderman Shea asked what about other schools. Are they districts or departments?

Atty. Eggert answered there are really three types of city school districts. There is the Nashua model where early on by Charter and by legislature the City of Nashua School District is truly merged with the City of Nashua. They are essentially one in the same entity.

Alderman Shea asked are they considered a department or a district.

Atty. Eggert answered the reality is that they act more as a department, vis a vis the city governance. Now they may be called a district and this is the issue where you see both words used, but I would say in the City of Nashua for example that is a good example of what I would call a truly dependent city school district, that model, and if you read their Charter it specifically says the City of Nashua District and the City are one in the same. They are one corporate entity. Then, if you look at the City of Concord, which is the alternative extreme model, the City of Concord school district as you know has appropriating authority, which is the other extreme. Being a truly independent district and Judge Nadeau actually in his ruling found that the City of Manchester was essentially in between those two poles.

Alderman Shea asked, Leo, if the Board of Mayor and Aldermen decide to put this on a ballot and a decision is then asked for from the Attorney General, how much time do you need before it is placed...in other words what are the restraints that are necessary for you to be able to put it on the ballot so people can vote.

Clerk Bernier answered I would say our deadline would probably be August 20. We have to program the computer and we have the printing of the ballots.

Alderman Shea stated so today is July 31 so you would have about 20 days.

Clerk Bernier replied correct. It is a very short period of time.

Alderman Shea asked that is the November ballot you are talking about, not the September right.

Clerk Bernier answered that is for the September ballot. It would have to be like October 20 for the November ballot.

Alderman Lopez stated I think the attorney for the School Department did an excellent job in making his presentation. I just want to remind the members of the Board that as a Charter Commissioner we didn't change anything but I wanted to know, the 1963 to 1986 the Judge didn't take anything into consideration because the voters didn't ratify that Charter is that the reason he only referred to the 1986 Charter?

Atty. Eggert answered I think you will find that the judge just for efficiency sake looked at a 1986 to the present span. The debate really was an interpretation of the current Charter, but it was significant that the judge went back and looked at the 1986 Charter and said you know what, this City has as a matter of law clearly established the separate entity since at least 1986 and then tonight you heard an elusion to Mr. McDonough's case, which predated the 1986 Charter. I believe it was a 1985 decision. That was interpreting the pre-existing Charter to also establish these entities as separate entities. I think I really want to emphasize one concern that I share with you that is a legal concern that has economic implications. I understand that by having two separate entities you have the mechanics in place to engage in chargebacks and I am concerned that when you engage in this merger and you make the district a department, I do not know the answer as to whether or not you can continue the practice of chargebacks and that is one concern that is a \$6.8 million concern for the Board of Mayor and Aldermen because I think you will find that interdepartmental chargebacks may or may not be a viable entity after such a step was taken.

Chairman Wihby asked what did we do before we had chargebacks three or four years ago.

Atty. Eggert answered I will honestly tell you, Sir, that I don't know enough about the history of the chargeback process to answer that question.

Chairman Wihby asked, Alderman Lopez, School Committee Member McDonough spoke about when he was a teacher and he wanted to be an Aldermen and he won in court...they told him he couldn't do it and he won in court and I noticed the Commission in the Charter this time changed that so if you are a

teacher you can't be a School Board member or an Aldermen so you did change that. The Charter says that now and he can't do it anymore. What is the difference in what we are trying to do today then what the Charter did two years ago?

Alderman Lopez answered the reason it was changed, and I think it was 8-1 if I recall, and the major reason was the school teacher would be making a decision on the budget and everything for the School Department or as an Aldermen so we felt that the City employees should not be an Aldermen or a School Board member.

Chairman Wihby asked so when School Board Member McDonough talks about how he won five years ago or however many years ago it was that he took them to court, do you think he could take us to court now and win.

Alderman Lopez answered I don't know if he could win, but I can tell you that the Charter on the School portion was very vague, very argumental and the reason we left it was because the end solution was that it would be challenged in court and some School Board member would step forward and challenge it and that is exactly what happened. We needed a legal interpretation and that is why I asked if Tom Arnold could rebut the legal interpretation that the School Board lawyer presented in writing so we can see it other than just saying yes you can do it. Yes, we can do anything we want to do, but does it make it legal. What is the implication of it? This lawyer here speaks of seven different things. What is the City Solicitor's position on those seven things?

Chairman Wihby replied we will get that in writing from him but you have to note that he did sit down and write this and he did speak with the attorney for the School Department. The attorney for the School District works for the School District and he is there to speak on behalf of the School District, not as far as what the Aldermen want. So, the City Solicitor did have those discussions with him. My understanding was that they agreed to some things that the attorney said and also took some things out that they believed wouldn't stand up in court.

Alderman Lopez stated I think, and I don't want to put words in his mouth and I will let the attorney speak but how much discussion have you had with Tom Clark or Tom Arnold in reference to this or in reference to your letter to Mr. Tanguay in citing the RSA's and everything. Were you satisfied in written communication with the City Solicitor or was it verbal?

Atty. Eggert replied we had very little communication. I think it was limited to .2 of an hour. I called up and asked what is the nature of this amendment. We have had probably two or three conversations at the most. I furnished a courtesy copy

of that March 17 opinion to the City Solicitor so that it would evoke a response and I am still pending a written response on that.

Deputy Solicitor Arnold responded regarding Mr. Eggert's prior letter, we disagree with a number of points and quite frankly I think the portion that begs the question is the effect of a Charter amendment. As I stated before the citizens of the City of Manchester are free to change their Charter and if they do so I believe it changes the basis of Judge Nadeau's decision in the Declaratory Judgment action.

Alderman Lopez stated there is no doubt that we can change, amend or revise. There is so much discussion about changing something in this Charter and if that is so important to a lot of people and they want something changed, why don't we establish the right procedure of appointing a Commission and bring in some changes before the Board of Mayor and Aldermen and look at the legality of it and look at the finance aspect of it or what is going to happen. We are just throwing this out in the dark and hoping for the best and I don't think that is the way to go but the Committee can make their recommendation to the full Board.

Alderman Gatsas stated Mr. Eggert certainly I can tell you that I am not well versed on the disillusionment. I have read it several times and certainly lawyers and judges write opinions so that only they can understand them. My concerns with either a Charter amendment or Charter change is basically looking at the financials. Where they are and the position of the School Board. Certainly my colleagues that are School Board members I have a lot of respect for and they have no easier job than we do over here. Now I believe if you can help me with this we can get through it.

Atty. Eggert replied I have rarely been given such an invitation, but I would love to do it.

Alderman Gatsas stated I believe we received a letter from Finance somewhere in the very first part of July about the School Board looking for an advance of \$1.9 million on taxes for FY01. Are you familiar with that letter or did you render any opinions?

Atty. Eggert replied I am generally familiar with that letter and I think that what you most be talking to is the question of whether or not you look at cash flow or whether or not the City segregates its tax accounts.

Alderman Gatsas responded let's make it easy for you and I will reword the question. We received a letter from Finance that said that if we did not forward

FY01 taxes of \$1.9 million you could not meet payroll. Is that correct or incorrect?

Atty. Eggert answered I need to make it very clear that I am not involved at all in the financial management of the district so I cannot answer that question.

Alderman Gatsas stated the total advance that the City made off of FY01 taxes was approximately \$4.3 million. Are you familiar with that number and did you render any decision to the School Board or the Finance Department of the School Board that said that you believe that those funds could be forwarded along for payment for bills for FY00?

Atty. Eggert replied I rendered an opinion that because the City does not segregate tax receipts and because the State law requires that it be paid over to the district that the Finance Officer was under an obligation to pay it over to the district. There is no requirement by the DRA that the City maintain separate tax accounts, so I did render the opinion that the City Finance Officer by State law was under an obligation to pay it over to the district. I don't know that I ever reached the question or was asked the question about what you can use the money for.

Alderman Gatsas responded well let's follow through with why my concerns are what they are for a Charter amendment. If we use that number of \$4.3 million and we add to that a \$1.4 million shortfall that was brought to this Board sometime in February or March that was going to appeal for FY00, that brings me to \$5.7 million. If I use the chargebacks of \$6.8 million, that brings me to \$12.5 million. If I use the medical and help me Mr. Tawney, have we come up with a firm number on the medical?

Mr. Tawney replied yes. It was \$1,537,262.48.

Alderman Gatsas stated I will use \$1.5 million. That brings us to somewhere around \$14 million, which is in excess of 13% of the \$100.6 million budget that we appropriated for FY01. If you were looking at it as a fiscal conservative and wondering where those numbers are and understanding that if the chargebacks should be paid before we give advances and that in November just looking at a cash flow sheet and I haven't seen on so I can't tell you and I could be completely wrong, but I would love to entertain one, that in November if those tax bills aren't sent in a timely manner that there could be another shortfall of cash because of the billing procedures at the School District.

Atty. Eggert stated I can certainly give you legal advice, but I can't tell you anything about the math. I simply am not privy to the day-to-day financial picture.

Alderman Gatsas replied but you are saying that the documentation that you found that you led the School District or the School Board to believe was that they could pay bills from 2000 from revenues collected in FY01. That was your legal opinion.

Atty. Eggert responded that is not what I said. My opinion was that the City was under a duty to pay over the tax.

Alderman Gatsas stated well let me ask you a tough question. I heard what you said, but answer the question. Would you give them legal advice that they could pay those bills from 2000 with FY01 revenues?

Atty. Eggert replied I would have to take a look at the issues. I don't have an answer to that question.

Alderman Gatsas stated I have asked this question now for two months and I would hope that by now the City Solicitor has come up with some sort of rendering.

Deputy Solicitor Arnold replied we have looked at the issue generally. It is a question of cash flow and I believe...I was not...

Alderman Gatsas interjected counselor I am asking you for a legal opinion and not a CPA's opinion. I am asking you for the opinion. Is it legal to take money from 2001 and pay bills of 2000?

Deputy Solicitor Arnold replied I can't answer that because Mr. Clark looked at that question. I did not.

Alderman Gatsas stated, Mr. Chairman, we are back to this having department heads here who can't answer questions and I don't think that is right. That is a question that I have been asking for two months.

Chairman Wihby replied we will try to have an answer at the next meeting.

Alderman Clancy stated, Mr. Eggert, since I have been on the Board the School District has over spent their budget every year. I heard you say how Nashua runs their school department and I am inclined to think that the City of Manchester should run theirs the same way as Nashua does. In other words, the Board of Mayor and Aldermen in Nashua have the final say like we do here. We appropriate the money and give the departments X amount of dollars. We don't tell them how to spend it. There is also a shortfall this year from chargebacks of a

little more than \$6 million. Like Alderman Gatsas said, how can you spend FY01 money to pay FY00 bills? To have someone come and tell us that the students at Central High do not have any paper, I am getting a little nervous here because when we gave them X amount of money and they don't have any paper, that is depressing. Right now, I am inclined to think that we should let the voters of the City decide how this should be run.

Atty. Eggert responded I would respectfully suggest that you might wish to inquire as to the success of the Nashua experience number one. Number two, I do want to share with Alderman Gatsas my initial reaction. If the City doesn't show on the district side accounts receivable that are accrued for the benefit of the district at the end of a fiscal year, then I would be concerned about the tax revenue being applied to those bills. However, if on the books of the district there is an accounts receivable say of \$6 to \$10 million, under that circumstance I know there is not statutory prohibition. I guess I wouldn't have a problem with it. I think you hit the nail on the head when you referred to it as an accounting function rather than a legal one.

Chairman Wihby stated it wouldn't be on the accounts receivable side because it is cash flow.

Alderman Gatsas replied I am glad you took me down that street. I was hoping you were going to come to that. Let me tell you that year-end when we close out the books we are going to show as a receivable \$6.8 million. I will bet a penny that our accounting firm or our auditors are going to come back and tell us that that is a receivable and you can't guarantee you are going to get it.

Atty. Eggert responded one thing I will be very clear about is that Alderman Gatsas has a better picture of the finances of the district than legal counsel would who is not involved in the day-to-day financial picture of the district.

Alderman Gatsas replied and that is the typical point that I am making and I don't know if the picture that I have is the same as the Board members on the School Board side. If it is, then I would say that they should be looking through the same glasses that I am looking through and saying there is a serious cash flow problem. A serious one. If this was a company that you were looking at with a cash flow problem like this, it would make you very nervous.

Atty. Eggert stated once again, I just lack the facts to answer that either yes or no.

Alderman Levasseur asked going back to the City Solicitor, the way the Charter is written in Nashua do you feel that language in their Charter if we had the same thing would you feel confident going to court on that.

Deputy Solicitor Arnold answered I think that the School District can be a department of the City. I think that the proposed amendments accomplish that objective.

Alderman Levasseur stated I want to anticipate a point, Dean, that you might have said concerning the Constitution. Is the Constitution of New Hampshire different that it is a fundamental right for education compared to the United States Constitution? I am just looking at the test that we would have to go against, whether it be rational basis or whatever. You alluded to that saying maybe there is where your strongest argument would be if we were to go to Supreme Court. Could you give me a little more detail on the anticipation of your argument?

Atty. Eggert replied now I am going to have to start charging you a fee for service but with all due respect what I am alluding to is Article 39 of Part I, which simply says that any City charter or charter amendment must be in compliance with the general laws of the State so it is nothing really new. It is just a Constitutional provision that says when you have a City charter or any charter for that matter, it has to comply with the general laws. Then I say well 194.1 says that districts administer schools not cities, so the issue becomes is the City now administering the School and if you ask me where the real landmine is, it is 6.08. 6.08 is the sleeper there that the court will probably have the most heartburn over.

Alderman Levasseur asked, Tom, what would be your response to that.

Deputy Solicitor Arnold answered I apologize, I wasn't listening.

Alderman Levasseur stated he was talking about the New Hampshire Constitution specifically stating that Charter amendments must fall within statutory rules, and I think he referred to Section 39 and then 6.08. I mean we can fight over this like crazy but you better have a strong argument going past this one.

Deputy Solicitor Arnold replied obviously the Charter has to comply with State statutes. I believe that this amendment does comply with State statutes. I understand that Mr. Eggert may disagree with that, but in my opinion it does.

Alderman Vaillancourt stated I just don't understand what this banter back and forth between these two lawyers on opposing sides is. Let the Attorney General decide it. He will tell us if it is legal or not.

Chairman Wihby replied I agree with you.

Alderman Shea asked, Dean, would your recommendation to the School Board be that we should get the final answer to this. I know that you have argued in a sense that possibly it would go against State law and it is a district rather than a department but wouldn't the prudent way to approach this...let's get it settled once and for all. In other words, where is the benefit of just continually having a discussion about whether it is going to agree or disagree with the Charter? If we finally have a final resolution then that would make a great deal of sense and I am not sure if your thinking would go along those lines or would you not propose this. I am kind of putting you on the spot without asking for a legal fee.

Atty. Eggert answered that is perfectly all right. I just wanted to make it very clear that my fundamental opinion was that two things are going to happen. Either a judge is going to tell you that you can call the district a widget or a department or whatever you want and it has done absolutely nothing, which by the way is one thing that the court probably will end up saying because you have really done nothing. In fact, in 4.01 you say we are going to call it a department but we are doing nothing. Well if that is the ruling that the court comes down with, then you have not achieved the legislative goal which, I would think, would be very frustrating for the Board of Mayor and Aldermen and for the citizens if they voted to adopt.

Chairman Wihby stated in that case you still are going to ultimately come down to the same thing. The School District is not going to go along with that and they are going to appeal it and we are going to end up in court and ultimately get a decision. That is the bottom line and whatever happens with this thing, if it is against the School Department they are going to appeal it and if it is against the Aldermen maybe they will let it go but if it is against the School Department and taking something away from somebody they are going to appeal it no matter what. It doesn't matter whether it is clear or not in the Charter. They are going to take it to the next step and that is, I guess, what Alderman Shea is saying. Ultimately it will be decided in court one way or the other.

Atty. Eggert stated I think what I am trying to express my concern that neither the City nor the District become involved in debating over the new name for this entity, whether it is going to be a department or stay as a district because the likely result is the court is going to say that the prior decision still applies, you just changed the descriptor for it and that is it.

Chairman Wihby replied but it is decided in court.

Atty. Eggert responded what I am concerned about, Sir, is that you do have the ability to make that decision tonight and what I am expressing is some degree of concern that stated intent is not achieved at all in 4.01 and I just don't want anybody to be surprised when a court says congratulations you can now call the district a department but you changed absolutely nothing.

Chairman Wihby asked, Mr. Arnold, what do you have to say to that.

Deputy Solicitor Arnold answered as I stated before, I think this particular amendment is quite clear. It says that the Board of School Committee shall administer the School District as a department of the City. I don't know how much clearer you can be than that.

Chairman Wihby stated this Board has always gone with the decision from our Solicitor and we have won some and have lost some and I guess that is what is going to end up happening now. The School District has their point of view and the Solicitor has his point of view. We can debate this issue all night.

Alderman Cashin stated I have sat here all-night and listened to the give and take and nothing is going to be gained by this. All you are going to do is build up more animosity between this Board and the Board of School Committee and that is not in the best interest of the City. That is number one. Number two, this may not pass. Number three, it may go on the ballot if it does pass but it may not pass there. Would this Committee go along with tabling this for 30 days and allowing me a chance to sit down with the Vice Chairman of the School Board or whoever else may be deemed necessary along with the members of this Board to see if we can work this out. This is not in anyone's best interest. All you are doing is creating more problems between the two boards and I would like to solve this and I think I can. I would like that opportunity and if I can't, I will be the first one to tell you that I tried and I can't do it.

Chairman Wihby replied with due respect, Alderman Cashin, this has been going on for years. This is not going to change unless we change something in the Charter. They are not going to come around and say okay do it. The right approach to this would be to pass this tonight, give you the opportunity in the meantime...hearing from Leo Bernier that he doesn't need this until October 20 anyway and giving you the opportunity to have a month or two to work with them and see if it changes. In the meantime we send it to the Attorney General's Office and get his opinion and move forward from there. As long as we delay this and keep tabling this and have this off the next election and have to wait until November of next year, nothing is going to get solved.

Alderman Cashin responded I don't want to debate it, but if you do that then you are telling the School District we don't have any faith in you anyway so we are going to proceed. As long as there is life there is hope. Let's at least give it a shot. What have we got to lose? Let's at least try it.

Alderman Gatsas stated, Mr. Eggert, I have one very difficult question. Let's take a for instance. If there was a \$9 million shortfall at the School District end in the budget, ultimately whose responsibility is it?

Atty. Eggert replied currently it is the districts. If this amendment passes, it becomes the City's.

Alderman Gatsas stated let me ask you another question. If it is the District's, where are they going to find the money to pay for it?

Atty. Eggert replied it would require a further appropriation and would affect the tax rate. It would have to be an appropriation, a line item in the budget, to deal with the deficit. The State law, just so we are very clear, the State law says that you can have a line item in your budget to deal with the deficit.

Alderman Gatsas responded I think you have addressed the question not only to this Board but for the taxpayer because that tells us that the spending can continue at any point at which point we can't stop and we just have to change tax rates and open them up with no control.

Atty. Eggert replied that is your conclusion. I don't know that it is legally correct.

Alderman Gatsas asked isn't that the statement that you just made to me. I said if there was a \$9 million shortfall where would the money come from.

Atty. Eggert answered Judge Nadeau made it very clear that under the current paradigm, the price for fiscal autonomy is fiscal responsibility. You change that paradigm as a matter of law and that dollar will rest with the Board of Mayor and Aldermen. I remember one Alderman who stated...

Alderman Gatsas interjected we haven't changed the point of law. What happens if there is a \$9 million shortfall?

Atty. Eggert answered it is very clear that that becomes a deficit on the part of the District and it works against their subsequent appropriation.

Chairman Wihby stated it also works against the City.

Atty. Eggert replied yes, Sir. It affects the same taxpayers.

Alderman Gatsas asked so what you are saying is there is no control.

Atty. Eggert answered Judge Nadeau made it very clear that the control lies with the appropriation. The difficulty that concerned Judge Nadeau was that the Board of Mayor and Aldermen and the City Finance Office were artificially inflating the School tax rate by retaining interest by engaging in undocumented chargebacks. That was his primary concern. The Board, historically, had exercised unlawful control. That was his concern.

Alderman Gatsas stated I am not concerned with what happened in the past because we can't control that. My concern is the future and the future looking at the numbers, specifically the numbers, I have great concern and my question to you and you still haven't given me an answer is if there is a \$9 million shortfall how do they appropriate when they don't have the ability?

Atty. Eggert replied it is very clear that you have the appropriating authority.

Alderman Gatsas asked where do they get the money then. Where do they get this \$9 million?

Chairman Wihby asked wouldn't they have to come back to the Board of Aldermen and ask for an additional appropriation.

Atty. Eggert answered yes.

Chairman Wihby stated in which case they already spent the money and the Aldermen would say gee you guys aren't too good to do that but they ultimately would have to appropriate that amount, which would have a negative to their balance for the following year, which would affect the tax rate other than what we had set but they would offset that the following year. All they would do is come back the following year and ask for more money to offset their deficit.

Atty. Eggert stated the court was very clear that two things can happen. If the District creates a surplus, the District keeps it. If the District creates a deficit, the District eats it. Changing this paradigm does change that situation as well. I am not here to comment at all on the political expedience of that. I am simply saying as a matter of law that would shift.

Chairman Wihby moved to recommend that the Board of Mayor and Aldermen order a Special Election to be held November 7, 2000 to place the question of whether the Charter should be amended as noted above and that Alderman Cashin work with the School Board to see if they can come up with something before the deadline. Alderman Pinard duly seconded the motion.

Alderman Pinard stated I want to have a definite that the Attorney General will look into this situation.

Chairman Wihby replied right. It will automatically be sent to him anyway and he will make a decision one way or the other I guess. They have so many days. Is it 30 days?

Deputy Solicitor Arnold answered it is 14 days.

Alderman Pinard asked can we have that at our next Board meeting.

Chairman Wihby answered it will come up at the next Board meeting on August 7.

Chairman Wihby called for a vote on the motion. Alderman Cashin requested a roll call. Aldermen Cashin, Sysyn, and Clancy voted nay. Aldermen Wihby and Pinard voted yea. The motion failed.

Chairman Wihby addressed Item 4 of the agenda:

Ordinance Amendment:

"An Ordinance amending Chapter 118, Vehicles for Hire, of the Code of Ordinances of the City of Manchester, Sections 118.01, 118.10, 118.11, 118.12, 118.15, 118.16, 118.33, 118.37, 118.39, 118.42 and 118.99 relative to taxicab definitions, regulations, fares and penalties."

Clerk Bernier requested that the ordinance amendment be tabled.

On motion of Alderman Cashin, duly seconded by Alderman Sysyn, it was voted to table this item.

Chairman Wihby addressed Item 5 of the agenda:

Ordinance Amendments:

“Amending Sections 33.024, 33.025 and 33.026 (Welfare Specialist III, Deputy Welfare Commissioner) of the Code of Ordinances of the City of Manchester.”

“Amending Sections 33.024 and 33.025 (Library Page) of the Code of Ordinances of the City of Manchester.”

“Amending Section 33.026 (Data/Telecommunication Specialist) of the Code of Ordinances of the City of Manchester.”

“Amending Sections 33.024 and 33.026 (Water Meter Technician I & II) of the Code of Ordinances of the City of Manchester.”

“Amending Sections 33.024 and 33.026 (Building Maintenance Superintendent) of the Code of Ordinances of the City of Manchester.”

“Amending Section 33.0348 (Advancements within Pay Range) of the Code of Ordinances of the City of Manchester.”

“Amending Sections 33.050 (Longevity Rates) of the Code of Ordinances of the City of Manchester.”

“Amending Section 33.081 (D) (Sick Leave) of the Code of Ordinances of the City of Manchester.”

“Amending Sections 33.024, 33.025 and 33.026 (Safety Coordinator) of the Code of Ordinances of the City of Manchester.”

On motion of Alderman Clancy, duly seconded by Alderman Sysyn, it was voted to recommend that the ordinance amendments ought to pass.

TABLED ITEMS

6. Rezoning petition from Brown Avenue residents requesting that their properties located between the lights on Brown Avenue, down to the bridge, be rezoned from residential to commercial.
(Tabled 2/2/00 - Airport working on solutions.)

This item remained on the table.

On motion of Alderman Pinard, duly seconded by Alderman Clancy, it was voted to remove this item from the table.

7. Zoning Ordinance Amendment:

"Amending the Zoning Ordinance of the City of Manchester by extending the B-2 (General Business) zone to include properties currently zoned I-3 (General Industrial) in the area generally on either side of March Avenue between John E. Devine Drive and Home Depot and generally on either side of John E. Devine Drive from Gold Street to Sam's Club to include the following parcels: Tax Map 438, Lots 2, 3, 4A, 4B, 5A and 5B."

(Tabled 6/20/00 - communication from Director of Planning enclosed.)

Alderman Pariseau left me a note saying that Bob MacKenzie wants to talk about the traffic problem and then he would like to have a neighborhood meeting relative to the traffic. I imagine that he is asking to retable it again and give him an opportunity to have a meeting in his ward, but we will continue with the discussion and then retable it.

Mr. MacKenzie stated we have been looking at the issues raised last time by both the Board and this Committee. Basically, the issues relate to traffic impact generally on South Willow Street, but more specifically the impact on the neighborhood, Gold Street, Sewall, President area that has already been impacted in the past. There has also been an issue related to the recreational needs and conservation issues of Nutts Pond. We have not reached any conclusion on the Nutt's Pond recreational issue. We do have a suggested approach as to how to mitigate some of the traffic impacts on Gold Street, Sewall Street and President Road. You may have seen in your packages, the Committee asked that I write to all of the residents in the area and we did do that. We got a fairly solid response from the neighborhood saying that the situation is very bad now and the neighborhood is hesitant to see any rezonings until the traffic problem is resolved. At this point, I would like to seek the direction of the Committee. I would be happy to review one traffic alternative that I have discussed with Alderman Pariseau that might be a way to mitigate some of the problems in that neighborhood.

Chairman Wihby asked well you are going to go back and meet with the people anyway and then come back with a proposal, right.

Mr. MacKenzie answered I would be happy to do that if you wanted me to.

Chairman Wihby asked isn't that what Alderman Pariseau is asking.

Mr. MacKenzie answered yes.

On motion of Alderman Cashin, duly seconded by Alderman Pinard, it was voted to put this item back on the table.

There being no further business to come before the Committee, on motion of Alderman Cashin duly seconded by Alderman Pinard, it was voted to adjourn.

A True Record. Attest.

Clerk of Committee