

Warrant Article Voting by Official Ballot (aka the Australian Ballot) in New Hampshire Towns

By Robert G. Eaton
Town Moderator – Rye, New Hampshire

In 1995, the New Hampshire Legislature passed what is popularly known, after the Senate bill that engendered it, as “SB2”. SB2, codified at RSA 40:13, permits towns to adopt “the official ballot for voting on all issues before the voters” at the same time they elect local officials. Adoption of SB2 requires a 3/5 majority vote at the polls. Similarly, after a town adopts SB2, a 3/5 majority is needed to rescind it. Under SB2, the annual town meeting is divided into two sessions that are held about a month apart. The first session, known as the “Deliberative Session”, “consist[s] of explanation, discussion, and debate of each warrant article.” There is no up or down vote on warrant articles at the first session, that being reserved for the second session – the official ballot on election day. SB2 official balloting is available to both towns and school districts. It is said that SB2 was enacted for two primary reasons: (1) in today’s busy world, many people do not have time to participate in a town meeting lasting many hours and perhaps over several days, but still want to vote on warrant articles; and (2) a popular belief that taxes would go down if budgets were defeated at the polls through increased voter participation, particularly by seniors who go south for the winter and cannot attend town meeting, but could cast absentee ballots.

A 2007 study¹ found that since it was enacted in 1995, of 219 New Hampshire towns, 57 had adopted SB2. There had been 22 votes to rescind SB2 after it was adopted, but only three were successful. 28 towns voted not to adopt SB2. 69 New Hampshire school districts also adopted SB2, while 19 declined to do so. There were 25 attempts to rescind SB2 in New Hampshire school districts; none were successful. By 2009, 63 towns and 73 school districts had adopted SB2.² Towns adopting SB2 tend to be larger – SB2 towns have an average population of 7,500; non-SB2 towns have about 2,600 residents. SB2 towns also grew three times faster between 1990 and 2000 than non-SB2 towns.

As the statistics show, once SB2 is adopted, it is hard to bring back the traditional town meeting. The reasons for this are three-fold. First, 3/5 of the voters must choose to do so. Second, RSA 40:13 requires the rescission question to be framed in language that might make one think he or she is giving up the right to vote on warrant articles altogether. Finally, and perhaps most importantly, it is hard to get any majority, let alone a 3/5 one, when 80% of the voters deciding the question do not come to town meeting. That 80%, arguably, is being asked to disenfranchise itself. Thus, it is no surprise that only three of 45 rescission attempts have been successful.

¹ D. Delay, *SB2 Adoption and Rescission Votes: 1996-2006*, New Hampshire Center for Public Policy Studies, www.nhpolicy.org/reports/sb2_referenda_02_07.pdf (March 2007).

² See statistics regarding the adoption and rescission of SB2 by the New Hampshire Department of Revenue Administration, www.nh.gov/revenue/munc_prop/SenateBill2Municipalities.htm (Jan. 23, 2009).

The Town of Rye, population 5,174, adopted SB2 in 1998 by a vote of 836 to 530, eclipsing the 3/5 majority needed for passage by 16 votes. An attempt to rescind SB2 the following year failed by a vote of 732 to 947 (1008 needed for rescission). A second attempt to rescind in 2011 was defeated decisively, with 291 votes in favor of rescission and 712 against (602 needed to rescind). If anything, the adoption of SB2 in Rye has reduced voter turnout on election day. In the ten years before SB2 was adopted, turnout at the polls averaged 31.9%; in the 13 years after its adoption, turnout averaged 29.1%. The effect SB2 has had on the Town Meeting / Deliberative Session is harder to calculate because attendance figures for those sessions have not always been kept. A reasonable estimate of town meeting attendance pre-SB2 can be made by looking at votes where the actual numbers on a question were tallied. On average, in the ten years before SB2 was adopted, 301 people voted at Town Meeting. Attendance at the Deliberative Session from 2004 to 2011, the only years for which records are available, has averaged 97. Even more telling has been the decline in the average length of those sessions. In the ten years before the adoption of SB2, the average Rye town meeting lasted five hours; in the twelve years after its adoption, the average deliberative session lasted just over three hours. Moreover, that number appeared to be declining, with the five Deliberative Sessions between 2006 and 2010 averaging only one hour and 47 minutes. However, the 2011 Deliberative Session lasted five and a half hours. Whether that constitutes an aberration or marks the beginning of a new trend remains to be seen. It is also noteworthy that, since the adoption of SB2, Rye has never come close to rejecting a town operating budget.

What many people do not understand about the SB2 process is that “[w]arrant articles may be amended at the first session” unless an article’s wording is required by law. In 2008, the New Hampshire Supreme Court concluded in Grant v. Town of Barrington, 156 N.H. 807, 943 A.2d 829, that the Deliberative Session’s power to amend warrant articles is extremely broad. In that case, petitioners submitted a warrant article “To see if the Town . . . will vote that infrastructure and landscape development . . . of said town . . . shall be by means of private investors . . . and not by the Town . . . at taxpayer’s expense.” At the Deliberative Session, a motion passed to amend the article by deleting all language therein after the words “To see”. The petitioners sought an injunction requiring the original article to be placed on the ballot. The Supreme Court, however, found that the Deliberative Session’s power included the power to amend a warrant article so that it effectively had no subject matter. “We find nothing” in the official ballot law statutes, the Court said, “that prevents voters at the deliberative session from effectively removing a subject from consideration at the second session by amending an article to delete the entire subject thereof.” New Hampshire law, the Court continued, “implicitly recognizes authority to amend an article to delete its purpose, which, in an SB 2 town, would deprive the voters at the second session of the opportunity to vote on that purpose.” The Rye Deliberative Session did the exact same thing to a warrant article in 2010.

The Legislature sharply limited the holding in Grant when it amended SB2 on the eve of the 2011 deliberative sessions. That amendment provided as follows: “No warrant article shall be amended to eliminate the subject matter of the article. An amendment that

changes the dollar amount of an appropriation in a warrant article shall not be deemed to violate this subparagraph.” The immediate goal of this change was to eliminate the “to see” amendments to warrant articles that were sustained in Grant and were occurring with increasing frequency at deliberative sessions throughout the State. Almost before the ink was dry on the legislative change to SB2, the Exeter Deliberative Session amended a warrant article seeking to establish a municipal budget committee by inserting the word “not” before the word “establish”, thereby making the article meaningless. The petitioners of the original warrant article appealed to Superior Court, which reversed the action of the deliberative session. In Bailey v. Town of Exeter (Rockingham Superior Court No. 218-2011-CV-203), the court (McHugh, J.) held that the “only way the phrase ‘no warrant article shall be amended to eliminate the subject matter of the article’ can be logically read is to conclude that any amendment that made the subject matter of the article a nullity was forbidden.” Inserting the word “not” into the warrant article at issue, the court said, made the article a nullity and was therefore impermissible. Not only did the Town incur the legal expense of litigating the case, but also the court ordered it to hold a new deliberative session and a new election, and to pay the petitioners’ legal fees. The Town did not appeal.

Clearly, the Legislature’s 2011 amendment of SB2 overrules the Supreme Court’s holding that warrant articles may be amended to eliminate their subject matter. Nonetheless, SB2 still permits the deliberative session to amend warrant articles. RSA 40:13, IV. What is less clear is precisely the types of amendment that are allowed. Both the courts and the Legislature will continue to struggle to achieve a proper balance between the desire of petitioners to have a warrant article placed on the official ballot for an up-or-down vote and the desire of communities to make common-sense amendments to articles after the “explanation, discussion and debate” that may only occur at deliberative sessions. At the time of this writing, several new changes to SB2 are pending in the legislature which may further define and limit the power of deliberative sessions. Courts, meanwhile, will likely be asked to rule on other types of amendment that may and may not run afoul of the statutory proscription against amendments that would eliminate the subject matter of an article. For instance, would amendments that ask for a “study” of the action demanded in an article eliminate the subject matter? Would an amendment that turns an article requiring action into one merely seeking the “sense of the community” eliminate the subject matter? At least until the law is further clarified, it seems that deliberative sessions still retain considerable power to amend warrant articles. As long as that remains true, with far fewer people attending deliberative sessions, at least in Rye, an unintended consequence of SB2 remains that fewer, instead of more, people will be deciding issues critical to the town.

The verdict on SB2 is decidedly mixed, at least as far as the results in the Town of Rye are concerned. While SB2 has certainly not increased election-day turnout in Rye, it is undeniable that the number of people voting on warrant articles has increased by over 350%. Of course, depending on how well a town educates its voters, it is arguable that voters are less informed on the issues. On the other hand, the prospect of budget rejections at the polls has never materialized. It is also undeniable that fewer people attend deliberative sessions than town meetings, and that the debate at the former is much

shorter. Some argue that the decline of the deliberative session undermines a town's sense of community. Moreover, the ability of voters to amend warrant articles at the deliberative session, although recently diminished, still has the opposite effect of what was intended by SB2 by concentrating power in a far smaller minority than was the case at town meeting. Some of the defects in SB2 can probably be remedied by amending RSA 40:13. In the long run, however, when considering whether to adopt the official ballot form of government (or to rescind it), towns, and voters, must balance the benefits of increased voter participation on warrant articles against the risk of marginalizing a town meeting's, or a deliberative session's, opportunity to provide citizens with information and debate on the issues of the day on which they are to vote.

Delivered to the Annual Meeting of the Massachusetts Moderators' Association, October 30, 2009; amended on February 26, 2010; further amended on January 21, 2012.