PRESCOTT JAMIESON MURPHY LAW GROUP, LLC

ATTORNEYS & COUNSELORS AT LAW

37 BEACH STREET
P.O. BOX 1190
SACO, ME 04072
TEL (207) 282-5966
FAX (207) 282-5968
www.southernmainelaw.com

Dana E. Prescott *
dana@southernmainelaw.com

Neil D. Jamieson, Jr.
neil@southernmainelaw.com

Timothy S. Murphy
tmurphy@padzilla.com

Joyce Leary Clark
joyce@southernmainelaw.com

*Also admitted in Massachusetts

February 18, 2022
(By Hand Delivery)

Tamara Rueda
Clerk of Court
Maine Superior Court
45 Kennebunk Road
Alfred, Maine 04002

Re: Regional School Unit 21 v. Town of Kennebunk and Town of Arundel and Town of Kennebunkport
Docket No. CV-22-7

Dear Tamara:

Enclosed for filing, please find the Brief in Opposition from the Party in Interest Town of Kennebunkport in the above captioned matter.

Please be assured a copy of this Brief has been submitted to all Counsel of record, by email with hard copy by US Postal Service.

Thank you for your attention on this matter.

Sincerely,

Timothy S. Murphy

Cc: Laurie Smith, Town Manager
Russell Pierce, Esq.
Natalie Burns, Esq.
Mark Bower, Esq.
Tom Danylik, Esq.

STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-22-7

REGIONAL SCHOOL UNIT 21,

Plaintiff,

v.

TOWN OF KENNEBUNK

Defendant

And

TOWN OF ARUNDEL and TOWN OF KENNEBUNKPORT,

Parties-in-Interest

TOWN OF KENNEBUNKPORT
BRIEF IN OPPOSITION

The Party in Interest, Town of Kennebunkport, ("Kennebunkport") files the following Brief in Opposition to Plaintiff Regional School Unit 21's (the "RSU") Complaint for Declaratory Judgment seeking a finding and Order that Defendants Town of Kennebunk ("Kennebunk"), Town of Arundel ("Arundel") and Town of Kennebunkport ("Kennebunkport") may not recall from office a sitting Board Member of the RSU. For the reasons more fully detailed below, Kennebunkport prays the Court make an affirmative declaration that a sitting Member of the RSU Board may be recalled from office.

1. This case arises from a political dispute between certain citizens of Kennebunk and certain Members of the RSU.

2. Upon information and belief, a group of Kennebunk citizens commenced a petition drive, as allowed by Kennebunk Town Charter, Article VII, Section 7.01, et al seeking a sufficient number of citizens interested in recalling from office two (2) sitting Board Members of the current RSU Board who had been elected from Kennebunk.

3. Pursuant to Kennebunk's Charter, if a sufficient number of signatures could be secured from Town citizens, then the Town's Board of Selectmen would be mandated to schedule a public hearing and set a date for a recall election.

4. It is the understanding of Kennebunkport that a sufficient number of signatures were secured as to one RSU Board Member but an insufficient number of signatures were collected as to a second Board Member.

5. As of this date, Kennebunk has scheduled a recall election for a single RSU Board Member (Timothy Stentiford) which recall election is now set for March 28, 2022.

6. The RSU, per this Declaratory Judgment Action, contests the right of Kennebunk to remove a sitting RSU Board Member.

7. The RSU contends that the Kennebunk Charter's provision permitting a recall of "any elected official" (see Section 7.01 of the Town Kennebunk Charter) does not mean and include those Kennebunk citizens elected by the Town to serve the RSU 21 Board.

8. The RSU also contends that absent an express declaration in a Town's Charter or Ordinances, either allowing or barring a recall of School Board officials (as was done in the case of Arundel) a Town may not recall a sitting RSU Board Member except as permitted by State Law 30-A MRS Section 2505.

9. As of this date, Kennebunkport has no RSU Board Member subject to a current recall effort, and Kennebunk's recall effort does not directly involve Kennebunkport.

10. However, Kennebunkport's Town Ordinances (the Town has no specific document denominated as a "Charter"), specifically Section 5.3 (adopted November 3, 2020), has verbiage that is similar to the Town of Kennebunk's. See stipulated record; Document 6 and 6 A. That Section states:

> Any elected official of the Town of Kennebunkport may be removed from elective office by the voters of the Town of Kennebunkport...

11. Due to the similarity of verbiage in the Kennebunk and Kennebunkport's respective Town recall provisions, a Court Declaration as to Defendant Kennebunk may be interpreted and found to be binding as to Kennebunkport.

12. For this reason, although Kennebunkport is a Party in Interest, it files this Brief in Opposition and in support of its neighbor Town of Kennebunk.

13. This Court on February 2, 2022 denied Plaintiff's request for emergency Injunctive Relief, but has set a schedule for briefing and arguments on the merits sufficient so that an Order could likely be entered before the potential March 28, 2022 Town of Kennebunk recall election.

14. For the reasons more fully detailed below, Kennebunkport believes the Court should make an affirmative finding that Kennebunk and Kennebunkport's Town recall provisions permit the recall of a sitting RSU Board Member.

ARGUMENT

The Legislature in 2011 enacted a statute that expressly permits, sanctions and authorizes the removal from office of "municipal officials." See 30-A MRS Section 2505. Interestingly, that legislation created two (2) means for possible removal from office of such "municipal officials." Those are:

1. The State statutory method set out in Section 2505; and
2. An alternate process established by each community as it chooses.

The basis for this conclusion is found in the very introductory verbiage of Section 2505. It states:

> Except as otherwise provided by a municipality's Ordinance or Charter, an elected official of a municipality may be recalled from office pursuant to this Section.

See 30-A MRS Section 2505, emphasis added. In other words, a recall can occur either 1) pursuant to the established textual provisions of Section 2505, Subsections 1 through 9, or, 2) a municipality may provide for their own recall processes in either their Town Charters or Ordinances ("Except as otherwise provided…").

The Court will recognize that this is a Legislative grant of authority to Maine's municipalities, and is therefore an extension of the plenary grant of home rule power set out in 30-A MRS Section 3001. In effect, the Legislature was expressly alerting municipalities in 30-A MRS Section 2505 that they could regulate the recall of their elected municipal officials pursuant to their home rules powers, if they opted to do so. See also School Committee of the Town of York v. Town of York, 626 A.2d 935 (Me. 1993), ("although the Constitution's grant of home rule power is limited, it imposes no express or implied restriction on the Legislature's power to grant additional home rule authority to municipalities"). Town of York at 939. Emphasis added. In short, 30-A MRS Section 2505 is just such an "additional home rule authority" should a community choose to use the dedication.

Here, the three communities in this matter (Kennebunk, Kennebunkport, Arundel) have each expressly chosen to enact local laws authorizing the recall of elected officials. Each has availed itself of the privilege to enact such laws afforded by 30-A MRS Sections 3001 and 2505. Specifically, the subject and applicable Town's provisions are as follows:

KENNEBUNK

Section 7.01 of Kennebunk's Charter (Article VII) is the provision at the heart of this case. It states:

> Any elected official may be recalled and removed from office by the qualitied voters of the Town as herein provided. Recall is intended to be used when, in the opinion of the number of voters hereinafter specified, an elected official, acting as such, has caused a loss of confidence in that official's judgment or ability to perform the duties and responsibilities of the office. (Emphasis added).

KENNEBUNKPORT

Section 5.3 of Kennebunkport's Ordinance reads much like Kennebunk's Article VII. It states:

> **§5.3 Removal.**
>
> Any elected official of the Town of Kennebunkport may be removed from elective office by the voters of the Town of Kennebunkport in the following manner: (Emphasis added).

ARUNDEL

Lastly, the Town of Arundel's Charter (Article 14) also addresses recalls. However, Arundel is also the sole community in this action whose Charter directly references School Board Members. It states:

> 14.3. RECALL OF ELECTED OFFICIALS [Amended 11.8.11]
>
> Any elected official of the Town, with the exception of School Board members as noted in 30-A M.R.S.A. Section 2602, may be recalled and removed from elective office by the registered voters of the Town as herein provided. (Emphasis added).

It bears noting that all three communities have enacted very similar provisions using the broadest, most unequivocal language possible: "any elected official." However, only Arundel has taken the extra step of expressly and intentionally removing one group of elected officials, its School Board Members, from the reach and effect of the words "any elected official." Nonetheless, the three communities in this action all have made use of the grant of Legislative authority to recall local elected officials as authorized by of 30-A MRS Section 2505.

The lawful enactment of these separate local ordinances, however, does not close the loop. What remains is a determination as to whether the phrase "any elected official" necessarily means not simply Mayors, Selectmen, Councilors, etc. but also includes a municipality's School Board Members. The answer as to Arundel is easily made. That community opted not to include its School Board.[1] For the reasons more fully set forth below, Kennebunkport contends that the phrase "any elected official" was meant to include a municipality's RSU School Board Members absent an express removal such as that made by Arundel.

I. 30-A MRS Section 2505 Recall Authority Includes School Board Members

As regards removal from office by recall, the Legislature provided clear guidance for determining who qualifies as a "municipal official." For purposes of the recall provisions in 30-

[1] Although not binding on this Court, that Arundel took the additional step of excising its School Board Members from the reach of the phrase "any elected official" suggests that Town had concluded that absent this express removal such School Board Members were within the reach of the terms: "any elected official." At the very least, it suggests some caution on Arundel's part in case someone, at a later date, read the words "any elected official" broadly.

A MRS Section 2505, an "official" subject to recall has the same meaning as found in "Section 2604, Subsection 2" of Title 30-A. That Section states:

> **2. Official.** "Official" means any elected or appointed member of a municipal or county government or of a quasi-municipal corporation.
>
> **3. Quasi-municipal corporation.** "Quasi-municipal corporation" means any governmental unit embracing a portion of a municipality, a single municipality or several municipalities which is created by law to deliver public services but which is not a general purpose governmental unit. This definition includes, but is not limited to, utility districts under the jurisdiction of the Public Utilities Commission and school administrative districts. (Emphasis added).

The Legislature's use of broad, expansive language ("any elected"; "includes but is not limited to") in Sections 2604 (2) and (3) suggests the Legislature intended all elected local officials, including elected School Board Members, to fall with the reach of recall.

This belief gains credence by the added express inclusion in Section 2604 (3) of those officials elected to "school administrative districts" or what are more commonly known as "SADs." The specific reference to SAD's in Section 2604 (3) clearly indicates the Legislature thought of SAD Board Members, at least in 1987, as "municipal officials," and not as officials merely of the SAD, disconnected from their sending municipalities.

Fast forward from 1987, and there are two reasons to conclude that RSU Board Members should be treated today as the equivalent of SAD Board Members for purposes of 30-A MRS Section 2604 (3).

First, RSUs were created by the Legislature to be a favored statutory kin, if not outright successor, of the long existing SADs. See 20-A MRS Section 1461 ("the residents of two or more school administrative units may form" an RSU). References linking SADs to the newer successor RSUs are peppered through the statutory framework governing RSUs. See for example, 20-A Sections 1451, 1461-B, and 1465 and 1479. Finally, the Legislature expressly stated that for "purposes of the Maine Constitution" (regarding finance and taxation) an RSU is "a school administrative district." See 30-A MRS Section 1453.

There seems little doubt RSU's were intended to be the more modern versions of SADs, allowing regionalization and the aggregation of smaller SADs into more cost effective structures. As the potential successors of the SADs, there is every reason to conclude that a 2022 reading of 1987's law (20-A MRS Section 2604 (3)) would include RSU Board Members as elected "municipal officials"; and, that if drafted now, the Legislature would have expressly referenced RSUs within Section 2604 (3) just as they included SADs in 1987.

Furthermore, RSUs also meet the four part statutory test laid out in Section 2604 (3) as a "quasi-municipal corporation."

The Legislature defines a "quasi municipal" corporation as being a 1) "governmental unit" comprised of 2) a "single municipality or several municipalities" which is 3) created "by law to deliver public service" and which is not 4) a "general purpose governmental unit." Kennebunkport argues that RSU 21 meets this four part test.

First, it seems beyond reasonable argument that an RSU is a "governmental unit" given it is a creation of Legislative enactment and is statutorily designated as an SAD for purposes of the Maine Constitution. It serves no private purpose. Second, an RSU can be comprised of one or more municipalities. See Section 1461 allowing two SADs to form an SAD and Section 1460 allowing an RSU member to leave such that the RSU can be comprised of a single municipality.[2] Third, RSUs are created to deliver a public service, that being the education of children. See 20-A MRS Section 1451 (8) "regional school units shall provide kindergarten to grade 12 public education." And finally, the RSUs are not "general purpose" governmental units, rather RSUs govern schools for the purposes of delivering State mandated public education. The RSUs hold no other significant statutory purpose outside of delivering public educational services.

Even though RSUs did not exist in 1987 when Section 2604 (3) was drafted, they do meet the four (4) part test of a "quasi-municipal" corporation as that term is used in Section 2604 (3), and for that reason, their Board Members should fall within the reach of 30-A MRS Section 2505, even if not expressly listed after SADs within 30-A MRS Section 2604 (3).

Given it is statutorily clear that the Legislature wanted SAD officials to be subject to 30-A MRS Section 2505 recall as a "municipal officials," and as it is reasonably evident that the reach of Section 2604 (3) would necessarily now include RSUs, what would remain is only a

[2] Kennebunkport notes that Saco and Dayton each withdrew from RSU 23, leaving Old Orchard Beach as the sole remaining Member of RSU 23.

determination whether each of the three communities in this matter intended to fully avail themselves of Section 2505's grant of Legislative authority.[3]

In other words, it seems fair for the Court to conclude that Section 2505 reaches RSU officials, but, as to each community that opts to legislate on the matter under Section 2505's "except as otherwise provided" exception, the Court would still need to determine the intentions of each community. Did Arundel, Kennebunk and Kennebunkport intend to limit their Section 2505 home rule authorities, or, were they legislating as broadly as Section 2505 permits?

II. Kennebunk and Kennebunkport's Local Recall Provisions Do Reach RSU School Board Members.

Both Kennebunk and Kennebunkport's recall provisions broadly define the scope of the parties who may be subject to recall. Each uses the broadest terms possible: "any elected official." Unlike their neighbor Town of Arundel, there is no limiting exclusion for School Board Members in either Kennebunk or Kennebunkport's applicable provisions. Based on the drafted verbiage, there is no evidence Kennebunk or Kennebunkport sought to limit their home rule powers under 30-A MRS Section 2505.

[3] Kennebunkport contends that as Section 2604 (3) reaches RSU School Board Members, it not only allows the recall of such officials pursuant to the statutory process set out in Section 2505, but it also imports such broad authority into the local legislative exception ("except as otherwise provided..." allowed for in Section 2505). In other words, the definition of "municipal officials" applies to all aspects of the legislative grant of authority set out in Section 2505.

RSU 21, however, argues that "any" cannot and should not be read to include parties such as RSU Board Members exactly because the subject local provision does not expressly list those officials as being subject to recall. For the RSU, "any" does not mean all but rather it only includes Town officers such as Mayors or Selectmen, and, that absent an express reference to RSU Boards in the Town's specific recall provisions, such officials cannot be subject to recall. See Page 5 of RSU 21's Reply Memorandum: "to change that, Kennebunk would have to change that affirmatively, at least by expressly including RSU Directors as subject to Town Charter recall..." Kennebunkport believes this argument was also raised orally by RSU 21 during the Court's February 2, 2022 hearing on Plaintiff's request for Emergency Injunctive Relief.

The RSU's argument, however, conflicts with statutory analysis as is applied by the Law Court. See Moody v. Williams 407 A.2d 299 (Me. 1979) and Stotler v. Wood 687 A.2d 636 (Me. 1996). Those cases both hold that "all" literally means all in Legislative drafting absent an express exclusion (not inclusion as argued by RSU 21).

In Stotler, a divorcing spouse asserted that the phrase "marital property," which under State law was defined as "all property acquired by either spouse subsequent to marriage" included military pensions including those which had not yet vested. Stotler at 638. The Law Court stated:

> In light of the expansive definition of property in Section 722-A (2)... an unvested military pension is a form of marital property.

Stotler at 638.

The Stotler Court rejected the same argument raised by Plaintiff here; that absent an express inclusion "all" does not mean all. Stotler at 638: "Donald argues the pension is not subject to equitable distribution because it had not vested at the time of divorce." Instead, the Law Court held that "all personal property... in which a spouse acquires an interest is includable" marital property even if the applicable statute does not mention such property specifically. See Stotler at 638.

A similar analysis was applied in the Moody v. Williams case. There the Law Court had to decide the question of whether a car which had run out of gas (and was being pushed) was a "vehicle" for purposes of Title 29 analysis. The Court noted that for purposes of Title 29:

> Vehicle shall include all kinds of conveyances on ways for persons and for property.

Moody at 301. The Defendant, however, contended that a car pushed or "propelled...by human power" was an exception to the meaning of "vehicle." The Law Court took note that Title 29 "broadly" defined vehicle, and that the term "vehicle" was given a "broad sweep" in meaning. Moody at 301. The legislation at issue (Title 29) the Law Court said:

> ...was obviously intended to be a comprehensive regulation of all kinds of conveyances in the public ways...

Moody at 301. And, the Law Court went on to reject a notion of an exception for cars being temporarily pushed due to lack of fuel stating:

> We are sure that our Legislature set out in Title 29 to regulate all the hundreds of thousands of trucks and cars that are at times on the

> Maine highway without excluding any that may be temporarily inoperable.

Moody at 302. Emphasis added. In short, absent an express statutory exclusion for an inoperable car being pushed, the word "vehicle" was going to be read as the Legislature most likely intended, all vehicles meant all cars, whether out of gas or not.

The same rules of statutory analysis applies to Kennebunk and Kennebunkport's local recall provisions. Absent an express exclusion (as was done by Arundel) the Court should infer that the drafters of each community fully understood the meaning of the word "all," and that they intended that all elected officials would be subject to recall.

In Stotler, the complete absence of a reference in Section 722-A to vested military pensions did not act as a bar to finding that the Legislature intended a broad interpretation of the phrase "all property acquired."

Similarly here, the absence of express inclusion of School Board officials in the subject recall provisions of Kennebunk and Kennebunkport should not be read as evidence of intention that each community's RSU School Board Members are exempt from recall.

III. The Independent Legal Status of RSU 23 Does Not Insulate its Board Members From Recall.

Finally, RSU 21 makes concerted effort to suggest that its School Board Members are not "of the Town" so to speak, that they are isolated from their sending communities and for this

reason, they do not fall within the reach of 30-A MRS Section 2505. So, for example, RSU 21 notes:

> 1. The RSU is a "separate body politic and corporate." See Complaint Paragraph 8;
>
> 2. A Board Member's oath of office is defined in Title 20-A governing education and is "to serve the regional school unit..." Complaint Paragraph 17
>
> 3. The Board Members "do not take an oath to serve [the] municipality..." Complaint Paragraph 18.
>
> 4. They are "not elected officials of a body corporate municipality." Complaint Paragraph 19.

The RSU's assertions partially mirror the holding of Pickering v. Town of Sedgwick, 628 A.2d 199 (Me. 1993). The Pickering Court fully understood and validated the independent legal status of school administrative districts, writing:

> Union School and other statutorily authorized forms of school administrative units are distinct legal entities...

Pickering at 150. However, despite being "distinct" and separate legal entities for operational purposes, it is clear that as of 2011, the legally separate status of an SAD does not insulate its Members from the reach of recall pursuant to 30-A MRS Section 2505.[4]

30-A MRS Section 2505 (in conjunction with the Town of York holding) confirms that the separate and independent legal status of a school unit is not a critical fact. Despite being

[4] The right of a municipality to alter the terms of office for an SAD or RSU Board Member—including by recall—actually became possible in 1993 when the Town of York case (626 A.2d 935 (Me 1993)) overruled the holding of School Committee of Winslow v. Inhabitants of Winslow 404 A.2d 988 (Me. 1979).

separate legal entities for the purposes of school operations, funding, and management, their elected Board Members do remain "of the Town" that sent them. RSU Board Members are inherently and intimately linked to their sending communities. It is those communities who:

1. Schedule elections; and
2. Conduct the elections; and
3. Whose citizens elect the School Board Members; and
4. The RSU has no ability to alter who the Town sends as its elected officials.

These general principles confirm what the Legislature enacted in 2007 when its established RSU's as legal entities. That year, the Legislature irrevocably linked the RSU's Board Members to their sending municipalities pursuant to 20-A MRS Section 1473. There, in the Section governing "elections," the Legislature stated:

> For the purposes of nominations, regional school unit board directors <u>are considered municipal officials</u>... (Emphasis supplied).

This linkage is further detailed in 20-A MRS Section 1474 subsections 1-4 governing "vacancy" in office. Pursuant to Section 1474, the authority to fill a vacancy reverts back to the sending community.

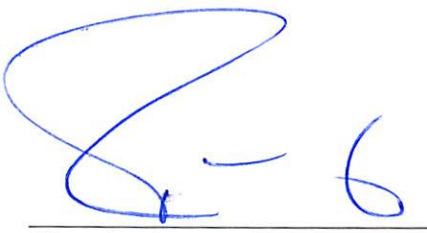
All of the above clarifies that while RSU Boards are, <u>for operational purposes</u>, distinct and legally detached from their respective municipalities, their individually elected Board

Members are inextricably tied to the very citizens who elected them, and who retain an express Legislative authority to recall those elected officials.

CONCLUSION

For all of the above reasons, the Town of Kennebunkport prays the Court declare in the affirmative that the Towns of Kennebunk and Kennebunkport may recall their RSU School Board Members as permitted by the respective Town Charter (in Kennebunk's cases) and Town Code (in Kennebunkport's case).

Dated at Saco, Maine this 18th day of February, 2022.



Timothy S. Murphy
Bar #3973
Attorney for Party in Interest
Town of Kennebunkport

Prescott Jamieson Murphy Law Group
37 Beach Street
Saco, Maine 04072
(207) 282-5966
tmurphy@padzilla.com