

**CITY OF PORTLAND  
M E M O R A N D U M**

**TO:** Members of the Portland Charter Commission

**FROM:** Gary Wood, Corporation Counsel 

**DATE:** July 29, 2009

**RE:** **Legality of Allowing Non-Citizens to Vote in Municipal Elections and on Municipal Referendum Questions.**

This issue has been identified by several members of the Commission as an important one for the Commission to consider. Commissioner Treverrow asked MMA for an opinion about the legality of providing such authority in a City Charter.

Bill Livengood, the Director of MMA's Legal Department, issued an informal opinion by e-mail on Wednesday, July 28<sup>th</sup>. A copy of that opinion is attached. His conclusion is that the legality of a Charter provision allowing non-citizens to vote on municipal issues and for municipal officers (Councilors and School Committee members) is questionable at best.

I have known and worked extensively with Bill on municipal legal issues since 1981. He is in my opinion the most well-versed attorney in the State on municipal law and in particular on home rule, having been MMA's lead person at the State Legislature in 1987 during the recodification of Title 30-A the principle state law addressing municipal legal authority.

On December 24, 2008 I issued a brief memorandum to the members of the City's Legislative Committee (attached) in which I concluded that under Maine's Home Rule provision a city could by charter allow residents who are non-citizens to vote on municipal issues, notably the election of councilors and school committee members and on municipal referenda questions. A copy of this memorandum is attached.

Bill's opinion rests on his analysis of 30-A M.R.S.A. § 2501 (attached) which states in pertinent part:

**2. Qualifications for voting.**

The qualifications for voting in a municipal election conducted under this Title are governed solely by Title 21-A section 111<sup>1</sup>.  
(emphasis added)

In addition to this specific language the first paragraph of §2501 explicitly provides Charter authority that supercedes state law on the issues of the method of voting and conduct of a municipal election but doesn't extend that authority to the qualifications for voting in par. 2.

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<sup>1</sup> Title 21-A §111 requires a person to be a citizen as one of the eligibility requirements for voting.

In issuing my opinion on December 24<sup>th</sup> I did not consider the impact of 30-A M.R.S.A. 2501(2) on a municipality's home rule charter powers. Those powers flow from Article VIII part second, Section 1 of the Maine Constitution which states as follows:

**Section 1. Power of municipalities to amend their charters.** The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, (emphasis added) which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

The current legal question upon which Bill and I agree and to which there is no easy answer, is what do the words "conducted under this Title" mean in 30-A M.R.S.A. § 2501(2) cited above.

The inclusion of those words suggest that there are elections held at the local level that are not conducted under Title 30-A and the answer to that question may be that those elections conducted under a home rule charter are not conducted under Title 30-A, and for that reason the qualifications for voting on municipal issues and positions can be determined by the charter as opposed to state law.

A countervailing argument that adds to the confusion is that Title 30-A in Chapter 121 Subpart III still has laws (see 30-A M.R.S.A. § 2551-2556) which preceded the home rule amendment to the Maine Constitution in 1969. Many of these laws contain conflicting messages when it comes to statutory interpretation regarding the legal ability of a City charter to create different or contradictory requirements. For example, §2551 that requires a City election to be called by a warrant, references a section (§2523) that is applicable to town meetings and is in itself a law that has existed since at least 1954. It is totally silent on the authority of a charter to provide a different way to call an election. On the other hand, §2553, Nomination to City Office by Petition, creates legal authority for a person to be nominated to any City office by following a state statutory procedure in Title 21-A Chapter 5, Subchapter 2 that is inconsistent with the procedure that has been long-standing and practiced under the current City charter. Furthermore, that same section goes on to recognize the power of a city charter by stating that a person seeking nomination under the section may use a political designation only if permitted by a city charter.

One another issue of importance to some members of the Commission, runoff voting, 30-A M.R.S.A. §2555 clearly recognizes the authority of a municipal charter to provide by election by other than a plurality, stating: "In a city election, unless otherwise provided by municipal charter, (emphasis added) the person who receives a plurality of the votes cast for election to any office is elected to that office."

The Immigrant Voting Project, an effort organized to support voting by immigrants concludes that Maine State law would have to be changed to allow non-citizens to vote on municipal issues. (See attached)

At this point my recommendation to the Commission, because of the legal uncertainty surrounding this issue, is that the Commission should take up the issue on its merits and decide if a majority of the Commission wish to submit it to the voters. If a majority of the Commission decides to submit the question and the necessary Charter language to the voters for approval, it should be submitted as a stand-alone question so that, if approved by the voters, a legal decision from a court in the form of declaratory judgment can be obtained to resolve the issue clearly and finally, as it is not one that can be resolved by an opinion of legal counsel. In such circumstances, it would be imperative to seek and obtain a legal decision on the issue before any election was held at which non-citizens were allowed to vote.

The legal Rubicon that has to be crossed on this issue is imposed by 30-A M.R.S.A. §2103(5)(D) which requires the final report of the Charter Commission to include a written opinion by an attorney admitted to the bar of this state that the proposed charter or charter revision does not contain any provision prohibited by the United States Constitution, the Constitution of Maine or the general laws.

Based on the Home Rule argument articulated above that the words “under this Title” are designed to recognize the ability of a charter to create different qualifications for voting on municipal issues and for municipal positions, I will certify that such a provision is not prohibited by state law and go to court to get a definitive answer if the provision is submitted to and approved by the voters.

Cc: Elizabeth Boynton, Esq.  
Linda Cohen, City Clerk

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