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Shaun Mulholland, City Manager
City of Lebanon
51 North Park Street
Lebanon, NH 03766

Re: "Welcoming Lebanon" Ordinance
City of Lebanon
Our File No. 20158-47.015

Dear Manager Mulholland and other City officials:

I understand a question has arisen concerning the extent to which the Lebanon City Council has legal authority to amend an ordinance enacted by the voters by initiative and referendum. This opinion addresses that question generically, without reference to any specific ordinance, or to any policy position with respect thereto.

QUESTION: Does the Lebanon City Council have legal authority to amend an ordinance enacted by referendum under § C419:23a of the City Charter, "Citizens Binding Initiative," and if so, when can such an amendment occur?

SUMMARY OF ANSWER: It is my opinion, for the reasons given below, that an ordinance enacted pursuant to § C419:23a stands in no preferred position with respect to the Council's authority to amend. The Council thus has the same legal authority to amend as it does with any prior Council-enacted ordinance. Such an amendment can legally be made to take effect immediately upon the effectiveness of the initiative-passed measure, or at any time thereafter.

DISCUSSION AND BASIS FOR OPINION:

A. IN GENERAL.

The first issue is whether the Council can amend a referendum-passed ordinance ***at all*** (by contrast with, say, such an ordinance being subject to amendment only by further referendum). My answer is that the Council clearly ***does*** have the legal authority to amend such an ordinance, for the following reasons:

1. ***Wording of Charter.*** First and foremost, no wording found in § C419:23a – or anywhere else in the Lebanon City Charter – suggests any restriction on such amendments. The Lebanon City Charter thus stands in clear contrast to some examples given in McQuillen, MUNICIPAL CORPORATIONS § 21:3 '*Power to amend – Initiative and referendum measures*' – of specific charters or constitutional provisions from other states which do impose such restrictions; for example a charter provision requiring a 2/3 council vote to amend an initiative-passed measure; or one requiring a new referendum to amend (*City of Shreveport v. Gregory,* 172 So. 435 (Louisiana 1936)); or one explicitly prohibiting amendments for a certain period of time (*Sustainable Growth Initiative Committee v. Jumpers,* 128 P.3d 452 (Nevada 2006)). Lebanon's charter simply does not contain any such provision. Neither does any New Hampshire statute.

2. It should be noted that the ***title*** of § C419:23a – "Citizens Binding Initiative" – does not alter that conclusion. The function of the words "Binding Initiative," taken in the context of the Charter as a whole, are simply to differentiate § 23a of the Charter from § 23b "Citizens Non-binding Initiative." A referendum vote under § 23b is merely advisory, and does not take effect at all unless enacted by the Council. A referendum under § 23a, by contrast, is "binding" in the sense that if the procedures therein are followed, it takes effect without a Council vote (until and unless affirmatively amended). Just as importantly, the word "binding" ***did not in fact appear*** in the version of § 23a which was actually voted upon by the City's voters in 1980 (*see* the ballot question, as quoted by the NH Supreme Court in *Harriman v. City of Lebanon*, 122 N.H. 477 at 479 (1982)).

3. ***The* Harriman *Case.*** The notion that there might be an implied restriction on the Council's authority to amend an initiative-passed measure would also be contrary to the holding of the NH Supreme Court in the 1982 *Harriman* decision, cited above. While the Court in that case held that § 23a was not unlawful on its face, the Court limited the scope and effect of the initiative petition process as follows:

> "The defendant argues that the process of initiative or referendum cannot exist in a municipality with a city council-city manager form of government. We disagree. Binding initiative does not run afoul of RSA Ch. 47 or RSA 44:3. When the proper procedures for amending a charter are followed, as they were in this case, a charter providing for citizen initiative or referendum can exist in a municipality with a city council-city manager form of government ***as long as the initiative petition neither intrudes into matters reserved for the city council under RSA Ch. 47, nor contravenes the general laws or constitution.***"

The above italicized language limiting the scope and effect of the initiative and referendum provision was also quoted in a more recent NH Supreme Court decision, *City of Manchester v. School Dist. of Manchester*, 150 N.H. 664 (2004)), where the Court was emphasizing the Legislature's ***limitations*** on the scope of charter amendments under RSA Ch. 49-B. The Court cited the *Harriman* case specifically to re-emphasize that "a citizen initiative and referendum process could not intrude into matters reserved for the city council, and could not contravene the general laws or the constitution" (150 N.H. at 670).

4. ***Council's Authority Under State Law.*** So, exactly what ***are*** the powers reserved to the Council, which the Court said in *Harriman* cannot be 'intruded into' by the initiative petition process? § C419:16 and § C419:23 of the Lebanon City Charter establish the Council as the City's legislative body, with all the powers given by state statutes to the "mayor and aldermen" and "common councils" of other cities. Those powers expressly include the authority to enact bylaws and ordinances "to carry into effect ***all*** the powers by law vested in the city" (RSA 47:17, paragraph I, italics added). While subsequent paragraphs of RSA 47:17 fill in the details of some of the Council's ordinance powers, the language of paragraph I makes it clear that the Council's authority over ordinances is intended to cover the full gamut of the ordinance authority conferred on the City by the Legislature. That intent is bolstered by RSA 49-B:2 – one of the body of statutes which implements the so-called "home rule charter" amendment to the N.H. Constitution (Part I, Article 39, adopted in 1966). RSA 49-B:2 sets forth the scope of municipalities' authority to adopt "home rule" charters. Local charter authority is broad but not unlimited. The statute mandates that the charter must either designate the municipality as a town or as a city (rather than something in-between). RSA 49-B:2, IV(c) establishes the council as the "legislative body" of a city. Moreover, if the municipality is a city, the provisions of RSA Chapter 49-C apply, and RSA 49-C:8 establishes the council as the "governing and legislative body" under the council-manager plan.

In sum, initiative-passed referendum measures ***cannot*** be legally exempt from the Lebanon City Council's authority to amend, because if they were, that would mean that the initiative petition process ***would*** "intrude into matters reserved for the city council" under state law, contrary to the *Harriman* decision.

5. ***The Craigue case.*** Another key case limiting the allowable scope and effect of municipal charter amendments is *City of Claremont v. Craigue*, 135 N.H. 528 (1992). Claremont's voters had tried – using charter amendment procedures under RSA 49-B – to amend the Claremont charter to make the annual budget subject to a voter referendum. The Court held that the amendment was invalid because it would enable the voters to intrude upon the powers reserved to the city council, and hence was inconsistent with state law. It's true that the Legislature has permitted a municipality to adopt a ***town*** council with budgetary town meeting (RSA 49-D:3, II), but ***this option is not available for a municipality whose charter designates it as a city.*** The Court said putting the budget to a referendum was inconsistent with the powers of a city council in RSA Chapters 44 and 47. Moreover, RSA Ch. 49-B sets out separate procedures for a charter ***amendment*** versus a charter ***revision***. Claremont could lawfully change itself from a city to a town with budgetary town meeting, but that would require a charter revision, not just an amendment.

By that same reasoning, the Courts would not construe § 23a of the Lebanon City Charter as placing initiative-passed measures beyond the Council's authority to amend, because such a construction would be inconsistent with Lebanon's city form of government, which could not be altered in the absence of a charter ***revision*** changing Lebanon from a city back to a town.

6. ***Other N.H. Cases Construing Charter Amendment Authority Narrowly.*** In other so-called "home rule" cases, it has been held that a town has no authority to enact term limits as part of a charter amendment, because that would be inconsistent with the State Legislature's comprehensive legislative scheme governing elections *see Town of Hooksett v. Baines*, 148 N.H. 625 (2002). The Supreme Court also overturned the City of Manchester's attempt, via charter amendment, to convert the school district, which had previously been a separate legal entity (as in Lebanon) into a department of the City. In the course of its opinion (*City of Manchester v. School Dist. of Manchester*, 150 N.H. 664 (2004)). These cases further demonstrate our N.H. Supreme Court's trend toward construing charter provisions narrowly.

7. ***Cases from Other States.*** Outside New Hampshire, courts have been presented with the argument that an initiative petition process logically implies some limitation on a council's authority to amend, and have ***rejected*** that argument. For example in *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir 2009) it was held that, several years after a voter referendum had established a 2-term term limit for city councilors in New York City, the Mayor and Council ***could*** lawfully amend that measure to allow up to 3 terms, without violating the free speech, due process or any other federal rights of either the referendum voters or council candidates. The Court rejected the argument that such amendment

authority would have a chilling effect on voters' participation in future referendum measures. The court observed that the US Constitution does not require states to provide referendum procedures at all, much less to insulate such measures from legislative body authority. The Court cited a prior New York ***state*** court case, *Caruso v. City of N.Y.*, 517 N.Y.S.2d 897 (Sup.Ct.1987), aff'd 547 N.Y.S.2d 837 (1989), which had stated the following:

> "The laws proposed and enacted by the people under an initiative provision are subject to the same constitutional, statutory and charter limitations as those passed by the [legislative body] and are entitled to no greater sanctity or dignity. Inasmuch as a legislative body may modify or abolish its predecessor's acts subject only to its own discretion, it likewise should be able, in the absence of an express regulation or restriction, to amend or repeal an enactment by the electorate, its co-ordinate unit, and *vice versa*."

In our neighboring state of Maine, the Supreme Judicial Court held in *Bird v. Town of Old Orchard Beach*, 426 A.2d 370 (1981) that where voters by referendum had rejected a bond issue, the town council nevertheless had authority to later pass that same bond issue, where the measure clearly fell within the town council's statutory powers, and no statute or charter provision limited such action. The Maine court found persuasive the following language from a New Jersey case:

> "We see no reason to ham-string the discretion of the municipal governing body by imposing a limitation upon it not required by explicit statutory or constitutional mandate. The municipal residents have an immediate remedy by way of a petition or protest and an ultimate remedy through the exercise of their voting rights at municipal elections."

Cornell v. Mayor and Council of Borough of Watchung, 229 A.2d 630 (1967). Those same observations are equally persuasive as applied to the City of Lebanon.

IN SUMMARY: There is no general limitation on the Lebanon City Council's authority to amend an initiative-passed ordinance because:

(a) The Charter itself contains no such limitation (items 1 and 2 above);

(b) Such a limitation cannot be inferred merely from the existence of the initiative petition process (item 7 above);

(c) To construe § C419:23a of the Charter as containing any such limitation would impermissibly allow the initiative process to "intrude upon" the powers given by state law to the City Council (items 3, 4 and 6 above); and

(d) Any such limitation would also be contrary to the council-city manager form of government (item 5 above).

B. When Could Such An Amendment Lawfully Take Effect?

The only wording concerning time frame mentioned in § C419:23a of the Charter is the statement that the initiative-proposed measure, if it passes, "shall thereafter go into effect on the first day of the next succeeding municipal year." Therefore, based on the wording of § C419:23a – and in light of the conclusions of part A of this opinion – it is my opinion that a Council-enacted amendment can lawfully take effect at any point in time after the initiative measure takes effect. No other timeframe is given in the Charter or in state law – there is no waiting period of a year, month, day, or even one second. Given that under § 23a, the initiative-passed measure goes into effect "on the first day of the next succeeding municipal year" (presumably at 12:00 A.M. on that day), a Council-approved amendment could take effect immediately (i.e. theoretically at a vanishingly-small fragment of a second after that time). To hold otherwise would be to insert some waiting period which the Charter simply does not contain.

The only remaining question which might be raised is whether the Council can act to draft and take a vote enacting such an amendment prior to the time the initiative-passed ordinance takes effect. The answer is yes. § C419:22 of the Charter – a section governing the Council's ordinance powers – states that the effective date must be stated as part of any ordinance, thus implying that it may lawfully have an effective date later than the time of the Council's vote. Indeed, the practice of inserting later effective dates is so common and well-known in the US Congress, state legislatures and municipal bodies as require no further discussion. An analogy suggested by the *Caruso* case (above) would be to consider the initiative-passed measure in the same light as a measure passed by a prior City Council (possibly with different membership). Let us assume, hypothetically, that the Council in 2017 had passed an ordinance with an effective date of January 1, 2021, and that the 2020 Council desired to make changes to the measure prior to its taking effect. Clearly the Council could – prior to January 1, 2021 – take a vote on amendments, and provide for them to take effect immediately upon the original taking effect. As set forth in Section A of this opinion, an initiative-passed measure stands in no different position.

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I would be glad to respond to any comments or questions concerning this opinion.

Sincerely,

H. Bernard Waugh, Jr.