Final Minutes

Legislative Commission on Statutory Mandates Meeting
9:30 a.m. • Tuesday, August 25, 2009
Executive Office Building • Executive Conference Room ▪ 5th Floor
2100 Pontiac Lake Road • Waterford, Michigan

Members Present:
Amanda Van Dusen, Chair
Robert Daddow, Co-Chair
Dennis Pollard
Louis H. Schimmel
J. Dallas Winegarden, Jr.

Members Absent:
None

I. Call to Order
The Chair called the meeting to order at 9:30 a.m. and the clerk took the roll. A quorum was present.

II. Approval of the Agenda
The Chair asked for a motion to approve today's meeting agenda. **Mr. Pollard moved, supported by Mr. Schimmel, that the meeting agenda as proposed be approved. There was no objection and the motion was unanimously adopted.**

III. Approval of Minutes – July 21, 2009 Meeting
The Chair asked for a motion to approve the minutes of the last Legislative Commission on Statutory Mandates meeting. **Mr. Schimmel moved, seconded by Mr. Pollard, to approve the minutes of the July 21, 2009 meeting. There was no further discussion. The minutes were unanimously approved.**

IV. Status of Costing Analysis
Mr. Daddow shared that Eric Scorsone has reported that he is on target in terms of getting cost information from the various agencies. He has the template out and is in the process of capturing the data. Mr. Daddow will make some calls to make sure the process is progressing.

V. Discussion of Draft Final Report/Recommendations and Approach
The Chair opened a discussion of what should be in the final report to insure compliance with the Commission's statutory charge. Mr. Pollard noted that he envisioned the draft he circulated today (see attachment) would be the last part of the final report. The Chair noted that the costing analysis being prepared by Mr. Scorsone and recommendations on how to eliminate funded and unfunded mandates and reporting requirements should also be included in the final report. The general order and content of the report and the notion of including an outline or executive summary at the beginning of the report were also discussed. Other items discussed included:

a. The Commission's Interim Report and the CRC Report to the Commission would be added as exhibits to the final report.
b. Concern over the time period relating to the notice of claim and the filing of a lawsuit were expressed. The Chair asked everyone to give more thought to these issues which will be discussed again at the next meeting.
c. Mr. Pollard suggested it would be better to work with the Legislative Service Bureau to prepare legislation in blueback form.
d. Mr. Daddow suggested that with regard to the monitoring report on page 11 a provision be added that would require the report be filed with the special master.
e. Another draft of the report will be prepared for discussion at the next meeting.

VI. Other Business
Mr. Daddow shared a few other unfunded mandates that have been brought to his attention since the last meeting.

VII. Public Comment
The Chair asked if there was any public comment. There was none.

VIII. Next Meeting
The Chair announced that the next meeting will be held at **9:00 a.m.** on **Tuesday, September 17, 2009** in Waterford.

IX. Adjournment
Having no further business, the meeting was adjourned at 11:40 a.m.

(These minutes were approved at the September 17, 2009 Legislative Commission on Statutory Mandates meeting.)

FINAL REPORT OF THE COMMISSION ON STATUTORY MANDATES REGARDING RECOMMENDED CHANGES TO ACHIEVE COMPLIANCE WITH § 29 OF THE HEADLEE AMENDMENT

[DRAFT – SUBJECT TO CHANGE]

AUGUST 18, 2009

I. PREFACE

The recommendations that follow are based on the words contained in Article 9, §§ 29 and 32 of the Michigan Constitution; integral parts of the Headlee Amendment tax reform initiative adopted by Michigan voters in 1978. The common understanding of those words, which is the meaning of the words to the Michigan voters who ratified the Amendment, serves as the controlling source of authority for the Commission's recommendations which follow.

The words used in these two sections of the Constitution are not difficult to understand or capable of varying interpretations. The intent of the Michigan voters is very plain or apparent.

However, there are obviously different ways in which implementing legislation could be designed to achieve compliance with the voters' intent. This was originally attempted through 1979 PA 101 but that attempt was, unfortunately, a failure. The result has been thirty years of State government ignoring the electorate's directed responsibility to fund those activities and services that it requires local units of government to provide. Thus, these recommendations are designed with that experience in mind and represent the Commission's considered judgment as to how to best assure compliance with the will of the people henceforth.

The Commission's greatest concern is that if the provisions of PA 101 were wholly ignored, as they were, whatever we may do presently may not produce any change in the state government's past behavior. The Commissioners nonetheless believe that the very specific recommendations that follow will, if implemented through legislation, put State government into compliance with the express will of the people, if for no other reason than the State will be held to account in the event of noncompliance through a meaningful judicial enforcement process, as recommended below.

II. RECOMMENDATION FOR THE REPEAL OF PA 101

The Commission considered the possibility of shoring up PA 101, but came to the conclusion that it would be better to start with a clean sheet of paper. There are far too many problems inherent in its design to warrant extensive amendments. Accordingly, the Commission recommends that it be repealed in its entirety.

III. RECOMMENDATIONS FOR CHANGES IN LEGISLATIVE PROCESS GOING FORWARD TO COMPLY WITH § 29 OF HEADLEE AMENDMENT

The recommendations regarding future legislative efforts must begin with the wording of the second sentence of § 29 of the Amendment. The unmistakable concept expressed in this sentence is that appropriations necessary to pay for the necessary costs of required activities and services to be provided by local units must occur concurrent with legislative debate over whether the requirements should be imposed. The debate, in other words, has to be not simply over the wisdom of what activities and services will be required of local units, but also over whether the State is prepared to pay for the necessary costs it is compelling local units of government to incur. This is expressed in § 29 as follows:

> A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, *unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs.* [Const 1963, art. 9, § 29.] (emphasis added)

This idea of discussing about paying for the necessary cost for an activity or service when the decision is being made whether to require it is fundamental to the Headlee reform. This reform is critical to the Headlee concept that the decision should be in the first instance whether State government can afford the objective sought to be accomplished. If not, the legislation should either be tailored to fit within the State's budget or possibly be deferred until it can be paid for or eliminated from consideration.

The net result of passing through the problem of paying for an activity or service as a *fait accompli* to local units is to either reduce established services that are provided by local units or, perhaps more frequently, cause a need for additional local taxation by means of stealth, *i.e.* the need for more taxes is not the result of a lack of local control of costs but the result of a State mandate totally out of the local units' control or discretion. The core idea is that if a unit of government, state or local, creates a need for a cost it should be fully accountable to the electorate for that cost.

Regardless of what one might think about the wisdom of this provision, there a can be no mistaking what the voters intended through ratifying this part of the Amendment.

Consistent with this underlying intent or purpose, the Commission recommends that several legislative provisions be implemented going forward. Several states that also have restrictions on state government imposing unfunded mandates on local units of government, either as a result of a constitutional amendment or a statutory limitation, have developed a common thread referred to as creating a "fiscal note" during the process of legislative debate. This information was made known to the Commission based on research done by the Citizens Research Counsel ("CRC"), previously forwarded with the Commission's Interim Report. The states include Massachusetts, Missouri,

Virginia, Maine, Rhode Island, New Jersey, Arkansas, Kentucky, North Dakota, West Virginia and Wisconsin. While the process and agency of state government responsible for development of the fiscal note (or equivalent document) varies from state to state, the basic concept of a fiscal note consists of the following elements:

1. All bills or amendments to pending bills, upon introduction in the legislature, are reviewed in order to identify whether they may require activities and services to be provided by local units that will entail new or additional costs,

2. An estimate of the necessary costs that are likely to be incurred by local units of government is developed,

3. The estimate is made known to the legislature while debate over the bill is occurring,

4. If the bill reaches the point of enactment, an accompanying appropriation bill is developed and tie barred to the underlying bill, and

5. A process is created for disbursing funding to local units, based on the appropriation, during the period the costs will be incurred by the affected local units.

There are some very apparent difficulties that will occur in implementing this process in Michigan. They, presumably, occur in the other states as well. The first problem is keeping track of bills and amendments to bills that are introduced in the sometime fast moving legislative environment. Determining the financial implications on local units, if any, from the flow of bills and related amendments through the Legislature will take time, more time than is presently expended.

Nonetheless, this is what the voters intend, as expressed in § 29, and is what is presumably occurring in these other states where similar limitations are in place. But it should be kept in mind that the actual instances where bills implicate required activities and services imposed on local units are not that frequent. Albeit, where it occurs the legislative process will require more time in order to satisfy the § 29 requirement.

One provision of PA 101 that the Commission recommends to be incorporated into the above process is the notion that some costs to local units arising from State imposed requirements are so minimal that they should not be subject to payment by the State *i.e. de minimis* expenditures. The cost threshold established in PA 101 is $300 per unit of local government. Clearly, this level of expense would be meaningless to a large local unit of government whereas it might make sense to a very small unit. The Commission recommends that the threshold be set at 1/100 of 1% of local units estimated expenditures per year for the requirement under consideration. This is a far more workable threshold from a practical standpoint.

Additionally, the Senate and House fiscal agencies that presently have financial projection responsibilities for the Legislature concededly do not have readily at hand information about the financial impact of the requirements on local units implicated in bills or amendments to bills.

Given this problem, the Commission recommends that established representatives or associations of local units of governments be enlisted into the first two steps above identified. Each unit of local government in Michigan has established organizations that serve their constituents in a lobbying role that includes dealing with the financial implications of pending legislation. Formalizing their role as consultants to the Senate and House fiscal agencies for these purposes should certainly suffice in the State meeting its financial responsibilities under the Headlee Amendment during the course of legislative debate.

At a practical level, local units' representatives/associations commonly make use of electronic surveys as a quick means of breaking down issues for many purposes where fast turn around time is necessary. That process could be very usefully employed to assist in the task of determining whether possible requirements in bills are substantive and, if so, a dollar estimate for meeting the requirement.

It should be further stressed that the process of identifying the financial implications of bills under consideration involves developing good faith estimates of the necessary costs that are projected to be incurred by local units. Later in this report a recommendation is made to create an on-going cost monitoring process that will permit plus or minus adjustments to be made as events materialize over time. This is necessary for the underlying integrity of the funding process. In other words, the good faith estimate is just that and can later be reconciled with costs actually incurred by local units in meeting the requirements of the laws.

A final point on this aspect of the Commission's Report is that § 29 of the Headlee Amendment expressly applies not only to requirements imposed by the Legislature but also to rules and regulations adopted by State agencies that require activities and services be provided by local units of government. Where that occurs, by operation of the words appearing in § 29, an appropriation is required to be adopted by the Legislature and funding disbursed to local units in order to pay for the necessary costs of same.

No attempt has ever been made, of which the Commission has been made aware, to deal with this clearly stated Constitutional requirement since the Amendment was adopted in 1978. Because rule making by State agencies occurs somewhat independent of the legislative process, this requirement of § 29 creates a need for a separate process than that identified above for legislative enactments. Thus, the administrative decision to adopt a rule or regulation imposing a requirement on local units has to somehow coordinate – consistent with the words used in § 29 – with the legislative process of appropriating.

The Commission recommends that the State Administrative Procedures Act of 1969 ("APA") be amended to provide for coordination between the administrative department

or agency creating the mandated activity or service and the legislative appropriation process.

More specifically, it is recommended that the APA be amended to provide that if a state agency makes a rule, as defined under that Act, or otherwise exercises that agency's authorized powers or responsibilities under the force of state law, that causes local units of government to incur necessary increased costs for new or increased activities and services, that action shall not become applicable or binding until and unless an appropriation is adopted to pay the local units for those necessary costs and a disbursement system is devised for timely payment. This will effectively provide fiscal control within the Legislature over the costs of administrative rules and regulations. It will also meet the obligation expressly imposed through § 29 of the Amendment.

IV. RECOMMENDATIONS FOR AN ADJUDICATORY PROCESS FOR DECIDING FUTURE DISPUTES ARISING UNDER § 29.

The Commission debated over the adjudicatory process and has decided to recommend that the exclusive remedy should be that provided under § 32 of the Headlee Amendment, utilizing the special master process that has evolved through past litigation, but to do so on a more formalized and expedited basis than is presently occurring. This will require the cooperation of the Michigan Supreme Court, as will be discussed below.

Section 32 of the Headlee Amendment provides as follows:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals *to enforce* the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit. [Const 1963, art 9, § 32.] (*emphasis added*).

This is the touchstone for the Commission's recommendations that follow.

Some history in this regard is necessary. The voters' intent through the above language seems very clear. The voters' intended that the judiciary would serve "to *enforce*" the provisions of the Amendment. This is as contrasted to the voters' intent, separately expressed in § 34 of the Headlee Amendment, that the Legislature should "*implement*" the provisions of the Amendment. Thus, as plainly as words permit, the voters intended through this language that the courts would police compliance with the Amendment if the Legislature strays from its implementing responsibility.

Additionally, for better or worse, the voters placed enforcement responsibility in the Michigan Court of Appeals. That Court is, of course, an appellate body and not structured to serve a fact determination role. Nonetheless, the voters left to the judicial system the responsibility to adapt to its role in terms of enforcing the Amendment.

While the reason for choosing the Court of Appeals as the court of original jurisdiction is not made known, it seems apparent to the Commission that one reason for doing so, if not

the controlling reason, is that by using this Court in this role would expedite the adjudicatory process. This would follow from the fact that this would eliminate the need to process these claims before various circuit courts in the State which are the courts of general jurisdiction for criminal and civil purposes. As a consequence of that broad range of responsibility, the circuit courts are pulled in many different directions and frequently have substantial dockets that equate to delays in disposing of cases. Dovetailing with that realty, circuit court decisions must be appealed to the Court of Appeals, if contested, and possibly to the Supreme Court. Thus, by allowing suits brought under the Headlee Amendment to be initiated in the Court of Appeals, one whole layer of the judicial system was eliminated. In theory, at least, this should serve to substantially expedite resolution of disputes brought under § 32 of the Amendment.

As noted in foregoing discussion in this report, the experience has been anything but expedited for taxpayers seeking to remedy noncompliance by State government with § 29. The infamous suit of *Durant v Michigan* was filed in the Court of Appeals, as specified in § 32, in May of 1980 but wasn't finally decided until July of 1997, in the taxpayers' favor. The point as relates to the present recommendation of the Commission is that the voters' manifest intent to have the Headlee Amendment enforced by the judiciary in an expeditious manner has been frustrated in the extreme.

The process of adjudicating these claims clearly needs to be prioritized and promptly brought to a reasoned result after initial filing based on the facts presented. Delays while fine points of law are endlessly debated and years are frittered away, most certainly does not speak well of the judicial system's adherence to the voters' expressed intent that the courts "enforce" the Amendment. If one subscribes to the notion that justice delayed is justice denied, Michigan voters and the taxpayers' whose suits have been delayed for years on end are certainly not receiving justice.

The Commission considered options identified in the CRC July 1, 2009 report about reforming the system in Michigan. The option of having an administrative adjudicatory system, similar to the forum created in PA 101, known as the Local Governmental Claims Review Board ("LGCRB"), was rejected because it wouldn't eliminate the fact that the remedy afforded under § 32 of the Headlee Amendment would not be obviated by such a forum and thus there would always be competing forums for these claims, the primacy of which would be in question. More importantly, if the remedy available to taxpayers, as limited by the Supreme Court in the final decision in the *Durant* suit, is a declaratory judgment, a non-judicial body is without authority to render such a remedy. This is to say nothing about the futilities experienced by local units with the defunct LGCRB, detailed above.

Consideration was also given to the Court of Claims as providing a forum, but rejected in the end in favor of making use of the forum specified in § 32 of the Amendment where original jurisdiction exists without question and thus provides for binding finality once a decision is rendered.

Consideration was finally given to a provision adopted in 1980 incorporated into the Revised Judicature Act ("RJA"), § 308a, (MCL 600.308a). This legislation placed

original jurisdiction in the circuit courts of the State, concurrent with original jurisdiction in the Court of Appeals that exists by operation of § 32 of the Constitution. While this placement of concurrent jurisdiction in the circuit courts would serve to overcome the limitations inherent with having an administrative board resolve disputes arising under § 29, it has the potential of walking taxpayers bringing suit to enforce § 29 back into the same problem that the voters sought to avoid by conferring jurisdiction originally in the Court of Appeals *i.e.* the delays associated with dealing with congested dockets of trial courts only to experience further delays during later appeals to the Court of Appeals and, potentially, the Supreme Court. Avoiding this was a key reform sought by the voters in the Commission's reading of § 32.

Moreover, the legislative changes presently being recommended by the Commission should set the tone for the efficient handling of suits by the Court of Appeals under § 32, as was originally envisioned through the ratification of that section. It would be most inefficient to set up an expedited and specialized process in the Court of Appeals while having a competing process available in circuit courts which are not geared for expeditiously resolving the frequently sophisticated issues of fact and law arising under § 32 suits. Accordingly, the Commission recommends that the provisions of the RJA be amended in this regard, placing original jurisdiction exclusively in the Court of Appeals.

The problem of the Court of Appeals sitting as an appellate body has been overcome through thirty plus years of practice before the Court under § 32 by resort to the services of a special master. This is a position that has a long history in the judicial system, dating back to English courts of equity. More modern practice has made use of special masters by circuit and appellate courts to assist in special circumstances where the appointing court needs fact finding and legal assistance due to practical limitations confronting the court. The special master's role is not technically to render a judgment on the disputed issues but rather to hear the facts and consider the contested issues of law and render a report of the person's findings to the appointing court. The court then renders a final decision or judgment after reviewing the report and either accepts the special master's report or takes some other action based on the reviewing court's independent evaluation.

This is the process that has been followed on an *ad hoc* basis as a way of resolving the fact that the Court of Appeals is not set up to function as a trial court, but must nonetheless serve in its Constitutionally delegated role under § 32 of the Amendment. The Commission's recommendation is to institutionalize the role of the special master within the Court of Appeals by amending § 308a of the RJA to provide for same. This would involve the appointment by, presumably, the Michigan Supreme Court of an attorney as the sitting special master who has attained some level of experience or expertise with state and local governments' operations both financially and operationally.

While it may be true that there has not been a great volume of suits brought under § 32 of the Headlee Amendment, the Commission concludes that this is by no means attributable to State government's faithful adherence to its funding responsibilities under § 29 of the Amendment. Rather, the opposite is true. As documented in the foregoing sections of this report, there have been numerous on-going violations of State government's funding responsibilities under § 29 that have occurred over the last thirty years. The reason for

the dearth of suits is the indisputable fact that challenging the State for failing to fund state mandates has become a daunting and extraordinarily expensive, time consuming process as experience has taught. As a result, violations of the Constitution are begrudgingly tolerated.

In the end, the people of Michigan are the losers. Their expressed will that each level of government should be financially accountable for activities and services that it has caused to be provided has simply been ignored.

It is submitted that only when State government is held accountable through active enforcement in the Court of Appeals for funding those activities and services that it has required to be provided shall Michigan voters' intent be respected. This is the responsibility of the Court of Appeals delegated through § 32 of the Amendment. This is practically attainable through established process within that Court.

One final point in this regard involves a Michigan Court Rule amendment adopted by the Michigan Supreme Court in 2007, establishing rules that uniquely apply to taxpayers' suits under § 32 of the Headlee Amendment; MCR 2.112 (M). The Commission has no interest in entering into the sharp debate reflected in the "Staff Comments to 1997 Amendment" Michigan Court Rules. Those comments are attached to that amendment where the concurring and dissenting opinions of the Justices of the Court relative to this rule change are aired.

Rather, it is sincerely desired by this Commission that the Justices of the Court enter into discussions and reach agreement on changes to the court rules that will serve to facilitate the changes contemplated by the present recommendations and that facilitates rather than inhibits or makes more costly suits brought by taxpayers challenging noncompliance with the Amendment. A healthy respect for and acquiescence in, if not agreement with, the expressed will of the voters of Michigan specifying this remedy compels nothing less.

V. RECOMMENDATIONS FOR EXPEDITING DECISIONS OF FUTURE SUITS FILED UNDER § 32 OF THE HEADLEE AMENDMENT.

As detailed above, suits brought under § 32 to enforce the State's funding obligation under § 29 have become an exercise in endurance that only the most patient and well funded taxpayers and their local units can tolerate. The two suits that highlight this flaw are the *Durant* suit and the presently pending *Adair* suit. The former suit was filed in May of 1980 but not resolved- in the taxpayers'/local units' favor – until July of 1997. The second suit, known as the *Adair* case, was filed in November of 2000 and is still pending on appeal before the Supreme Court. Ironically in the latter suit, the taxpayers/local units adhered to the process described by the Supreme Court in July of 1997 in its final decision in the *Durant* suit, ostensibly to expedite future decisions in § 32 suits. There the Court stated as follows:

> As arduous as the proceedings in this case have been, we have succeeded in deciding many points of law that will guide future

> decisions. Thus, there is every reason to hope that future cases will be much more straightforward. We anticipate that taxpayer cases filed in the Court of Appeals will proceed to rapid decision on the issue of whether the state has an obligation under art 9, § 29 to fund an activity or service. The Court of Appeals would give declaratory judgment on the obligation of the state. If there was such an obligation, we anticipate that the state would either comply with that obligation no later than the next ensuing fiscal year, unless it could obtain a stay from this Court, or remove the mandate. In such an instance, we anticipate that the obligation of the Court to enforce § 29 would not include any grant of money damages. This is not such a case. We turn to the proper remedy in this case. [*Durant*, 456 Mich at 205-06.]

Again, despite having followed the above direction of the Court, the taxpayers' suit remains mired in the litigation process for over nine years after being filed.

It is very clear that delay in bringing these suits works to the State's financial advantage because it allows its noncompliance to be rewarded over a longer period of time. Local units must bear the costs of the mandate while the suit remains in the abyss that this form of litigation has become. Also, because the Supreme Court has indicated that it will limit the remedy for the State's noncompliance to the issuance of a declaratory judgment, rather than permitting the local units to recover damages for the State's noncompliance, the State gets a second opportunity to design a funding scheme that suits its own fiscal purposes, again at the expense of local units of government. From a purely pecuniary perspective, there is no down side for the State in ignoring the requirements of § 29.

Given these realities, the Commission recommends changes that will need to be adopted in legislation in order to insure enforcement of these provisions of the Michigan Constitution. It is initially recommended by the Commission that the legislation, reverse the burden of proof that has applied in past suits under § 32. That is, the State would have the burden of initially proving in a suit brought under § 32 of the Amendment that a statute or administrative requirement that implicates a local unit of government being required to provide an activity or service will not impose more or additional necessary costs on affected units of local government or, alternatively, that the State has properly funded the activities and services that it has required.

Perhaps more than any other reform, this will focus the process in the Court of Appeals on the Constitutional objective. If the State, must prove the elements of the funding requirements under § 29 either do not apply or have been satisfied because full funding for the required activities and services has been appropriated and is being disbursed, the time and expense associated with litigation will be drastically reduced. This would not, of course, relieve the taxpayers/local units from being prepared to establish otherwise where the State can initially meet its burden of proof. But it would serve to focus the direction of the suit upon its Constitutional purpose.

A related recommendation of the Commission is that when legislation is adopted in the future that taxpayers/local units believe to be in violation of the State's funding responsibility under § 29, the local units may initiate suit under § 32 challenging the constitutionality of the statute. If, following six months of compliance with the requirements of the statute, following filing the suit, the local units may choose to cease compliance with those requirements without being penalized or caused to suffer some offset or deduction from state funding that might apply by operation of otherwise applicable statutes, unless the Court of Appeals decides the merits of the suit adversely to the local units within that six month period.

In other words, it will be incumbent on the State and the Court of Appeals, if this recommendation is adopted, to process these cases expeditiously, consistent with that which the Michigan Supreme Court expressed in the *Durant* case, above quoted, *i.e.* that suits "will proceed to rapid decision on the issue of whether the State has an obligation under art 9, § 29 to fund an activity or service." The pattern of the Attorney General's office, amply displayed in Headlee challenges in the past, of filing blocking motions or requesting reconsiderations by the courts of previously decided points of law that have too often been rewarded by the Court of Appeals only to be later reversed in the Supreme Court after several more years of litigation, rather than dealing with the merits of the claim at the outset, will no longer be incentivized. Rather, under this change the merits of the claims will need to be promptly evaluated and a declaratory judgment be issued by that Court, if warranted, so that the Legislature can promptly assess its options and do what is required of it under the Headlee Amendment.

An additional recommendation of the Commission concerns the circumstances that exist after the courts have ruled through issuance of a declaratory judgment that the State is violating its funding responsibilities under § 29. It is by no means clear from the perspective of local units of government that in that circumstance they are relieved from complying with the requirements of the underlying statute going forward. The jeopardy that local units face is that they may, even if only temporarily, be caused to experience offsets or penalties while the Legislature contemplates what it intends to do in response to the court's declaratory ruling.

Out of respect for the separation of powers concept, the courts cannot issue orders that require an appropriation be adopted that will fund the activities or services which local units are required by law to provide. Thus, it is recommended that legislation be adopted that specifies that all affected local units of government are relieved of their responsibility to comply with a requirement that has been so adjudicated until such time as legislation is adopted that modifies or formally eliminates the subject requirements or the Legislature elects to adopt an appropriation in compliance with § 29 of the Headlee Amendment. This would serve to assure the local units that the Headlee process is functioning in practical terms. As matters now stand that is an open ended aspect to the Amendment.

VI. RECOMMENDATION FOR AN ONGOING PROCESS OF MONITORING THE STATE'S COMPLIANCE WITH ARTICLE 9 § 29.

The CRC Report referred to the need perceived in other states where there is a prohibition on unfunded mandates to continuously monitor compliance with the states' funding responsibility. This is particularly important in order to maintain the integrity of the underlying process in ever evolving financial circumstances. The necessary costs for activities and services can swing up or down over time for many reasons and thereby change the state's funding responsibility under § 29, either plus or minus.

The Commission has reviewed the various states' approaches to this part of the process which are quite varied. The essential features that have been gleaned from these varied approaches and the features that the Commission concludes to be necessary and constructive for Michigan are as follows:

1. A state agency or department, acting in consultation with established representatives/associations of local units, reports to the legislature twice a year on the status of compliance with its funding obligation categorized by local governmental units and individual mandated subjects within each category of local unit,

2. The agency or department assists in drafting appropriation bills during the annual appropriations process consistent with the information reported in 1 above,

3. The agency or department assists in creating more efficient or streamlined processes for paying or reimbursing local units for the costs of state required activities and services, and

4. The agency or department creates mechanisms to identify administrative rules and regulations that impose unfunded mandates on local units.

These tasks should ideally be assigned to an agency charged with providing objective or non-partisan research and information, such as the Legislative Service Bureau, working in active cooperation with representatives of local units of government, as earlier referenced in these recommendations. The Commission submits that conformance with the requirements of § 29 will only occur as a result of good faith involvement by both state government officials and local unit representatives.

While, realistically, reasonable minds will disagree during this process, access to a functioning dispute resolution forum at the Court of Appeals under § 32 should serve to temper each side's position and contribute to a readiness to compromise in the interest of avoiding an adverse decision resulting from that process.

VII. RECOMMENDED CHANGES FOR PAST UNDERFUNDING UNDER § 29 OF THE HEADLEE AMENDMENT.

To this point these recommendations have only dealt with reforms necessary on a going forward basis based on the requirements of the second sentence of § 29 of the Amendment. However, an even more financially significant problem exists in relation to the State's noncompliance with the first sentence of § 29 which implicates significant exposure to the state for accumulated unfunded activities and services over the last 30 years. This cannot be ignored by this Commission, despite the formidable funding problems presently confronting State government.

Preliminarily, however, the Commission recommends below a means of moving the State toward compliance with § 29 that also takes into account, the State's current funding crises. This recommendation, moreover, serves to partially meet the requirements of the Headlee Amendment while relieving the financial strains of previously imposed but presently unfunded mandates on local units of government.

The first sentence of § 29 provides as follows:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any *existing* activity or service required of units of Local Government by state law. [Const 1963, art. 9, § 29 (emphasis added).]

A combined reading of both of the first two sentences of § 29 requires the State to continue providing to local units the same proportion of state funding that was provided in 1978 for the necessary costs of required activities and services when the Headlee Amendment was adopted, and to provide full funding of the necessary costs incurred in order to provide activities and services newly required after 1978 or that represent an increase in those activities and services required after 1978. Given that this report is occurring more than 30 years after the point in time when the Amendment was ratified, there are several problems that are presented - some without practical solutions due to the passage of time.

The first problem is that it is not practically possible to construct the base year proportions, *i.e.* the percentage of funding that applied in 1978, required under the first sentence of § 29. As the Commission learned very early in its review, that only a beginning attempt was made to identify required activities and services that existed in 1978. Despite whatever good intentions that existed leading to enactment of PA 101, no attempt was made by the State to resolve the question of how much funding was then being provided to local units as a proportion of costs being incurred in order to pay for those mandates. It was certainly possible to have made those fundamental determinations in 1979, but that did not occur.

The only document that was created in that vein was a study commissioned by the Department of Management and Budget in the summer of 1979 that attempted to catalogue State legislative mandates. These mandates are identified by reference to

sections of Michigan Compiled Laws, but appear to be nothing more than a rote listing based on the use of the term "shall" or some other imperative term appearing in statutes without any accompanying analysis of whether whatever may have been required by the use of that word was meaningful under § 29. The study also made no attempt to identify whether the State was providing funding to local units for those identified statutory provisions. As such this is meaningless information for present purposes. While it is surmised that this report was a beginning step by the Department toward assembling this necessary data for future funding compliance purposes, it was never subsequently acted upon.

The Commission also learned that in most, if not all, cases the information needed from the State's and local units' accounting records to compile the "base year" funding proportions simply doesn't exist any longer; thirty years after the fact. Thus, it is not practically possible to provide a costing of the State's funding responsibility under this requirement of the Michigan Constitution, except for a select few requirements that were quantified in intervening litigation or where funding was provided in an identified proportionate amount of total costs incurred in 1978.

An example of the latter is the proportion of funding required to be paid for the school employees under the State school retirement system, known as the Michigan Public School Employees Retirement System ("MPSERS"). In 1978 school districts and community colleges were required to pay the first 5% of the annual required contribution on behalf of their employees with the State paying the balance of the contribution. As of the present time, due to intervening statutory changes, school districts and community colleges must contribute the full amount of the contribution to MPSERS from operating revenues, without any corresponding payment or reimbursement of those costs from the State. Thus, in this case the amount of the underfunding is readily determinable from 1978 through the present time.

The same problem exits under the second sentence of § 29 for newly (post-1978) imposed requirements on local units of government, except for underfunding occurring over the last few years where accounting information remains available. However even in those instances the actual costs being incurred by local units to provide a given activity or service are not segregated or categorized from an accounting standpoint in order to allow an accurate accounting of the necessary costs being incurred by local units as of the present time. Such an accounting system should be devised to measure underfunding over the recent past. By necessity, that would have to be created and directed at the State level.

The stark reality is that despite the initial attempt to bring about implementation of § 29, represented by the adoption of PA 101, State government thereafter ignored that section of the Headlee Amendment. To be certain immediately following the adoption of the Headlee Amendment determining the base year proportion of funding being provided in 1978 for mandated services was critical, yet no such attempt was ever made. That situation also exists even today for the State's failure to fund activities and services that were first created or the levels of service were expanded after 1978.

Given these inherent problems, the Commission attempted to meet its statutorily delegated responsibility (MCL 4.1782(12), (13)), to report on the range of costs being incurred by local units of government to provide unfunded activities and services required by State law by use of the services of a Specialist in State and Local Government Programs, Michigan State University, Dr. Eric Scorsone. The Commission's request was for Dr. Scorsone to provide a reasonable estimate of the unfunded costs that have been incurred by local units in the past, given the inherent problems identified above. As such, the Commission is able to report only that the scale of the State's past underfunding for mandated services is very substantial, with an estimate of the range of some of those costs being provided. The Commission is not able to report in specific or accurate accounting terms the full dollar extent of the past Constitutional violations of § 29.

Thus, the fact is the State has without question violated its past funding responsibilities under both of the first two sentences of § 29 but there are no means available to quantify that financially significant breach of trust with Michigan voters' beyond the development of rough estimates of some, but not all of those costs.

It must be kept in mind that the State's responsibility under the Constitution to continue to proportionately fund the costs of mandates imposed on local units in 1978 is on-going. While this responsibility can no longer be implemented may be welcome news to State government given the State's current financial crisis, it will not be received so philosophically by local units of government that have experienced the financial effects of the State's dereliction over the last thirty years.

The Commission strongly recommends in the interests of ameliorating this Constitutional compliance problem that the Legislature conduct a review of existing statutes and administrative rules/regulations that represent state law mandates imposed on local units in order to determine whether relief can be provided to local units prospectively. More specifically, there are essentially three choices that the Legislature and Governor can make, consistent within the Headlee Amendment scheme, when state mandates are determined to exist. The mandate can be eliminated by legislative fiat, its requirements can be redesigned for the purpose of reducing costs of compliance, or it can be proportionately or fully funded (depending on when the requirement first came into existence and or an expansion in the requirement first came into existence).

Relative to facilitating payment to local units for the costs of activities and services first required after 1978 or where the level of activities and services have been increased after 1978, that remain after the review process, the Commission recommends that a state department, such as DMB, be tasked with responsibility to create accounting systems that will capture the costs being incurred by local units for mandated services in order to permit accurate payments to them. Implementing such systems will have the added benefit of forestalling suits challenging nonpayment for those services.

There is no reason that these alternatives cannot, albeit belatedly, be considered in the interest of reducing the financial burdens on local units during this time of extreme financial crisis on local units too. It would represent hypocrisy in the extreme to suggest

that at long last state government has chosen to comply with the will of the people expressed in November of 1978, but then wholly ignore the underfunding that has occurred since 1978 and continues to accumulate. While this palliative will not eliminate the reality of the ongoing noncompliance, it will nonetheless meaningfully serve to show the Legislature's and Governor's good faith attempt to rectify the financial impact of this problem.

VIII. RECOMMENDATION FOR CHANGES FOR ACTIVITIES AND SERVICES REQUIRED OF LOCAL UNITS BUT NOT ENCOMPASED BY THE HEADLEE AMENDMENT

As a final recommendation, there are many instances, as noted in the prior parts of this report, where the State has either statutorily or administratively imposed requirements or "mandates" on local units of government that pre-date the ratification of the Headlee Amendment in 1978 and for which no funding was being provided at that time to support the activity or service. As such, the funding responsibility of the State under the Amendment does not come into operation. However, these imposed requirements in many instances are of questionable value to the people of Michigan and, the Commission submits, need to be reviewed due to their continuing costs to local units of government.

An example of this form of requirement is the numerous statutorily required obligations for publication of notices in newspapers of general circulation of matters of public interest, for which no funding was supplied by the State. When these obligations were first imposed – *well* before 1978 – they made a great deal of sense because people in the community commonly used newspapers to learn of such things as the date and time of meetings of public bodies and various forms of public actions/transactions that were under consideration. However, today few could argue that anyone interested in the public's business affairs wouldn't use the local unit's website or resort to a simple telephone call to learn such information. In many cases, local units publish newsletters for that purpose as well. Yet, local units continue to expend tens of millions of dollars annually to publish information in newspapers of general circulation that is not read and thus not meaningful. These monies are, arguably, being wasted.

Given the dire fiscal circumstances of all local units of government, there needs to be a vigorous debate in the Legislature about whether some of the anachronistic requirements of past legislation that is contributing to the potential insolvency of local units should be eliminated or, at least, modernized recognizing the advanced forms of communication or other modern mechanisms that have been devised for efficiency purposes in the private sector.

This should be done, the Commission recommends, wholly apart from whether the Headlee Amendment compels it. Chaining local units of government to past requirements, the purpose for which cannot any longer be justified, is a luxury well beyond the current fiscal circumstances of this State.

IX. SUMMARY

The right of the people of Michigan to reshape the operation of State government in respect to the prohibition on imposing unfunded mandates on local units of government has been rendered inoperative over the last thirty (30) years. This must be corrected in order to provide belated integrity to the constitutional underpinnings of Michigan government.

The Commission recommends the following legislative actions:

A. PA 101 be rescinded

B. Legislation be adopted that sets forth the State's commitment to implementing § 29 of the Headlee Amendment going forward to accomplish the following:

1. Require that no statute which requires new activities and services or an increase in the level of activities or services beyond that required by existing law to be provided by local units of government becomes legally binding on those local units until an appropriation is enacted that serves to pay the affected local units for the increased necessary costs on a current basis.

2. Require that a fiscal note process be created and followed by the Legislature in connection with all bills or amendments to bills that will serve to:

   (a) Require upon introduction that a review of the bill or amendment to a bill be conducted by the respective House or Senate fiscal agency, working in consultation with representatives of local units affected by the bill or amendment to determine whether any new or increased costs are likely to occur as a result of the same being adopted

   (b) The respective House or Senate fiscal agency working in consultation with representatives of the affected local units develop an estimate of the necessary new or increased costs that are likely to be incurred by local units statewide,

   (c) Inform the Legislature of the estimated costs found in (b) above while debate is occurring over the subject bill or amendment, and

   (d) Prior to enactment, create an appropriation bill that is tie barred to the bill creating the requirement which serves to appropriate sufficient funding to pay for the new or increased costs for the affected local units,

(e) A disbursement process is created that provides for payments to local units from the appropriation on a current basis or as the subject expenses are being incurred by the local units.

3. Amend the APA to provide that if a State administrative agency, department, or bureau acts to create a rule or otherwise exercises its authorized powers or responsibilities that will cause local units of government to provide either new activities or services or that represent an increase in the level of any activity or service beyond that required by existing law shall be of no force or effect in law unless and until an appropriation is adopted to pay local units for any necessary increased costs, including a payment or disbursement mechanism to ensure payment on a current basis or as the subject expenses are being incurred by the local units.

C. Legislation should be adopted amending the Revised Judicature Act to amend section 308a of the Act in order to:

1. Create exclusive jurisdiction for original suits brought under § 32 of the Headlee Amendment in the Court of Appeals.

2. Create as a permanent/sitting position within the Court of Appeals a special master with authority:

(a) To receive evidence and determine disputed facts based on the evidence received

(b) To hear and consider arguments of law

(c) To prepare a report for the Court of Appeals that recommends resolution of the disputed questions of fact and law

(d) Recommends, if the suit is sustained, an award of the costs incurred by the plaintiffs in maintaining the suit to be paid by the applicable unit of government

D. Legislation should be adopted which establishes that:

1. The burden of proof in suits brought in the Court of Appeals under § 32 of the Headlee Amendment to enforce the requirements of § 29 shall initially be on the State, in order to establish that any new activities or services or any increases in the level of any activities or services beyond that required by existing law as a result of State law or administrative requirements either does not give rise to any necessary increased costs for the affected local units of government

or the necessary increased costs are being appropriated and paid for in accordance with the requirements of § 29 of the Amendment.

2. If suits are brought under § 32 by a taxpayer to enforce the requirements of § 29 of the Headlee Amendment, alleging that recently enacted legislation is requiring local units to provide either new activities and services or an increase in the level of any activity or service beyond that required by existing law that are not being paid for as required under § 29 of the Amendment the affected local units of government shall not be required to comply with the legislation beyond six (6) months following the filing of such suit, unless the Court of Appeals issues a declaratory judgment finding against the merits of the taxpayer's allegations. This legislation should express that there will be no penalty or offset that is enforced against revenues otherwise due to the local units by operation of exercising its right to not comply pursuant to the foregoing.

3. If State administrative rules/regulations are implemented that will require activities or services that involve incurring necessary increased costs, those activities or services shall not be required to be provided by local units of government until an appropriation is adopted by the Legislature and a disbursement process is implemented to pay the affected local units for any increased necessary costs on a current basis or as those costs are incurred. This legislation should further provide that there will be no penalty or offset that is enforced against revenues otherwise due to the local units by operation of exercising its right to not comply pursuant to the foregoing.

4. In the event the Michigan Court of Appeals issues a declaratory judgment in a suit brought under § 32 of the Headlee Amendment declaring that the State has not met its responsibilities to fund required activities and services as required under § 29 of the Amendment, enforcement of the requirements shall be suspended for all other similarly situated local units of government until such time that the Legislature takes whatever actions may be required to meet the State's responsibilities under that section of the Amendment.

E. An on-going process for monitoring the State's compliance with § 32 of the Headlee Amendment be created that does the following:

1. The Legislative Service Bureau or equivalent, non-partisan State department or agency, working in active consultation with established representatives/associations of local units of government, shall be required by legislation to:

(a) Prepare and publish a report twice annually for the Legislature and Governor on the status of the State's compliance with its funding responsibilities for local units of government under § 29 of the Headlee Amendment, broken down by categories of local units and mandated subjects of activities and services within each such category,

(b) Assist the Legislature in drafting appropriation bills during the annual appropriation process that meets the State's funding responsibilities as reported in (a) above,

(c) Assists the Legislature in creating more efficient or streamlined process for paying or reimbursing local units of government for the necessary costs of required activities and services, and

(d) Assist the Legislature in identifying administrative rules and regulations that impose unfunded mandates on local units of government.

F. Legislation should be adopted that commits the State to dealing with past underfunding of § 29 to the extent possible by doing the following:

1. The Legislature creating a review process to examine all statutes and administrative regulations that require local units of government to incur necessary increased costs as a result of statutes and administrative rules/regulations that require either new activities and services or an increase in the level of any activity or service beyond that required by existing law in order to determine:

(a) Whether the requirements continue to be necessary in the public interest given the extreme financial stress that local units are experiencing and, if not, initiate legislation to rescind the requirement.

(b) If it is determined that that the requirements need to continue in effect in the public interest, to work in consultation with representatives of local units to determine how the required activities and services can be more cost effectively provided and to initiate any changes or amendments to the law necessary to implement changes for that purpose. If the activity or service was either first required after 1978 or the level of the activity or service was increased beyond that required in 1978 that the remaining costs, after implementing such changes, be

funded through adoption of an appropriation and that a system for disbursing such funding be implemented.

(c) If it is determined that the required activities and services cannot be changed in the public interest, that the necessary increased costs for providing same be funded through adoption of an appropriation if the activity or service was either first required after 1978 or the level of the activity or service was increased beyond that required in 1978 and that a system for disbursing such funding be implemented.

(d) Place responsibility in the DMB to create and implement accounting systems that accurately capture the necessary costs being incurred, going forward, by local units of government for activities and services first required after 1978 or which relate to increased levels of activities and services required after 1978.

(e) Relative to any requirements imposed on local units by State law before the Headlee Amendment was ratified and for which no funding was then provided, the Legislature shall conduct a review to determine if it is cost effective for local units to continue to be required to provide the required activities and services and to adopt whatever changes that may serve to reduce or eliminate the costs to local units for same.

The foregoing is respectfully submitted as the final report and recommendations of the Commission on Statutory mandates submitted as of December 31, 2009.

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