Bill as Introduced

HB 618-LOCAL - AS INTRODUCED

2019 SESSION

19-0678
08/06

HOUSE BILL ***618-LOCAL***

AN ACT relative to the definition of contracts relative to official ballot default budgets.

SPONSORS: Rep. Gilman, Rock. 18; Rep. Josephson, Graf. 11

COMMITTEE: Municipal and County Government

ANALYSIS

This bill repeals the definition of contracts relative to official ballot default budgets.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 618-LOCAL - AS INTRODUCED

19-0678
08/06

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT relative to the definition of contracts relative to official ballot default budgets.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Repeal. RSA 40:13, IX(c), relative to the definition of contracts relative to municipal budgets, is repealed.

2 Effective Date. This act shall take effect upon its passage.

HB 618-LOCAL - AS AMENDED BY THE SENATE

06/06/2019 2373s

2019 SESSION

19-0678
08/06

HOUSE BILL ***618-LOCAL***

AN ACT relative to the definition of contracts relative to official ballot default budgets.

SPONSORS: Rep. Gilman, Rock. 18; Rep. Josephson, Graf. 11

COMMITTEE: Municipal and County Government

AMENDED ANALYSIS

This bill revises the definition of "contract" relative to official ballot default budgets.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 618-LOCAL - AS AMENDED BY THE SENATE

06/06/2019 2373s

19-0678
08/06

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT relative to the definition of contracts relative to official ballot default budgets.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Use of Official Ballot; Contracts. Amend RSA 40:13, IX(c) to read as follows:

(c) "Contracts" as used in this subdivision means contracts previously approved, [~~in the amount so approved,~~] by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.

2 Effective Date. This act shall take effect upon its passage.

Amendments

Sen. Morgan, Dist 23
May 28, 2019
2019-2355s
08/10

Amendment to HB 618-LOCAL

Amend the bill by replacing section 1 with the following:

1 Use of Official Ballot; Contracts. Amend RSA 40:13, IX(c) to read as follows:

(c) "Contracts" as used in this subdivision means contracts previously approved, [~~in the amount so approved,~~] by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.

UNAPPROVED

2019-2355s

AMENDED ANALYSIS

This bill revises the definition of "contract" relative to official ballot default budgets.

UNAPPROVED

Election Law and Municipal Affairs
May 29, 2019
2019-2373s
08/04

Amendment to HB 618-LOCAL

Amend the bill by replacing section 1 with the following:

1 Use of Official Ballot; Contracts. Amend RSA 40:13, IX(c) to read as follows:

(c) "Contracts" as used in this subdivision means contracts previously approved, [~~in the amount so approved,~~] by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.

2019-2373s

AMENDED ANALYSIS

This bill revises the definition of "contract" relative to official ballot default budgets.

Sen. Gray, Dist 6
June 4, 2019
2019-2420s
08/10

Floor Amendment to HB 618-LOCAL

Amend RSA 40:13, IX(c) as inserted by section 1 of the bill by replacing it with the following:

(c) "Contracts" as used in this subdivision means contracts previously approved, in the amount so approved, ***including approved increases in multi-year contracts,*** by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.

Committee Minutes

AMENDED
SENATE CALENDAR NOTICE
Election Law and Municipal Affairs

Sen Melanie Levesque, Chair
Sen Tom Sherman, Vice Chair
Sen Jon Morgan, Member
Sen Regina Birdsell, Member
Sen James Gray, Member

Date: April 25, 2019

HEARINGS

Wednesday		05/01/2019
(Day)		(Date)
Election Law and Municipal Affairs	LOB 102	9:00 a.m.
(Name of Committee)	(Place)	(Time)

9:00 a.m.	**HB 479-FN**	relative to eligibility for the low and moderate income homeowners property tax relief. (THE PREVIOUS HEARING FOR HB 479 WAS RECESSED ON APRIL 24th)
9:20 a.m.	**HB 504**	relative to election-related amendments to the United States Constitution.
9:45 a.m.	**HB 618-LOCAL**	relative to the definition of contracts relative to official ballot default budgets.
10:00 a.m.	**HB 706-FN-A**	establishing an independent redistricting commission.
11:30 a.m.	**HB 641-LOCAL**	allowing municipalities to collect an occupancy fee from operators of local room rentals.

EXECUTIVE SESSION MAY FOLLOW

Sponsors:

HB 479-FN

Rep. Fellows	Rep. Gordon	Rep. Ames	Rep. Ellison
Rep. Weston			

HB 504

Rep. Read	Rep. Butler	Rep. Vann	Rep. T. Smith
Rep. W. Pearson	Rep. Guthrie	Sen. Fuller Clark	

HB 618-LOCAL

Rep. Gilman	Rep. Josephson		

HB 641-LOCAL

Rep. Edgar	Rep. Almy	Rep. Cushing	Rep. Cleaver
Rep. Pantelakos	Rep. Cloutier	Rep. Khan	Rep. Loughman
Rep. Suzanne Smith	Sen. Sherman		

HB 706-FN-A

Rep. M. Smith	Rep. Berch	Rep. Porter	Rep. Knirk
Rep. Danielson	Rep. Ebel	Rep. Gordon	Rep. Myler
Sen. Fuller Clark	Sen. Chandley	Sen. Feltes	

Tricia Melillo 271-3077

Melanie Levesque
Chairman

Senate Election Law and Municipal Affairs Committee
Tricia Melillo 271-3077

HB 618-LOCAL, relative to the definition of contracts relative to official ballot default budgets.

Hearing Date: May 1, 2019

Members of the Committee Present: Senators Levesque, Sherman, Morgan, Birdsell and Gray

Members of the Committee Absent : None

Bill Analysis: This bill repeals the definition of contracts relative to official ballot default budgets.

Sponsors:
Rep. Gilman Rep. Josephson

Who supports the bill: Rep. Gilman, Barrett Christina, Russell Dean

Who opposes the bill: Rep. Migliore, Neal Kurk, Alvin See, Richard Lehmann

Who is neutral on the bill: NH Municipal Association

Summary of testimony presented in support:

Representative Gilman

- The intent of this legislation is to fix a key problem in RSA 40:13 and the definition of contracts for the purpose of the default budget.
- In SB 2 towns if a proposed budget fails, then it is deemed that the 2019 default budget has been approved.
- The problem is that the 2019 default budget uses contracts previously approved by the legislative body (in 2018) in the amount so approved in the previous year, not contracts that are entered into by the governing body.
- Examples would be a paving contract approved by the legislative body in 2018 at $100. The contract is signed by the governing body and it includes an escalation of three percent to account for rising costs of asphalt. The legislative body did not approve that, the governing body did.
- The default budget would only allow the $100 and not the $103 that the contract was signed to include.
- The governing body would have to do less paving or find the money elsewhere in the budget to cover the contract.
- This situation will occur with many of the contracts that the governing body has to enter into.
- The whole process leaves the governing body at odds with the legislative body in how to expand funds for the services the tax payers expect.
- This bill was approved by the House committee on a partisan vote, but it is not a partisan issue, it is a tax payer issue.

Barrett Christina – NH School Boards Association

- When the law changed last year school board members were concerned with the language.
- NHSBA hosted some workshops on how to interpret the language because it was confusing.
- There are hundreds of contracts that the school board has to deal with over the year.
- Trying to ascertain which numbers go into the default or operating budgets can be confusing.
- Contracts means contracts approved by the legislative body, but not every contract goes before the legislative body.
- There is a conflict between what the language says versus the reality of running the schools.
- The law passed last year created confusion and they think appealing it would be appropriate.
- The taxpayers always have the right to decide or amend the proposed operating budget as they see fit.

Russell Dean – Town Manager Exeter

- One issue with the current law is that it makes it difficult to take advantage of savings.
- A few years ago, they had decreases in some categories and the current definition would have not allowed them to put the decrease in the default budget.
- They also had a decrease in workers compensation but could not put it in the default budget.
- The voters want to know why the lower number is not there and it seems disingenuous to not put it in the default budget.
- He agrees that the voters have the final say and they can vote to amend the proposed operating budget.
- They try to keep the ballot short and the idea of putting every contract on the warrant is not practical.
- Senator Sherman asked when his town has cost savings and they have to stick with the default budget wouldn't they see the cost benefit in the next budget year. Mr. Dean stated he is not sure, but the current law does not allow them to put the decrease in the default budget.
- Senator Sherman asked if they are depending on a default budget that does not reflect the savings the biggest risk is that they are basing their tax rate on a higher number than they have to. Mr. Dean stated that could be correct, but it would be hard to explain to the taxpayer why they are taxing them more than they need to.
- Senator Sherman confirmed that under current statute you have to. Mr. Dean stated yes, under the current definition of contract and the amount that has to be in the default budget.
- Senator Birdsell asked if he is concerned that contracts could be placed in the default budget without the voters knowing about it. Mr. Dean stated he does not think that causes much of a concern.

Summary of testimony presented in opposition:

Representative Migliore

- He has seen a series of usages of the default budget.
- In the legislation last year, they tried to address the contractual increases.
- In some cases, the default budget would come out higher than the proposed budget.
- His concern is when SB 2 towns have health care contracts that have to be planned for how can they account for increases.
- When you create the operating budget, you have to include the potential increases.
- Some of the budget items pass and then in actuality are higher or lower than what was passed.
- This bill would allow them to use the previous year's contracts.
- If you made an obligation to provide health care to your employees that needs to be kept.
- His suggestion is to modify section C from last year redefining contracts.
- Senator Levesque asked about other contracts besides health care. Representative Migliore stated that this would only affect heath care.

Neil Kurk

- The issue is who gets to decide how much taxes are going to be raised , the selectmen or the voters.
- In SB 2 towns the budget comes out of town meeting.
- It has changed so that the selectmen can give the proposed budget and then the default budget.
- The selectmen have usurped the authority of the voters by making up both budgets.
- Examples are, selectmen using gallons instead of dollars and entering into contracts that have costs that would increase over the years and put the increase into the default budget.
- What should go into the default budget is the contract from the last year and nothing else.
- You cannot put in the default budget the extra 5,000 dollars for the contract.
- Labor contracts in school districts are approved by vote and are included in the default budget.
- Any increase in the contract should be included in the default budget
- The selectmen cannot put increases in the default budget that the voters have not approved of.
- Some operating budgets approved by voters have increases included in them.
- One major item not covered in this bill is when an expense decreases over the year, what should go in the default budget. The answer under current law is the higher amount but the selectmen do not have to account for the lower amount.

Alvin See

- He does not think it is a good idea to remove the definition of the word contract that is used in previous paragraphs.
- The definition adds clarity and that is needed in statute.
- He believes there should be a separate warrant article that deals with increases.

Richard Lehman

- Right now, if the definition of contracts is repealed, the next time this issue is before the court the Judge will have to figure out what the intent of the legislature is regarding contracts and there will be uncertainty as to what goes into a default budget.
- There may be difficulties with governing but the way to deal with those issues that put financial pressure on towns, is not to remove the traditional manner in which towns determine how much money to appropriate to their governing bodies.
- The way to deal with budget pressures is to find better ways to budget, not to remove the check and the authority that the legislative body of a school board or town has to approve the spending that it wants to subject itself to.
- That is the last bastion of pure direct democracy left. It gives everyone who participates in town meeting or school board to have a say on how much taxation they are going to consent to by being a part of the majority vote.
- Senator Levesque asked if the contracts that provide health care would not be included or obligations that the town has previously incurred. Mr. Lehman stated that it depends on whether you are talking about a multi-year contract that was approved by the legislative body. If they approve a contract with annual cost increases that is approved. The problem arises when the selectmen enter into a contracts that have increases that the voters have never voted on and that gets built into the default budget. By doing it that way, they effectively increase the amount of spending and the legislative body never has a chance to say no.
- Senator Sherman asked if they have this kind of setting the only way to make sure that contracts entered into before will be honored is to make sure that the legislative body has voted on them. Mr. Lehman stated that was correct.

Neutral Information Presented:

Margaret Byrnes – NH Municipal Association

- They have not taken a position on the bill.
- The default budget has been an ongoing issue for SB 2 towns.
- In the town meeting the voters do have the ability to put it in a separate warrant article.
- The only increases that can be added in the default budget are those that have already been approved by the voters at the inception of the contract.
- Multiple things can occur to create those increases.
- They have seen those issues create problems for the municipalities and it has led to some confusion.

TM
Date Hearing Report completed: May 9, 2019

Speakers

Senate Election Law and Municipal Affairs Committee
SIGN-IN SHEET

Date: May 1, 2019 **Time:** 9:45 a.m.

HB 618-LOCAL AN ACT relative to the definition of contracts relative to official ballot default budgets.

Name/Representing *(please print neatly)*

Name/Representing	Support	Oppose	Speaking?	Yes	No
Barrett M. Christina, NH School Bds. Assoc.	☑	■		☑	☐
Rep Vincent Paul Migliore	☐	☒		☒	☐
Rep Lie Gilman Rockingham	☒	■		☒	☐
Alvin Sec London Self	☐	☑		☐	☐
Margaret Byrnes NHMA	☐	☐		☑	☐
Neal Kurk Weare	☐	☐		☐	☑
Rep Julie Gilman	☑	☐		☑	☐
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Senate Election Law and Municipal Affairs Committee

SIGN-IN SHEET

Date: ~~January 23~~ May 1st, 2019 **Time:** 9:45 a.m.

SB 618-L AN ACT relative to the definition of contracts relative to official ballot default budgets.

Name/Representing ***(please print neatly)***

Name/Representing	Support	Oppose	Speaking?	Yes	No
~~Richard Lehmann/self~~	~~☐~~	~~☑~~	~~Speaking?~~	~~☑~~	~~☐~~
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Senate Election Law and Municipal Affairs Committee

SIGN-IN SHEET

Date: May 1, 2019 **Time:** 9:45 a.m.

HB 618-LOCAL AN ACT relative to the definition of contracts relative to official ballot default budgets.

Name/Representing ***(please print neatly)***

Name/Representing	Support	Oppose	Speaking?	Yes	No
~~Russell Dean~~	☒	☐	Speaking?	☒	☐
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Testimony

SB 2 Municipalities and School Districts Chapter 40 Official Ballot Referenda

Section 40:13, Subdivision 9 (b) defines default budgets as the same as the previous year with certain defined expenditures in higher or lower amounts: debt service, one time expenditures, contracts, reductions in personnel and costs incurred through separate warrant articles.

Legislative body voted to approve the 2018 operating budget, the proposed 2019 budget is based on that with the higher or lower line items such as I've listed.

If the 2019 proposed budget fails, then it is deemed that the 2019 default budget has been approved by the legislative body.

The key problem here in RSA 40:13 subdivision IX (c), the definition of contracts. The 2019 default uses contracts "previously approved by the legislative body (in 2018) **in the amount so approved in the previous year (2018)**" not ~~what is~~ ~~approved~~ by the governing body for 2019.

Example ; Paving contract – approved by the legislative body in 2018 at $100. The contract is signed by the governing body. The contract includes an escalator of 3% to account for the rising costs of asphalt. But the legislative body didn't approve that, the governing body did. So the 2018 contract says $100, the 2019 proposed budget is $103. If the proposed budget fails the 2019 default goes into affect at the previous approval of $100. So the governing body has to decide to pave less or find $3 in another part of the operating budget.

Or, the cost of electricity. The 5 year contract starting in 2018 is approved in a line item by the legislative body at $100 in 2018 but is signed by the governing body, not the legislative body and provides for an escalator of 4%. So $104 for 2019. If the 2019 proposed budget fails and the default is deemed approved by the legislative body, then only $100 can be spent on electricity because that was what was approved by the legislative body in 2018.

This leaves the governing body at odds with the legislative body in how to expend funds for the services the tax payers expect.

This bill was approved by my committee on a partisan vote, but this not a partisan issue it is a tax payer issue.

Lehmann Law Office, PLLC

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Manchester, N.H. 03104
(603) 731-5435
rick@nhlawyer.com

VIA EMAIL

May 1, 2019

Hon. Melanie Levesque
State House, Room 105
107 North Main Street
Concord, N.H. 03301

Re: Opposition to HB 618

Madam Chairwoman and members of the committee:

I write to express my opposition to HB 618-LOCAL. While I wish that I could attend the hearing to express my views in person, the courts have scheduled me to be elsewhere at the time of the hearing. I respectfully request that you enter this letter into the legislative record.

By way of brief introduction, I am a lawyer in private practice in Manchester. During my 27-year career, I have served the judicial branch as a superior court law clerk, the executive branch as a criminal prosecutor in the Merrimack County Attorney's Office and the Attorney General's Office, and the legislative branch as legal counsel to the New Hampshire Senate from 2001-2005 and from 2010-2018. I have also represented private clients in a broad range of civil and criminal matters.

Passage of HB 618 would mark the end of the New Hampshire tradition of direct democracy for town and school board meetings in SB 2 towns and school districts. You will likely hear testimony asserting that HB 618 simply repeals a provision that was added to New Hampshire law just last year. This is true. However, the bill has far reaching implications that may not be immediately apparent on a cursory reading of the bill.

HB 618 seeks to repeal RSA 40:13, IX. That statute deals with items that are included in the default budget prepared in SB2 towns and school districts that take effect if the operating budget proposed by the selectmen or school board fails to garner a majority of votes. The default budget is defined as:

> the amount of the same appropriations as contained in the operating budget authorized for the previous year, reduced and increased, as the case may be, by

> debt service, contracts, and other obligations previously incurred or mandated by law, and reduced by one-time expenditures contained in the operating budget and by salaries and benefits of positions that have been eliminated in the proposed budget.

RSA 40:13, IX(b). This has been the law for many years. Last year, the legislature passed RSA 40:13, IX(c), which reads:

> "Contracts" as used in this subdivision means contracts previously approved, in the amount so approved, by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.

Last year's bill defining "contracts" was intended to clarify that default budgets could not include appropriations that the legislative body of a town or school district had not previously approved. This is the essence of our direct democracy – the people of a town or school board vote to approve the annual budget and other matters of local control. This understanding was sufficiently clear and widely understood that, until last year, to my knowledge there had never been a court case challenging the inclusion of items not approved by the legislative body of the town or school district.

Last year I was involved in litigation involving the default budget approved by the selectmen in the Town of Weare. The case, *Kurk v. Clow, et al*, was a challenge to the inclusion in the default budget of expenditures that increased taxation to a level above that approved by the legislative body at the last town meeting. This case occurred under the law as it existed before RSA 40:13, IX(c) was adopted. The plaintiff's position was that while the governing body had authority to enter into contracts and to move money between budget lines without approval of the town meeting, ***the total amount of appropriations in the budget could not exceed the budget amount approved by the legislative body***. The lawyer for the Town of Weare argued the contrary position that selectmen had authority under the prior law to include contract amounts in the default budget that had not been approved by the legislative body. Superior Court Judge Nicolosi found that inclusion of contract amounts in the default budget was improper. The court held:

> The practical effect of including the challenged contracts in the default budget is the appropriation of money by the governing body without any meaningful input by the voters of the Town. None of the safeguards set forth in RSA chapter 32 have any force and effect if the board of selectmen is capable of unilaterally increasing the default budget by an unchecked amount. The Court thus finds defendants' interpretation of RSA 40:13, IX(b) undermines the overall purpose of the statute scheme governing municipal budgets and is therefore unreasonable. On the other hand, the Court finds the plaintiff's interpretation – requiring contracts included in the default budget to have been previously voted on at a Town meeting – to be in line with the legislature's intent and ensures the proper enforcement of the safeguard on unlawful or excessive spending by the Town.

See Attachment #1.

The Kurk case is currently pending before the New Hampshire Supreme Court. Despite the fact that RSA 40:13, IX(c) passed while the *Kurk* case was pending, that provision will not be the basis of any decision in the case as it was not in effect when the Town of Weare calculated its default budget. Oral argument was held on March 6, 2019, and the Supreme Court has not issued a ruling. During oral argument, the following exchange occurred:

> Town Attorney: The way the legislature wrote [RSA 40:13, IX(b)], it was entirely within the discretion of the board of selectmen how to calculate the default budget.
>
> Justice Hicks: No matter how large this new contract might be? A new grater, a new warehouse?
>
> Town Attorney: Well certainly we can take it to extremes.
>
> Justice Hicks: I don't think that's extreme for the Town of Weare.
>
> Town Attorney: Well, the Town of Weare could enter into a lease-purchase agreement.
>
> Chief Justice Lynn: If we interpret the statute, you said before that there is a limitation, that the selectmen can't authorize a contract that would allow them to spend in excess of in my example earlier, of $1 million....But if we accept your construction of this, this is an exception to that. They basically can say oh well, we can't spend more than $1 million because that's what the town meeting approved. But, we can go ahead and do it now because then it will go in the default budget and the voters will have no choice. They either vote for the new budget or as a matter of law, this [default] budget gets approved.
>
> Town Attorney: That is true, however the voters select the selectmen. So, the legislature delegates the authority to the selectmen to do this. The voters elect the selectmen. If the voters don't like what the selectmen are doing, they are free to vote them out of office.

Oral argument in in the Kurk case can be viewed at the following link: https://livestream.com/NHJB/events/8521573/videos/188354381. The exchange quoted above occurs at the 8:05 mark on the video. The town attorney's answer - that the town meeting is free to vote the selectmen out of office - is completely contrary to the direct-democracy tradition of New Hampshire town meeting. The United States Congress and the New Hampshire legislature are both representative bodies in which the voters choose representatives to make decisions on their behalf. In representative bodies, the remedy of the voters is to vote in new representatives. But town meeting and school board meetings in SB2 towns have never been understood to be representative bodies. Instead, in town and school board meetings the people vote

directly for budgets, warrant articles, and ordinances that they will live under. Town meeting is one of the last, proud bastions of true democracy left in America. HB 618 would abandon this form of direct-democracy in favor of the position stated by the Town Attorney in the *Kurk* case. It would enable selectmen and school board members to increase spending and taxes without the direct consent of the legislative body.

How can simply repealing a statute enacted only last year have the effect of causing such a broad, wholesale change? The answer has to do with the way New Hampshire courts engage in statutory interpretation. The superior court decision in the *Kurk* case provides a typical example of statutory interpretation. Courts seek to determine legislative intent by examining the entire statutory scheme and looking at legislative history. In the *Kurk* decision, Judge Nicolosi looked to the entire statutory scheme governing town meeting and found that the language in RSA 40:13, IX(b), concerning the inclusion of contracts in the default budget showed that "contracts...previously incurred" applied only to contracts voted on at a prior town meeting. This interpretation was explicitly made part of the statutory scheme last year when RSA 40:13, IX(c) was added.

Repeal of RSA 40:13, IX(c) would likely change the interpretation of the statutory scheme and cause future courts to find that legislature intended that contracts entered into by selectmen and school boards can be included in the default budget, even though those appropriation amounts were never approved by the legislative body.

You do not need to take my word for it. The majority statement on HB 618 in the House calendar fully sets forth this view. The House calendar No. 16 blurb reads as follows:

> Rep. Julie Gilman for the Majority of Municipal and County Government. This bill repeals RSA 40:13, IX(c), the definition of contracts in SB 2 default budgets. Under current law, any contract escalator clause cannot be included in a default budget's calculated bottom line. If the proposed budget fails and the default budget is activated then contracts are only budgeted for the same cost as the previous year, leaving the governing body to manipulate line items to pay bills. Alternatively, contracts with an escalator clause may be addressed in a warrant article, but risk failure. An example is waste management contracts. A contract is signed by the governing body at $100 with a 3% escalator in the 2017 proposed budget. If the default budget is activated then in 2018 the contract would still be budgeted at $100 not the $103 increase. So where does that extra 3% come from in the 2018? Somewhere else, leaving the governing body to manipulate expenditures. For these reasons a majority of the committee recommends Ought to Pass. Vote 11-8.

The blurb asks the question, "So where does that extra 3% come from in 2018?" The answer to this question is simple: "That extra 3%" comes from the local taxpayers." But "where" that extra 3% comes from is the wrong question to ask. ***The important question to ask is not "where" the extra 3% comes from, but rather, "who" authorizes the 3% increase in total appropriations? There are only two options: (1) the legislative body; or (2) the governing***

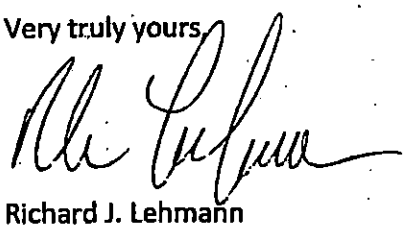
body. In traditional, direct-democracy town and school board meetings, the legislative body of the town or school district approves the total budget amount and consents to the taxes that this spending will impose upon the people. Passage of HB 618 would change the answer to this question and vest authority to increase spending the governing body, leaving the legislative body – the people of the town or school district – to pay taxes that they never approved by majority vote.

As an aside, the answer to the problem of what to do with multi-year contracts with escalator clauses posed in the House blurb is straightforward. The governing body should either refrain from entering into contract that it cannot fund from appropriations made by the legislative body or it should go to the legislative body for approval of those multi-year contracts. This is the essence of our direct democracy.

Repeal of RSA 40:13, IX(c) would evince a legislative intent to authorize selectmen and school boards to use the default budget process to spend money never approved by the voters and thus undermine our longstanding tradition direct democracy. I urge you to find that HB 618 is inexpedient to legislate.

If any members of the committee have concerns or questions, please feel free to contact me by telephone at (603) 731-5435 or via email at rick@nhlawyer.com.

Very truly yours,



Richard J. Lehmann

CC: Hon. Tom Sherman
Hon. Jon Morgan
Hon. Regina Birdsell
Hon James Gray
Tricia Mello, Committee Aid

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

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February 20, 2018

FILE COPY

Case Name: **Neal Kurk v Thomas Clow, et al**
Case Number: **216-2018-CV-00086**

You are hereby notified that on February 20, 2018, the following order was entered:

RE: COMPLAINT AND MOTION TO DISMISS:

See copy of order attached - Nicolosi, J.

W. Michael Scanlon
Clerk of Court

(539)

C: Richard J. Lehmann, ESQ; Laura Spector-Morgan, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. NORTHERN DISTRICT

SUPERIOR COURT

Neal Kurk

v.

Thomas Clow, et al.

Docket No. 216-2018-CV-00086

Order

Plaintiff has brought the present action against defendants seeking a declaratory judgment, permanent restraining order, and a writ of mandamus. The case arises out of the Town of Weare Board of Selectmen conduct in creating a default budget pursuant to RSA 40:13. Defendants have moved to dismiss, arguing plaintiff lacks standing. The Court held a hearing on February 9, 2018. For the reasons that follow, defendants' motion to dismiss is DENIED and plaintiff's requested relief is GRANTED.

Factual Background

The Town of Weare is an "SB2" town that passes its budget via public ballot referenda pursuant to RSA 40:13. Under to the statute, the Town must present both a proposed and a default budget to its residents for a vote. In the event the proposed budget fails to pass, the Town shall adopt the default budget unless it elects to proceed to a special meeting under RSA 40:13, XVI. The statute defines "default budget" as:

> the amount of the same appropriations as contained in the operating budget authorized for the previous year, reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and reduced by one-time expenditures contained in the operating budget. For the purposes of this paragraph, one-time expenditures shall be appropriations not likely to recur in the succeeding budget, as determined by the governing

body, unless the provisions of RSA 40:14-b are adopted, of the local political subdivision.

RSA 40:13, IX(b).

The Town's Board of Selectmen has recently published a document titled "2018 Budget Worksheet" which purports to present the default budget for 2018. Plaintiff has identified approximately $60,000 worth of budget increases he alleges are improperly included in the default budget. These increases are the result of contracts entered into by the board of selectmen after the last Town meeting. While the contracts were not approved by the legislative process, plaintiff does not contest their validity. Rather, he asserts they do not qualify as "contracts . . . previously incurred" under the statute, and thus cannot be included in the default budget.

Analysis

I. Motion to Dismiss

Defendants move to dismiss, arguing plaintiff lacks standing to bring the present complaint. "When a motion to dismiss challenges a [plaintiff]'s standing to sue, the trial court must look beyond the [plaintiff]'s allegations and determine, based on the facts, whether the [plaintiff] has sufficiently demonstrated [his] right to claim relief." Hannaford Bros. Co. v. Town of Bedford, 164 N.H. 764, 766–67 (2013). "The standing required by our constitution is not satisfied by the abstract interest in ensuring that the State Constitution is 'observed' or by claiming an 'indistinguishable, generalized wrong allegedly suffered by the public at large.'" Duncan v. State, 166 N.H. 630, 643, 646 (2014). Rather, "standing under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute which is capable of judicial redress." Id. at 642–43

(citations omitted). The party must show that his "own rights have been or will be directly affected." Eby v. State, 166 N.H. 321, 334 (2014).

In his complaint, plaintiff argues he has standing because the allegedly unlawful inflation of the default budget will deprive him of "his right to vote for or against the selectman's proposed budget with knowledge that a default budget consistent with New Hampshire law will result if the selectman's budget fails to garner a majority of votes cast." (Compl. ¶ 24.) The Court disagrees. Being presented with unsavory choices does not rob one of the right to vote, and nothing the Town has done would prevent plaintiff from actually casting a vote one way or another.

At the hearing, plaintiff also argued he would suffer an actual, concrete harm in the form of paying higher taxes as a result of the default budget going into effect. The Court finds this adequately states a specific harm to establish standing. Plaintiff's alleged injury is distinguishable from the speculative, generalized harms alleged in the cases cited by defendants. In Duncan, the plaintiffs challenged a tax credit program, claiming it would result in a net fiscal loss on New Hampshire governments and remove funding from public schools. 166 N.H. 645. In Baer v. New Hampshire Department of Education, 160 N.H. 727 (2010), the plaintiffs challenged the grant of lot size waivers for schools, claiming they would be harmed because of the presence of "substandard" schools in their community. Id. at 730. In Babiarz v. Town of Grafton, 155 N.H. 757 (2007), the plaintiff challenged the results of a vote recount, claiming that he had an interest in the outcome of the vote as a resident and taxpayer of the town. Id. at 758.

In each of those cases, the Court properly found no standing because none of the plaintiffs could demonstrate a specific, concrete injury caused by the defendants'

actions. Here, on the other hand, plaintiff has established that he will personally face an increased tax burden as a direct result of the increased default budget. In Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587 (2007), the United States Supreme Court noted that:

> As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. Of course, a taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.

Id. at 599. Other jurisdictions have likewise found that incurring an increased tax obligation can provide sufficient grounds for standing. See West Farms Mall, LLC v. Town of West Hartford, 901 A.2d 649, 657 (Conn. 2006) (articulating two-prong taxpayer standing analysis requiring "taxpayer status and conduct that has caused or will cause increased taxes"); Henson v. Healthsouth Medical Center, Inc., 891 So. 2d 863, 868 (Ala. 2004) (finding standing to challenge tax abatement "so long as the taxpayer can demonstrate a probable increase in his tax burden from the challenged activity"); Beattie v. EastChina Charter Twp., 403 N.W.2d 490, 494 (Mich. App. 1987) (finding standing where plaintiffs alleged their property taxes would increase by 10% as a result of tax exemption provided to power agency); Jenkins v. Swan, 675 P.2d 1145, 1153 (Utah 1983) (finding standing where plaintiff would pay increased property tax as result of government action). While plaintiff's injury here is shared by the other taxpayers in Weare, it is a specific, concrete injury that is sufficient to provide him standing to bring the present complaint.

Accordingly, for the foregoing reasons, plaintiff's motion to dismiss is DENIED.

Lehmann Law Office, PLLC

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VIA EMAIL

May 9, 2019

Hon. Melanie Levesque
State House Room 105-A
107 North Main Street
Concord, N.H. 03301

Re: HB 618

Madam Chairwoman and members of the committee:

I wrote to you on May 1 to express my opposition to HB 618. In my correspondence, I included reference to the case *Kurk v. Clow,* which was then pending before the New Hampshire Supreme Court. This morning the New Hampshire Supreme Court released its decision in that case, and I would like to call your attention to it for the purpose of re-iterating my concern about the consequences of passing this bill.

The relevant portions of the case are highlighted in the decision, which is attached for your review. The contested question in the case was whether the definition of "contracts" for the purpose of establishing a default budget meant: (a) any contracts that the selectmen entered into; or (b) only contracts that were approved by the voters at the prior town meeting.

While the case was pending, the legislature adopted RSA 40:13, IX(c), which answered this question by stating:

> (c) "Contracts" as used in this subdivision means contracts previously approved, in the amount so approved, by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year.

Repeal of this provision would once again render the law ambiguous, as it was before RSA 40:13, IX(c) was adopted last year. However, a court addressing the same question before the

court in the *Kurk* case would likely reach the opposite conclusion concerning the meaning of the word "contracts." After repeal, a court faced with a question about the definition of "contracts" would find that the word could not mean, "contracts approved by the voters at the prior town meeting," because the legislature specifically and intentionally repealed that definition from the statute. If the legislature intended that to be the meaning of the word, the argument would go, then the legislature would never have repealed that definition. The net result of this would be, as both the superior and Supreme Courts found, that, ***"[n]one of the safeguards set forth in RSA chapter 32 have any force and effect if the board of selectmen is capable of unilaterally increasing the default budget by an unchecked amount."*** Order at page 6. Passing HB 618 to repeal RSA 40:13, IX(c) would hand select-board members and school board members unilateral authority to raise the default budget to whatever level they wished simply by entering into contracts after the town of school board meeting and then rolling those costs into the default budget.

New Hampshire has a proud tradition of direct democracy at town and school board meetings. Repeal of RSA 40:13, IX(c) would effectively authorize select board and school board members to increase spending, and the resulting taxes, with no ability of the town or school meeting to check these increases.

If you have any questions please do not hesitate to contact me.

Very truly yours,

Richard J. Lehmann

CC: Hon. Tom Sherman
Hon. Jon Morgan
Hon. Regina Birdsell
Hon James Gray
Tricia Mello, Committee Aid

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2018-0239, Neal Kurk v. Thomas Clow & a., the court on May 9, 2019, issued the following order:

Having considered the briefs and oral arguments of the parties, the court concludes that a formal written opinion is unnecessary in this case. This case arises out of the calculation of the Town of Weare's 2018 default budget pursuant to RSA 40:13 (Supp. 2017) (amended 2018). The defendants, the Town of Weare, Thomas Clow, and other members of the town's board of selectmen, appeal orders by the Superior Court (Nicolosi, J.) denying their motion to dismiss and granting the relief requested by the plaintiff, Neal Kurk. On appeal, the defendants argue that the trial court erred in ruling that: (1) the plaintiff has standing to bring this suit; (2) the 2018 default budget improperly included the cost of certain contracts the town entered into in 2017; and (3) the plaintiff was entitled to an award of attorney's fees. We affirm, in part, and reverse, in part.

The relevant facts follow. The town is a Senate Bill 2 town that passes its budget by an official ballot pursuant to RSA 40:13. Under the statute, the governing body of the town presents both a proposed operating budget and a default budget to the voters. RSA 40:13. In the event the proposed operating budget fails to pass, the default budget is imposed unless the governing body, in this case the board of selectmen, elects to proceed to a special meeting pursuant to RSA 40:13, XVI (Supp. 2018). RSA 40:13, X (Supp. 2018). The default budget is defined as:

> [T]he amount of the same appropriations as contained in the operating budget authorized for the previous year, reduced and increased, as the case may be, by debt service, contracts, and other obligations previously incurred or mandated by law, and reduced by one-time expenditures contained in the operating budget. For the purposes of this paragraph, one-time expenditures shall be appropriations not likely to recur in the succeeding budget, as determined by the governing body, unless the provisions of RSA 40:14-b are adopted, of the local political subdivision.

RSA 40:13, IX(b) (Supp. 2017) (amended 2018). The board of selectmen calculated a default budget for 2018 and published a document entitled "2018 Budget Worksheet" that included the default budget.

In February 2018, after the default budget was published and before the town voted, the plaintiff initiated a declaratory judgment action against the defendants seeking a temporary and permanent injunction. He alleged that $59,864 in budget increases were improperly included in the default budget because they were the result of contracts entered into by the board of selectmen after the last town meeting and without a vote by the citizens of Weare. The plaintiff asserted that although the contracts were valid, they did not qualify as "contracts . . . previously incurred" under the statute, and thus, could not be included in the default budget without approval by the town. See RSA 40:13, IX(b).

In response, the defendants filed both an answer contesting the merits and a motion to dismiss for lack of standing. Following a hearing, the trial court denied the defendants' motion to dismiss and granted the relief requested by the plaintiff. In its order, the trial court found that the plaintiff had standing because he established that he would suffer actual, concrete harm in the form of paying higher taxes if the default budget went into effect. On the merits, the trial court found that the board of selectmen improperly included the contested contracts in the default budget calculation. Engaging in statutory interpretation, the trial court determined that the phrase "previously incurred" set forth in RSA 40:13, IX(b) was ambiguous. The court then considered the overall statutory scheme and concluded that the "contracts . . . previously incurred" that increase the default budget must be previously voted on at a town meeting. See RSA 40:13, IX(b). Accordingly, the trial court ordered the defendants to remove the contracts identified by the plaintiff from the default budget before presenting the budget at the upcoming deliberative session.

Shortly thereafter, the plaintiff filed a motion for attorney's fees, which the trial court granted over the defendants' objection. The trial court found that the plaintiff conferred a substantial benefit on the public by providing the citizens of Weare with an opportunity to provide "meaningful input" on the "appropriation of money by the governing body" that increases the default budget. The court determined that this benefit to the citizens of Weare "extends beyond the confines of the instant litigation." This appeal followed.

The defendants argue that the trial court erred when it found that the plaintiff had standing to bring this lawsuit. Following briefing on appeal, the plaintiff moved to strike the standing issue, arguing that a constitutional amendment, approved by the voters of New Hampshire in the November 2018 election, grants him standing. The defendants counter that the constitutional amendment does not apply retroactively. We need not reach this issue because we conclude that the plaintiff has standing under the law in effect at the time the case was decided in the trial court.

When the relevant facts are not in dispute, we review de novo the trial court's determination on standing. State v. Actavis Pharma, 170 N.H. 211, 214 (2017). "[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress." Duncan v. State, 166 N.H. 630, 642-43 (2014) (citations omitted).

The defendants contend that the plaintiff lacks standing because he alleges the same harm as every other taxpayer and fails to allege an actual, as opposed to hypothetical, harm. As to the defendants' first point, the plaintiff counters that there is no requirement that a party suffer a "unique injury" to establish standing. We agree with the plaintiff. Although a person's status as a taxpayer is not, by itself, sufficient to establish standing, taxpayer status in conjunction with an injury or an impairment of rights can confer standing. See Baer v. N.H. Dep't of Educ., 160 N.H. 727, 730-31 (2010); see also Duncan, 166 N.H. at 645 (to bring a declaratory judgment action under RSA 491:22, a party must establish that some right of the party has been impaired or prejudiced by the application of a rule or statute). The United States Supreme Court discussed what kind of personal injury confers standing and held that:

> As a general matter, the interest of a federal taxpayer in seeing that Treasury funds are spent in accordance with the Constitution does not give rise to the kind of redressable "personal injury" required for Article III standing. Of course, a taxpayer has standing to challenge the collection of a specific tax assessment as unconstitutional; being forced to pay such a tax causes a real and immediate economic injury to the individual taxpayer.

Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 599 (2007).

Here, the plaintiff contends that the calculation of the default budget will impair his personal rights by illegally increasing his taxes. Specifically, he asserts that the town's default budget proposed to "take money from his pocket," without the legislative body's approval of the contracts, in violation of RSA 40:13. This is not simply a case where a plaintiff asserts standing as a taxpayer and contests the spending or allocation of the funds at issue. See Duncan, 166 N.H. at 646 (petitioner's claim that a program will result in "net fiscal losses" to local governments does not articulate a personal injury); Baer, 160 N.H. at 730-31 (holding that petitioners lacked standing as taxpayers because they failed to demonstrate how certain waiver rules that allowed their taxes to be used to finance certain schools in the community impaired or prejudiced their rights). Instead, the plaintiff here is contesting the collection of a specific tax assessment, arguing that it is based upon an unlawful default budget calculation. Although the increased taxes will impact all of the taxpayers in the town, not just the plaintiff, that does not mean that the plaintiff's personal rights are not sufficiently impaired to confer standing.

The defendants further assert that the plaintiff lacks standing because the alleged increase in his taxes would occur only if the town did not vote to adopt the proposed budget, a vote which had not yet taken place when the hearing was held in this matter. The plaintiff counters that he would have suffered "real prejudice and real injury if the town [had been] permitted to include the challenged contracts in its default budget" because, under the default budget, the town asserted the right to collect his money as taxes.

Despite the defendants' contention that the plaintiff's alleged injury was merely hypothetical at the time he filed suit, it was not a speculative injury, as was the harm alleged in Duncan. In Duncan, the plaintiffs challenged a tax credit program, arguing that it would impose net fiscal losses on New Hampshire governments and would take state funding away from public schools. Duncan, 166 N.H. at 646-47. There, we held that the plaintiffs lacked standing because the purported personal injury — the loss of money to local school districts as a result of certain legislation creating a tax credit program — was speculative. Id. at 646-67. Specifically, the prospect that the net fiscal losses would occur "require[d] speculation about whether a decrease in students [would] reduce public school costs and about how the legislature [would] respond to the decrease in students attending public schools, assuming that occurs." Id. at 647. Consequently, the plaintiffs could not demonstrate whether local governments would, in fact, experience "net fiscal losses." Id. By contrast, here, the plaintiff alleges a concrete, actual injury that he would directly suffer if the default budget were to be imposed. The increased taxes were not an abstract possibility; the default budget had been calculated and published as the budget that the town would adopt in the event that the residents rejected the proposed operating budget and did not elect to hold a special meeting. See RSA 40:13, X. Accordingly, the plaintiff has standing.

Next the defendants argue that the statute authorizes the selectmen to enter into the challenged contracts and include them in the default budget. The plaintiff does not dispute the selectmen's authority to enter into the same contracts. See, e.g., RSA 41:10-a (2012) (allowing selectmen to appoint and compensate members of the New Hampshire bar to serve as municipal prosecutors); RSA 105:1 (Supp. 2018) (selectmen may designate one of the police officers as chief of police). However, the parties disagree as to whether those contracts could be included in the default budget as defined in RSA 40:13, IX(b).

The defendants argue that the reference in RSA 40:13, IX(b) to "contracts . . . previously incurred," allows them to include in the default budget contracts they entered into after the last town meeting. Furthermore, they contend that nothing about the purpose of the default budget "limits the contracts to be included in the default budget to the amounts previously approved by town meeting."

Resolution of this issue requires that we engage in statutory interpretation. We review the trial court's statutory interpretation de novo. Franciosa v. Hidden Pond Farm, 171 N.H. 350, 355 (2018). In matters of statutory interpretation, we are the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. Id. We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Id. We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include. Id. We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. Id. Moreover, we do not consider words or phrases in isolation, but rather within the context of the statute as a whole. Id. This construction enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. Id. When statutory language is ambiguous, however, we will consider legislative history and examine the statute's overall objective and presume that the legislature would not pass an act that would lead to an absurd or illogical result. See STIHL, Inc. v. State of N.H., 168 N.H. 332, 334-35 (2015).

The defendants contend that the trial court erred in finding the statute ambiguous. In support of their argument, the defendants rely upon the dictionary definition of the term "incur," and conclude that, because the term is defined as meaning to "become liable or subject to," see Webster's Third New International Dictionary 1146 (unabridged ed. 2002), the identified contracts — which, all parties agree, were legitimately entered into — were previously incurred and properly included in the default budget. We disagree. The phrase "contracts . . . previously incurred" fails to specify precisely when such contracts were entered into or whether they required approval by the legislative body of the town. In addition, the entire subsection defining "default budget" does not provide context beyond a reference to the previous year's budget. Thus, because the "language is subject to more than one reasonable interpretation," we agree with the trial court that the statutory provision is ambiguous. Attorney General, Dir. of Charitable Trusts v. Loreto Publ'ns, 169 N.H. 68, 74 (2016) (quotation omitted).

We also agree with the trial court that this ambiguity can be resolved by examining the overall statutory scheme, specifically RSA chapter 32. Although the defendants contend that it is irrelevant and only addresses the actions the selectmen may take during the year after the budget is adopted, RSA chapter 32, the Municipal Budget Law, provides significant guidance for the creation of the budget. It does not apply solely to post-budget approval; rather, sections of the chapter also apply to the creation of the budget before it is enacted by the town. See, e.g., RSA 32:4 (2000), :5, II (Supp. 2018), :5-b (Supp. 2018), :5-c (Supp. 2018), :6 (2000), :8 (2000). For instance, RSA 32:5, II prohibits the governing body or budget committee from making alterations to a proposed

budget without providing a hearing. RSA 32:8 provides that "[n]o board of selectmen . . . shall pay or agree to pay any money, or incur any liability involving the expenditure of any money, for any purpose in excess of the amount appropriated by the legislative body for that purpose, or for any purpose for which no appropriation has been made." We have previously noted that the purpose of RSA chapter 32 was "to establish some uniformity in the manner of appropriating and expending public moneys in the various municipalities of the State and to establish the safe ceiling on the total indebtedness beyond which a municipality could not expend money." Ashley v. School Dist., 111 N.H. 54, 56-57 (1971) (citation omitted). We agree with the trial court's interpretation that "[n]one of the safeguards set forth in RSA chapter 32 have any force and effect if the board of selectmen is capable of unilaterally increasing the default budget by an unchecked amount." Therefore, the defendants' interpretation of the statute undermines the overall purpose of the statutory scheme.

The defendants further argue that in February 2018, when this case was decided by the trial court, the term "previously incurred" did not equate to "previously approved" as evidenced by the subsequent amendment to RSA 40:13, adopted shortly after the trial court's decision.[1] See Laws 2018, 241:2. Specifically, the defendants argue that according to a report by a legislative subcommittee of the municipal and county government committee, the amendment to RSA 40:13 sought to redefine "contracts" and we should give weight to this report. See Supervisory Union 29 v. N.H. Dep't of Educ., 125 N.H. 117, 122 (1984). The defendants contend that because the subcommittee report includes the word "redefining," then we should conclude that the amendment's purpose was to redefine "contracts." The plaintiff counters that we should look to the full committee report that was subsequently provided to the entire House of Representatives, which contains contradictory language and demonstrates that the statutory language is meant to be construed in the same manner as did the trial court. We agree with the plaintiff.

The circumstances in Supervisory Union 29 are similar to those present here. Id. In that case, we noted that comments concerning prior law which are contained in the legislative history of a subsequent amendment enacted by a subsequent legislature, although not controlling, are entitled to some consideration. Id. We held that the legislative history of the amendment at issue supported the conclusion that, by the amendment, the legislature intended to clarify or interpret an ambiguity in the existing law and not to effect a change in legal rights. Id. at 123.

[1] The amendment to RSA 40:13 added a definition of "contracts," defining it as: "contracts previously approved, in the amount so approved, by the legislative body in either the operating budget authorized for the previous year or in a separate warrant article for a previous year." RSA 40:13, IX(c) (Supp. 2018).

We come to a similar conclusion here. The full committee report discussing the amendment to RSA 40:13 provides, in part, that:

> The bill . . . adds a definition, recently tested in superior court, to stipulate that "contracts" and their amounts are those included in the previous year's operating budget or in previous separate warrant articles. Defining how contracts are to be used in the construction of default budgets is intended to align this element of default budget construction more clearly with the concept that a default budget should freeze the previous year's budget in place.

N.H.H.R. Jour. Vol. 40, at 45 (Mar. 2, 2018) (discussing HB 1307).

The legislative history does not indicate that we should construe the statute differently than did the trial court. The subsequent amendment merely clarifies the term "contract" — it does not effect a change in legal rights. Thus, based upon the statutory scheme as a whole, we conclude that RSA 40:13, IX requires that the "contracts . . . previously incurred" that increase the default budget be previously voted on at a town meeting. Accordingly, the default budget defined by the statute captures multi-year contracts, such as collective bargaining agreements, that had been approved at a prior town meeting and which reduce or increase, "as the case may be," the subsequent annual appropriation set forth in the default budget. RSA 40:13, IX. Similarly, a default budget also captures any other multi-year contract provided that the full, multi-year cost of the contract was disclosed and discussed at the town meeting during which the contract was approved. Therefore, we affirm the trial court's decision to grant the plaintiff declaratory relief.

Next, the defendants argue that the trial court erred in awarding the plaintiff attorney's fees based upon its finding that the plaintiff conferred a substantial benefit to the public. More specifically, the court found that the plaintiff's lawsuit conferred upon the voters of Weare the benefit of providing them with an opportunity to decide whether to appropriate funds towards contracts entered into by the board of selectmen that increase the default budget. The court noted that the budget process impacts every citizen of Weare and "the practical effect of including the challenged contracts in the default budget is the appropriation of money by the governing body without any meaningful input by the voters of the town."

We review a trial court's award of attorney's fees under our unsustainable exercise of discretion standard, giving deference to the trial court's decision. Shelton v. Tamposi, 164 N.H. 490, 501 (2013). When reviewing a trial court's award of attorney's fees, we will uphold the trial court's factual findings unless they are erroneous as a matter of law or unsupported by the evidence. Taber v. Town of Westmoreland, 140 N.H. 613, 615 (1996). To be reversible on appeal, the trial court's discretion must have been exercised

for reasons clearly untenable or to an extent clearly unreasonable to the prejudice of the objecting party. Shelton, 164 N.H. at 501.

New Hampshire adheres to the American Rule; that is, absent statutorily or judicially created exceptions, parties pay their own attorney's fees. Board of Water Comm'rs, Laconia Water Works v. Mooney, 139 N.H. 621, 628 (1995). One judicially created exception is the substantial benefit theory, by which attorney's fees may be awarded when a litigant's action confers a substantial benefit upon the general public. Bedard v. Town of Alexandria, 159 N.H. 740, 744 (2010).

The defendants argue that if we affirm the trial court on the merits, that, at most, amounts to a finding of an erroneous application of the law by the board of selectmen, which is not sufficient to award attorney's fees. In support of its argument, the defendants rely upon Taber, where we recognized that "[w]e have never held that forcing the losing party to a strict adherence to the law is a sufficient benefit conferred on nonparties to justify awarding attorney's fees to the prevailing party." Taber, 140 N.H. at 615. Here, even though the trial court determined that "[t]he impact on third parties to this lawsuit is . . . much more concrete than in Taber, and is more significant than merely forcing 'strict adherence to the law,'" see id., we disagree.

In reaching our decision in this case, we, like the trial court, conclude that RSA 40:13, a statute that we have not previously had an occasion to interpret, is ambiguous. It is undisputed that the board of selectmen did not intentionally violate the statute. Rather, the board simply disagreed with the plaintiff's interpretation and application of RSA 40:13 to the default budget, which led to a disparity of less than $60,000 between the previous year's budget and the 2018 default budget originally presented to the voters. While "[t]he good or bad faith of the defendants is not a consideration in the award of attorney's fees under th[e substantial benefit] exception," Claremont School Dist. v. Governor (Costs and Attorney's Fees), 144 N.H. 590, 595 (1999) (quotation omitted), we hold that, as a matter of law, the disparity here at issue did not confer a "substantial benefit" upon the voters of Weare.

Moreover, to the extent that the trial court rationalized its award of attorney's fees on the benefit of ensuring the voters a more meaningful opportunity to approve those contracts that the governing body enters into which increase the default budget, we conclude that such reasoning is speculative and unsupported by the evidence. In this case, the citizens of Weare did not vote on the contested contracts; instead, the selectmen were ordered to remove the contracts from the default budget. Neither we, nor the trial court, can infer what impact, if any, the opportunity to vote on the challenged contracts, or the board of selectmen's removal of these contracts from the 2018 default budget had, on the decision the voters made in 2018 or will make in any subsequent year.

Nonetheless, the plaintiff maintains that the public interest in this case is similar to the interest that supported the award of attorney's fees in Irwin Marine, Inc. v. Blizzard, Inc., 126 N.H. 271 (1985). There, we concluded that the plaintiff had conferred a substantial benefit upon the citizens and taxpayers of Laconia by insisting upon a requirement of fairness in the city's public bidding procedures. See Irwin Marine, Inc., 126 N.H. at 277. The plaintiff argues that, as in Irwin Marine, his efforts "prevent[ed] the government from taking action that deprives the public of a government that exercises fair powers of administration while looking after the public weal." Although the plaintiff's primary purpose in litigating the case may not have been to advance his "own personal benefit," see Taber, 140 N.H. at 616, the record in this case does not suggest that his intended purpose was to rectify an injustice or unfairness with the selectmen's governance of the town's affairs.

In fact, the plaintiff's counsel made the following representations to the trial court at the hearing:

> The town . . . has been very responsive and helpful. This is not a situation where we're claiming that . . . they're up to no good . . . . to their credit, they show all their work . . . they're not hiding what they're doing. They're putting it all out [there] for people to see . . . . It's just our position that what they're showing when they do show their work is something that's outside the scope of what they're permitted to do.

The facts in this case are more aligned with the sentiment expressed in Taber, where we reasoned that "forcing the losing party to a strict adherence to the law is [not] a sufficient benefit conferred on nonparties to justify awarding attorney's fees to the prevailing party." Id. at 615. Accordingly, we conclude that, under these unique circumstances, the trial court's award of attorney's fees is an unsustainable exercise of its discretion.

Affirmed in part;
reversed in part.

LYNN, C.J., and HICKS, BASSETT, HANTZ MARCONI, and DONOVAN, JJ., concurred.

Eileen Fox,
Clerk

Voting Sheets

Senate Election Law
& Municipal Affairs Committee
EXECUTIVE SESSION RECORD
2019 Session

Bill # HB 618

Hearing date: 5/1/19

Executive Session date: 5/29/19

Motion of: OTP **Vote:**

Committee Member	Present	Made by	Second	Yes	No
Sen. Levesque, Chair	✓				
Sen. Sherman, Vice Chair	✓	✓			
Sen. Morgan	✓				
Sen. Birdsell	✓		✓		
Sen. Gray	✓				

Motion of: 2355s **Vote:** 5-0

Committee Member	Present	Made by	Second	Yes	No
Sen. Levesque, Chair	✓			✓	
Sen. Sherman, Vice Chair	✓		✓	✓	
Sen. Morgan	✓	✓		✓	
Sen. Birdsell	✓		✓	✓	
Sen. Gray	✓			✓	

Motion of: Re Refer **Vote:** 2-3

Committee Member	Present	Made by	Second	Yes	No
Sen. Levesque, Chair	✓				✓
Sen. Sherman, Vice Chair	✓				✓
Sen. Morgan	✓				✓
Sen. Birdsell	✓		✓	✓	
Sen. Gray	✓	✓		✓	

OTP/A ✓ ✓ 3-2

Reported out by:

Notes: Sen. Morgan

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Wednesday, May 29, 2019

THE COMMITTEE ON Election Law and Municipal Affairs

to which was referred **HB 618-LOCAL**

AN ACT relative to the definition of contracts relative to official ballot default budgets.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS WITH AMENDMENT

BY A VOTE OF: 3-2

AMENDMENT # 2373s

Senator Jon Morgan
For the Committee

Tricia Melillo 271-3077

General Court of New Hampshire - Bill Status System

Docket of HB618

Docket Abbreviations

Bill Title: relative to the definition of contracts relative to official ballot default budgets.

Official Docket of **HB618.**:

Date	Body	Description
1/16/2019	H	**Introduced** 01/03/2019 and referred to Municipal and County Government **HJ 3** P. 22
1/23/2019	H	Public Hearing: 01/30/2019 03:00 pm LOB 301
2/15/2019	H	==TIME CHANGE== Executive Session: 02/26/2019 01:00 pm LOB 301
3/1/2019	H	Majority Committee Report: Ought to Pass for 03/19/2019 **(Vote 11-8; RC) HC 16** P. 31
3/1/2019	H	Minority Committee Report: Inexpedient to Legislate
3/20/2019	H	**Ought to Pass**: MA DV 197-125 03/20/2019 **HJ 11** P. 19
4/1/2019	S	Introduced 03/28/2019 and Referred to Election Law and Municipal Affairs; **SJ 12**
4/25/2019	S	**Hearing:** 05/01/2019, Room 102, LOB, 09:45 am; **SC 20**
5/29/2019	S	Committee Report: Ought to Pass with Amendment **#2019-2373s**, 06/06/2019; **SC 25**
6/6/2019	S	Committee Amendment **#2019-2373s**, AA, VV; 06/06/2019; **SJ 19**
6/6/2019	S	Sen. Gray Floor Amendment **#2019-2420s**, AF, VV; 06/06/2019; **SJ 19**
6/6/2019	S	**Ought to Pass with Amendment** 2019-2373s, MA, VV; OT3rdg; 06/06/2019; **SJ 19**
6/13/2019	H	House Non-Concurs with Senate Amendment 2373s (Rep. Carson): MA VV 06/13/2019 **HJ 19** P. 11

NH House	NH Senate

Other Referrals

Senate Inventory Checklist for Archives

Bill Number: HB 618 - LOCAL Senate Committee: Elec. Law + MA

Please include all documents in the order listed below and indicate the documents which have been included with an "X" beside

X Final docket found on Bill Status

Bill Hearing Documents: {Legislative Aides}

X Bill version as it came to the committee

X All Calendar Notices

X Hearing Sign-up sheet(s)

X Prepared testimony, presentations, & other submissions handed in at the public hearing

X Hearing Report

___ Revised/Amended Fiscal Notes provided by the Senate Clerk's Office

Committee Action Documents: {Legislative Aides}

All amendments considered in committee (including those not adopted):

X - amendment # 2355 X - amendment # 2373

___ - amendment # _____ ___ - amendment # _____

X Executive Session Sheet

X Committee Report

Floor Action Documents: {Clerk's Office}

All floor amendments considered by the body during session (only if they are offered to the senate):

X - amendment # 2420 ___ - amendment # _____

___ - amendment # _____ ___ - amendment # _____

Post Floor Action: (if applicable) {Clerk's Office}

___ Committee of Conference Report (if signed off by all members. Include any new language proposed by the committee of conference):

___ Enrolled Bill Amendment(s)

___ Governor's Veto Message

All available versions of the bill: {Clerk's Office}

X as amended by the senate ___ as amended by the house

___ final version

Completed Committee Report File Delivered to the Senate Clerk's Office By:

_____ _____

Committee Aide Date

Senate Clerk's Office _____