The Commonwealth of Massachusetts

EIGHTH REPORT

OF THE

SPECIAL COMMISSION ON IMPLEMENTATION

OF THE

MUNICIPAL HOME RULE AMENDMENT

TO THE

STATE CONSTITUTION

(Created by Resolves of 1965, c. 131)

(Revived and Extended by Resolves of 1966, c. 63)

November 30, 1967

The Commonwealth of Massachusetts

STUDY AUTHORIZATION

RESOLVES OF 1965 — CHAPTER 131

RESOLVE PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION RELATIVE TO SUCH CHANGES IN THE LAWS AS MAY BE DESIRABLE IF THE HOME RULE AMENDMENT, SO CALLED, TO THE CONSTITUTION IS ADOPTED.

Resolved, That a special commission, to consist of three members of the senate, seven members of the house of representatives, and five persons to be appointed by the governor, is hereby established for the purpose of making an investigation and study relative to the statutory implementation of the proposal for a legislative amendment to the Constitution providing for home rule (see current House document numbered 461), which was agreed to for a second time by the general court in joint session on May nineteenth, nineteen hundred and sixty-five, in the event said amendment should be approved and ratified by the people. Said commission shall consider, among other appropriate aspects but not limited thereto, the following: — (a) corrections of existing general law provisions, designed to bring them into line with the requirements of said constitutional amendment; (b) the establishment of additional general law standards of local government, if necessary and desirable; (c) the implementation of the right of free petition at the local government level, through improved initiative and referendum procedures or otherwise; (d) procedures to be followed by local governments, or by the governor, in requesting the enactment of special local laws by the general court; (e) procedures for the voluntary merger of municipalities which are too small in population and resources to provide certain local services, and the feasibility for state assistance in such mergers; (f) the classification of municipalities for the purposes of said constitutional amendment; and (g) any changes which may be necessary in the joint rules of the general court. Said Commission may report from time to time and shall file a preliminary report not later than March thirty-first, nineteen hundred and sixty-six, and shall file its final report not later than May fifteenth, nineteen hundred and sixty-six.

The Commonwealth of Massachusetts

Resolves of 1966 — Chapter 63

Resolve extending the time within which the special commission on implementation of the municipal home rule amendment to the state constitution is required to complete its study and file its final report.

Resolved, That the unpaid special commission, established by chapter one hundred and thirty-one of the resolves of nineteen hundred and sixty-five, is hereby revived and continued, and that said commission shall file its final report hereunder on or before the last Wednesday of January in the year nineteen hundred and sixty-eight.

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LETTER OF TRANSMITTAL TO THE SENATE AND HOUSE OF REPRESENTATIVES

To the Honorable Senate and House of Representatives:

GENTLEMEN: — In conformity with Chapter 131 of the Resolves of 1965 which created it, and Chapter 63 of the Resolves of 1966 which continues its study mandate, the Special Commission on Implementation of the Municipal Home Rule Amendment to the State Constitution submits herewith its *Eighth Report.*

The attached interim report consists of an analytical discussion of the Home Rule Amendment made for the Home Rule Commission by its legal consultant firm. The members of this Special Commission are not prepared at this time to endorse unequivocally all of the statements made and conclusions reached by the authors of the report. However we believe that publication of this report will be of significant value in assisting members of the General Court and members of the general public in gaining a better understanding of the import of the Amendment's provisions. The report is complex because of the complexity of the issues it discusses and its primary value lies in the fact that it sets out a relationship of each aspect of the Amendment with every other.

The attached report represents, at this time, however only the views of the legal consultants and should not be construed as representative of the views of any member of this Commission.

SEN. JAMES A. KELLY, JR., *Chairman*
Fourth Worcester District
REP. STANLEY J. BOCKO, *Vice Chairman*
Nineteenth Middlesex District
REP. H. THOMAS COLO, *Clerk*
First Worcester District
SEN. JOHN J. MOAKLEY
Fourth Suffolk District
SEN. WILLIAM D. WEEKS
Norfolk & Plymouth District

REP. MARY B. NEWMAN
Second Middlesex District
REP. WINSTON HEALY
First Franklin District
REP. DAVID M. BARTLEY
Thirteenth Hampden District
REP. JOHN F. MELIA
Seventeenth Suffolk District
REP. MAURICE E. RONAYNE, JR.
Sixth Norfolk District
HON. FRANCIS C. FLORINI
Mayor of North Adams
MR. CLARKE H. WERTHEIM
Selectman, Needham
MR. FRANCIS J. MCGRATH
City Manager of Worcester
MR. WILLIAM F. CHOUINARD
Norwood

The Commonwealth of Massachusetts

LETTER OF TRANSMITTAL TO THE SPECIAL COMMISSION ON IMPLEMENTATION OF THE MUNICIPAL HOME RULE AMENDMENT TO THE STATE CONSTITUTION

STORY THORNDIKE PALMER & DODGE
53 STATE STREET, BOSTON
NOVEMBER 15, 1967.

Special Commission on Municipal Home Rule
State House,
Boston, Massachusetts

Gentlemen:

The home rule amendment confers new law-making powers on cities and towns and defines the power of the general court to enact laws with respect to them. Although separate sections of the amendment deal with different aspects of the new relationship between the state and its local governments, the amendment can be properly understood only if it is viewed as a whole.

The following explanatory materials are the result of our study of the amendment as a whole. In preparing them we have been concerned with the need for finding consistent answers to the major questions of interpretation which have already arisen or which now appear likely to arise in the future. Since we have limited ourselves to discussing what we regard as the central issues, the explanatory materials will not provide specific answers to many questions. However, we trust that the materials are comprehensive enough to serve as a useful guide in finding answers to those questions.

Yours faithfully,

STORY THORNDIKE PALMER & DODGE

EV/vr

Massachusetts Home Rule — A Sharing of Legislative Power

The Home Rule Amendment (HRA) confers broad new law-making powers on cities and towns. While the exercise of these powers is subject to such standards and requirements as may be established by the general court, there is now a state and local sharing of legislative powers with respect to many subjects. In order to avoid the enactment of conflicting laws in this new situation, the HRA establishes a system of priorities which applies to all laws, preamendment or post amendment, state or local.

Easy identification of the laws that belong in each priority group is an essential element of a workable system. The correct classification of post amendment laws is simple. State laws have first priority, locally adopted charters have second priority and ordinances and by-laws have third priority. The correct classification of preamendment laws is more difficult and requires a rather detailed discussion of the provisions of the HRA. Two important objects of this report are to show how both preamendment and post amendment laws fit into the constitutional priority system and to indicate the areas where existing laws must be changed before the HRA can be fully effective. The following is a brief statement of how laws should be grouped.

First priority is given to "laws enacted in conformity with the powers reserved to the general court by [HRA] section eight", which will be called "Section 8 Laws".

Second priority is shared between (1) charters adopted, and later revised or amended, through the procedures set forth in HRA 3 and 4 ("home rule charters"), (2) "existing charters", (3) special laws relating to individual cities and towns which were in effect on November 8, 1966, which will be called "Section 9 Laws", and (4) locally adopted amendments of existing charters and Section 9 Laws.

Third priority is given to local ordinances and by-laws.

I. *Placing Enactments in a Priority System:*

A. *The First Priority: Section 8 Laws.*

(1) *Post Amendment Laws.* HRA 8 defines the general court's power to act in relation to cities and towns. While general and special laws relating to municipal affairs may be enacted in the

future, both kinds of laws must now meet certain tests. No city or town has the power to do anything inconsistent with an applicable Section 8 Law. What do these Section 8 Laws include?

Under HRA 8, any post amendment law enacted by the general court which relates to a city or town must be a law which is either (a) applicable to a class of at least two municipalities* or (b) if not applicable to such a class, is (i) requested by the affected city or town (HRA 8(1)), or (ii) imposed upon the affected city or town by a two-thirds vote of each branch of the general court following a recommendation by the governor (HRA 8(2)), or (iii) concerned with a regional entity (HRA 8(3)), or (iv) concerned with municipal incorporation or municipal boundaries (HRA 8 (4)). Section 8 also gives the general court power to provide optional plans of city or town organization and government, subject to the foregoing requirements.

(2) *Preamendment Laws.* Can laws which were enacted before the HRA became effective be called Section 8 Laws? In a literal sense none could have been enacted "in conformity with the powers reserved to the general court by section eight", because HRA 8 did not exist. But many would have met the tests in HRA 8, if the section had existed; and the intent to repeal all existing laws relating to cities and towns is not likely to be found. Therefore, laws enacted before the HRA became effective are presumed to be Section 8 Laws, at least where that result is not anomalous. To apply the tests of HRA 8 to various preamendment laws:

(a) *Preamendment General Laws.* The test under the first clause of HRA 8 is the applicability of the law to a class of at least two municipalities. There is no question that the vast majority of preamendment general laws would meet this test if they were enacted now. But to what extent should they be interpreted as restrictions on local power? If home rule powers had been in existence at the time, some of these general laws, intended to limit powers, would have been enacted with the intent that they control local lawmaking, but many others, intended to grant powers, would not have been enacted because they would have been unnecessary. Are these same laws now to be interpreted

* The word "municipality" in this report includes cities and towns only. It does not include districts.

as limitations of power in the new context created by the HRA? If preamendment general laws are Section 8 Laws, all charters, ordinances and by-laws must be "not inconsistent with" them. But many preamendment general laws are so specific that little could be changed without creating some inconsistency, so that the home rule charter powers given to cities and towns may be largely illusory if consistency is required. Certainly this result is anomalous. If the legislature wishes, it can reduce the specificity which creates the anomaly. If it does not, the supreme judicial court will probably have to solve the problem on a case by case basis. Generally speaking, where a preamendment general law deals with a matter comprehensively or provides quite definite limits on the granted powers, the court may find that cities and towns may not act in relation to that matter except in compliance with that law. Less comprehensive laws or laws with less specific limitations may be interpreted as nonexclusive grants of power, now unnecessary, from which no negative implication of lack of power should be drawn, so that cities and towns may be permitted to exercise home rule powers without regard to them. It seems obvious, however, that until either the legislature or the court has acted, the exact effect of preamendment general laws in the first priority group created by the HRA will be in doubt. Surely this will impede all local enactments which have second or third priority, and is one of the important problems created by the HRA.

(b) *Preamendment Special Laws.* HRA 9 provides that all "special laws relating to individual cities or towns shall remain in effect" but also that they shall be subject to amendment or repeal by home rule charter procedures or by the general court under HRA 8. So the special laws described in HRA 9 are not Section 8 Laws. Does this mean there are no preamendment special Section 8 Laws? It seems probable that preamendment special laws of the type described in HRA 8(3), concerning regional entities, relate to several, not individual cities or towns, and therefore are not subject to HRA 9 and do have the status of Section 8 Laws. Special laws described in HRA 8(4), concerning municipal incorporation, may well relate to individual cities and towns and may well be literally described in HRA 9.

Nevertheless, it seems that special laws of this type as well as the HRA 8(3) type should be treated as Section 8 Laws. The legislative power over both these areas continues to be vested solely in the general court, so that it would be anomalous to treat these laws either as repealed by the HRA or as repealable by local action under HRA 9.

It seems equally clear that other preamendment special laws are not Section 8 Laws, even though, by some coincidence, they may have been enacted under procedures described in HRA 8(1) or 8(2). It is not appropriate now to give any effect to a method of enactment which at the time of enactment had no constitutional significance. Accordingly, preamendment special laws of the type described in HRA 8(3) and (4) are first priority Section 8 Laws, but all other preamendment special laws are second priority Section 9 Laws.

(3) *Summary.* "Section 8 Laws" include (1) all post amendment laws in relation to cities and towns which the general court may enact under HRA 8, whether they are general or special laws and including the optional forms of government authorized by that section, (2) preamendment special laws relating to regional entities or municipal incorporation and (3) all preamendment general laws; provided that the supreme judicial court may decide that certain preamendment general laws do not preclude the exercise of home rule powers by charter, ordinance or by-law. The term "Section 8 Laws" does not include any preamendment law which the general court could now enact only by recourse to HRA 8(1) or 8(2). Section 8 Laws have the highest priority.

B. *The Second Priority: — Home Rule Charters, Existing Charters, Section 9 Laws and Amendments to Existing Charters and to Section 9 Laws.*

All the four types of laws mentioned in the title of this section are in the second priority group. Existing charters and Section 9 Laws are preamendment second priority laws, which were not locally enacted and to which the requirement of consistency with first priority Section 8 Laws does not apply, but which are locally amendable by charter procedures (see Section II(A) (2) on page 12 of this report) and which do govern third priority ordinances and by-laws. Home rule charters and all charter amendments (whether

they are amendments to home rule charters, to existing charters or to Section 9 Laws) are post amendment second priority laws, which will be locally enacted and which will have to be consistent with first priority Section 8 Laws, and which will also govern third priority ordinances and by-laws.

While it is easy to identify a home rule charter, the definition of "charter amendments" is more difficult and involves a discussion of "existing charters" and Section 9 Laws in order to determine whether charter amendments include anything more than changes in home rule charters.

(1) *Home Rule Charters.* A home rule charter is a local law drawn up by a charter commission and approved by the voters of a city or town in accordance with HRA 3. After its adoption a home rule charter may be revised or amended under HRA 3 or 4. Its most important features are that it is a law which is local in origin and application and its provisions may not be inconsistent with Section 8 Laws. This requirement of consistency means that home rule charters are in the second priority group.

(2) *What is Amendable: Existing Charters and Section 9 Laws.* The language governing the question of what is amendable by local action is found in HRA 2, which confers upon a city or town the power "to amend its existing charter", and in HRA 9, entitled "Existing Special Laws", which states that "All special laws relating to individual cities or towns shall remain in effect and have the force of an existing city of town charter, but shall be subject to amendment or repeal through the adoption, revision or amendment of a charter by a city or town in accordance with the provisions of sections three and four . . ." There is no other reference to "existing charter" in the HRA. In HRA 2 "existing charter" (which may be amended) is contrasted with "charter" (which may be adopted and revised and which therefore means a home rule charter, that is, a future charter) and it seems plain that "existing" means "existing on the effective date of the HRA". HRA 9 deals with "All special laws" and states that they shall "remain in effect and have the force of an existing . . . charter". This seems clearly enough to say that special laws in existence on the effective date of the HRA shall remain in effect after that effective date and shall have the force of a charter existing on that effective date.

The "remain in effect" language would be inappropriate as to special laws enacted after that effective date. Moreover, if HRA 9 were construed to apply to post amendment special laws enacted in conformity with HRA 8, its effect would be that Section 8 Laws enacted under HRA 8(1) and 8(2) could be amended by local action. This result would be inconsistent with the second section of HRA 2 and with the whole notion of the priority system. So, in HRA 9, just as in HRA 2, the word "existing" appears to mean "existing on the effective date of the amendment". The result is that whatever was an "existing charter" on November 8, 1966 may be amended under HRA 2 and that Section 9 Laws, having the force of "existing charter", may be similarly amended.

To determine what were "existing charters" on November 8, 1966, it is necessary to look to the various forms of local government then in existence in Massachusetts. — Comparison of these forms permits three general classifications. In the first class are cities. Regardless of whether a city looked on November 8, 1966 to a special law or to a Chapter 43 plan, every city may safely be said to have had a charter on that date. This statement seems consistent with common understanding of the word charter and is reinforced by the fact that such special laws and plans refer to themselves as charters.

The second class includes towns which have a representative town meeting or town manager pursuant to a special law. The question whether such towns had an existing charter need not be asked, because both of the two possible answers to the question produce the same result. If such special laws are "existing charters", they may be amended pursuant to the grant of power contained in HRA 2. If such special laws are not "existing charters", they must be Section 9 Laws with the force of "existing charters", and therefore they are also amendable under HRA 2.

The third class is composed of towns which did not have a representative town meeting or a town manager. Towns in this class usually have a short special law creating them as municipal corporations and defining their boundaries but do not think of themselves as having charters. They must refer to the general laws to find the details of their governmental structure and the methods of exercising their powers. This does not mean that the general

laws applicable to a town should be thought of as an "existing town charter". Not only would such a construction be a sharp departure from any common understanding of what a charter is, but it would mean that certain general laws would be locally amendable and that frequent recourse to the courts might be required to ascertain just which general laws were the amendable ones. There is no reason to say that a town must actually have an "existing charter" before it can change its Section 9 Laws. There is, therefore, no reason to stretch the words.

This classification leads to three conclusions. (1) Although general laws have first priority, the HRA makes an exception in the case of Chapter 43 charters. This exception has the effect of keeping all cities on the same footing under the HRA. (2) Towns with representative town meeting or town manager special laws may amend such laws, because they are either "existing charters" or Section 9 Laws. (3) Towns which do not have representative town meetings or town managers do not have "existing charters".

The foregoing discussion leads to two final conclusions. (1) City charters in existence on November 8, 1966 (regardless of whether they were special laws or Chapter 43 plans), representative town meeting and town manager laws and all special laws relating to individual cities and towns may be amended through the use of HRA 4 procedures. (2) Because these laws are existing charters or laws with the force of existing charters, amendments of them should be called "charter amendments". Because HRA 2 makes it clear that charter amendments may not be inconsistent with Section 8 Laws, they must be placed in the second priority group along with home rule charters.

C. *The Third Priority: Ordinances and By-Laws.* Prior to the effective date of the HRA cities and towns could only enact ordinances and by-laws pursuant to authority given by the general court. Potentially this local lawmaking power has been greatly expanded by the HRA. Except for certain subjects listed in HRA 7 for which state law authority is still required, cities and towns through the enactment of ordinances and by-laws may exercise any power or function which the general court could confer on them, so long as the result is "not inconsistent with" Section 8 Laws or denied them by their charters.

As used in HRA 6, the word "charter" must be taken to mean "whatever second priority laws are in effect". The term clearly includes a "home rule charter". It would be wholly anomalous for it not to include an "existing charter". And Section 9 Laws are given the force of an existing charter. So the ordinance and by-law power is governed by all of these. Furthermore, an optional plan, once adopted, will also control the ordinance or by-law power.

D. *The Basic Rule: Consistency with Higher Priority Enactments.* Once the definitional problems are resolved, the basic rules are simple enough. A city or town adopting a third priority ordinance or a by-law must (after avoiding all areas described in HRA 7 as to which powers have not been specifically delegated) act subject to (1) all first priority laws (Section 8 Laws) and (2) all second priority laws (home rule charter, if any, the charter existing on November 8, 1966, any representative town meeting or town manager law, Section 9 Laws and any charter amendments). If the proposed action is inconsistent with a first priority Section 8 Law, a first priority Section 8 Law, whether general or special, must be obtained to remove the inconsistency. If there is only inconsistency with a second priority law, the inconsistency may be removed either by a second priority charter enactment under HRA 3 or 4 or by a first priority Section 8 Law. In adopting, revising or amending a second priority home rule charter, existing charter or Section 9 Law by home rule charter procedures, only first priority Section 8 Laws need be checked for inconsistencies, and only a first priority Section 8 Law may remove any that are found.

E. *Some Aspects of a Priority System.* Under a constitutional government, we are well accustomed to the notion that certain enactments have priority over other enactments. The state constitution both confers and restricts the legislature's power to enact laws. Since the constitution is a governing instrument, it ought not to be excessively detailed; it ought to set limits but allow flexibility within those limits.

Before the HRA was adopted, state laws were the only source of municipal powers. Municipal powers were not implied unless absolutely necessary, and laws relating to municipalities had to be

detailed and explicit. Now, Section 8 Laws are the highest priority enactments, and both home rule charters and ordinances and by-laws must be consistent with them. There will be many instances where it will be appropriate to depart from the detail previously required of the general laws and to draft legislation as constitutional provisions have previously been drafted. And there will be many instances where Section 8 Laws are made available as a matter of convenience—model forms of government for example—or where they will be intended to apply only until the city or town by home rule charter or ordinance or by-law otherwise provides. Similarly, good draftsmanship requires a home rule charter to serve as a basic document leaving a good deal to scope, within prescribed limits, for implementation by ordinance or by-law.

Quite obviously, the more flexibility is permitted by home rule charters and Section 8 Laws, the fewer inconsistencies will arise when a city or town tries to exercise powers and functions by ordinance or by-law, and the fewer the inconsistencies, the less necessary it will be for cities and towns to resort to a charter commission or to the general court to solve their problems.

For the general court, it is important to remember that Section 8 Laws are first priority laws and that there is no local power to override or change them unless the Section 8 Law so states. A Section 8 Law providing optional forms of government will presumably specify how the options may be exercised and revoked. Future general laws relating to municipalities should address themselves to the question of whether variation by home rule charter or by ordinance or by-law will be permitted. A Section 8 Law requested under HRA 8(1) is nevertheless a Section 8 Law and may not be varied unless it, or another Section 8 Law, so provides. The general court should, therefore, seriously consider including provisions for local amendment in every law enacted under HRA 8(1), or enacting a general Section 8 Law providing that all HRA 8(1) laws shall have the force of a home rule charter. If these things are not done, cities and towns will find that they are locked in by the first priority enactments and that their only recourse is to the general court. In that event the general court will find that the burden of dealing with local affairs is magnified.

II. *Local Problems Under Home Rule:*

A. *Procedures.*

(1) *Charter Adoption and Revision.* HRA 3 sets forth quite detailed requirements for the adoption and the revision of a home rule charter. A petition for the adoption or revision of a charter must be signed by at least fifteen per cent of the number of legal voters residing in the city or town at the preceding state election. This requirement is not, of course, subject to change by the general court. A charter commission when elected is perfectly free to produce any form of charter it wishes, except that the provisions of the charter must not be inconsistent with Section 8 Laws, and the municipality must have at least 12,000 inhabitants before adopting a city charter or at least 6,000 inhabitants before adopting a limited or representative town meeting form of government. While it is not so stated, it seems possible that a city could return to the status of being a town. (The population limits prescribed in HRA 2 are the same as those in the second paragraph of HRA 8 which relates to optional plans of government. While there is no express limit on the general court's power to create cities with less than 12,000 inhabitants and limited town meeting towns with less than 6,000 inhabitants by special law enacted under HRA 8(1) or (2), such a limit would undoubtedly be implied.)

(2) *Amendments.* Home rule charters once adopted may be amended through use of the procedures set forth in HRA 4. "Existing charters" may likewise be amended. Also, because they are given the force of an existing charter, Section 9 Laws may be locally amended.

Charter amendments, and these words include amendments of home rule charters, existing charters and Section 9 Laws, are subject to the requirement that they not be inconsistent with Section 8 Laws. There is the further requirement that charter amendments relating to certain subjects listed in HRA 4 clause (2) may only be accomplished by the process of charter revision which involves the election of a charter commission. This means that an amendment to a city charter existing on November 8, 1966 or a Section 9 Law which, for example, establishes the mode of electing the city's mayor cannot be accomplished through the use of HRA 4. The city may only make the desired change locally

through the adoption of a home rule charter, which, of course, will relate to many other subjects as well.

The fact that HRA 4 procedures may not be used to change a city's mode of electing its mayor does not mean that the city is unable to make a change except through the adoption of a home rule charter. The general court through the enactment of a general or special Section 8 Law may provide the means for reaching the desired result. Clause (2) of HRA 4 should not be construed to limit the power of the general court; it is merely a limit on a power conferred on cities and towns to make law for themselves at the charter level.

At this point HRA 9 must be more closely examined. It seems possible that the last two clauses of the section were included only for the purpose of overcoming any implication that the special laws which "remain in effect" under the section were made immutable by the HRA. However, if these clauses are necessary, the first of them which provides that such laws ". . .shall be subject to amendment or repeal through the adoption, revision or amendment of a charter by a city or town in accordance with the provisions of sections three and four . . ." requires further discussion. Here again the word charter must be interpreted. Does it only mean "home rule charter"? If so, it follows that a city or town cannot amend a Section 9 Law, unless it has first adopted a home rule charter and is in the process of revising or amending it, or unless it is in the process of adopting a home rule charter. Obviously this would result in a very serious curtailment of local lawmaking power.

The principal argument in favor of such curtailment is based on the proposition that the business of amending laws is a serious matter and should not be attempted until the whole local situation has been reviewed by a charter commission. But the argument creates too many anomalies. It lacks force in all cases where the proposed amendment is minor or is unrelated to the matters with which a home rule charter would be primarily concerned. In the case of a municipality which has already adopted a home rule charter and has decided that no change in a particular Section 9 Law is necessary, its result would be that the municipality could not later amend or repeal the Section 9 Law unless it also found

something in its home rule charter to amend at the same time.

Even if the word "charter" is broadened to include existing charters, the results are still unsatisfactory, because so many towns do not have existing charters. This interpretation would result in an unnecessary and undesirable discrimination between cities and a majority of the towns.

In order to avoid interpreting the word "charter" in the next to last clause of HRA 9 in such a way that local power is curtailed and unnecessary amendments to home rule charters or existing charters are required, it seems appropriate to construe the clause as meaning that Section 9 Laws are amendable through the use of HRA 3 and 4 procedures, regardless of whether they are charter adoption procedures, charter revision procedures or charter amendment procedures. This reading of the clause gives full effect to the provision that special laws relating to individual cities and towns shall have the force of "existing charters". It is clear that an "existing charter" may be amended without adopting a home rule charter. If Section 9 Laws have the force of an existing charter, they must be amendable either as a part of or as the equivalent of an existing charter, in either case without any requirement that a home rule charter be adopted or that some other provision of a home rule or existing charter be amended at the same time.

As a result of the foregoing interpretations, the meaning of the word "charter" as it first appears three times in HRA 4 might be subject to debate. But no debate is really necessary. It certainly means "home rule charter" at the very least, and to that extent it is probably the grant of power to amend a home rule charter. However, the grant of power to amend existing charters and Section 9 Laws is found elsewhere; as to them HRA 4 merely provides procedures. Hence, the question whether the word "charter" has a broad or narrow meaning in HRA 4 is a matter of no consequence.

(3) *The Procedures Act.* At the special session held late in 1966 after the November election, the general court enacted Chapter 734 which inserts a new Chapter 43B in the General Laws (the "Procedures Act"). This law establishes standard procedures to be followed by cities and towns in the adoption, revision and amendment of home rule charters. It also includes provisions relating

to the local amendment of Section 9 Laws and charter lawmaking by cities and towns subject to Chapters 43 and 43A of the General Laws. In dealing with these matters the general court construed the HRA conservatively and then sought to meet the deficiencies which result from the conservative interpretation. The result is that some powers granted by the Procedures Act may be unnecessary, because those powers already exist by force of the HRA alone.

An example of this is section 18 of the Procedures Act which permits a city with a so-called "plan" charter adopted under G.L. c. 43 or a town which has accepted the provisions of Chapter 43A to change the same by use of the procedures provided in HRA 4 as supplemented by the Procedures Act in other sections. If the position taken in this report to the effect that such a city had an "existing charter" is correct, the permission given by section 18 of the Procedures Act is unnecessary. It is not so clear that Chapter 43A is the "existing charter" of the town in which it is in effect, and to this extent, section 18 of the Procedures Act may confer a power which is not conferred by the HRA.

There is another example of what might be called an unnecessary reaffirmation of constitutional power. Section 10(e) of the Procedures Act provides for the local amendment of Section 9 Laws, so that even if the analysis and conclusions set forth in the immediately preceding subsection (2) of this report are incorrect, cities and towns may amend Section 9 Laws without having to adopt a home rule charter first.

If there is any need to test whether Section 10(e) is constitutional, the following considerations would be relevant. First of all, there is nothing in the language of the HRA which suggests that the power to enact section 10(e) is denied to the general court. On the affirmative side it is wholly clear that the general court by using its HRA 8 powers could amend or repeal all Section 9 Laws. Before the adoption of the HRA it was commonly understood that the enactment of statutes subject to local acceptance did not involve any improper delegation of the general court's legislative power. Therefore, a general law repealing all Section 9 Laws but making such repealers effective only upon local acceptance should raise no new problems. Similarly, a grant of the power to amend Section 9 Laws at local option should not be troublesome as an

unwarranted delegation of the general court's lawmaking power, because the constitutional requirement that local amendments of Section 9 Laws may not be inconsistent with Section 8 Laws is a sufficiently definite standard.

In summary it may be said that the Procedures Act recognizes the possibility of doubts about the purely constitutional power to amend existing charters and Section 9 Laws locally and then overcomes the effects of those doubts by conferring powers which are perhaps not conferred by the HRA. However, the positions taken in this report, if correct, show that sections 10(e) and 18 of the Procedures Act only reaffirm existing local powers, except that section 18 resolves the more difficult question of correctly categorinzing G. L. c.43A.

(4) *Petitions for Special Laws.* In its second report (Senate No. 1030 of 1967) the Special Commission proposed the enactment of a law (the "Petitions Act") clarifying and defining the procedures to be followed by cities and towns when requesting the enactment of special laws under HRA 8(1). The need for many kinds of special local laws enacted by the general court will continue, and petitions for such laws may now be filed at any time pursuant to changes in the rules of the general court. The Petitions Act is designed to provide standard procedures to be followed by cities and towns so that their petitions will meet the requirements of HRA 8(1) when they are presented to the general court.

(5) *Optional Plans.* The second paragraph of HRA 8 states that, subject to the requirements of the first paragraph, the general court may provide optional plans of city or town organization and government under which an optional plan many be adopted or abandoned by a city or town. This does not prevent the general court from providing a plan of government for a particular city or town by a special law which becomes effective without a local referendum, if that law has been properly requested by the city or town under HRA 8(1). But it does prevent the general court from offering two or more alternative plans to a particular municipality by a special law which fails to meet the requirements of HRA 8(1) or (2). The main purpose of the second paragraph of HRA 8 is to make it clear that the general court may by general law offer a series of optional plans and provide procedures for their

adoption or abandonment which are different from the procedures set forth in HRA 3 and 4. The general court may make the adoption of optional plans easier or more difficult than the adoption of home rule charters, and the only condition imposed is that the option be exercised by a local referendum.

It must be remembered that optional plans will be Section 8 Laws and not home rule charters or "existing charters", so the municipalities which adopt them will be unable to change them through local procedures except to the extent permitted by the general court. However, despite their nature as Section 8 Laws, the existence of a series of optional plans will not prevent municipalities which have not adopted an optional plan from adopting home rule charters with provisions which are inconsistent with the provisions of the optional plans.

B. *Content.* The question of what a home rule charter, an amendment of an existing charter or Section 9 Law, or an ordinance or by-law enacted under HRA 6 ought to contain appears to be affected by very few provisions of the HRA. None of these local enactments may contain anything inconsistent with a Section 8 Law nor may they exercise any of the powers listed in HRA 7 without statutory authority. Furthermore, charter amendments relating to subjects listed in HRA 4(2) may only be made upon the recommendation of a charter commission. Finally, ordinances and by-laws, which form the third priority group, may not exercise powers and functions which are denied to the municipality by its charter level enactments, since those are in the second priority group. These are all prohibitions and do not constitute affirmative statements of what subjects must or may be included in locally made laws. These details must be supplied by the general court. The question of what *may* be included involves the consistency problem discussed below. As for what *must* be included, there is little need for new laws relating to ordinances and by-laws. As to charters, there is a need for new laws providing standards and defining the outer limits of local options.

C. *Consistency.* As long as there is uncertanty whether particular general laws exclude or permit inconsistent local enactments, it will be most difficult for cities and towns to proceed under the HRA. Because the existing general laws are so detailed and ex-

plicit, there may really be very little that cities and towns may do by home rule charter, ordinance or by-law which will be clearly consistent with those laws. A town home rule charter wholly consistent with chapters 39 through 41 of the General Laws could hardly be more than a recodification. Since it is unsafe to assume that preamendment general laws will not be held to be controlling, cities and towns will have no option but to petition for more Section 8 Laws under HRA 8(1), rather than adopt home rule charters, ordinances and bylaws, until the existing general laws are revised to permit the increased flexibility which has now become appropriate and necessary. Only when that has been done can cities and towns really begin to take advantage of their new powers and will the general court be relieved of its tremendous local affairs burden.

III. *The General Court's Problems under Home Rule:*

A. *Enactment of Laws in Relation to Cities and Towns.*

(1) *Breadth of State Power.* Under HRA 8, the power of the general court over cities and towns is paramount, and there is no subject matter limit on its power to act in relation to cities and towns. It may do anything by a general law applying alike to a class of at least two municipalities and anything with respect to a regional or metropolitan entity (including all or any part of at least two municipalities). It may do anything with respect to a single city or town, either upon its request or, upon the Governor's recommendation and by a two-thirds vote of each branch, without any prior request or subsequent consent. The HRA, unlike those in many other states, does not give cities or towns the final control in any area. The general court has the final control in all areas, but if it acts to establish policy in relation to a particular city or town which it is not willing to establish with respect to a class or a regional district including at least one other city or town, it must either do so upon the governor's recommendation and by a two-thirds vote of each branch or do so upon petition filed or approved by the city or town.

(2) *Breadth of Construction.* In jurisdictions where localities have been given complete control in certain areas and the legislature has been given complete control in all other areas, fear of local

abuses and of unreasonable restraints on state powers has led to a technical approach, whereby the areas in which the localities have control have been narrowed and the areas in which the state has control have been broadened by constitutional interpretation. It seems clear that the purpose of the HRA in giving the general court the final control in all areas was to avoid this approach, and that the HRA is intended to give localities real powers and scope subject to the general court's real power to pass general and regional legislation in the normal course and to override local action by a two-thirds vote.

Because the general court has the final control under HRA 8, there is no reason to say that legislation "in relation to cities or towns" is a narrow area. If a matter is one which affects the powers, government, finances or property of cities or towns, it would seem to be a matter "in relation to" cities or towns. In view of the fact that cities and towns have powers conferred upon them by the HRA (particularly HRA 6), it seems that any law either removing or imposing restrictions on the exercise of those powers is a law "in relation to cities and towns". A law relating to the manner in which cities and towns are governed and the officers and agents through whom they exercise their powers and functions would seem to be a law "in relation to cities or towns". A law granting moneys to or imposing expenses upon cities and towns would seem to be a law "in relation to cities or towns". A law making property taxable by or exempt from taxation by cities and towns would seem to be a law "in relation to cities and towns". Does this mean that such laws may not be passed? Of course not. They may be passed whenever they operate generally (upon a class of at least two) or through a regional entity. They may be passed with respect to a single city or town upon its request, or imposed upon it without its approval by a two-thirds vote. There is no want of legislative power in the general court. But in order to permit localities to assume and the general court to relinquish responsibility for purely local problems, the weight of additional procedural requirements is imposed upon purely local enactments of the state legislative body under HRA 8(1) and 8(2). If the problem is confined only to a particular city or town, it is now harder for a city

or town to obtain, and for the general court to volunteer, a solution by a state enactment.

B. General Laws.

(1) *Classification.* The general court may act in relation to cities and towns "by general laws which apply alike . . . to a class of not fewer than two" municipalities. It seems clear that the words "a class of" must be given some effect. It is not enough that a law relates to two cities or towns mentioned by name in the law. The cities and towns to which it relates must constitute a class on some reasonable basis. Probably there are no tests other than that of reasonableness. To a great extent, the subject matter of the particular law determines what classifications are reasonable with respect to it. This is probably why a pragmatic test of reasonableness, rather than a more precise but inflexible test like population, was selected. Probably a law relating to a class which is found to be reasonably determined will be upheld even though the basis for the classification is not stated in the law. But where the class is very small, a legislative statement of the basis may be of real value. Preamendment and future laws of general application and pertaining to an appropriate class will presumably be upheld although they do not appear in the General Laws. The test of "generalness" does not depend upon the color of the book in which the law appears.

(2) *A Special Problem:* "Except Boston". Many general laws enacted in the past have applied to all cities and towns except Boston. Presumably a future law of this kind which does not apply at all to Boston and which leaves it entirely unaffected, is not invalid for failing to "apply alike" to Boston. It is enough if it applies alike to a class of at least two, and "all cities and towns except Boston" is such a class. It need meet no tests as to cities or towns to which it does not apply, even though there is only one. If this assumption is correct, the general court may confer powers upon all cities and towns except one, and the excluded one has no right to have these powers conferred upon it. The exception is permissible so long as it does not change previous law with respect to the excepted community. But what if an exception is changed? Clearly a special law applicable to Boston may be overridden by a general law applying alike to Boston and other cities or towns. It

would seem that an exception in a general law should be on the same footing and that therefore it can be changed so long as the result of the change is a law applying alike to a class of at least two including Boston. On this analysis, then, a future general law may except Boston so long as the exception does not change any law applicable to Boston, because the new general law does not apply to Boston at all; also a general law may change a special Boston rule without Boston's consent so long as the resulting law applies alike to a class which includes Boston. But a general law may not create a new special rule for Boston only or change one exception for Boston only into a different exception for Boston only, because such a law does apply to Boston and fails to apply alike to it and at least one other city or town. If this analysis is correct, preamendment general laws which except Boston but do not expressly or by implication establish any rule for Boston are Section 8 Laws for all cities and towns except Boston but do not interfere at all with Boston's home rule charter or ordinance powers. Preamendment general laws which except Boston and which expressly or by implication do establish a special rule for Boston should also be treated as Section 8 Laws for all cities and towns other than Boston. But since, as to Boston, they were not "enacted in conformity with the powers reserved to the general court by section eight", it would seem that the special rule should be treated as if it were contained in a special law and given the status of a Section 9 Law pertaining to Boston. The result would be that Boston could amend or repeal the special rule by charter procedures but could not override it by ordinance.

C. *Special Laws as to Regional Entities and Municipal Incorporation.* HRA 8 (3) provides that "The general court shall have the power to act in relation to cities and towns . . . by special laws enacted . . . to erect and constitute metropolitan or regional entities . . . and to grant these entities . . . powers" it deems necessary; also that the metropolitan or regional entity must "[embrace] any two or more cities or towns or cities and towns, or [be] established with other than existing city or town boundaries". It seems clear that the word "regional" is meant to describe areas extending beyond the boundaries of any one city or town, and not areas entirely within any one city or town. Brighton

and Brookline could be constituted a regional entity for some purpose, even though all of Boston was not "embraced" by the entity, but Brighton alone, although having other than existing city boundaries, could not be so constituted. Any other reading appears to strain the normal meaning of the words and to open the door to abuse. But, because of the many special purpose districts which now exist entirely within the boundaries of particular cities and towns, the point is of some importance. Preamendment special laws pertaining to these non-regional districts can presumably be amended by charter procedures or by special laws under HRA 8(1) or 8(2), but all these methods are cumbersome. General legislation facilitating their merger and consolidation with the city or town in which they are located would probably serve a real need. Also useful, although probably less pressing, would be general legislation to permit cities and towns to form regions for special purposes not now authorized.

HRA 8(4), giving the general court power to incorporate, dissolve, merge and consolidate cities and towns and alter their boundaries, is strictly written and will probably be strictly construed. A general law permitting regions for various purposes at local option could also provide for full scale merger if it seemed appropriate.

D. *Special Laws as to Cities and Towns.*

(1) *Typical Past "Special Laws" and the Future Local Affairs Problem.*

The following are the major types of special laws enacted in the past:

(a) Laws relating to the manner in which the locality is governed and governmental powers therein are carried out, such as laws (i) offering new charters or providing initiative or referendum procedures, (ii) creating new or reallocating functions among existing departments, agencies, boards, commissions, authorities, intramunicipal districts, officers and positions, and (iii) granting tenure or civil service protection or otherwise affecting the manner in which the holder of any position is selected.

(b) Laws granting specific powers such as the power (i) to borrow money in amounts or for purposes not authorized by general law, (ii) to dispose of park land for other public or for private

purposes, (iii) to make appropriations, expend money, enter contracts or leases, acquire or sell land and furnish or obtain municipal services in a manner or for purposes not authorized by or inconsistent with general law, (iv) to "do equity" by honoring unenforceable contracts, paying unenforceable claims, paying for services after retirement, paying cash in lieu of sick leave or vacation, paying retirement benefits, annuities, overtime pay, medical expenses and damages on account of injuries or land takings, making refunds of taxes or assessments improperly collected, or conferring amenability to suit, waiving statutes of limitations, or extending appeal periods, (v) to grant special licenses or variances under building, zoning, milk control, liquor control or other statutes, or grant or extend special tax exemptions, (vi) to grant extraterritorial powers or (vii) to validate the unauthorized exercise of any power.

The general court this year has been faced with the usual large number of local bills of the type described above. These are bills which the HRA has made it procedurally more difficult to enact, requiring either the governor's recommendation and a two-thirds vote of each branch, or a municipal petition. Although legislation establishing procedures for the filing of municipal petitions is being considered by the general court, this legislation will not alter the fact that the enactment of local bills by the general court has been deliberately made more difficult by the HRA.

Local bills have been filed in the past and were filed this year, because something was wanted in a city or town which was either (1) inconsistent with a general or special law or (2) consistent with, but not specifically authorized by, a general or special law. Laws in the second category may now be enacted at the local level by ordinance or by-law unless they relate to the matters set forth in HRA 7. Laws in the first category cannot now be enacted by a city or town without authorization by the general court under HRA 8(1) or 8(2), except that problems of inconsistency with pre-amendment special laws (Section 9 Laws) may also be removed by home rule charter procedures.

The first problem is to identify which local bills contain no "consistency" problem. An attempt to draw the locality's attention to this issue and to initially screen local bills is made in the proposed

Petitions Act by requiring an opinion of counsel as to the need for the legislation being requested. If there is no "consistency" problem, the legislation is unnecessary (subject, always to HRA 7).

Within the far larger category of local bills whose objectives are inconsistent with some provision of Section 8 Law (or with some provision of Section 9 Law which it would take too much time to amend by home rule charter procedures) the general court has two alternatives, assuming it agrees with the objective. One is to grant a special exception to the applicable provision of Section 8 Law and the other is to make a general exception. The special exception is always easier in the particular case. However, a general exception has the advantage of helping rid the general laws of unnecessary specificity and detail and of bringing about a permanent reduction in the number of requests for special exceptions. Because of the large quantity of bills relating to tenure, civil service and "doing equity" (see pp. 28-29, paras. (a) (iii) and (b) (iv) above) a good deal of work has been and will undoubtedly be done to determine whether satisfactory general solutions to these problems can be devised. It is expected that legislation offering new optional forms of government, together with HRA 3 and 4, will virtually eliminate charter requests (see p. 28, para. (a) (i) above). A revision and liberalization of much of chapters 39 through 41 is needed to reduce bills in the categories described in paragraphs (a) (ii) and (b) (iii), pp. 28-29, above (although there may be some of these matters which can now be dealt with by local ordinances or by-laws). Just which other areas of the general laws are the most troublesome will be revealed by the municipal petitions filed with the general court and the questions addressed to state officials from time to time. Together these petitions and questions will surely create pressures for law revision over a considerable period of time.

(2) *What Laws Are "In Relation To" a City or Town?* HRA 8 describes the power of the general court to enact laws "in relation to" cities and towns. As has been stated (see p. 18, para. III (A) (2)), there seems to be no reason to conclude that these laws constitute a narrow category. Futhermore, a narrow construction of the area in which the rules of HRA 8 apply will make the section meaningless. However, a construction which seriously impairs the

state government's ability to perform its functions should be avoided. The supreme judicial court will ultimately decide which laws are, and which are not "in relation to" particular cities and towns. Even before the court speaks, it will be easy to classify the greater volume of special laws, but until it has spoken, it will be necessary to proceed with some caution in a few difficult areas.

An analysis of special laws enacted in recent years indicates that the following are difficult areas: (1) laws relating to local commissions, boards, authorities and districts, (2) laws relating to state projects in particular municipalities and (3) laws involving relationships or transactions between the state and a particular municipality or between two municipalities. Are laws on these subjects laws "in relation to" cities or towns? What criteria should be used in approaching this issue?

(a) *Some Relevant Factors.* It seems clear that no criteria can be found which will mechanically produce a correct classification of laws in all cases. But there are at least four factors which seem particularly relevant. They are:

— What is the geographical scope of the law? It seems plain that whenever a law is limited in its operation to a particular municipality, a strong presumption of "localness" is created. The presumption is not absolute. But it should be difficult for the state to say that something whose operation is wholly "local" is nevertheless "state". Unless the local aspect is clearly incidental, such a state law appears to be an overriding of local concern which may be accomplished under HRA 8(2) but should not otherwise be permitted.

—Does the law change the powers exercised or exercisable by the city or town? A law which confers powers upon or takes powers away from a city or town seems obviously to be in relation to it. Since cities and towns now have their own reservoirs of power under HRA 6, laws relating to local HRA 6 powers, as well as laws relating to HRA 7 matters, seem to be laws in relation to cities and towns.

—Who will feel the principal financial effects of the law? Insofar as a law imposes expense upon, grants funds to or affects the tax base of a city or town, it seems to be a law in relation to that city or town. Whether the law as a whole is in relation

to a city or town may depend upon whether its financial effects are an important or a subordinate feature.

—What person or persons, selected in what manner, will execute the law? The use of local rather than state executive and administrative officers to execute a law also creates a presumption of "localness". If the officers are not selected by the city or town but are authorized to act only within the city or town, the geographical factor is involved. If the officers are selected by the city or town, the "change of powers" and "financial effect" factors may be involved; so also may a separate factor of the form of the local government and the relationships between various local officers.

(b) *Some Alternative Theories.* Opposed to the foregoing factors are two distinct theories, both of which appear to have been rejected by the HRA, but each of which is sufficiently plausible to merit discussion. They will be referred to as the "state concern theory" and the "separate entity theory".

The "state concern" theory is that certain areas of government activity are inherently "state" in nature, or are of overriding importance to the state, and that laws in relation to these "state" matters are not in relation to a city or town because they are "state" matters. This theory finds no support in the HRA, for the very sections which recognize state concern (HRA 7 and 8) prescribe its limits. Even as to the subjects listed in HRA 7, the general court's powers must be exercised subject to HRA 8. HRA 8 recognizes, as the "state concern theory" does not, that very few laws are exclusively local or exclusively state, that very little can be done by a municipality which does not concern the state (and vice versa) and that the problem is not how to deal with laws in relation to cities and towns with which the state has no concern, but how to deal with laws in relation to cities and towns with which the state *is* concerned. HRA 8 allows "state concern" to be expressed by first priority general laws or laws relating to regional entities. If HRA 8(2) is to have any meaning, it must be that state concern, if it is to be expressed by a first priority law relating neither to a class of at least two municipalities nor to a regional entity, must be strong enough to overcome the procedural obstacles of that subsection.

The "separate entity theory" is that a law relating to a board, commission, authority, district or other separate entity is not in relation to a city or town because the city or town is a different entity. The theory finds support in the fact that the HRA speaks only of "cities and towns" and "regional entities" and in the existence of judicial decisions indicating that certain municipal bodies having separate corporate existence are separate entities for some purposes. But the fact that HRA 8 deals with law relating to regional and metropolitan entities as a sub-category of laws "in relation to" cities and towns is a strong indication that the "separate entity theory" is rejected by the HRA. Certainly a regional entity is an entity separate from its constituent municipalities. HRA 8 recognizes that just as "state concern" and "local concern" are not mutually exclusive, so also laws exist which relate to regional entities but nonetheless also relate to municipalities. Where regional entities are involved, HRA 8(3) specifically allows the state to override the separate local interests which are recognized to be involved. There is no such permission where non-regional separate entities are involved. It is obvious, moreover, that the "separate entity theory" would permit HRA 8 to be completely circumvented as to any city or town by the simple device of creating a separate body politic and corporate within that city or town and conferring powers and responsibilities upon it. No one who intended that result would have taken the time to draft HRA 8.

(c) *Examples From Some Problem Areas.*

—A special law providing for compensation of members of a particular redevelopment authority. Both the "separate entity" and "state concern" theories may be advanced in support of the argument that this special law is not "in relation to" the city or town involved. A redevelopment authority is not a municipal department and is a separate entity. Urban renewal is an area of large state concern and participation. Turning to the factors discussed on pages 31 and 32, above, however: (i) The operation of the law is limited to a single municipality (the agency it affects exercises important powers solely within a single municipality). (ii) The affected agency is locally activated and is empowered to carry out locally approved projects and to act as the locality's agent in many respects, so that the manner in which local powers are exer-

cised is affected. (iii) The expense imposed by the law, though small, is imposed on the municipality except to the extent that it can contract for aid from others. (iv) The officers who will implement the law will be officers of the local authority and the municipality. In the stated example, the question seems a close one. But a special law directing a particular redevelopment authority to carry out a project voted down by the municipality presents no distinction in principle, only a distinction in degree of financial effect. In an opinion dated May 1, 1967 addressed to the Governor, the Attorney General advised that a bill to compensate members of the Boston Redevelopment Authority was "in relation to" the City of Boston and could only be enacted under HRA 8(1) or 8(2).

—A special law authorizing the acquisition of land and construction of a state mental hospital in a particular municipality. Recourse could easily be had to the "state concern theory", but let the four factors be tried instead: (i) The operation of the law is limited to a single municipality. But any state building must be located somewhere and surely the appropriate state department could select a location. Here the geographical limitation is not evidence of "localness", it is simply evidence that a building has to have a site. In some cases, a law directs a state agency having the general power to choose sites for its projects to use a particular site for a particular project. In these cases it could be argued that the geographical factor becomes primary rather than incidental. But to say that the general court cannot do what an administrative agency can do seems to go too far. (ii) No local powers are affected (except the power to take the same land for some municipal purpose, a necessary consequence of any state use of the eminent domain power). (iii) Property is removed from the tax rolls, but this is also incidental to the state's acquisition of land. The cost of the land acquisition and construction and operation of the hospital is borne by the state. (iv) The law is executed by state officers. The indications are that the local effects of the law (although they might be vigorously opposed) are clearly incidental to the performance of a state function customarily performed by state officers at state expense, and that power to enact the law without recourse to HRA 8(1) or 8(2) should be found. It is not necessary to resort to the "state concern theory" to override HRA 8,

because it need not be overridden. Applying standards designed to give the section full effect, it does not fairly apply.

—A special law authorizing a local body to perform a function normally performed by a state agency, for example, granting licenses in tidelands. Here (as in many related cases involving state-local transactions such as the reimbursement of a municipality for expenditures, conveyance of state-owned land to a municipality for certain purposes, or exchanges of state and municipal property) it is possible to urge that since a local benefit is involved, the law is permissible. This is not really an argument that HRA 8 is not involved, however, but an argument that a violation of HRA 8 which confers a benefit on a municipality is harmless error, therefore valid. But there is not always agreement as to what is beneficial and it may not take much to overturn a "harmless error" argument. Turning to the four factors: (i) The operation of the law is limited to a single municipality. In the tidelands license case, unlike the state project case, the local effect is the exception to, rather than the usual consequence of, the state objective. The land sale and land swap cases seem in-between. (ii) Local powers are affected and presumably increased. (iii) Where additional powers are conferred, the expense of their exercise is presumably local, and provisions may differ as to financial benefit. Where property is conveyed, there is presumably financial benefit, although conditions and restrictions are sometimes imposed. (iv) Powers are conferred upon local bodies; responsibility for land may be shifted. In this sort of case, the factors seem very evenly balanced, but the reason may be that the cases seem unimportant and locally beneficial. Assume, for whatever reason, that in each case there has been a vote of the municipality against the proposed law; the tidelands will be locally licensed as a dump, the state land will be converted from park land to house lots. And so forth. Even though state powers, state land or other state matters are involved, when they are locally dispensed, perhaps the municipality should be willing. This seems to be an area where wisdom and caution incline to the use of HRA 8(1) or 8(2).

—A special law authorizing one municipality to use a water source and lay pipes in another. Again, there is "state concern" that water resources be equitably distributed, but HRA 8 permits

that concern to be expressed through laws relating to classes of municipalities or to regional entities. As to the municipality which wants the power, the "harmless error" argument can be made and the discussion of the tidelands license case is relevant. As to the other municipality, the effect of the law is much the same as the effect of a state project, and the discussion of that case is also relevant. Here caution would indicate that HRA 8 is involved for both municipalities, and that a regional or general solution to the problem had better be found. General laws permitting inter-municipal cooperation by contract or the formation of regional entities, or granting limited extraterritorial powers in certain cases, are among the possible solutions.

(d) *A Suggested Approach.* It is clear from the foregoing discussion that it will not be easy to define what laws are subject to HRA 8 laws as laws "in relation to" cities and towns. The lines which are easiest to draw are at the extremes: either (a) anything having colorable state concern is not "in relation to" cities and towns or (b) anything having colorable local effect is "in relation to" cities and towns. The first nullifies HRA 8. The second requires a two-thirds vote or local petition before the general court can place another state building in the city of Boston. So the proper line will not be easy to draw. It does seem obvious, however, that a line drawn on the basis of technical distinctions will be easier to evade and more destructive to the intent of the amendment than one drawn on the basis of practical considerations. The HRA attempts to avoid the "state" vs. "local" distinction that has proved so troublesome in other states. The attempt is not wholly successful because it is impossible to avoid that distinction altogether. But since the ultimate power as to matters "in relation to" cities and towns is in the general court (by general laws relating to a class, by laws relating to regional entities, or by overriding special laws under HRA 8(2)), it seems correct to say that where there is a substantial local concern, HRA 8 should apply, and the close questions should be resolved accordingly. The general court has the full power to correct any local abuses and to override local concerns if the state concern is sufficiently strong, and there seems to be no reason to narrow the area of permitted local initiative by construction.

IV. *Some Problems of the Public.*

A. *Validity of State Enactments.* The Supreme Judicial Court has looked behind the published laws to determine whether constitutionally required procedures have been observed in their enactment, e.g. *Carnegie Institute of Medical Laboratory Technique, Inc.* v. *Approving Authority,* 350 Mass. 26, 213 N.E. 2d 225, where the court found that the House and Senate had not concurred and struck down a law which had been on the books for almost ten years. Under this rule, it is difficult enough for the public to determine whether state laws are properly enacted, but at least all the records necessary for that determination may be found at the State House. But HRA 8(1) requires fairly elaborate local procedures before the general court has the constitutional power to pass a law. And no evidence of local action is required to be filed. If a petition has in fact been locally approved by the requisite persons, there is (and should be) power to enact a law. But if the rule of the *Carnegie Institute* case is to be applied to the question of local and state concurrence in an HRA 8(1) law, how may the public determine whether such a law has been properly enacted? The Petitions Act (S.1030), designed to prescribe procedures for filing and approving petitions, requires evidence of local action to be filed with the general court. At least this much is desirable, for it is certainly appropriate to have in the custody of the state the materials upon which the validity of a state enactment depends. Presumably these local proceedings will be filed in the Archives with the legislative documents pertaining to any HRA 8(1) laws which are passed, but consideration should perhaps be given to devising methods of filing, or even duplication or printing, to increase their accessibility to the public. And surely the public convenience would be served by including in the published Acts and Resolves at least a statement of which were and which were not enacted on the basis of local petition. For without such a statement (or a statement of its enactment on the governor's recommendation and by two-thirds vote under HRA 8(2)), a law relating to a single city or town will lack the appearance of having been validly enacted.

B. *Dissemination of Local Enactments.* Up to this time, all legislation pertaining to cities and towns has been contained in the

general laws or in special laws printed in the Acts and Resolves. In either case they have been widely distributed. Some cities have had the special acts applicable to them compiled and printed with the local ordinances, but these volumes are not widely distributed and are not ordinarily cited by or accessible to the courts. HRA 5 provides that home rule charters and charter amendments shall be filed with the secretary of the commonwealth as well as locally and that courts may take judicial notice thereof, but the language as to judicial notice is permissive and the HRA certainly does not provide any way to make these documents available to judges unless they are presented as evidence. Publication at the state level may well be the only feasible answer, particularly since Section 9 Laws can now be amended and repealed by local action. The most convenient solution might be to devote a special section of the Acts and Resolves to local legislation, and there to set forth all charters and charter amendments as filed under HRA 5, all special laws enacted under HRA 8(1), 8(2) and 8(4), and all local proceedings upon which the validity of any law enacted under HRA 8(1) depends. Probably the volume of material involved will govern the feasibility of this suggestion.

APPENDIX I

The HRA Priority System

Priority 1. Section 8 Laws.

These are laws enacted by the general court in conformity with the powers reserved to the general court by HRA 8. They include laws *in relation to cities and towns* which are

(A) General laws applicable to a class of at least 2 cities and/or towns; or

(B) Special laws not complying with (A) but

(1) requested by a city or town (HRA 8(1)); or

(2) imposed on a city or town by a 2/3 vote on recommendation of the governor (HRA 8(2)); or

(3) concerned with a regional or metropolitan entity (HRA 8(3)); or

(4) concerned with municipal incorporation, including boundaries (HRA 8(4)).

These laws may be repealed or amended only by other Section 8 Laws or as a Section 8 Law may provide. G.L. c. 43 and c. 43A (standard city and town charters) are Section 8 Laws. However c. 43 is almost certainly the "existing charter" (as used in HRA 2) of every city in which it is in force. Possibly c. 43A is the "existing charter" of the one town in which it is in force. If so, these "existing charters", unlike any other Section 8 Law, are amendable by local action under HRA 2. In order to remove doubt, Procedures Act s. 18 specifies that they may be changed in accordance with that Act. Future optional forms of government provided in conformity with HRA 8 will also have the first priority status of Section 8 Laws. They will not be "existing charters" as used in HRA 2 and will therefore have to specify whether and, if so, how they may be changed by local action.

Priority 2. A. Section 9 Laws.

These are all special laws (except "existing charters") in existence at the time the HRA was adopted which relate to cities and towns (HRA 9) but do not relate to regional entities (HRA 8(3)) or to municipal incorporation or boundaries (HRA 8(4)).

B. *Existing Charters.*

These are charters existing on the HRA's effective date. The term probably includes all city charters (G.L. c. 43 and the special law city charters). It may also include certain enactments relating to towns (such as G.L. c. 43A and special laws providing for representative town meetings) but it might be held that no town then had a "town charter" in any meaningful sense. Any question as to the general law charters (G.L. c. 43 and c. 43A) is resolved by the Procedures Act s. 18 provision that these laws are amendable and repealable by charter procedures. Any question as to special laws which might or might not constitute "existing charters" is resolved by the HRA 9 provision that all existing special laws have the force of existing charter and are amendable and repealable by charter procedures as well as by Section 8 Laws.

C. *Home Rule Charter.*

This is a Charter drafted by a Charter Commission under HRA 3. It must be consistent with Section 8 Laws but need not be consistent with Section 9 Laws or existing charters.

A Home Rule Charter may be revised by the charter revision procedure of HRA 3. This procedure is not called "revision" when applied to Section 9 Laws or existing charters but Section 9 Laws and existing charters can in fact be revised in the process of adopting a Home Rule Charter under HRA 3. In either case the result may not be inconsistent with Section 8 Laws (other than G.L. c. 43 and c. 43A).

D. *Charter Amendments.*

A Home Rule Charter, a Section 9 Law and an existing charter may each be amended under HRA 4 and 9 subject to the limitations prescribed in HRA 4 but the result may not be inconsistent with Section 8 Laws (other than G.L. c. 43 and c. 43A).

Priority 3. By-Laws and Ordinances.

These are local enactments which (except as to subject mentioned in HRA 7) are now permitted as to any subject so long as they are not inconsistent with Section 8 Laws, Section 9 Laws, an existing charter or a Home Rule Charter.

APPENDIX II

Comments on the Home Rule Procedures Act (HRPA) Chapter 43B of the General Laws

TEXT:

Section 1. This chapter may be cited as the "Home Rule Procedures Act." As used in this chapter, the terms "board of registrars of voters", "city council", and "board of selectmen" shall include any local authority of different designation performing like duties.

Section 2. Every city and town shall have the power to adopt or revise its charter or to amend its existing charter in accordance with procedures prescribed by this chapter.

Comment:

The definitions in the second sentence of s. 1 are taken from HRA s. 3. S. 2 not quite accurately quotes the first sentence of HRA s. 2, referring to the HRPA rather than to HRA ss. 3 and 4 for the procedure to be used. The purpose of these sections is to make the HRPA self-contained.

TEXT:

Section 3. The adoption of a charter for any city or town under sections two and three of Article LXXXIX of the Amendments to the Constitution and the revision of any charter so adopted shall be initiated by filing with the board of registrars of voters of the city or town a petition signed by at least fifteen per cent of the number of registered voters residing in said city or town at the preceding state election. Such petition may consist of a number of separate sheets, but each sheet shall be in substantially the form prescribed therefor in section fifteen and shall be signed and completed in accordance with the instructions contained therein. The city or town clerk shall furnish forms for such petition to any registered voter of the city or town requesting the same. Within ten days from such filing, the board shall check each name to be certified by it on the petition, shall certify thereon the number of signatures so checked which are names of registered voters in the city or town, and shall report the results to the city council or board of selectmen, as the case may be, by filing its report with the city

or town clerk. Only names so checked shall be deemed to be names of registered voters for purposes of such petition. The board need not certify more than one hundred and forty per cent of the number of names required to file a petition, and names not certified in the first instance shall not thereafter be certified on the same petition.

Notwithstanding the foregoing provisions, the persons responsible for filing such petition may elect to postpone the date on which such petition is deemed to be filed by filing a written request for such postponement with the board at the time such petition or any portion thereof is filed. In such a case, the petition shall not be deemed to have been filed until the thirtieth day after such written request is filed. During such thirty day period, the board may, but shall not be required to, certify signatures on portions of the petition already filed and the persons responsible for filing such petition may, but shall not be required to, file additional separate sheets with the board, all of which shall be deemed to constitute part of the same petition. Certification of signatures shall be completed by the board within ten days after such postponed effective date.

Objections to the sufficiency and validity of the signatures on any such petition as certified by the board of registrars of voters shall be made in the same manner as provided by law for objections to nominations for city or town offices, as the case may be.

Comment: This section follows the first paragraph of HRA s. 3 closely, making it clear that only a home rule charter may be "revised" (see HRA s. 3, para. 3, permitting the revision question only if a charter has previously been adopted under HRA s.3) and providing some additional details as to forms of petition and methods of certification. The constitution permits only 10 days for certification of signatures and that time is very short for larger cities. Although there is no deadline for filing petitions, it was not thought appropriate to permit insufficient petitions to be perfected by filing additional signatures. The second paragraph of HRPA s. 3 attempts to soften both these positions by permitting the persons filing a petition to waive their right to certification within 10 days. Whenever there is such a waiver, up to 40 days can be spent certifying signatures.

If the board of registrars wishes to be cooperative in return, it may certify the signatures filed in time to permit additional signatures to be added if necessary for the success of the petition.

TEXT:

Section 4. Within thirty days of receipt of certification by the board of registrars of voters that a petition contains sufficient valid signatures, the city council or board of selectmen shall by order provide for submitting the question of adopting or revising a charter to the voters of the city or town, and for the election of a charter commission, at the first regular city election, or at the first annual or biennial town meeting for the election of town officers, held on or after the sixtieth day following the adoption of the order. Said order shall also provide for the nomination of charter commission members, who shall be nominated in accordance with this chapter. Said order shall not require the concurrence of the mayor in a city and shall not be subject to referendum. If an order of the city council or board of selectmen under this section has not been adopted within the thirty days specified above, the question of adopting or revising a charter shall be submitted to the voters and charter commission members shall be elected at the first regular city election, or at the first annual or biennial town meeting for the election of town officers, held on or after the ninetieth day after receipt by the city council or board of selectmen of certification provided for in the first sentence of this section.

Comment: This section tracks the second paragraph of HRA s.3. But it takes the position that a charter question should be voted upon at a regular election on or after 90 days after certification of signatures or, if earlier, on or after 60 days after the vote of the city council or board of selectmen ordering submission of the question to the voters. Since the constitution requires the matter to be submitted to the people, HRPA s.4 was designed to get the matter before the voters at the first appropriate election whether or not any effective proceedings of the council or selectmen were taken. Similarly, nominations are to be made in accordance with the HRPA whether or not the council or selectmen provide for them as directed.

TEXT:

Section 5. The signatures of the following number of registered voters shall be required to nominate charter commission members in cities or towns having the following number of inhabitants: two hundred such signatures if one hundred thousand or more inhabitants, one hundred such signatures if fifty thousand or more but less than one hundred thousand inhabitants, fifty such signatures if twelve thousand or more but less than fifty thousand inhabitants, twenty-five such signatures if six thousand or more but less than twelve thousand inhabitants and ten such signatures if less than six thousand inhabitants.

The last day for filing certified nomination papers for members of a charter commission with the city or town clerk shall be the twenty-eighth day preceding the date for their election. The manner of signing and the time for presenting nomination papers for certification to the board of registrars of voters, and the manner of and time for certifying the same, shall be governed by section seven of chapter fifty-three. Such nomination papers shall contain information with respect to candidates, except that no party or political designation shall be used, and shall be filed with the city or town clerk by a responsible person and accompanied by the candidate's acceptance, all as provided by and subject to the provisions of sections eight and nine of chapter fifty-three applicable to the nomination of officers for such city or town. Objections to the sufficiency and validity of the signatures on any nomination paper as certified by the board of registrars of voters shall be made and disposed of in the manner provided by sections eleven and twelve of chapter fifty-three, or by special law applicable to the city or town.

Upon application made by any city or town clerk, the state secretary shall provide him with blank forms for the nomination of charter commission members in such city or town. The city and town clerks shall supply such forms only to candidates or to persons authorized in writing by a candidate to obtain said forms in his behalf. One copy of a voting list shall be furnished to each candidate by the city or town clerk upon request. Except as provided in this section, the provisions of sections one to twelve, in-

clusive, and section seventeen of chapter fifty-three shall not apply to the nomination of charter commission members.

Comment: HRPA s.5 provides for nominations of charter commission members on petition signed by varying numbers in cities and towns of various sizes, deals with the form and filing of nomination papers, states the extent to which election laws apply and provides for printing of forms by the state secretary and making voting lists available to candidates. No political designations are permitted at the nomination stage since none are permitted at the election. An objection procedure is provided.

TEXT:

Section 6. A charter commission shall consist of nine registered voters of the city or town elected at large and by official ballot, without party or political designation, at an election held in accordance with this chapter. The names of the candidates nominated in accordance with section five shall be placed on such ballot in alphabetical order, preceded by an instruction to the effect that a voter may vote for not more than nine persons as charter commission members whether or not he favors the election of a charter commission. The question of electing a commission to adopt or revise the charter shall be placed on such ballot in the form prescribed by the constitution.

If a majority of the votes cast upon the question of adopting or revising the charter is in the affirmative, the nine candidates receiving the highest number of votes shall be declared elected.

Comment: This section closely follows the third and fourth paragraphs of HRA s.3 but again requires the election to be determined in accordance with the HRPA.

TEXT:

Section 7. A charter commission shall promptly organize by the election from among its members of a chairman, a vice chairman and a clerk and shall file a notice of such organization with the city or town clerk. If no notice of organization is received by the city or town clerk within ten days after the election of the commission members, such clerk shall immediately call a meeting of the commission for the purpose. A charter commission shall continue to exist until thirty days after the election at which its

charter adoption or revision proposal, if any, is required to be submitted to the voters under this chapter or until thirty days after submission to the city council or town meeting of a final report recommending no new charter or revision. If any member dies, resigns or ceases to be a registered voter of the city or town, a vacancy shall result which shall be filled by the election of any registered voter of the city or town by vote of a majority of the remaining members. The commission may continue to act notwithstanding the existence of any vacancy. Members shall serve without compensation but shall be reimbursed from the commission's account for expenses lawfully incurred by them in the performance of their duties.

Comment: This section contains some routine provisions with respect to the organization of the charter commission and attempts to deal with the problem of vacancies. With such a short-lived entity, the filling of vacancies by election did not seem feasible.

TEXT:

Section 8. (*a*) A charter commission may adopt rules governing the conduct of its meetings, and proceedings and may employ such legal, research, clerical or other employees, who shall not be subject to the provisions of chapter thirty-one, or consultants as its account may permit. In addition to funds made available by a city or town the charter commission account may receive funds from any other source, public or private, provided, however, that no contribution of more than five dollars shall be accepted from any source other than the city or town unless the name and address of the person or agency making the contribution, the amount of the contribution and the conditions or stipulations as to its receipt or use, if any, are disclosed in a writing filed with the city or town clerk. The consent of a charter commission to any such condition or stipulation shall not be binding upon a city or town. Within thirty days after submission of its final report the charter commission shall file with the city or town clerk a complete account of all its receipts and expenditures for public inspection. Any balance remaining in its account shall be credited to the city's or town's surplus revenue account.

(*b*) Each city or town shall provide its charter commission, free

of charge, with suitable office space and with reasonable access to facilities for holding public hearings, may contribute clerical and other assistance to such commission, and shall permit it to consult with and obtain advice and information from city or town officers and employees during ordinary working hours. Within twenty days after the election of a charter commission, the city or town treasurer shall credit to the account of the charter commission, with or without appropriation, the sum of five hundred dollars in a town of less than six thousand inhabitants, the sum of one thousand dollars in a town of six thousand or more but less than twelve thousand inhabitants, the sum of two thousand dollars in a city or town of twelve thousand or more but less than fifty thousand inhabitants, the sum of five thousand dollars in a city or town of fifty thousand or more but less than one hundred thousand inhabitants and the sum of ten thousand dollars in any other city or town. Such sum shall be provided by taxation in the manner set forth in section twenty-three of chapter fifty-nine if payment is made prior to the fixing of the annual tax rate, and otherwise shall be provided by transfer by the treasurer from available funds or by borrowing in the manner and for the period provided in the case of final judgments under clause (11) of section seven of chapter forty-four, and subject to all other applicable provisions of chapter forty-four except that such borrowing may be authorized by the city treasurer and city manager, if any, otherwise the mayor of a city and by the town treasurer and board of selectmen of a town. A city or town may appropriate additional funds for its charter commission provided the aggregate contribution by a city or town to its charter commission does not exceed ten times the initial contribution required of the city or town under this section.

Comment: This section confers a few basic powers upon charter commissions but is primarily concerned with funds for its work. Private contributions are permitted by HRPA s.8(a) but the source of contributions of more than $5 and any strings on any foundation or other grants must be disclosed. Surplus commission funds must be paid over to the city or town treasury when the commission's work is done. A special sentence was added to make sure that no commission could bind a city or town to make any matching grants or otherwise commit it without its

consent. Section 8(b) requires a minimum of cooperation from a local administration which may be hostile to the commission's work, provides for a modest amount of local funds to be promptly transferred to the commission's account, and permits additional local appropriations in aid of a commission: provisions of no great complexity but of considerable practical importance.

TEXT:

Section 9. (*a*) Within forty-five days after its election the charter commission shall hold a public hearing.

(*b*) Within eight months after its election, the charter commission shall prepare a preliminary report including the text of the charter or charter revision which the commission intends shall be submitted to the voters and any explanatory information the commission deems desirable, shall cause such report to be published in a newspaper having general circulation in the city or town, shall provide sufficient copies of the preliminary report to the city or town clerk to permit its distribution to each registered voter requesting the same, and shall furnish two copies to the attorney general. Within four weeks after such publication, the commission shall hold one or more public hearings upon the report. Within four weeks after his receipt of the report, the attorney general shall furnish the commission with a written opinion setting forth any conflict between the proposed charter or charter revision and the constitution and laws of the commonwealth.

(*c*) Within ten months after its election, the charter commission shall submit to the city council or board of selectmen its final report, which shall include the full text and an explanation of the proposed new charter or charter revision, such comments as the commission deems desirable, an indication of the major differences between the current and proposed charters, and a statement of not more than one thousand words by the commission minority, if any, provided such statement is filed with the chairman of the commission within forty-eight hours after the commission's vote approving such report.

(d) All public hearings before a charter commission shall be held within the city or town at such time and place as may be specified in a notice published at least ten days prior to the hearing in a newspaper having general circulation in the city or town, but hear-

ings may be adjourned from time to time without further published notice.

Comment: This section requires charter commissions to observe various procedures calculated to give the commission the benefit of the public's view as to policy and the attorney general's views as to legality and to give the public the benefit of a preliminary draft before a final report is prepared.

TEXT:

Section 10. (*a*) Amendments to a city or town charter previously adopted or revised under this chapter may be proposed by the city council of a city or town meeting of a town by a two thirds vote in the manner provided by this section; provided, that amendments of a city charter may be proposed only with the concurrence of the mayor in every city that has a mayor, and that only a charter commission elected under this chapter may propose any change in a charter relating in any way to the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager, or the board of selectmen or town manager. In this section, the word "mayor" shall mean an officer elected by the voters as the chief executive officer of a city or an officer lawfully acting as such, and the term "two thirds vote" shall mean, in cities, a vote, taken by yeas and nays, of two thirds of the members of a city council present and voting thereon, and shall mean, in towns, the vote of two thirds of the voters present and voting at a duly called meeting.

Comment: Subsection 10(a) pertains to amendments of home rule charters proposed to the voters by the city council or town meeting. The terms "mayor" and "two-thirds vote" are defined and the subsection follows HRA s.4 in requiring certain changes to be proposed only by a charter commission.

TEXT:

Section 10. (*b*) In addition to any amendment proposed by a city council or town meeting under subsection (*a*) the city council or town meeting shall consider and vote upon any suggested charter amendment which it would have the power to propose under subsection (*a*) and which is not substantially the same as an amendment already considered and voted upon by it within the

last twelve months, and which is suggested to it in a written request signed by the mayor or city manager or any member of the city council in a city or by the town manager or any selectman of a town, or is suggested to it by a petition in substantially the form set forth in section fifteen, signed and completed in accordance with the instructions contained therein by at least ten registered voters, in the case of a town and by as many registered voters, in the case of a city, as would be required to nominate a charter commission member in such city under section five, which written request or petition shall be filed with the city or town clerk.

At the earliest convenient time not later than three months after the date any suggested amendment is filed with the city or town clerk, the city council or board of selectmen shall order a public hearing to be held thereon before it or before a committee selected or established by it for the purpose, provided that any number of suggested amendments may be considered at the same hearing. Such a hearing shall be held not later than four months after the filing date of any suggested amendment to be considered, and at least seven day's notice of such public hearing shall be published in a newspaper of general circulation in the city or town. Except where the hearing is held by a city council, the board or committee holding the public hearing shall report its recommendations to the city council or town meeting, as the case may be. Final action on such a suggested amendment shall be taken not later than six months after such filing date in the case of a city and, in the case of a town, not later than the first annual town meeting held at least six months after such filing date, provided that at any time after the public hearing two hundred registered voters of a town or twenty per cent of the total number of registered voters of such town, whichever is less, may in writing request the selectmen to call a special town meeting to consider the suggested amendment, and the selectmen shall thereupon call such meeting which shall be held not more than forty-five days after the receipt of the request.

Comment: Subsection 10(b) provides a system whereby the city council or town meeting may be compelled by petition to vote on the question of whether an amendment should be proposed to the voters. If the petitioners suggest an amendment which the city council or town meeting could itself propose to the voters

and which is not substantially similar to one voted upon within the last year, the subsection requires a public hearing and final city council action on the suggestion within stated time limits. Of course the petitioners have no right to have the matter referred to the voters, for HRA s. 4 provides that only the city council or town meeting has this power. But they are entitled to have the city council or town meeting say either yes or no to the suggestion.

TEXT:

Section 10. (c) Whenever an order proposing a charter amendment to the voters is approved by the mayor and city council or town meeting, a copy of the proposed amendment shall be immediately submitted to the attorney general and such order shall not take effect for four weeks after the date of such submission. Within such four weeks the attorney general shall furnish the city council or board of selectmen with a written opinion setting forth any conflict between the proposed amendment and the constitution and laws of the commonwealth. If the attorney general reports that the proposed amendment conflicts with the constitution or laws of the commonwealth, the order proposing such amendment shall not take effect except as may be specified by further proceedings of the mayor and city council or town meeting under subsection (*a*). If the attorney general reports no such conflict, such order shall become effective four weeks after its submission to the attorney general.

Comment: Subsection 10(c) provides a procedure designed to permit the attorney general to advise cities and towns with respect to the legality of a proposed charter amendment. It would have been inappropriate to require the attorney general to review amendments which had not yet been proposed to the voters by the city council or town meeting, for they might never be proposed. It might have been held improper to give a state officer any power to veto a proposed amendment. The subsection provides, instead, for a four week delay in the effective date of an order proposing an amendment, to give the attorney general time to pass upon it, and provides that the order becomes effective at the end of that period if no unfavorable report is received within that period, but that if an unfavorable report is received,

the matter shall be finally disposed of by further order of the city council or vote of the town meeting. Of course a town meeting proposing an amendment to the voters should be adjourned to reconvene four weeks thereafter unless notice of cancellation is given, so that a new meeting need not be called in the event of an unfavorable report.

TEXT:

Section 10. (d) No order or vote under subsection (*a*), (*b*), or (*c*) shall be subject to referendum or shall, except as provided in subsection (*a*), require the concurrence of the mayor.

Comment: Since the city council or town meeting must propose an amendment, their failure to do so is not made subject to referendum.

TEXT:

Section 10. (*e*) The provisions of subsections (*a*), (*b*), (*c*) and (*d*) shall apply to amendments of laws having the force of a city or town charter by virtue of section nine of Article LXXXIX of the Amendments to the Constitution as well as to amendments of a charter previously adopted or revised under this chapter.

Comment: Subsection 10(e) provides that the amendment procedure is applicable to laws having the force of a charter, that is, Section 9 Laws, as well as to home rule charters. This provision, like the provision in section 18 as to general law charters, is drafted on the assumption that the term "existing charter" as used in HRA s.2, might be narrowly construed to mean "home rule charter", in which case the power to amend preamendment special laws would be derived exclusively from the HRA s.9 provision that all preamendment special laws have the force of existing (home rule) charter and are locally amendable. (See General Comment #1 on page 62.) But this narrow construction of the term "existing charter" is not the most likely construction. The term probably includes certain preamendment special laws, and any preamendment special laws which are "existing charters" are not Section 9 Laws. If certain preamendment special laws are "existing charters", then HRA s.2 provides that they may be amended but HRPA s.10(e) is defective: it is limited to Section 9 Laws and says nothing about "existing charters". The section should be amended to correct this error.

TEXT:

Section 11. Upon submission of the final report of a charter commission under section nine, the city council or board of selectmen shall order the proposed charter or charter revision to be submitted to the voters of the city or town for their approval at the first regular city election, or at the first annual or biennial town meeting for the election of town officers, held at least two months after such submission, but a charter commission report which does not recommend the adoption or revision of a charter shall not be submitted to the voters. Such an order shall not require the concurrence of the mayor in cities and shall not be subject to referendum. A proposed charter amendment shall be similarly submitted to the voters at the first such election or meeting held at least two months after the order proposing such charter amendment becomes effective under section ten. The question of adopting a charter or revising a charter as recommended by a charter commission shall be submitted to the voters as a single question unless the report of the charter commission provides for the separate submission of proposed revisions. Unrelated charter amendments proposed by a city council or town meeting shall be submitted to the voters as separate questions.

The question of approving the adoption of or any revision of or amendment to a charter shall be placed on a written or printed ballot, which ballot, including ballot labels where voting machines are used, shall be prepared by public authority and at public expense. A copy of the ballot question and summary prepared in accordance with the following instructions shall be filed with the city or town clerk no later than thirty-five days before the election, and the form of the question shall be substantially as follows:

"Shall this (city) (town) approve the (insert "new charter recommended by the charter commission" or "charter revision recommended by the charter commission" or "charter amendment proposed by the (city council) (town meeting", as appropriate) summarized below?

YES	
NO	

(Where a new charter or single charter revision is being submitted at an election, set forth here a brief summary of its basic provisions (composition and mode of selection of the legislative and

executive branches and school committee or, if a change of none of these is involved, the most significant proposed change). Where separate revisions or any amendments are being so submitted, set forth here the substance thereof in a manner also sufficient to distinguish each from any other amendments or revisions to be considered at the same election. The charter commission shall prepare the summaries of its own proposals and the city solicitor or town counsel shall prepare the description of proposed amendments.)

The city council or board of selectmen shall cause the final report of a charter commission, or a charter amendment proposed in an order which has become effective under section ten, to be printed and a copy to be distributed to each residence of one or more registered voters. Such distribution shall occur not later than two weeks before the election at which the question of adopting, revising or amending the charter is to be submitted to the voters. Additional copies of such final report or proposed amendment shall be filed with the city or town clerk for distribution to registered voters requesting the same and one such copy shall be posted in his office.

A new charter or charter revision approved by a majority of the voters of the city or town voting thereon shall take effect on the day specified in such charter or revision, and any proposed amendment so approved shall take effect upon the date specified therein or in the city council order or town meeting vote proposing the same. If two or more charter adoption, revision or amendment proposals are submitted to the voters in the alternative and are approved, only the alternative proposal receiving the highest number of affirmative votes shall take effect. If two or more charter adoption, revision or amendment proposals containing conflicting provisions are submitted to the voters, but not as alternatives, and are approved, all such proposals shall take effect, but the proposal receiving the highest number of affirmative votes shall be construed to prevent all conflicting provisions contained in other proposals from taking effect.

Comment: This section considerably amplifies the provisions of the last paragraphs of HRA ss. 3 and 4. The first paragraph deals with placing questions of adopting, revising and amending charters on the ballot and provides that the questions of adopting

or revising a charter shall be single questions unless the charter commission wishes to submit separate revisions separately. However unrelated amendment proposals are separate questions. The second paragraph prescribes a form of ballot question and summary to be used, requiring only a summary sufficient to identify, not describe, the proposal being submitted. If several proposals are being considered at the same election (amendments could easily be considered at the same election as adoption or revision proposals), each must also be sufficiently described to distinguish it from the others. The third paragraph provides for the publication of charters and charter amendments by printing and distributing copies to each residence of one or more registered voters and by making copies available upon request. It was considered that this is the most effective means of publication. The last paragraph deals with the effective date of proposals approved by the voters and with the problem of conflicting proposals considered at the same election. The submission of alternative proposals by charter commissions is not encouraged by the act and the constitution may furnish no basis for such a practice. But nothing bars the submission of amendments to the voters at the same time as proposals for charter revision or adoption. The local administration may well wish to offer proposals which differ from those suggested by the charter commission. So the statute attempts to provide some ground rules.

TEXT:

Section 12. Duplicate certificates shall be prepared setting forth any charter that has been adopted or revised and any charter amendments approved, and shall be signed by the city or town clerk. One such certificate shall be deposited in the office of the secretary of the commonwealth and the other shall be recorded in the records of the city or town and deposited among its archives. All courts may take judicial notice of charters and charter amendments of cities and towns.

The city council of each city, and the board of selectmen of each town, shall, at intervals of not greater than ten years, cause the charter of said city or town as revised or amended to be reprinted for distribution to such registered voters of said city or

town as may apply therefor at the office of the city or town clerk. Acts of the general court which are included in such charter may be referred to by appropriate subject headings and statutory citations instead of being set forth at length. Copies of said document may be sold at a price not to exceed the cost of paper, printing and binding thereof, plus mailing charges if any, as determined by said clerk.

Comment: This is a repetition of HRA s. 5, to which a decennial republication requirement is added.

TEXT:

Section 13. Any city or town may, by the adoption, amendment or repeal of local ordinances or by-laws, exercise any power or function which the general court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the general court in conformity with powers reserved to the general court by section 8 of Article LXXXIX of the Amendments to the Constitution and which is not denied, either expressly or by clear implication, to the city or town by its charter. Whenever appropriations, appointments, orders, regulations or other legislative or executive actions within the scope of any such ordinance or by-law are necessary in the exercise of any power or function authorized by such ordinance or by-law, any such actions which are to be taken by a city council or town meeting may be taken by ordinance, by-law, resolution, order or vote, and any such actions which are to be taken by executive officers may be taken in any appropriate manner, subject, however, as to both such categories, to all provisions of the ordinance or by-law in question, the city or town charter, and other applicable law. Any requirement that an ordinance or by-law be entitled as such, or that it contain the word "ordained," "enacted" or words of similar import shall not affect the validity of any action which is required to be taken by ordinance or by-law. Nothing in this section shall be construed to permit any city or town, by ordinance or by-law to exercise any power or function which is inconsistent with any general law enacted by the general court before November eighth, nineteen hundred and sixty-six which applies alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two. No exercise

of a power or function denied to the city or town, expressly or by clear implication, by special laws having the force of a charter under section nine of said Article, and no change in the composition, mode of election or appointment, or terms of office of the legislative body, the mayor or city manager or the board of selectmen or town manager, may be accomplished by by-law or ordinance. Such special laws may be made inapplicable, and such changes may be accomplished, only under procedures for the adoption, revision or amendment of a charter under this chapter.

Comment: Section 13 begins by paraphrasing HRA s. 6. A number of interpretations are then codified. First it is stated that the exercise of powers need not literally be "by adoption [etc.] of local ordinances or by-laws", but that ordinances and by-laws may provide, just as statutes have previously done, for the exercise of certain powers by a city or town. Once the local legislation by ordinance or by-law has been provided, ordinary legislative, executive and administrative actions may be taken accordingly. Second, it is stated that what is an "ordinance" or "bylaw" for purposes of exercising HRA s. 6 powers is not to be governed by formal considerations. Third, it is stated that preexisting general laws shall have the status of Section 8 Laws as against the ordinance and by-law power. (The question of whether they have this status as against charter powers is left open by the act, with the result that existing general laws may be more restrictive as against the ordinance and bylaw than as against the charter power.) And last, it is stated that no power denied by Section 9 Laws (having the force of a charter) may be exercised by ordinance or bylaw and that no changes of the type prohibited by charter amendment under HRA s.4 may be made by ordinance or bylaw; but that charter procedures must be used to exercise such powers or make such changes. The last sentence of the section should be construed to be a statement of what is the city or town's own home rule power as against Section 9 Laws. The sentence could not affect any authority to exercise such powers or make such changes conferred on cities and towns by future Section 8 Laws, and should not be read to affect any such authority conferred on cities or

towns by preamendment Section 8 Laws. The preamendment Section 8 Law powers intended to be repealed were repealed by section 18 of the HRPA. This section is drafted without reference to "existing charters" (see comment to s.10(e)), and should be appropriately amended.

TEXT:

Section 14. (1) The superior court shall, upon petition of ten or more registered voters or of the attorney general, have jurisdiction in equity to enforce the provisions of this chapter.

(2) The provisions of chapter two hundred and thirty-one A applicable to municipal by-laws or ordinances shall apply to charters, charter revisions, charter amendments, by-laws and ordinances of a city or town adopted under this chapter. In addition, a petition for declaratory relief under chapter two hundred and thirty-one A may be brought on behalf of the public by the attorney general or, by leave of the court, by ten or more registered voters of the city or town. In the case of a petition brought by ten registered voters, the attorney general shall be served with notice of the preliminary petition for leave, and may intervene as a party at any stage of the proceedings; and the petitioners shall be liable for, but may in the court's discretion also be awarded, costs, which may include reasonable counsel fees.

(3) Judicial review to determine the validity of the procedures whereby any charter is adopted, revised or amended may be had by petition of ten or more registered voters of the city or town brought within thirty days after the election at which such charter, revision, or amendment is approved. If no such petition is filed within such period, compliance with all the procedures required by this act and the validity of the manner in which such charter, revision or amendment was approved shall be conclusively presumed. No charter adoption, revision or amendment shall be deemed invalid on account of any procedural error or omission unless it is shown that the error or omission materially and substantially affected such adoption, revision or amendment.

Comment: This section provides for equity jurisdiction to enforce the HRPA and for appropriate declaratory judgment procedures. It also provides that the validity of the procedures whereby a

charter is adopted, revised or amended is to be conclusively presumed unless judicial review of the procedures is sought within 30 days from the date of the election at which the charter, revision or amendment is approved, and that only procedural defects substantially affecting the result should be held to affect validity. Of course the validity of the substance of any such charter, revision or amendment may be questioned after this 30 day period.

TEXT:

Section 15. (*a*) A petition for the adoption or revision of a charter shall conform with the requirements of subsection (*c*) and shall have a sentence in substantially the following form at the top of each page:

Each of the undersigned requests that the (city) (town) of ..... revise its present charter or adopt a new charter, and each of the undersigned certifies that he is a registered voter of said (city) (town) whose residence addresses at the times set forth below were as shown below, and that he has not signed this petition more than once.

(*b*) A petition suggesting a charter amendment under section ten shall conform with the requirements of subsection (*c*) and shall have a sentence in substantially the following form at the top of each page:

Each of the undersigned requests that the (city council) (town meeting) propose the charter amendment(s) attached hereto to the voters of the (city) (town) of ....., and each of the undersigned certifies that he is a registered voter of said (city) (town) whose residence addresses at the times set forth below were as shown below, and that he has not signed this petition more than once.

(*c*) All petitions shall require the following information to be furnished by each signer in accordance with the following instructions which shall be printed on each page:

*Name**	*Present Address* (Street and Number)	*Registered Address* (Street and Number January 1, 19.....**)
.....	.....	.....
.....	.....	.....

Instructions:

* Written signature of voter to be supplied; provided that a registered voter prevented from writing by physical disability may authorize another person to write his signature and address.

** If a voter was registered later than this date, the registered address on such later date shall be used.

If a petition is expected to be filed on or after July 15 of any year, the registered address on the preceding January 1 shall be used. If a petition is expected to be filed before July 15 of any year, the registered address on the second preceding January 1 shall be used.

No petition shall contain or be accompanied by any indication of party or political designation.

Comment: Forms for various petitions are prescribed by this section. The collection of signatures on a charter adoption or revision petition, which does not need to be filed by any particular date, presents the problem of which year's voting list will be in use when the signatures are actually certified. The act guesses that new lists may not be available before July 15 and asks the petitioners to guess when their petitions will be filed. As a practical matter, the deadline for filing a petition will be determined by the date of the election at which the charter adoption or revision question is to be considered. A petition certified by the board of registrars of voters must be filed with the city council or board of selectmen 90 days before the election if the question is to appear on the ballot without their cooperation. If the 90th day before the election is a Saturday, Sunday or legal holiday, the certified petition must be filed the next preceding secular day. The uncertified petition must be filed with the board of registrars at least 10 days (or 40 days if extended under HRPA s. 3) before the filing date for the certified petition, and if that day is a Saturday, Sunday or legal holiday, the uncertified petition must be filed the next preceding secular day. (See the series of articles by Norman Gleason in *The Public Recorder*, Vol. 15 (published by the Massachusetts Town Clerk's Association), especially No. 7 (May, 1967 Special Issue) and No. 10 (August, 1967).

TEXT:

Section 16. Any paper or document which is required by this

chapter to be filed with or submitted to the city or town clerk or a city council or a board of selectmen shall be deemed to be so filed or submitted when it is delivered to the city or town clerk or to his office. Any paper or document which is required by this chapter to be filed with or submitted to a board of registrars of voters shall be deemed to be so filed or submitted when it is delivered to the office of the board or, if the board maintains no office, to the office of the city or town clerk. Any paper or document which is required by this chapter to be filed with or submitted to the attorney general shall be deemed to be so filed or submitted when it is delivered to the attorney general or to his office.

Comment. This section prescribes some rules of convenience for various filings.

TEXT:

Section 17. The provisions of chapters fifty to fifty-seven, inclusive, applicable to city or town elections shall apply to the proceedings governed by this chapter so far as apt, but the provisions of sections fifty-five to fifty-eight, inclusive, of chapter fifty-four shall not be deemed to apply, and the provisions of this chapter shall prevail where they are in conflict with any applicable provisions of said chapters fifty to fifty-seven, inclusive.

Comment: This section refers to the election laws for further procedural rules.

TEXT:

Section 18. Any city or town having a charter under chapter forty-three or forty-three A or a method of electing officers under chapter fifty-four A may change the same in accordance with the procedures for the adoption or amendment of a charter prescribed by this chapter. Except as may be permitted by any general or special law enacted after November eighth, nineteen hundred and sixty-six, no city or town shall adopt or change charters or change its methods of electing officers under said chapters forty-three, forty-three A, fifty-four A or under any special laws in effect on such date, including without limitation chapters four hundred and fifty-two of the acts of nineteen hundred and forty-eight, six hundred and sixty-one of the acts of nineteen hundred and forty-nine and one hundred and fifty-two of the acts of nineteen hundred and

fifty-four, as amended, and the procedures set forth in this chapter shall be exclusive.

Comment: This section permits the provisions of listed Section 8 Laws (some of which may also be "existing charters" and therefore amendable apart from this section) to be changed by charter procedures. It also prevents the provisions of the general and special laws so listed and of other unlisted preexisting *special* laws from being changed except in accordance with the HRPA. The rule of this section does not apply to unlisted preexisting general laws. The last clause of this section, like the last sentence of s. 13, ought to be disregarded to the extent its implications extend beyond the subject matter of the section.

TEXT:

Section 19. Clause fifth of section seven of chapter four shall not apply to this chapter, and no special law enacted after November eighth, nineteen hundred and sixty-six shall be subject to amendment, revision or repeal by the adoption, revision or amendment of a charter under this chapter except to the extent that such special law shall expressly or by clear implication so provide.

Comment: This section makes the statutory definition of "charter" inapplicable to the HRPA. Under that definition, all "special acts and provisions" relating to cities and towns are "charter", whether they are Section 8 Laws, existing charters or Section 9 Laws. The definition cuts across too many HRA concepts to be a useful tool under the HRA. This section further makes it clear, as a matter of information, that special laws enacted after the effective date of the HRA, since they will be Section 8 Laws, are not amendable by charter procedures unless they say so.

General Comment #1

Subsection 10(e) provides that Section 9 Laws are amendable by the charter amendment procedures of s. 10(a), (b), (c) and (d). This comment discusses some theories of constitutional interpretation and legislative power underlying the subsection.

1. *Constitutional Interpretation.* It is not entirely clear whether the constitution provides for the amendment of all preamendment special laws, or only of those applicable to cities and towns having

"existing charters", or only of those applicable to cities and towns having home rule charters.

As used in the HRA, the term "charter", used in every section except sections 1 and 7, could have as narrow a meaning as "home rule charter" or as broad a meaning as "home rule charter plus pre-HRA optional plans of government plus pre-HRA special laws" or any meaning in between these meanings, depending on the context. It is clear that "charter" is used in its narrowest sense in HRA ss. 3 and 4. Only a home rule charter can be adopted under HRA s. 3. (Future optional plans of organization under HRA s. 8 will be adopted in accordance with the Section 8 Law providing them and even if the HRA s. 3 method is prescribed (e.g. HRPA s. 18), the plan is adopted by authority of the Section 8 Law and not by authority of HRA s. 3.) Only a charter adopted under s. 3, that is, a home rule charter, can be revised under HRA s. 3, and HRA s. 4 is primarily (and perhaps exclusively) concerned with home rule charters. HRA s. 2 says that a "charter" (meaning home rule charter) may be adopted and revised and that an "existing charter" (meaning probably more than a home rule charter) may be amended. HRA s. 5 provides for recording of charters and charter amendments. "Charter amendments" must be read to include amendments to home rule charters and existing charters. HRA s. 6 provides that powers denied by charter may not be exercised by ordinance or bylaw. Here "charter" may have a broad meaning. But whatever it means in HRA s. 6, the effect is the same. Whether a law is a Section 8 Law, a home rule charter, an existing charter or a Section 9 Law having the force of charter, it seems clear that ordinances and bylaws are subordinate. HRA s. 8 speaks of charter adoption and refers only to home rule charter. HRA s. 9 says special laws in existence when the HRA became effective have the "force of an existing . . . charter, but shall be subject to amendment or repeal through the adoption, revision or amendment of a charter . . . in accordance with the provisions of [HRA ss. 3 and 4]", as well as through the enactment of laws under HRA s. 8.

If "charter" (at least in HRA ss. 5 and 6) and "existing charter" (HRA ss. 2 and 9) include pre-HRA optional plans, then these are amendable by virtue of HRA s. 2 and the HRPA s. 18 provision is unnecessary. If "charter" or "existing charter" includes all pre-

amendment special laws (see G.L. c. 4 s. 7 (5)), then these preamendment special laws are amendable by virtue of HRA s. 2 and the HRA s. 9 provision that they have the force of an existing charter seems unnecessary. If "charter" or "existing charter" includes such preamendment special laws as are commonly thought to be "charters" but excludes other special laws, then the power to amend the special laws which are *not* "existing charter" arises from the fact that they are given the force of "existing charter" by HRA s. 9 and are therefore intended to be amendable under HRA s. 4, "existing charter" being stated by HRA s. 2 to be amendable under HRA s. 4. If "charter" or "existing charter" includes only "home rule charter", then the power to amend preamendment special laws arises from the fact that they are given the force of an existing home rule charter by HRA s. 9 and are therefore intended to be amendable under HRA s. 4. Note that if "charter" or "existing charter" includes only home rule charters, the conclusion that all preamendment special laws are amendable cannot be drawn from the HRA s. 2 permission to amend "existing charter". Also, if "charter" or "existing charter" includes preamendment special laws thought of as charters but not other preamendment special laws, then the conclusion that these other preamendment special laws are amendable cannot be drawn from the HRA s. 2 permission to amend "existing charter". For on neither of these assumptions does "existing charter" include preamendment special laws which are not thought of as charters (that is, Section 9 Laws). In either case, therefore, the conclusion that Section 9 Laws are amendable depends upon a construction of HRA s. 9. HRA s. 9 says all Section 9 Laws have the force of existing charter. This should mean they are equally amendable. But it goes on to say that Section 9 Laws are amendable "through the . . . amendment *of a charter*". If "charter" here means "home rule charter" or "home rule charter or special acts thought of as a charter", the HRA s. 9 "force of an existing . . . charter" provision could be taken to be qualified, with the result that no Section 9 Law could be amended except through the process of adopting, revising or amending, in the first case, a home rule charter or amending, in the second case, either a home rule charter or a charter-like preamendment special law.

An interpretation of HRA s. 9 which results in all or part of the preamendment special laws being unamendable except in the process of adopting or revising a home rule charter or amending a home rule charter or a charter-like preamendment special law does not seem to be the best interpretation. For while it gives full literal effect to the "amendment of a charter" language in HRA s. 9, it conflicts with the language in HRA s. 9 that Section 9 Laws shall "have the force of an existing . . . charter", for laws having the same force should be amendable in the same manner. In resolving the conflict, it seems important to note that HRA s. 9 is a transitional provision, designed to deal with how the legislative power shall be allocated between cities and towns and the general court with respect to the existing body of special laws applicable to individual cities and towns (the Section 9 Laws). Unlike HRA ss. 6 and 8, HRA s. 9 need not state that it applies whether or not a charter has been adopted under HRA s. 3 because it is obviously intended to apply everywhere immediately. As is discussed elsewhere, this provision clearly places Section 9 Laws on a par with home rule charters (and "existing charters") in the priority system established by the HRA, and it seems basically to say that these Section 9 Laws may be repealed or amended either locally by the procedures applicable to home rule charters or by the general court's enactment of Section 8 Laws. Both of these considerations lead more to the conclusion that all preamendment special laws should have the force of a charter and be equally amendable, effective immediately, rather than to the conclusion that some or all preamendment special laws are untouchable except under HRA s. 8(1) or 8(2) until a home rule charter has been adopted or until a charter-like preamendment special law is also amended. And since unrelated charter amendments ought obviously to be voted upon as separate questions, it is not sensible to read the constitution to require that some or all preamendment special laws may only be amended in conjunction with the amendment of another law or charter. While there is room for the idea that some or all preamendment special laws may only be repealed or amended if the result is incorporated into a home rule charter or charter-like preamendment special law, it seems more sensible, on balance, to read the words "subject to amendment or repeal through the

adoption, revision or amendment of a charter in accordance with the provisions of [HRA ss. 3 and 4]" less literally to mean "subject to amendment or repeal through a local enactment at the charter (rather than the ordinance or bylaw) level in accordance with the procedural provisions contained in [HRA ss. 3 and 4]".

2. *Legislative Power.* Even if the constitution were construed to make some or all preamendment special laws amendable by the charter amendment procedure only in cities and towns which have already adopted home rule charters or are amending charter-like preamendment special laws, legislative power to change the rule should be found to exist. The HRA language itself is certainly too unclear to serve as a basis for denying legislative power. The general court has the power to amend or repeal preamendment special laws under HRA s. 8. It is familiar law that the enactment of statutes subject to acceptance was not improper delegation of legislative power before the adoption of the HRA. A general law providing that all preamendment special laws were repealed, subject to acceptance of each repealer by the city or town involved, should raise no new question. Nor should amendment at local option be troublesome as a delegation. The constitutional requirement of consistency with Section 8 Laws is a sufficient standard.

3. *The HRPA Position.* As a result of the foregoing, the HRPA takes the position that all preamendment special laws are amendable before or after the adoption of a home rule charter and whether or not any charter-like preamendment special law is involved. It also takes the position that the words "charter" and "existing charter" as used in the HRA cannot be safely assumed to have a broader meaning than "home rule charter". The HRPA therefore treats the word "charter" narrowly, to mean "home rule charter" and provides (1) that preamendment special laws have the same force and are therefore similarly amendable (HRPA s. 10(e)) and similarly superior to the ordinance and bylaw power (HRPA s. 13), (2) that preamendment general law optional plans are repealable and amendable by charter procedures (HRPA s. 18) and (3) that future Section 8 special laws are not locally amendable without legislative permission (HRPA s. 19). This approach keeps the HRA priority system as simple as possible by avoiding the notion that a "charter" is something which might be in Section 8

Law or Section 9 Law or home rule charter. Hopefully, also, it will avoid protracted debate about the precise meaning of "existing charter" because the term is really unnecessary. Whether pre-amendment optional plans are amendable as "existing charters" or are amendable in the same manner as charters by virtue of HRPA s. 18, it seems that the procedures are identical. Whether pre-amendment special laws are amendable because they are "existing charters" under HRA s. 2, or because they are laws having the "force of an existing . . . charter" under HRA s. 9, or because HRPA s. 10(e) provides that they may be amended in the same manner as charters, it seems that the procedures are identical. By one route or the other, all these enactments are placed in the second priority "equivalent to a home rule charter" category, of which the voters are advised when they vote on a "charter amendment" under HRPA s. 11. (It may also be appropriate, in a ballot summary, to mention whether the particular enactment to be amended is a charter-like or non-charter like preamendment special law, an optional plan or a home rule charter but failure to do so should have no effect on validity.) As has been pointed out in the comment on HRPA s. 10(e), the fact that the meaning of "existing charter" should have no effect on amendability does not mean that the term should be ignored, and HRPA ss. 10(e) and 13 should both be amended to refer to existing charters.

General Comment #2

G.L. c. 43B contains an unusual amount of language which is essentially explanatory of the HRA and its effect. An example outside the chapter is St. 1966 c. 734 s. 3 stating that a statute properly enacted (subject to the condition subsequent of acceptance) before the HRA became effective may be validly accepted after the HRA became effective. The intent was not to usurp the court's function in interpreting the HRA. The general court had an independent duty to interpret the HRA so that home rule legislation would fit and not collide with its scheme. Because of the general court's great powers under HRA s. 8, it seemed permissible as well as wise to state, and thereby enact by Section 8 Law, a number of the constitutional interpretations upon which the HRPA is based. It is to be hoped that if errors of interpretation have been made, they are not so serious that the court will be inclined to find a lack

of power to impose the interpretation by Section 8 Law, and that the validity of the various provisions of the HRPA is therefore on a relatively firm footing.