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REPORT OF THE JOINT STANDING COMMITTEE ON LOCAL AND COUNTY GOVERNMENT ON THE REVISION OF TITLE 30

DECEMBER 1986

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PREFACE TO THE COMMITTEE REPORT

This study was conducted by the Joint Standing Committee on Local and County Government from January of 1985 through November of 1986. Two separate subcommittees of the full committee worked on the study during the interim periods between the First and Second Regular Sessions of the 112th Legislature and between the Second Regular Session of the 112th Legislature and the conclusion of the study. Local and County Government Committee chairmen Sen. John L. Tuttle and Rep. Edward A. McHenry served as chairmen of both subcommittees. Other members of the first subcommittee included Sen. Courtney E. Stover, Rep. Roy I. Nickerson and Rep. Dorothy A. Rotondi. Other members of the second subcommittee included Rep. John P. Daggett, Rep. Eleanor M. Murphy and Rep. Alberta M. Wentworth. Gilbert Brewer, legislative counsel to the Local and County Government Committee, served as staff for the study.

The Local and County Government Committee also received invaluable assistance from numerous state departments and agencies, other public agencies, municipal and county government officials, Indian representatives and members of the public. The Committee would like to thank all of those persons who assisted the Committee in this study. Special thanks is due to the representatives of the Maine Municipal Association, Bill Livengood and James Katsiaficas, for their integral participation, advice, review and constructive criticism in all phases of the study. Special thanks is also due to those attorneys who volunteered their time and efforts in assisting the committee in understanding the complex problems associated with municipal home rule in Maine, and in suggesting methods to clarify its implementation. These persons include Robert Bower, William Dale, Geoffrey Hole, Cab Howard, James Katsiaficas, Bill Livengood, David Lourie, and Curt Webber.

INTRODUCTION

During the First Regular Session of the 112th Legislature, it was suggested that Title 30 of the Maine Revised Statutes, containing most of the laws governing county and municipal government, be revised. That suggestion was presented to the Legislative Council for approval and a legislative study of the Revision of Title 30 was approved. The Joint Standing Committee on Local and County Government conducted the study over the next 20 months. This report and its accompanying legislation is the result of that study.

It may be necessary to briefly explain the structure of this report and its accompanying legislation. Soon after the Committee began its work on revising Title 30, it became apparent that a simple recodification would not solve the problems that exist in Title 30 of the Revised Statutes. A recodification would be unable to address several serious substantive problems within the provisions of Title 30. Further, a recodification alone would not address what appeared to be the most serious shortcoming involved in the municipal laws contained in Title 30, the flawed implementation of the concept of municipal home rule in Maine.

In order to enable the revision to adequately address all 3 problem areas in Title 30, the Committee decided to submit 3 separate bills for the Legislature's consideration. The first bill would address only those problems associated with the implementation of municipal home rule. The second bill would attempt to resolve the various substantive flaws in Title 30, flaws which could not be corrected in the non-substantive recodification. Finally, the third bill would be the recodification bill itself, which would rewrite and reorganize the statutes in Title 30 to clarify their intent and to make the Title easier to use and understand.

The process envisioned by the Committee is that the first 2 bills, the home rule revision bill and the substantive changes bill, will be submitted to the Legislature first, as emergency bills. After these 2 bills are passed by the Legislature and signed by the Governor, the recodification bill will be submitted as an emergency measure which repeals the existing Title 30, as amended, and replaces it with a new Title 30-A. This is necessary so that the changes included in the first 2 bills can be written into the new Title 30-A enacted by the recodification bill.

The Committee felt that this process, involving 3 separate bills, would be the clearest and most forthright approach to the problem. Under this approach, the home rule revisions and substantive changes are isolated from the larger recodification bill. This was done for 3 reasons. First, it makes it easier for individual legislators or interested members of the public to review the substantive changes made in the first 2 bills.

No attempt is made to "hide" any changes in law within the large recodification bill; it remains a "clean" bill containing no substantive changes in the law. Second, it provides a clear legislative history for the courts so that the intent behind the home rule revisions and the substantive changes is unambiguous and isolated from the recodification changes, which are not intended to have any substantive impact at all. Third, it allows the recodified version of Title 30 to incorporate the changes made by the 2 previous bills. If the home rule revisions and substantive changes were to be enacted after the recodification bill, it would disrupt the new organization of the title achieved under the recodification.

This report follows the same three-way division employed in the legislation suggested by the Committee. The first part of the report discusses the recodification aspect of the study. The second part discusses the Committee's review of substantive problems, and the third part includes a discussion of the home rule revisions suggested by the Committee. Since the purposes of the recodification and substantive changes suggested by the Committee are largely self-evident, this report only briefly examines those areas of the study. The home rule revisions are discussed in more detail because of the greater complexity of the issues involved and the opportunity it affords to provide a legislative history of the intent behind the suggested revisions.

I. THE RECODIFICATION OF TITLE 30 OF THE REVISED STATUTES

Title 30 of the Revised Statutes has existed in basically its present form since the last major revision of all of the Revised Statutes in 1964. That revision consisted primarily of a simple reshuffling of existing statutes into a new organization with little effort made to integrate the separate provisions into an coherent whole. The last real recodification of provisions that are presently included in the title occurred in 1954 when the municipal laws were rewritten. Over the past 20-odd years since the 1964 revision, the title has been amended many times in many ways, with no change ever occurring in its basic organization and little effort made to coordinate and harmonize all of the several separate amendments.

The result of this piecemeal legislation is that the provisions of Title 30 have become difficult to use and understand. Many statutes exist in the same form as when enacted over 150 years ago. The language of these statutes has become so archaic as to obscure the true meaning and intent of the law. Further, juxtaposition of these archaic statutes with more recent legislation only serves to heighten the confusion. The original organization of Title 30, designed to serve as an aid in locating and understanding the significance of the statutes has instead become a hindrance. New statutes have been added in chapters far removed from other relevant statutes, making it difficult to find them and obscuring the effect of other relevant statutes.

The recodification portion of the Committee study recommends a complete rewrite of Title 30. The suggested legislation repeals the entire existing Title 30 and replaces it with a new Title 30-A. This new title will contain the exact same provisions of law that the present Title 30 contains, but they will be redrafted and reorganized to make it easier to use and understand the law. The recodification is designed to accomplish 3 broad goals. First, archaic, ambiguous or legalistic language is rewritten in plain English wherever possible to make the statutes easier to read and understand, without making any change in the substance of the law. Second, the statutes are reorganized within the Title in a logical sequence, grouping statutes of similar subject matter in order to make it easier to find a specific statute and to locate other relevant statutes in the same subject area. Third, the provisions in the title are rewritten to reflect the provisions of other relevant statutes, so that they can sensibly be read together, and cross-references within the Title are updated or added where necessary in order to ensure that proper cross-references to relevant statutes are available.

The Committee has taken great efforts to avoid including in the recodification any substantive change in the law as it presently exists. The intent of the Committee was to include only drafting and organizational changes in the recodification bill without making any substantive changes. All substantive changes in present law which the Committee considered necessary or desirable were relegated to either the home rule revision bill or the substantive changes bill. All possible efforts were made to ensure that the recodification bill is "clean" and includes no substantive changes. Drafts of the recodification bill have been circulated to all interested parties in an attempt to identify any substantive changes that may have been inadvertantly made in the redrafting. Any such changes that were identified were corrected during the drafting process.

II. SUGGESTED SUBSTANTIVE CHANGES IN TITLE 30 OF THE REVISED STATUTES

The second major portion of the Study to Revise Title 30 concerns the substantive revisions to the title. These revisions generally fall into one of 2 categories: revisions made to restore consistency between 2 or more related statutes or to harmonize the provisions of 2 or more such statutes; and revisions made to update or repeal archaic statutes.

As noted, the last comprehensive recodification of the municipal laws occurred in 1954. Since that time, and longer in the case of the county laws included in Title 30, many separate amendments have been made to the Title. Very often these separate amendments will have an effect on laws which are related to the statute which was actually amended. In some cases, these effects are intended and cause no problem, but in other cases they are unforeseen and create an anomoly in the general body of law. Similarly, there are many statutes which have existed for very long periods of time, well over 100 years in some cases. Very often these laws have become outdated and no longer serve any useful purpose as rules of law, or although the general intent of the law is still valid, certain aspects of the original provisions are no longer useful. In both of these cases, the anomolous provisions created by scattershot amendments and the outdated provisions of archaic laws create confusion and uncertainty in the law. The purpose of the substantive changes bill is to remove this uncertainty and restore consistency and clarity to present law.

In addition to the changes described above, the substantive changes bill also makes corrections where necessary to fill gaps in current law, or to resolve conflicts with other statutory provisions. It also adds provisions to clarify present law where judicial decisions have determined the meaning of ambiguous language, or where common practice has been adopted by local governments.

The Committee has made every effort to include only corrective changes in the substantive changes bill. Several substantive changes were suggested for inclusion in the bill by various parties but were rejected by the Committee because they were not really "corrections" to existing law, but instead involved a change in the policy expressed in current law. The Committee attempted to limit its changes in this bill to only those changes that corrected inconsistencies in present law, or updated present law in light of changed conditions. Although many of the suggested changes which were not included in this bill were meritorious and perhaps deserved consideration by the Legislature, the Committee felt that it was inappropriate to include them in this bill as part of the revision of Title 30.

III. SUGGESTED HOME RULE REVISIONS IN TITLE 30 OF THE REVISED STATUTES

A. STATEMENT OF THE PROBLEM

The final area of study concerns the implementation of municipal home rule in Maine. When the Committee began work on its study to revise Title 30 of the Revised Statutes, it soon became apparent that the major changes wrought by the adoption of home rule for municipalities in 1970 were not reflected in the statutory language of the title. In order for the Committee to complete its assigned task of revising the title, it was necessary to reconcile the adoption of municipal home rule with the great mass of statutes which existed in Title 30 before 1970, and in many cases, with statutes enacted even after that date. This effort was also spurred by the decisions of the Law Court regarding home rule which, perhaps reflecting the confusion in the title itself, appeared not to reflect the Legislature's commitment to municipal home rule as expressed in the statutes. The Committee was not alone in this judgment; many municipal officials as well as the Maine Municipal Association similarly perceived a need to clarify the application of home rule as expressed in Title 30. Scholarly legal articles also bemoaned the Legislature's and Judiciary's failure to follow through on the concept of municipal home rule in Maine. See Comment, Home Rule and the Pre-emption Doctrine: The Relationship Between State and Local Government in Maine, 37 ME.L.REV. 313 (1985), referred to in this report as the Maine Law Review article.

The Committee first attempted to define the current state of the problem regarding municipal home rule in Maine and to identify the sources of that problem. An excellent detailed historical discussion of the roots of the present confusion in the home rule area appears in the Maine Law Review article cited above at pages 313-334. To very briefly recount that discussion, the problem arose from the inconsistency between the constitutional amendment granting municipalities the power

to amend their charters "on all matters, not prohibited by Constitution or general law, which are local and municipal in character," Me. Const. art. VIII, pt. 2, §1, and the subsequent implementing legislation passed by the Legislature, found at 30 M.R.S.A. c.201-A. As described in the Maine Law Review article, the constitutional amendment adopted an approach to municipal home rule that apparently contradicts the method contained in the implementing legislation passed in the following legislative session. The second home rule grant is found in 30 M.R.S.A. §1917, and provides that a municipality "may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication."

A full discussion of the conflict and interworkings of the constitutional amendment and the enabling legislation is beyond the scope of this study, which is limited to reviewing the status of home rule solely within Title 30. However, the Committee's basic premise in revising Title 30 was its belief that the apparent conflict between the constitutional amendment and the grant of home rule power under the implementing legislation can best be resolved by viewing them as 2 separate grants of power to municipalities. The constitutional amendment deals solely with the grant of power to municipalities to amend their charters without specific authorizing legislation in each instance. The legislation subsequently passed by the Legislature, ostensibly to implement the constitutional grant of charter home rule, actually contains a second, entirely separate grant of home rule authority to municipalities.

The statutory grant of home rule authority in 30 M.R.S.A. §1917 stands on its own as a grant of power to municipalities to enact local legislation on any legal subject unless the Legislature has acted to restrict that power, either expressly or by clear implication. The result is that under this statute, the Legislature no longer has to specifically authorize individual subjects of permissible municipal legislative action. It is presumed that a municipality already has the authority to act under section 1917, subject only to the Legislature's ability to restrict that authority through legislation.

This statute reverses the usual legal rule that applied to municipalities before the adoption of home rule. Known as "Dillon's Rule," it provided that a municipality, as a creature of the state, could exercise only those powers which the legislature had expressly or by clear implication given to the municipality, see Chase v. Inhabitants of Litchfield, 134 Me. 122, 182 A. 921 (1936). This rule required the Legislature to dole out individual grants of legislative authority to municipalities whenever it became apparent that a municipality

needed to act on any specific problem. Because of this legal rule, before 1970, the Legislature had to enact specific enabling statutes governing even the most minute aspects of municipal existence. The purpose of enacting section 1917 was to remove this burden upon the Legislature, and its attendant restrictions upon municipalities, by reversing the rule so that the only action the Legislature had to take with respect to municipal ordinance authority was to enact any restrictions upon its exercise by municipalities as the legislature saw necessary.

The primary problem created in Title 30 by the adoption of home rule involves the great mass of statutes enacted before the advent of home rule in 1970. These statutes were originally intended, as required by the application of Dillon's Rule, to grant municipalities the power to perform certain functions, or to adopt ordinances in certain areas. However, the adoption of home rule renders many of these statutes entirely obsolete since its grant of plenary power already includes the specific grants given under these statutes. But these statutory "dinosaurs" may still have a quite unintended effect. For example, 30 M.R.S.A. §3851 was originally enacted to enable municipalities to create a park commission, and later amended to change the grant of authority to allow the creation of municipal conservation commissions. It also set up a detailed pattern of how such a commission was to operate and what its duties were. However, after the advent of home rule, the specific authority to create a conservation commission is no longer necessary; a municipality already has this power under the general home rule authority granted by section 1917. Section 3851 still remains in effect, although its original reason for existence is no longer valid. However, now a court may look at this statute, not as a grant of power, but as a limitation on municipal home rule authority. The court might reason that the Legislature has acted to preempt municipal authority to create a conservation commission in any other way than as described in section 3851. Although this is clearly not the intent of the Legislature, existing law appears to require just such a result in many instances because the legal background against which the statute must be read has changed since its original enactment. There are many such pre-home rule statutes in Title 30 which do not properly reflect the current legal background established by the adoption of municipal home rule.

Unfortunately, the problem is not limited to pre-home rule statutes. The Legislature, steeped in the tradition of providing specific grants of authority to municipalities, has failed to consistently consider its own prior adoption of municipal home rule in enacting statutes after 1970. To use the same statutory section as an example, 30 M.R.S.A. §3851 has been amended several times since 1970 without any apparent legislative recognition of the change in its legal effect

caused by the adoption of home rule. In fact, new statutory provisions, 30 M.R.S.A. c.229, sub-c.II-A, were enacted in 1981 to parallel the provisions of section 3851 with respect to energy commissions. The Legislature has continued to attempt to "grant" municipalities powers which they already possess under section 1917 without recognizing that each such "grant" instead acts to diminish municipal authority under their home rule powers. See the Maine Law Review article at page 365.

Recently, largely through the efforts of the Maine Municipal Association, the Legislature has grown more aware of the repercussions of its actions as regards municipal home rule. Very often it has explicitly acknowledged a municipality's home rule authority as the source of power to perform a function or enact ordinances; see e.g. 30 M.R.S.A. §4962. However, even this type of express acknowledgment can work against the fundamental concept of municipal home rule, that municipalities have been given a plenary grant of authority. The acknowledgment approach leads back into one of the very problems that home rule was intended to solve, that is the burden on the legislature to enact legislation covering every facet of a municipality's operation. If the legislature has to expressly acknowledge municipal home rule in every instance in which it could conceivably be at issue, this advantage of home rule disappears.

Ideally, under home rule, the only legislative action that should be taken regarding municipal authority is to enact limitations on that authority. In actuality, a pure application of this idea proves to be impractical. The primary problem with this approach is that it requires the Legislature to consider the potential home rule effects of every piece of legislation that it considers. Although this is undoubtedly a worthy goal and should be pursued wherever possible, it is impractical to expect the Legislature to accurately assess the potential home rule implications of every bill that it enacts. Additionally, the legislature may wish to enact legislation that, without limitations, establishes a model that municipalities can readily adopt or that suggests areas in which the legislature feels that municipalities should act under their home rule authority. This type of legislation is valuable and should not be discouraged.

Given the inherent limitations on the legislature's ability to accurately analyze each piece of legislation that passes before it to ascertain its potential effects upon home rule, it is necessary that the legislative and judicial branches of State Government cooperate to effectively implement the concept of municipal home rule. The Legislature must make every effort to recognize and address potential home rule issues when they arise, and the Law Court must construe legislation which affects municipal powers with the fundamental concept of municipal home rule in mind. In fact, the implementing

legislation required the Law Court to do exactly this when it called for the chapter to be liberally construed, 30 M.R.S.A. §1920. As seen however, it is doubtful that the Legislature has cooperated to the extent necessary to avoid confusion in the area of home rule; whether the Law Court has effectively shouldered its share of this burden has also been questioned by some. See the Maine Law Review article at pages 344-365.

The Law Court has considered several cases in which the validity of municipal ordinances as exercises of home rule authority has come into question. The Maine Law Review article has a detailed discussion and criticism of the Court's analysis in these cases. The Committee has no desire to second-guess the correctness of the Court's decisions in those cases, nor to wholly adopt the positions taken by the author of the Maine Law Review article, but there are some statements in the case opinions which appear to indicate that the Court has not entirely accepted the policy established by the Legislature regarding municipal home rule.

As stated, the Committee believes that the legislative intent behind the original enactment of 30 M.R.S.A. §1917 was to convey a plenary grant of power to municipalities, subject only to the legislature's ability to limit that power in appropriate instances. Under such a grant, the role of the Court should be to initially accept the municipal ordinance as a valid exercise of municipal home rule authority, and begin its analysis by searching for a limitation on the exercise of that authority, whether constitutional or statutory. Instead, the Law Court has in many cases continued to search for a specific statutory authorization for a municipality to enact a specific ordinance. For example, in Roy v. Inhabitants of Augusta, 387 A.2d 237 (Me. 1978), the Court failed to search for whether the specific statute denied the city the power to enact the ordinance in question, but ruled that the city lacked the required grant of authority to do so. Similarly, in the case of Crosby v. Inhabitants of Ogunquit, 468 A.2d 996 (Me. 1983), the Court searched for the grant of power under which the town was acting without acknowledging the plenary grant of power given to towns under 30 M.R.S.A. §1917.

This tendency to look for specific authorizing statutes may be no more than a lingering habit from the days of Dillon's Rule, when a specific grant was required in every instance before a municipality could act to protect its interests. The language in the Court's opinions cited above may simply be an anachronism, for the Court has on occasion used language indicating its acceptance of home rule as the basic source of municipal authority, then sought out limitations on that authority. See e.g. Tisei v. Town of Ogunquit, 491 A.2d 564 (Me. 1985). However, it has been suggested by some that this anachronistic language may be more than just a simple slip of the pen, and indicates a deeper distrust of the concept of home rule.

As discussed above, the concept of home rule authorizes municipal action in any area unless the legislature has acted to deny the power, "either expressly or by clear implication." Municipal home rule authority can thus only be denied in two ways, by express legislative prohibition or by an implied denial. The first of these poses no problem for a court; where the Legislature has performed its obligation and considered the home rule effects of legislation and expressly stated its intent, the court can clearly discern and follow that intent. It is the second area, where the Legislature has failed to address the home rule issues, that problems have arisen. Despite the legislative admonition that the home rule implementing legislation be construed "liberally," the Law Court has tended to find an implied state preemption or denial of authority a little more readily than the Committee feels is warranted.

Several of the Court's decisions show an excellent grasp of the fundamentals of legislative preemption of municipal home rule authority. For example, in Ullis v. Inhabitants of Boothbay Harbor, 459 A.2d 153 (Me 1983), the Court found that the field of liquor control was preempted by comprehensive and exclusive state legislation in the subject area. The second requirement, that the state legislation be intended to be "exclusive" is the key here. In this case, the Court is properly searching for a legislative intent to deny municipalities the power to regulate in a certain area. The mere fact that there is a state law, or even a multitude of state laws on a subject is by itself irrelevant; the key is whether the Legislature intended to exclusively occupy the field and thereby deny a municipality's home rule authority to act in the same area. The second key factor exhibited by the Ullis decision was its requirement that the municipal ordinance work at "cross-purposes" with the legislative enactment. This factor correctly emphasizes the fact that a municipality may regulate in an area similarly regulated by the State, so long as the municipal ordinances do not interfere with the state statutes. The Court's analysis in Ullis exhibits a sensitive understanding of the fundamental principles involved in municipal home rule preemption. See also the Court's opinions in Tisei v. Town of Ogunquit and Begin v. Inhabitants of Sabattus, 409 A.2d 1269 (Me. 1979).

However, as discussed above, the Court's opinions have not consistently exhibited the clarity of analysis found in the cases cited above, and even in these cases there appears to be little recognition of the legislative directive to construe the home rule grant "liberally." Several examples are discussed at length in the Maine Law Review article at pages 348-363, dealing with the Court's finding of an implied denial of municipal authority in the face of comprehensive state legislation in a subject area.

The Committee believes that although most of the Court's difficulties with the analysis of home rule cases stems from the Legislature's failure to properly indicate its intent regarding home rule in various statutes, the Court has similarly failed to give municipal home rule the benefit of the "liberal construction" mandated by 30 M.R.S.A. §1920. The Court has tended to find even minimal excursions into a field to constitute an "occupation" of the field, thus denying municipalities home rule authority to legislate in that area. See the Court's opinions in East Millinocket v. Medway, 486 A.2d 739 (Me. 1985), opinion of Nichols, J.; James v. Inhabitants of West Bath, 437 A.2d 863 (Me. 1981); Roy v. Inhabitants of Augusta, 387 A.2d 237 (Me. 1978); and Crosby v. Inhabitants of Ogunquit, 468 A.2d 996 (Me. 1983). While not expressly disagreeing with the Court's holdings in any of these cases, the Committee feels that in light of the directive to construe a municipality's home rule powers "liberally," the preemption issues involved in these cases appear at the least to have merited more extensive analysis and discussion than they received in the Court's opinions.

B. SUGGESTED LEGISLATION

It is the purpose of the suggested legislation to reinvigorate the concept of municipal home rule in Maine to reflect the original commitment intended by the Legislature in enacting 30 M.R.S.A. §1917. This exercise will require the combined efforts of the legislative and judicial branches of State Government. The legislation suggested by the Committee is only the first step in this process, the success of which depends upon the future cooperation of the Legislature and the Law Court.

The Committee suggests that the Legislature take the first step in reinvigorating municipal home rule in Maine by passing the suggested home rule revisions. These revisions represent an attempt to redraft the provisions of Title 30 of the Revised Statutes to reflect the adoption of home rule and to clarify its implementation by the Law Court. It must be stressed however that the legislation is limited to revising only Title 30 of the Revised Statutes; the study was authorized only to revise Title 30 and the suggested legislation acts within that restriction. Many of the remaining titles of the Revised Statutes stand in similar need of revision in light of the adoption of home rule, however a revision of all state statutes appears to be impractical. It is hoped that the standard of review regarding municipal home rule enactments contained in the suggested legislation will obviate the need for wholesale statutory revisions.

The Committee's guiding principle in drafting the suggested legislation was the idea that the grant of home rule ordinance power to municipalities in the current Title 30, section 1917 of the Revised Statutes, is a plenary grant of power; no further grants of power need be given to municipalities. The only legislative action that should be taken concerning municipalities is to determine when that power should be limited. The suggested legislation attempts to implement that concept in Title 30 through three basic methods:

1. The bill repeals all asserted grants of power to municipalities that do not contain a limitation on that power, except where the grant may serve as an example of how a municipality may choose to use its home rule power;

2. Provisions which do not limit home rule power but may serve as a useful guide to municipalities are retained, but with an express recognition of municipal home rule authority to act otherwise; and

3. Finally, express limitations on home rule authority are retained wherever they represent a legitimate state interest. Former limitations which do not further legitimate state interests are repealed to allow municipalities freedom to act under their home rule authority.

This process accomplishes two major goals: it removes provisions which formerly functioned solely as a grant of authority and contained no limitations on municipal powers; and it clarifies existing limitations on municipal home rule authority wherever necessary.

It is not the intent of the suggested legislation to deny municipalities any power which they currently have under their home rule authority. The bill retains many statutory provisions as examples to provide guidance to a municipality in exercising its home rule authority. Although this type of legislation is not strictly necessary under the concept of home rule, it is useful as an indication of areas in which the Legislature feels that it is desirable for municipalities to act under their home rule powers, without mandating any action or any procedure to be followed if action is taken. The suggested legislation also retains many provisions where a municipality's home rule authority is recognized as the source of power to perform a certain action. Again, although this type of legislation is not strictly necessary under home rule, it is desirable to maintain consistency with the concept that section 1917 is the only grant of authority necessary to authorize any municipal action. These changes are not intended to deny a municipality's home rule authority to enact ordinances in any area in which they presently may act. They are intended to clarify a municipality's present home rule authority, not to reduce it.

One additional method of clarifying home rule power applied in the suggested legislation, and perhaps the most important, was to redraft the original grant of home rule power in an attempt to clarify its plenary grant of authority. This includes the addition of a standard of review by which the concept of home rule will be interpreted by the judiciary. The suggested legislation includes a new version of 30 M.R.S.A. §1917. The new provisions contain the same original grant of home rule authority that currently appears in section 1917, but are moved to place them under chapter 209 of the Revised Statutes. This was done to reemphasize that the grant of ordinance home rule power is a separate and distinct aspect of a municipality's total home rule power in Maine. The Constitution of Maine, Article VIII, Part Second contains the general charter home rule grant of authority. Title 30, chapter 201-A of the Revised Statutes contains the implementing statutes for the charter home rule grant. As explained earlier, despite its current placement in the midst of chapter 201-A, the ordinance home rule grant is not part of the charter home rule implementing legislation. It stands on its own as a separate legislative grant of home rule authority to enact ordinances for any purpose not denied by the legislature. Its movement to Title 30, chapter 209 of the Revised Statutes, which contains the provisions related to municipal ordinance authority, is designed to reflect the two-fold composition of municipal home rule in Maine, charter home rule and ordinance home rule. In addition to simply moving the grant of ordinance home rule authority, the suggested legislation also retains the original requirement that its provisions be construed liberally. By moving section 1917 into a new chapter, it is isolated from the provision requiring liberal construction found in 30 M.R.S.A. §1920. That requirement is written directly into the new section.

The new version of section 1917 also includes the addition of a new standard of review to be applied by the Court in construing municipal home rule ordinances. That standard first provides a presumption that any action taken by a municipality is a valid exercise of its home rule authority; the Court starts from the base that the municipality has the power to enact any given ordinance. Second, the Court will move from this base and invalidate a municipal ordinance only where the municipal ordinance will frustrate the purpose of any state law, or where the Legislature expressly denies a municipality the power to act in some area. This standard functions as a general expression of legislative intent that applies whenever the Legislature fails to state in the legislation how home rule is affected by the law. The standard reaffirms the fundamental principle of home rule, that municipalities have been given a plenary grant of power, while recognizing that this authority is subject to the State's ability to limit that power in the furtherance of legitimate state interests. Only where the municipal ordinance prevents the efficient accomplishment of a defined state purpose should a municipality's home rule power be restricted, otherwise they are free to act to promote the well-being of their citizens.

This standard of review will focus the Courts' inquiry onto the issues that lie at the heart of municipal home rule. When faced with future preemption issues, the Court's focus will not be on the "scope" or "geography" covered by a statute (Tisei at 571), but on whether the municipal ordinance interferes with the state statutes at issue. Under the concept of home rule, a municipality's powers should not be limited merely because a state law of general applicability also operates in the same subject area, but only because the municipal ordinance operates to prevent the efficient accomplishment of the purpose of that law. Municipal and state enactments may peacefully co-exist within any given subject area unless a conflict arises, in which event the state statute will control. This is the essence of the municipal-state relationship established under home rule; municipalities are given the authority to act freely without unnecessary control by the state except where those activities actually interfere with actions taken by the state.

Finally, a savings clause is added to the bill to clarify the transition from the old statutes to the new. This clause is designed to ensure that any changes in the statutes made under the suggested legislation will affect only cases which arise after the new law takes effect; it will not upset any actions which were previously taken. The clause also ensures that municipal ordinances which were enacted before the effective date of the legislation will be interpreted according to the new standard of review set out in the legislation if the case involves events occurring after the law takes effect.

In summary, the legislation has been drafted to improve the implementation of the following fundamental principles of home rule:

1. The grant of home rule authority to municipalities in section 1917 is a plenary grant of power, subject only to any restrictions that the Legislature may enact in law;

2. No further legislative action need be taken in regards to that power except to prescribe limits on its application, and perhaps to suggest models or examples of how a municipality may implement that power;

3. Limits on municipal home rule authority should be enacted only where necessary to further a legitimate state-wide interest;

4. Municipalities are free to act under their home rule authority except where that action interferes with the accomplishment of a defined state purpose, as expressed in legislation.

C. RECOMMENDATIONS

Although the Committee has drafted its suggested legislation with the primary goal of improving the implementation of these fundamental concepts of home rule, the achievement of this purpose will depend upon many factors other than enactment of the suggested legislation. First and foremost among these factors is whether the Legislature itself will accept the responsibility placed upon it by the adoption of home rule. The troubled implementation of municipal home rule in Maine can be traced directly to the Legislature's failure to effectively acknowledge the adoption of home rule in its legislation, both in legislation that pre-dates the adoption of home rule and in legislation enacted afterwards. The Legislature must refrain from enacting any legislation purporting to grant municipalities any powers in addition to their home rule powers. Municipal home rule is a plenary grant of power; further "grants" of power only diminish the effectiveness of the home rule scheme. Additionally, whenever possible, the Legislature should take care to expressly acknowledge the extent of municipal home rule authority under any law that possibly infringes upon a municipality's home rule authority. It is ultimately the Legislature's responsibility to define the limitations upon home rule that it desires; it should not simply rely upon the Law Court to construe its intent from statutes bare of any evidence that the effects upon home rule were even considered by the Legislature. In order for the concept of home rule to be effectively implemented, the Legislature must take a more active role in defining the limits it places upon municipal home rule authority.

However much care the Legislature actually takes to more carefully define its intent to limit municipal home rule in its enactments, it will eventually be up to the Law Court to determine the extent of home rule limitations in the laws of Maine on a case-by-case basis. This is a burden that can never be totally removed from the judiciary. The Committee recognizes the problems faced by the judiciary in interpreting statutes that have not adequately reflected the concept of municipal home rule, both within and outside of Title 30 of the Revised Statutes. It is hoped that the revisions suggested by the Committee can relieve some of the home rule confusion, at least as it involves the provisions of Title 30, although the Court must remain aware that it was not possible to completely revise Title 30; some provisions of the title which are not intended to operate as limitations may have inadvertantly escaped revision. However, the Committee believes that the addition of an express standard of implied preemption will aid the Court in construing a statute's effect on municipal home rule where there is no express indication of Legislative intent within the statute, whether the statute is within or outside of Title 30. Under the suggested standard, the Court's inquiry will be directed to whether the municipal ordinance in question frustrates the purpose of any state law or rule adopted under a

state law. This standard provides a general expression of legislative intent regarding home rule that applies in the absence of a contrary specific provision in the law. It provides that a municipality is free to act under its home rule authority unless that action prevents the accomplishment of the purpose of any state statute or rule adopted under a statute.

D. SUMMARY

It is hoped that the Law Court will apply the new standard of review contained in the suggested legislation faithfully to carry out the purpose of the original adoption of home rule for municipalities and the purpose of the suggested legislation. That purpose can be expressed as faith in the ability of local governments to more effectively express the will of their inhabitants on issues that directly affect them. Municipal government is the level of government closest to the people and most immediately responsive to their needs. It is manifest that the people need and deserve the authority to act to meet demands occasioned in the community. In making this determination, the Legislature has also recognized the limits on the desirability of granting municipalities plenary authority under home rule. In certain areas, municipal governments may lack the technical expertise to address problems. Similarly, there are problems which cut across local community lines and require a broader, state-wide solution. The Legislature also recognizes the possibility that in certain instances, local governments may abuse their authority to the detriment of their inhabitants or of neighboring communities. The Committee feels confident that these problems can adequately and best be met by effective legislative action on a state-wide basis under the existing home rule scheme without undue interference and restrictions upon a municipality's home rule authority. As was the belief of the Legislature in originally adopting home rule for municipalities in Maine, we feel confident that municipalities in Maine have earned the right to the broad powers granted under home rule, and denounce any undue restrictions upon that authority.

The Committee believes that the recommendations made in this report, and the enactment of the suggested accompanying legislation, will go a long way towards fulfilling the original promise of municipal home rule. For too long the incomplete implementation of municipal home rule has unduly restricted municipal authority, hindering their ability to efficiently address problems of local concern. The measures suggested in this report do not abdicate the role of state government; the Legislature retains the ultimate ability to step in and restrict a municipality's exercise of home rule authority wherever it is in the best interests of the citizens of this State. Nor do these measures radically change existing state policy, they simply restore the relationship between the state and municipal governments to the harmonious and proper balance intended by the original enactment of municipal home rule by the people of Maine.

APPENDIX A

SUGGESTED LEGISLATION

Due to the length of the legislation suggested by this study, copies of the bill drafts are not included in this report. Copies are available from:

Gilbert W. Brewer
Office of Policy and Legal Analysis
State House Station 13
Augusta, Maine 04333

The telephone number is 289-1670. Additionally, the bill drafts should soon be available as Legislative Documents prepared for the 113th Session of the Maine Legislature.