

final minutes

Michigan Law Revision Commission Meeting
Wednesday, September 24, 2008 ▪ 9:00 a.m.
Legislative Council Conference Room ▪ 3 Boji Tower
124 W. Allegan ▪ Lansing, Michigan

Members Present:

Richard McLellan, Chair
Anthony Derezinski, Vice-Chair
Senator Ray Basham
Representative Edward Gaffney
Representative Mark Meadows
John Strand
George Ward
Judge William Whitbeck

Members Absent:

Senator Bruce Patterson

Others Present:

Cliff Flood, State Bar of Michigan
Gary Gulliver, MLRC Executive Secretary
Susan Cavanagh, Office of the Legislative Council Administrator
Scott Shewcraft
Bruce Timmons, House Republican Staff
Professor Gina Torielli

I. Convening of Meeting

Chairperson McLellan called the meeting to order at 9:00 a.m. The clerk took the roll as each member introduced themselves. A quorum was present and the absent member was excused.

II. Approval of August 23, 2007 Meeting Minutes

The Chair asked for a motion to approve the minutes of the last meeting. No corrections or amendments were offered.

Mr. Ward moved, supported by Representative Meadows, to adopt the minutes of the August 23, 2007 Michigan Law Revision Commission meeting. The minutes were unanimously adopted.

III. Report on Small Criminal Fines for Resort Association Rules Violations

The Chair presented a report prepared in response to a suggestion made by attorney David Marvin to review section 214 of 1929 PA, MCL 455.214 that provides for a penalty of up to 25 dollars or 30 days imprisonment or both for a violation of the bylaws of summer resort owners corporations. He called on Mr. Gulliver to provide an overview of the proposal which would raise the dollar amount on the basis of inflation and decriminalize the violation. Mr. Gulliver also noted that the email from Bruce Timmons raised several points regarding Michigan's treatment of civil fines. A discussion of the issues followed. After discussion, the Commission will continue to review the issue. Mr. Gulliver will look into and report how resort associations operate and evaluate condominium association laws to see if there is another approach to use. The draft report is attached to these minutes.

IV. Report on Other Small Criminal Fines in Older Michigan Statutes

The Chair proceeded to a report on low criminal fine statutes which identified other older statutes that have minor amounts of criminal fines. The Chair recommended the findings of the report be transmitted to the Legislature. There were no objections. The report is attached to these minutes.

V. Michigan Economic Development Codification

Chairperson McLellan called on Professor Gina Torielli to provide an update on the Michigan Economic Development Codification project. Professor Torielli began with an explanation of the work that has been done to consolidate all of the economic statutes into an Economic Development Code. She proceeded with an overview of her September 24, 2008 memo to the Commission that outlined four of the proposed articles drafted for inclusion in the Code by faculty members from the Thomas M. Cooley Law School. Professor Torielli's memorandum and the proposed articles are attached to these minutes. The Chair noted the need to seek assistance from other groups to work on some of the areas such as the bonding statutes and land use sections as Professor Torielli has already spent a significant amount of time and effort on this project.

VI. Other Business

Report on the Governor's Power to Remove Public Officials from Office and Recommendations

The Chair is contemplating sending the 2003 MLRC Report on the Governor's Power to Remove Public Official from Office and Recommendations to the leaders of the Legislature with a suggestion that they may want to tweak the statute. The issue was discussed further. A copy of the report is attached to these minutes.

Report on Bar Admission Issues for In-House Counsel

The Chair also reported that he is hoping to have a report on bar admission issues for in-house counsel by the end of the year.

Report on Access to Government

Scott Shewcraft was called on by the Chair to report on his progress on the Access to Government and Transparency project. A written report that provided a compilation of statutes pertaining to access to government that will be reviewed was circulated and a discussion of the issue followed. A copy of the report is attached to these minutes.

VII. Public Participation

The Chair asked for public participation. There was none.

VIII. Adjournment

Having no further business, Mr. McLellan moved, supported by Mr. Ward, to adjourn the meeting.

Without objection, the motion was approved. The meeting was adjourned at 11:00 a.m.

(Minutes approved at the March 24, 2009 Michigan Law Revision Commission.)

Report on Resort Associations Civil Infractions:

The Michigan Law Revision Commission received a letter from attorney David Marvin suggesting that the Commission review section 214 of 1929 PA 137, MCL 455.214, and perhaps “alert the Michigan Legislature to the need to update [that] Section.” The section of law, which has not been amended since its enactment in 1929, provides for a penalty of up to 25 dollars or 30 days imprisonment or both for a violation of the bylaws of summer resort owners corporations created under that act. Mr. Marvin indicated that board members of such corporations “have expressed frustration with their inability to compel association members to remedy problems such as unsanitary conditions, public nuisances, roaming dogs, etc.,” complaining “that the \$25 limit in the statute makes it virtually impossible for them to effectively enforce their bylaws.” That inability, according to Mr. Marvin, arises from the fact that the fine is lower than court filing fees and does not provide the economic incentive for violators to alter their behavior, particularly since it is unlikely imprisonment would be ordered. While Mr. Marvin indicates that, adjusting for inflation, the maximum penalty would more appropriately be set at \$300.00, he recommended an increase in the maximum penalty to \$500.00 to make the statute “more effective.”

In responding to Mr. Marvin’s suggestion, a review of penalties in the laws regulating entities similar to those created under 1929 PA 137 was undertaken. The review uncovered three similar outdated statutory provisions. Sections 10 and 13 of 1889 PA 39, MCL 455.60 and 455.63, both of which were last amended in 1895, respectively establish a maximum penalty of 25 dollars or 30 days imprisonment or both for violations of the bylaws of summer resort and assembly associations created under the act and for certain other acts of destruction, injury, or removal of property on the grounds of the associations. Lastly, section 11 of 1887 PA 69, MCL 445.111, which has never been amended, sets a maximum penalty of 25 dollars or 30 days imprisonment for certain acts of destruction, injury, or removal of property committed on the grounds of suburban homestead, villa park and summer resort associations created under that act.

The powers given to the corporations and associations discussed above are often very broad. A corporation formed under 1929 PA 137, for instance, is a “body corporate and politic,” “becom[ing] the local governing body.” MCL 455.204. Such a corporation is authorized to adopt bylaws whose purpose is any of the following:

To keep the grounds of the corporation in good sanitary condition; preserve the purity of the water of all streams, springs, bays, and lakes within or bordering the grounds; and compel persons to keep abutting streets, highways, and sidewalks free from dirt and obstruction..

To protect all occupants from contagious disease and to remove from the grounds all persons afflicted with contagious disease.

To prevent and prohibit all forms of vice and immorality and all disorderly assemblies, disorderly conduct, games of chance, gaming, and disorderly houses.

To regulate billiard and pool rooms, bowling alleys, dance halls, and bath houses.

To prohibit and abate all nuisances.

To regulate meat markets, butcher shops, and other places of business as may become offensive to the health and comfort of members and occupants.

To regulate the speed of vehicles over its streets and alleys and make general traffic regulations.

To prevent the roaming at large of any dog or other animal. MCL 455.212.

The Commission agrees that the penalties provided by the sections enumerated above are outdated and that, depending on the age of the statute involved, most measures of inflation would indicate an adjusted amount between \$300.00 and \$600.00 would be more appropriate. The Commission also notes that fixed dollar amounts will likely require continual updating by the Legislature. The Commission further notes that the Legislature has often determined that the benefits flowing from the authority to levy penal sanctions may be outweighed by the burdens placed on law enforcement agencies and have instead provided for the imposition of civil fines in acts such as the Michigan vehicle code, 1949 PA 300, MCL 257.1 et seq. The Commission’s recommendations are as follows:

1. To preserve their deterrent effect, the maximum fines set by MCL 455.214, 455.60, 455.63, and 455.111 should be increased to \$500.00 with that amount changing at the same rate as the consumer price index, rounded off to the nearest \$10.00.
2. The statutory provisions should be de-criminalized by replacing the criminal fines with civil fines in the manner set forth in other Michigan statutes and eliminating the possibility of imprisonment.
3. Section 12 of 1889 PA 39, MCL 455.62, sections 215 and 216 of 1929 PA 137, MCL 455.215 and 455.216, and section 113 of the Revised Judicature Act of 1961, 1961 PA 236, MCL 600.113, should be amended to reflect the de-criminalization of the statutory provisions identified above.

Proposed Amendments

1889PA 39

Sec. 10. Any person who shall violate any of such by-laws made as in said last section provided, *shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine IS RESPONSIBLE FOR A CIVIL INFRACTION AND MAY BE ORDERED TO PAY A CIVIL FINE AND COURT COSTS* not exceeding 25 **500** dollars *or imprisonment in the county jail not to exceed 30 days, or by both such fine and imprisonment in the discretion of the court*, which fine shall go to the same fund as other **CIVIL** fines *for misdemeanor* in the township where such association lands may be located.

Sec. 12. The marshal shall have the authority to take any person arrested **OR ISSUED A CIVIL INFRACTION CITATION**, before the district or municipal court of the judicial district or municipality in which the association lands are situated, to be dealt with according to law.

Sec. 13. Any person who shall willfully destroy, injure or remove any statuary, fence, fountain, hydrant, building or other structure placed on the grounds of the association, any dock, landing, quay or boat house thereon, or boat upon the waters upon which such lands are located, the property of any association incorporated under this act, or of any individual member thereof, or who shall willfully cut or injure any tree, shrub or plant upon such grounds, or shall deposit in any spring, stream, reservoir or water pipe, or water upon or within such grounds or in front thereof, any filth or impurity, or who shall in any way injure any water pipe, lock or reservoir for the storage or passage of water along or upon such grounds, or any sewer or drain, *shall be deemed guilty of a misdemeanor, and shall be liable, on conviction thereof, to a fine IS RESPONSIBLE FOR A CIVIL INFRACTION AND MAY BE ORDERED TO PAY A CIVIL FINE AND COURT COSTS* not exceeding 25 **500** dollars, *or imprisonment in the county jail not exceeding 30 days, or by both such fine and imprisonment, in the discretion of the court.*

1887 PA 69

Sec. 11. Any person who shall willfully destroy, injure or remove any statuary, fence, fountain, building or other structure placed on the grounds, or any dock, landing, quay, boat house, or boat upon the waters upon which said grounds are located, the property of any association incorporated under this act, or of any individual member thereof, or who shall willfully cut or injure any trees, shrub or plant within the said grounds, *shall be deemed guilty of a misdemeanor, and shall be liable on conviction thereof to a fine IS RESPONSIBLE FOR A CIVIL INFRACTION AND MAY BE ORDERED TO PAY A CIVIL FINE AND COURT COSTS* not exceeding 25 **500** dollars, *or in default of fine to imprisonment in the county jail for a period not exceeding 30 days, PURSUANT TO AN* action *for the enforcement of such penalty to be brought* in the name of the people of the state of Michigan upon the complaint of the trustees of the association or an individual member thereof; and such offender shall also be liable in an action of trespass to be brought in the name of such association for all damages caused by such unlawful act or acts.

1929 PA 37

Sec. 14. Any person who shall violate any of such by-laws *shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of* **IS RESPONSIBLE FOR A CIVIL INFRACTION AND MAY BE ORDERED TO PAY A CIVIL FINE AND COURT COSTS** not exceeding 25 **500** dollars *or imprisonment in the county jail not to exceed 30 days or by both such fine and imprisonment in the discretion of the court*, which fine shall be distributed to the same fund as *other misdemeanor CIVIL* fines in the township where such lands may be located.

Sec. 15. The board of trustees may appoint a marshal, whose duties shall be to enforce the by-laws of said corporation. Said marshal shall have the authority of a deputy sheriff in maintaining peace and order and the enforcement of law on the lands under the jurisdiction of the corporation, and in addition thereto shall be vested with authority to make arrests **AND ISSUE CIVIL INFRACTION CITATIONS**, in accordance with law, for the violation of the by-laws of said corporation. Compensation of said marshal shall be fixed and paid by said corporation and the said corporation shall alone be responsible for his acts; he may be removed at any time by a majority vote of the trustees, with or without cause; in the discharge of his duties in respect to any matter that is an offense against the general laws of the state, his fees and charges shall be regulated and paid in the same manner as other officers.

Sec. 16. The marshal shall have authority to take any person arrested **OR ISSUED A CIVIL INFRACTION CITATION** before the district or municipal court of the judicial district or municipality in which the lands of the corporation are situated, to be there dealt with according to law.

1961 PA 236

Sec. 113. (1) As used in this act:

(a) "Civil infraction" means an act or omission that is prohibited by a law and is not a crime under that law or that is prohibited by an ordinance and is not a crime under that ordinance, and for which civil sanctions may be ordered. Civil infraction includes, but is not limited to, the following:

(i) A violation of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws, designated as a civil infraction.

(ii) A violation of a city, township, or village ordinance substantially corresponding to a provision of Act No. 300 of the Public Acts of 1949, if the ordinance designates the violation as a civil infraction.

(iii) A violation of an ordinance adopted pursuant to Act No. 235 of the Public Acts of 1969, being sections 257.941 to 257.943 of the Michigan Compiled Laws.

(iv) A violation of a city, township, or village ordinance adopting the uniform traffic code promulgated under Act No. 62 of the Public Acts of 1956, being sections 257.951 to 257.954 of the Michigan Compiled Laws, if the uniform traffic code designates the violation as a civil infraction.

(v) A violation of an ordinance adopted by the governing board of a state university or college pursuant to Act No. 291 of the Public Acts of 1967, being sections 390.891 to 390.893 of the Michigan Compiled Laws, if the ordinance designates the violation as a civil infraction.

(vi) A violation of regulations adopted by a county board of commissioners pursuant to Act No. 58 of the Public Acts of 1945, being section 46.201 of the Michigan Compiled Laws.

(vii) A municipal civil infraction.

(viii) A state civil infraction.

(ix) A violation of the pupil transportation act, Act No. 187 of the Public Acts of 1990, being sections 257.1801 to 257.1877 of the Michigan Compiled Laws, designated as a civil infraction.

(b) “Civil infraction action” means a civil action in which the defendant is alleged to be responsible for a civil infraction.

(c) “Municipal civil infraction” means a civil infraction involving a violation of an ordinance. Municipal civil infraction includes, but is not limited to, a railway municipal civil infraction. Municipal civil infraction does not include a violation described in subdivision (a)(i) to (vi) or (ix) or any act or omission that constitutes a crime under any of the following:

(i) Article 7 or section 17766a of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7101 to 333.7545 and 333.17766a of the Michigan Compiled Laws.

(ii) The Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.1 to 750.568 of the Michigan Compiled Laws.

(iii) Act No. 300 of the Public Acts of 1949, being sections 257.1 to 257.923 of the Michigan Compiled Laws.

(iv) The Michigan liquor control act, Act No. 8 of the Public Acts of the Extra Session of 1933, being sections 436.1 to 436.58 of the Michigan Compiled Laws.

(v) Part 801 (marine safety) of the natural resources and environmental protection act, Act No. 451 of the Public Acts of 1994, being sections 324.80101 to 324.80199 of the Michigan Compiled Laws.

(vi) The aeronautics code of the state of Michigan, Act No. 327 of the Public Acts of 1945, being sections 259.1 to 259.208 of the Michigan Compiled Laws.

(vii) Part 821 (snowmobiles) of Act No. 451 of the Public Acts of 1994, being sections 324.82101 to 324.82159 of the Michigan Compiled Laws.

(viii) Part 811 (off-road recreation vehicles) of Act No. 451 of the Public Acts of 1994, being sections 324.81101 to 324.81150 of the Michigan Compiled Laws.

(ix) The railroad code of 1993, Act No. 354 of the Public Acts of 1993, being sections 462.101 to 462.451 of the Michigan Compiled Laws.

(x) A VIOLATION OF SECTION 13 OF 1889 PA 39, MCL 455.63; SECTION 11 OF 1887 PA 69, MCL 455.111; OR A BYLAW ESTABLISHED UNDER 1889 PA 39, MCL 445.51 ET SEQ., OR 1929 PA 137, MCL 445.201 ET SEQ.

(XI) Any law of this state under which the act or omission is punishable by imprisonment for more than 90 days.

(d) “Municipal civil infraction action” means a civil action in which the defendant is alleged to be responsible for a municipal civil infraction. Municipal civil infraction action includes, but is not limited to, a railway municipal civil infraction action.

(e) “State civil infraction” means a civil infraction involving either of the following:

(i) A violation of state law that is designated by statute as a state civil infraction.

(ii) A violation of a city, township, village, or county ordinance that is designated by statute as a state civil infraction.

(f) “State civil infraction action” means a civil action in which the defendant is alleged to be responsible for a state civil infraction.

(g) “Trailway municipal civil infraction” means a municipal civil infraction involving the operation of a vehicle on a recreational trailway at a time, in a place, or in a manner prohibited by ordinance.

(h) “Trailway municipal civil infraction action” means a civil infraction action in which the defendant is alleged to be responsible for a trailway municipal civil infraction.

(2) Except as otherwise provided in this act:

(a) A civil infraction action involving a traffic or parking violation is governed by Act No. 300 of the Public Acts of 1949.

(b) A municipal civil infraction action is governed by chapter 87.

(c) A state civil infraction action is governed by chapter 88.

(3) A determination that a defendant is responsible for a civil infraction and thus subject to civil sanctions shall be by a preponderance of the evidence.

Low Criminal Fine Statutes:

Recognizing the wisdom of Mr. Marvin's suggestion regarding certain statutory provisions setting criminal fines whose minimum amount is not sufficient to encourage the enforcement of the provisions, the Michigan Law Revision Commission surveyed Michigan law to determine which Michigan statutory provisions either set a criminal fine of \$25 or less or set a range of criminal fines, whose minimum is less than \$50 and whose maximum is not more than \$100. The survey uncovered 41 such statutory provisions.

In some instances, the length of time that has elapsed since a provision was last addressed statutorily is of sufficient length to suggest that it be examined by the Legislature to determine whether amendments similar to that previously recommended for the summer resort and assembly associations laws should be adopted for the provisions as well, including an increase in the amount of the fines; a decriminalization of the provision's enforcement, if applicable; and an indexing of the amount of the fines to the consumer price index. An example of such a section is MCL 255.8, enacted as part of the Revised Statutes of 1846, but never amended since that time. Other sections, such as MCL 324.17107, have been only recently enacted, but were enacted as part of a recodification with the language of the section having remained unchanged for decades. The Commission also recommends a legislative examination of those sections for their possible amendment in the fashion described above. Lastly, other statutory sections, such as MCL 286.259, have recently been the subject of a legislative enactment, not as part of a recodification. The dollar amount of the fines set by those sections may be appropriate but the applicability of the Commission's recommendations regarding the decriminalization of the sections' enforcement and the indexing of the amount of the criminal fines should be assessed by the Legislature, if only to eliminate the need for continual amendments in the future. (The Commission recognizes that such indexing may be appropriate for higher fines as well, but is addressing only those fines meeting the criteria set out above.) The section number of the 41 sections described above, along with the statutorily or editorially supplied short description of the acts or parts of acts in which they are found, the year of the most recent legislative enactment regarding the sections, and the dollar amount of the fines are set out below:

28.246 Bureau of Criminal Identification and Records 1987 \$25-\$100
54.222 Section Corners and Quarter Posts 1889 \$25-\$50
205.105 Use Tax Act 1949 \$25/day
247.182 Use of Highway by Public Utilities 1925 \$15-\$50
255.8 Of the Regulation of Ferries 1846 \$25
286.84 Cherry Pests 1929 \$25-\$100
286.226 The Insect Pest and Plant Disease Act 1955 \$25-\$100
286.259 The Insect Pest and Plant Disease Act 2005 \$25-\$100
287.209 Breeding of Horses 1929 \$25-\$100
289.40 Dairy and Food Commissioner 1893 \$10-\$100
289.44 Dairy and Food Commissioner 1893 \$10-\$50
289.252 Immature or Unwholesome Calves 1913 \$25-\$100
289.645 Seal of Quality Act 1961 \$25-\$100
290.133 Standard Climax Baskets, Baskets, or Other Containers 1917 \$25
290.465 Wholesale Potato Dealers 1964 \$25-\$100
317.208 Wild Life Sanctuaries 1929 \$25-\$100
317.225 Pine Lake Wild Life Sanctuary 1925 \$25-\$100
317.245 Harbor Beach Refuge 1929 \$10-\$100
324.17107 Battery Disposal 1995 \$25
324.40903 Homing Pigeons 1995 \$25-\$100
324.46902 Taking Rainbow Trout in Soo Rapids and St. Mary's River 1994 \$10-\$100
324.47334 Commercial Fishing 1995 \$25-\$100
333.2843 Vital Records 2002 \$25-\$100
380.1599 The Revised School Code 1976 \$5-\$50

Report on Other Small Criminal Fines

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380.1807 The Revised School Code 1976 \$25-\$100
380.1808 The Revised School Code 1976 \$2-\$50
380.1812 The Revised School Code 1976 \$5-\$50
390.892 Traffic Ordinances at School Universities and Colleges 1978 \$25
390.892a Traffic Ordinances at School Universities and Colleges 1998 \$25
408.403 Legal Day's Work 1990 \$5-\$50
421.54 Michigan Employment Security Act 2002 \$25
427.7 Hotels, Inns, and Public Lodging Houses 1913 \$25-\$50
427.14 Hotels, Inns, and Public Lodging Houses 1913 \$25-\$50
444.27 Warehousemen and Warehouse Receipts 1895 \$25
445.5 Carrying on Business under Assumed or Fictitious Name 1949 \$25-\$100
446.218 Pawnbrokers 1917 \$25-\$100
453.362 Protection of Fair Grounds and Exhibitions 1873 \$25
460.55 Michigan Public Utilities Commission 1919 \$10-\$100
551.105 Marriage License 1887 \$25-\$100
551.204 Issuance of Marriage License without Publicity 1979 \$25-\$100
750.497 The Michigan Penal Code 1931 \$10

MEMORANDUM

TO: Michigan Law Revision Commission

FROM: Professor Gina M. Torielli

DATE: September 24, 2008

RE: Status of Michigan Economic Code Project

Code Structure

In late 2006, the Commission identified more than 50 current statutes as relating to Michigan state and local government “efforts to increase employment opportunities by getting new businesses to relocate in a community or existing businesses to expand.” Attached, is an updated and annotated proposed structure for a Michigan Economic Development Code, which groups these statutes into categories based on the function exercised, industry affected, or level of government involved.

Code Drafting

We have identified a number of public acts since late 2006 that may also be candidates for the Code, and are in the process of evaluating each for inclusion.

Faculty members from the Thomas M. Cooley Law School drafted four of the proposed articles for inclusion in the Code. These include:

- Article I – General Provisions;
- Article III - Promoting the Michigan Agricultural Economy;
- Article VI – Energy Source Development; and,
- Article X – Michigan Workforce Development.

These drafts were circulated to MLRC staff and revised to reflect staff comments. Revised versions of these articles were circulated to the Commission members for comment.

The drafters followed the Commission’s overall principle that it would not recommend any changes in policy as reflected in current legislation. Rather, the Commission directed drafters to attempt to consolidate and harmonize existing law without making substantive changes. Where changes are made or recommended, drafters added notes to make this process transparent.

The drafting of Article I, however, requires certain decisions regarding the overall structure of the Code that may result in some deviation from the “no changes” principle. These decisions include:

Title for the Act: Of necessity, a new title must be drafted for the Code. The title proposed is much shorter than the NREP Act on which this Code project is based, or the Michigan Strategic Fund Act (MSF Act), which makes up a large part of the proposed Code. The drafters had initially proposed a longer title consistent with the MSF Act, but Commission staff suggested a shorter title is more appropriate. The drafters would like feedback as to whether the proposed shorter title is missing any component necessary or desirable.

Liberal Construction of the Code: The MLRC should consider whether to add a section in Article I to the effect that the entire Code be liberally construed to effectuate the legislative intent and its purposes. Such a provision appears in many places (but not universally) in the statutes comprising the proposed Code. As the intention is not to change existing law, the drafter left the liberal construction passages only in the parts of the Code where they exist. However, this will raise the specter that a court - now that everything is in one code - may be more likely to decide that parts of the Code that don't have this language should be narrowly construed. The drafter does not know whether liberal or narrow construction currently is the rule or legislative intent for those statutes.

Division V – Sunshine Provisions: The MLRC should consider whether to add a division in Article I that would subject the entire Code to various provisions relating to government transparency, avoiding the appearance of conflict, and program oversight. Such provisions appear in many places (but not universally) in the statutes comprising the proposed Code. Including them in Article I would involve a policy change in some cases, but may be an uncontroversial improvement within the ambit of the MLRC to recommend. Provisions for possible inclusion in Article I include:

- **Open Meetings.** Although governmental entities included in the Code are subject to the Open Meetings Act, some quasi public entities may not be unless the Code includes them.
- **Access to Information.** Except as specifically exempted in the code, any writing prepared, owned, used, in the possession of, or retained by any authority, board or commission created or authorized pursuant to the code, in the performance of an official function would be made available to the public in compliance with the freedom of information act.
- **Oaths of Office.** Before beginning his or her duties, a member of any authority, board or commission created or authorized pursuant to the code would be required to take and subscribe the constitutional oath of office. A record of each oath or affirmation would be filed in the office of the secretary of state.
- **Payment of Expenses.** Except as specifically provided in the code, a member of any authority, board or commission created or authorized pursuant to the code would not be entitled to compensation for services as a member, but may be reimbursed for all actual and necessary expenses incurred in connection with the performance of duties as a member. The drafter notes that the tourism commission is limited to 25 days of expenses and is explicitly subject to Department of Management and Budget rules. The MLRC should consider whether these limitations should be made (or if they are already made) universal.
- **Conduct of Business.** An authority, board or commission created or authorized pursuant to the code would be allowed to act only by resolution. A majority of the members of the authority, board or commission then in office, or of any committee, would constitute a quorum for the transaction of business. The drafters note that quorum may not be a majority for all authorities, boards and commissions and some commissions may be able to act without resolution. Perhaps someone from the Attorney General's office could advise the Commission on this point. The tourism commission act states that a majority of those present and serving is required for action. The MLRC should consider whether this requirement should be made universal.
- **Avoidance of Personal Gain.** A member of any authority, board or commission created or authorized pursuant to the code would be prohibited from using for personal gain information obtained by the member while performing business of the authority, board or commission, and from disclosing confidential information obtained by the member while conducting authority, board or commission business, except as necessary to perform official business.

- Duties of governor. The governor would be directed to inquire into the administration any state activities under the Code. The governor would be authorized to remove or suspend any appointive public officer for violations of the Code. The governor may request the MEDC to remove or suspend any MEDC corporate employee for violations of the Code. The governor would be authorized to remove or suspend any elective public officer for violation of the Code that constitutes gross neglect of duty, corrupt conduct in office, misfeasance, or malfeasance. The governor's powers to remove or suspend would not apply to any public officer of the legislative branch or the judicial branch of state government.
- Chief Compliance Officer. The concept of a Chief Compliance Officer is currently contained in the Michigan Strategic Fund Act and does not apply to other agencies or levels of government. The MLRC or the Legislature must make a policy decision regarding the extent to which the COO concept should apply.
- Harmonized definitions. The drafters would like direction from the MLRC regarding the extent to which drafters should develop consistent definitions for common terms (such as "person"), and a process for determining what that definition should be. One view is that the drafters should adopt the more modern definition, and that this choice should not be viewed as substantive. However, there may be agency or court interpretation of component acts that hold otherwise.
- Conflicts of Interest. The drafters note, that there are strong anti-conflicts of interest provisions relating to certain agricultural commissions and committees that might be made generally applicable to all commission, authority and boards. These define "substantial conflict of interest" as "the pecuniary interest is of such importance as to either materially influence the judgment of the member in the actual performance of his or her duty under the act or to foreseeably and materially influence the judgment of a reasonable person with similar knowledge and experience acting under similar circumstances and in a like position as the member." Members of the commissions, authorities and committees are required to do the following:
 - (a) Discharge the duties of the position in a nonpartisan manner, in good faith, in the best interests of this state, and with the degree of diligence, care, and skill that a fiduciary would exercise under similar circumstances in a like position..
 - (b) Not make or participate in making, or in any way attempt to use his or her position to influence a matter before the relevant state department regarding, a loan, loan guarantee, grant, or other expenditure under this part.
 - (c) Not have any financial interest in a recipient of proceeds under this part and shall not engage in any conduct that constitutes a substantial conflict of interest.
 - (d) Immediately advise the commission of agriculture in writing of the details of any incident or circumstances that may present the existence of a substantial conflict of interest with respect to the performance of his or her duty under this part.
 - (e) Disclose a substantial conflict of interest related to any matter before the relevant state department or the commission takes any action with respect to the matter, which disclosure shall become a part of the record of the official proceedings.
 - (f) Refrain from doing all of the following with respect to the matter that is a basis of a substantial conflict of interest: (i) voting in the proceedings related to the matter; (ii) participating in the discussion or deliberation of the matter; (iii) being present at the meeting when the discussion, deliberation, and voting on the matter takes place; or (iv) discussing the matter with any other member of the commission.

II. Next Steps

With MLRC direction on the issues outlined above, the drafters can complete drafts of the four articles previously submitted and to draft a report to the Legislature containing the framework and those articles. Drafters will also update the framework and drafted articles with new legislation since late 2006. It may also be possible to complete workable drafts of three more articles for inclusion in this report (Article II - State Strategic Fund, Article V – State International Trade Development, and Article IX – State Infrastructure Development).

Other articles that would require harmonization contain numerous existing and overlapping statutes or require special drafting expertise might better be drafted through legislatively directed projects. The drafters suggest the MLRC commend these to the Legislature for consideration. These articles include:

- Article IV - Michigan Land Use Revitalization
- Article VII – Encouraging Michigan As A Destination For Tourism, Conventions And The Film Industry
- Article VIII – Local Economic Revitalization Authorities
- Article XI – Planning Michigan Economic Development
- Article XII – Financing Michigan Economic Development

MICHIGAN ECONOMIC DEVELOPMENT (MEDC)

DRAFT OF ARTICLE I

ARTICLE I – GENERAL PROVISIONS

STATUS, ARTICLE I DRAFTED BY GINA T., REVIEWED BY GARY G. REVISED VERSION RESUBMITTED. MLRC TO DISCUSS SOME BIG PICTURE ISSUES IN ORDER TO FINALIZE THIS ARTICLE AND SET THE TONE FOR THE CODE.

DIVISION I – TITLE

~~Sec. 11101. Title. AN ACT relating to the economic development of this state; to codify, revise, consolidate, and classify laws relating to the economic development activities of the state and political subdivisions of the state; to provide for the creation of public economic development corporations; to provide for the issuance of notes, bonds and other evidence of indebtedness; to validate bonds, notes, and other evidence of indebtedness; to provide for condemnation of property; to provide for the undertaking of projects relative to the economic development of the state and its political subdivisions; to provide for the creation and funding of certain accounts for certain purposes; to establish the Michigan early stage venture investment fund and other funds; to provide for tax credits and incentives; to authorize certain investments; to impose certain powers and duties upon certain state and local agencies and officials; to provide for certain charges, fees, assessments, and donations; to provide certain appropriations; to provide penalties and remedies; and to repeal acts and parts of acts.~~

DIVISION II - LEGISLATIVE FINDINGS

DIVISION III

Sec. 11301. Short Title.

~~Sec. 11302. Repeal Of Statute; Effect.~~

~~The repeal of any statute by this act does not relinquish any penalty, forfeiture, or liability, whether criminal or civil in nature, and such statute shall be treated as still remaining in force as necessary for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of the penalty, forfeiture, or liability.~~

~~Sec. 11303. Heading Or Title; Effect.~~

~~A heading or title of an article, chapter, part, or subpart of this act shall not be considered as a part of this act or be used to construe the act more broadly or narrowly than the text of the sections of the act would indicate, but shall be considered as inserted for the convenience of the users of this act.~~

Sec. 1130~~2~~4. Members Of Predecessor Agencies; Powers.

Sec. 1130~~3~~5. Existing Rules; Effect.

Sec. 1130~~4~~6. Orders; Effect.

Sec. 1130~~5~~7. Editorial Changes; Effect; Intent.

Sec. 1130~~6~~8. Construction of Code.

~~Sec. 11309. Severability.~~

~~If any article, division, part, section, subsection, paragraph, clause, or provision of this code shall be adjudged unconstitutional or ineffective, no other article, division, part, section, subsection, paragraph, clause, or provision of this code shall on account be deemed invalid or ineffective and the inapplicability~~

~~of any article, division, part, section, subsection, paragraph, clause, or provision of this code in any 1 or more instances or under any 1 or more circumstances shall not be taken to affect or prejudice in any way its applicability or validity in any other instance or under any other circumstance.~~

DIVISION IV – DEFINITIONS

[Drafter’s comment: Once all sections of the Code have been assembled, decisions will be made regarding consolidations of other definitions into this Division of the Code.]

DIVISION V – SUNSHINE PROVISIONS

Sec. 11501. Open Meetings. OFFICE OF CHIEF COMPLIANCE OFFICER

~~[Drafter’s question: Should some of the sunshine and anti-conflict provisions found inconsistently in individual authority, board and commission statutes be moved up here and made universal?~~

~~Examples of such provisions might be:~~

Sec. 11502. Access to Information. (2)

Sec. 11503. Oaths of Office. (3)

Sec. 11504. Payment of Expenses.

Sec. 11505. Conduct of Business. (5)

Sec. 11506. Avoidance of Personal Gain. (6)

Sec. 11507.(7) Duties of governor.

Sec. 11508. Conflicts of Interest.

Sec. 115031. Office of Chief Compliance Officer

ARTICLE II - STATE MICHIGAN STRATEGIC FUND TO PROMOTE ECONOMIC COMPETITIVENESS

STATUS. THIS ARTICLE CONTAINS THOSE PORTIONS OF THE MSF STATUTE NOT MOVED TO OTHER ARTICLES. ONCE OTHER ARTICLES ARE DRAFTED, THIS ONE WILL BE PUT TOGETHER FROM THE REMAINS.

Division I - State Strategic Fund

Statutes:

1. PA 270 of 1984 - Michigan Strategic Fund Act, as revised in 2008
2. PA 317 of 2006 - Michigan Strategic Fund Centers

ARTICLE III - PROMOTING THE MICHIGAN AGRICULTURAL ECONOMY STATUS, ARTICLE III DRAFTED BY GINA T., REVIEWED BY GARY G. REVISED VERSION RESUBMITTED.

Division I – State Promotion Of Agricultural Value Added Products

Statutes:

1. PA 322 of 2000 – Julian-Stille Value-Added Act
2. [PA 423 of 2006 – Amendment, Gina will check to be sure included]
3. PA 451 of 1994 - Forest Finance Authority Act - Natural Resources and Environmental Protection Act (Excerpt – MCL 324.50501)

Division II - Other State Activities Promoting The Agricultural Economy

[Reserved for future legislation or cross-reference to existing law not part of the code.]

ARTICLE IV - MICHIGAN LAND USE REVITALIZATION

STATUS. NOT STARTED AND WOULD BENEFIT FROM A LEGISLATIVELY DIRECTED TEAM, TO REFORM RATHER THAN REITERATE THIS AREA, AS THIS INVOLVES CONDEMNATION (THE SUBJECT OF 2006 CONSTITUTIONAL AMENDMENT) AND BONDING POWERS.

Division I – Land Rehabilitation and Blight Reduction

Statutes:

1. PA 146 Of 2000 - Obsolete Property Rehabilitation Act
2. PA 381 Of 1996 – Brownfield Redevelopment Financing Act
3. PA 173 Of 1992 - Land Reclamation and Improvement Authority Act
4. Portions Of Statutes Included Elsewhere In The Code Involving Rehabilitation and Blight Reduction.

Division II - Land Assembly

Statutes:

1. PA 258 Of 2003 – Land Bank Fast Track Act
2. PA 260 Of 2003 – Tax Reverted Clean Title Act
3. PA 171 Of 1981 – Michigan Urban Land Assembly Act
4. Portions Of Statutes Included Elsewhere In The Code Involving Land Assembly.

ARTICLE V – MICHIGAN INTERNATIONAL TRADE DEVELOPMENT

STATUS. NOT STARTED. THIS NEEDS A DRAFTER FAMILIAR WITH THIS AREA.

Division I – State Foreign Trade Infrastructure

Statutes:

1. PA 157 Of 1986 - Michigan Export Development Act
2. PA 24 Of 1968 - Division Of International Commerce
3. PA 154 Of 1963 - Foreign Trade Zones
4. PA 639 Of 1978 – Hertel Stopczyznski Port Authority Act
5. Portions Of Statutes Included Elsewhere In The Code Involving International Trade.

Division II – State Agricultural Export Development

Statutes:

1. PA 23 Of 1968 - Foreign Trade Branch Of Department Of Agriculture
2. PA 359 Of 1990 – Michigan Farm Export Act

ARTICLE VI – ENERGY SOURCE DEVELOPMENT

STATUS, ARTICLE VI DRAFTED BY GINA T., REVIEWED BY GARY G. REVISED VERSION RESUBMITTED.

Division I – State Encouragement Of Alternative Energy Development

Statutes:

1. PA 593 Of 2002 - Michigan Next Energy Authority Act
2. PA 272 Of 2006 - Renewable Fuels Commission Act (Sunset 1/1/2010)

Division II – State Encouragement For Development Of Products Enhancing Energy Efficiency

[Reserved for future legislation or cross-reference to existing law not part of the code.]

ARTICLE VII – ENCOURAGING MICHIGAN AS A DESTINATION FOR TOURISM, CONVENTIONS AND THE FILM INDUSTRY

STATUS. NOT STARTED AND WOULD BENEFIT FROM A LEGISLATIVELY DIRECTED TEAM, TO REFORM RATHER THAN REITERATE THIS AREA. LOTS OF OVERLAPPING AND SOME DEFUNCT (SUPERBOWL) LEGISLATION.

Division I – Promotion Of Tourism

Part A: State Activities

Statutes:

1. PA 106 Of 1945 – Michigan Tourism Policy Act

Part B: State Activities

Statutes:

1. PA 244 Of 1991 – Regional Tourism Marketing Act

Division II – Promotion Of Michigan As A Convention Destination

Part A: State Activities

Statutes:

1. PA 106 Of 1985 – State Convention Facility Development Act

Part B: Local Activities

Statutes:

1. PA 180 Of 1991 – Stadia Or Convention Facility Development
2. ~~PA 395 of 1980 – Community Convention or Tourism Marketing Act~~
2. PA 383 Of 1980 – Convention and Tourism Marketing Act
- 3.
- 3.4. PA 203 Of 1999 – ~~Community~~ Convention ~~Facility Financing Or Tourism Marketing~~ Act

Division III – State Activities Promoting Film Industry Activity In Michigan

Statutes:

1. PA 63 Of 2001 – History, Arts and Libraries Act (Excerpt MCL 399.721-722)
2. PA 657 Of 2006 – Use Tax Exemption For Motion Picture Industry Activities In Michigan
3. 2008 Film incentive legislation.

ARTICLE VIII – LOCAL ECONOMIC REVITALIZATION AUTHORITIES

STATUS. NOT STARTED WOULD BENEFIT FROM A LEGISLATIVELY DIRECTED TEAM, TO REFORM RATHER THAN REITERATE THIS AREA.

Division I – Local Economic Development Corporations

Statute:

1. PA 338 Of 1974 – Economic Development Corporations Act

Division II - Local Commercial Development Authorities

Statutes:

1. PA 197 Of 1975 - Downtown Development Authority Act
2. PA 280 Of 2005 - Corridor Improvement Authority Act
3. PA 59 Of 1986 - Resort District Rehabilitation Act
4. PA 120 Of 1961 - Principal Shopping Districts and Business Development Districts Act
5. PA 451 Of 1994 - Waterfront Revitalization - Natural Resources and Environmental Protection Act (Excerpt – MCL 324.79501)
6. PA 255 Of 1978 - Commercial Redevelopment Act
7. PA 210 Of 2005 - Commercial Rehabilitation Act

Division III – Local Industrial Redevelopment Authorities

Statutes:

1. PA 198 Of 1974 - Plant Rehabilitation and Industrial Development Districts

Division IV – Urban Redevelopment

Statutes:

1. PA 250 Of 1941 - Urban Redevelopment Corporations Law
2. PA 376 Of 1996 - Michigan Renaissance Zone Act
3. PA 56 Of 1980 - Neighborhood Assistance and Participation Act

ARTICLE IX – MICHIGAN INFRASTRUCTURE DEVELOPMENT FOR ECONOMIC GROWTH

STATUS. NOT STARTED. THIS NEEDS A DRAFTER FAMILIAR WITH THE AREA.

Statutes:

1. PA 385 Of 1984 – Technology Park Development Act
2. PA 231 Of 1987 – Transportation Economic Development Fund
3. PA 295 Of 1976 - State Transportation Preservation Act Of 1976 (Excerpt)
4. PA 49 Of 2002 - Michigan Broadband Development Authority Act

ARTICLE X – MICHIGAN WORKFORCE DEVELOPMENT

STATUS, ARTICLE I DRAFTED BY PROFESSOR BERRY, REVIEWED BY GARY G. REVISED VERSION BY PROFESSOR TORIELLI RESUBMITTED.

Statutes:

1. PA 489 Of 2000 - 21st Century Jobs Trust Fund Act
2. PA 48 Of 1982 - Michigan Business and Industrial Training Act

ARTICLE XI – PLANNING MICHIGAN ECONOMIC DEVELOPMENT

STATUS. NOT STARTED AND THERE APPEARS TO BE A LOT OF OVERLAP. THIS ARTICLE WOULD BENEFIT FROM A LEGISLATIVELY DIRECTED TEAM, TO REFORM RATHER THAN REITERATE THIS AREA, AS IT INVOLVES OVERLAPPING FEDERAL/STATE INITIATIVES, AND SOME MAY BE DEFUNCT.

Statutes:

1. PA 46 Of 1966 – County Or Regional Development Commission
2. PA 116 Of 1963 – Economic Expansion
3. PA 224 Of 1985 – Enterprise Zone Act
4. PA 123 Of 1995 – Enterprise Community Development Corporation Act

5. PA 75 Of 1995 – Empowerment Zone Development Corporation Act
6. PA 89 Of 1986 – Michigan BIDCO Act

**ARTICLE XII – FINANCING MICHIGAN ECONOMIC DEVELOPMENT
STATUS. NOT STARTED AND DIVISION III (AND POSSIBLY II) WOULD BENEFIT FROM
A LEGISLATIVELY DIRECTED TEAM, TO REFORM RATHER THAN REITERATE THIS
AREA, TO REDUCE COMPLEXITY AND PLETHORA OF GOVERNMENTAL ENTITIES.**

Division I - Purposes

Division II – State Venture Capital

Statutes:

1. PA 198 Of 1984 - Michigan Business Incubation Act
2. PA 24 Of 1995 - Michigan Economic Growth Authority Act
3. PA 296 Of 2003 - Michigan Early Stage Investment Act Of 2003
4. PA 175 Of 1982 - State Research Fund
5. PA 489 Of 2000 - 21st Century Jobs Trust Fund Act
6. Portions Of Statutes Included Elsewhere In The Code Involving Venture Capital.

Division III - Conduit Financing

Part A: State- and Municipal-Chartered Corporations

Statutes:

1. Portions Of Statutes Included Elsewhere In The Code Involving State-Level Conduit Bond Financing.

Part B - Municipal-Chartered Corporations

Statutes:

1. PA 450 Of 1980 - The Tax Increment Finance Authority Act
2. PA 281 Of 1986 - The Local Development Finance Act
3. PA 62 Of 1963 - Industrial Development Revenue Bond Act Of 1963
4. Portions Of Statutes Included Elsewhere In The Code Involving Local Conduit Bond Financing.

ARTICLE XIII – MICHIGAN AND THE KNOWLEDGE ECONOMY – RESERVED

ARTICLE XIV – MICHIGAN FOREST ECONOMY – RESERVED

ARTICLE XV – MICHIGAN AFFORDABLE HEALTH CARE – RESERVED

ARTICLE XVI - REPEALER SECTION

**THIS ARTICLE WILL BE THE LAST ONE DONE, AND JUST REPEAL STATUTES
THAT HAVE BEEN ROLLED INTO THE CODE.**

A REPORT ON THE GOVERNOR'S POWER TO REMOVE PUBLIC OFFICIALS FROM OFFICE AND RECOMMENDATION TO THE LEGISLATURE

I. INTRODUCTION

Broadly stated, the Governor is granted the express power to remove any state official, elected or appointed, from office for gross neglect of duty or corruption. Moreover, the Michigan Constitution makes it clear that the Governor not only has the power to remove state officers for corruption and malfeasance, but that it is his or her duty to inquire into the condition and administration of those offices. However, this gubernatorial power does not extend to legislative or judicial officers.

Removal of public officers from office is governed by two sections of the 1963 Michigan Constitution. The first is Article 5, § 10, which provides:

The governor shall have power and it shall be his duty to inquire into the condition and administration of any public office and the acts of any public officer, elective or appointive. He may remove or suspend from office for gross neglect of duty or for corrupt conduct in office, or for any other misfeasance or malfeasance¹ therein, any elective or appointive *state officer*, except legislative or judicial, and shall report the reasons for such removal or suspension to the legislature. [Emphasis and footnote added.]

The second provision of the Constitution, Article 7, § 33, provides:

Any elected officer of a *political subdivision* may be removed from office in the manner and for the causes provided by law. [Emphasis added.]

These two sections are derived from the 1908 Constitution, Articles 9, §§ 7 and 8, respectively. Article 5, § 10 essentially replicates the language of Article 9, § 7 of the 1908 Constitution, with the exception that under the 1908 Constitution the Governor's removal power was limited to periods when the Legislature was not in session.²

¹ Interpreting similar language, Michigan courts have held that misfeasance "is a default in not doing a lawful thing in a proper manner, or omitting to do it as it should be done." *Gray v Hakenjos*, 366 Mich. 588, 593, 115 N.W.2d 411, 413 (1962). Malfeasance is the failure to perform the duties of a public office. *Gray, supra* this note, 366 Mich. at 594.

² Under prior Michigan Constitutions, the Governor's removal power was limited to times when the Legislature was not in session. The drafters of the 1963 Constitution removed the phrase, "except at such time as the legislature may be in session." Accordingly, "[t]he new language places authority for inquiry as well as removal and suspension of officials in the hands of the governor at all times." Const. Conv. Official Record 3380 (1961).

II. REMOVAL OF STATE OFFICERS UNDER ARTICLE 5, § 10 OF THE 1963 CONSTITUTION

Article 5, § 10 confers upon the Governor the power to remove state officers for cause, after notice and an opportunity for a hearing. *Attorney General ex rel. Rich v Jochim*, 99 Mich. 358, 58 N.W. 611 (1894). The details of the gubernatorial removal power are described in *Jochim*:

[The Governor] is given inquisitional power, that he may ascertain their condition, for the public welfare. No other means is provided for acquiring the necessary information. If he discovers irregularities of particular character, it is his duty to remove the officer, and supply his place by appointment, reporting his action to the Legislature at the next session. *Dullam v Willson* is authority for the proposition that the incumbent is entitled to notice of the charge, and an opportunity to be heard in his defense. This necessarily implies that the Governor's action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the Governor; that the complainant must procure counsel; or that the Governor is necessarily interested, and thereby disqualified from hearing and determining, because he performs the other duties which are specifically imposed upon him by this section of the Constitution. . . . There is nothing in the record to show any interest upon the part of the Governor, further than to ascertain the condition of the office, and to act upon the information obtained as the Constitution requires. It is the duty of the Governor to investigate, using all lawful means to go to the bottom of any real or supposed irregularity. To that end, he may use clerks and expert accountants, if necessary, and it is fair to presume that the State would recognize.

Jochim, supra, 99 Mich. at 374-75.

The power of the Governor to remove state officials under Article 5, §10, is self-executing, i.e., it does not require implementing legislation. Interpreting a substantially similar predecessor provision (Const. 1908, art. 9, § 7), the Michigan Supreme Court held that the constitutional provision is self-executing and requires no legislation to make it effective. *People ex rel. Clardy v Balch*, 268 Mich. 196, 201, 255 N.W. 762, 764 (1934). Nevertheless, there do exist specific statutory provisions providing for the removal of state officials pursuant to Article 5, § 10. They include the following:

A. M.C.L. § 168.83 (Attorney General and Secretary of State)

The governor shall have the power and it shall be his duty, except at such times as the legislature may be in session, to examine into the condition and administration of the public offices and the acts of the public officers enumerated herein, and to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, and report the causes of such removal to the legislature at its next session as provided in section 10 of article 5 of the state constitution. Such person shall be served with a written notice of the charges against him and be afforded an opportunity

for a public hearing conducted personally by the governor.

B. M.C.L. § 168.293 (State Board of Education, Board of Regents of the University of Michigan, Board of Trustees of Michigan State University)

The governor shall have the power and it shall be his duty, except at such time as the legislature may be in session, to examine into the condition and administration of the said boards and the acts of the members enumerated herein and to remove from office for gross neglect of duty or for corrupt conduct in office, or any other misfeasance or malfeasance therein, and report the causes of such removal to the legislature at its next session. Such person shall be served with a written notice of the charges against him and be afforded an opportunity for a public hearing conducted personally by the governor.

C. M.C.L. § 201.5 (Appointees filling vacancy during legislative recess)

All officers who are or shall be appointed by the governor to fill a vacancy which shall have existed during the recess of the legislature, may be removed by the governor.

III. REMOVAL OF LOCAL OFFICIALS UNDER ARTICLE 7, § 33 OF THE 1963 CONSTITUTION

Under Article 7, § 33 of the 1963 Constitution, a public officer may be removed from office "in a manner and for the causes provided by law." This constitutional provision is not self-implementing. Mich. Op. Att'y Gen. No. 5395 (1978). "Where 'provided by law' is used, it is intended that the legislature shall do the entire job of implementation." *Beech Grove Investment Co. v Civil Rights Comm'n*, 380 Mich. 405, 418-419, 157 N.W.2d 213, 219 (1968). The Governor's power to remove officers of a political subdivision has been implemented by the Election Law, which includes provisions for removal of the following local officers:

- M.C.L. § 168.207 (all county officers named in M.C.L. § 168.200, including the county clerk, the county treasurer, register of deeds, prosecuting attorney, sheriff, drain commissioner, surveyor, and coroner)³;
- M.C.L. § 168.238 (county auditor);
- M.C.L. § 168.268 (county road commissioner);
- M.C.L. § 168.327 (city officers);
- M.C.L. § 168.369 (township officers); and
- M.C.L. § 168.383 (village officers).

Noticeably absent are statutory provisions on the removal of elected county executives, members of community college boards, members of boards created under the Urban Cooperation Act (M.C.L. §§ 124.501-124.512), and school board members. Specifically, the Attorney

³ M.C.L. § 168.200 uses the term "county boards of commissioners," but does not mention the office of county commissioner or individual members of a county board of commissioners.

General has opined that the Governor lacks constitutional authority under Article 5, § 10 to remove local school board members because the framers of the 1963 Constitution intended that removal of such public officials be governed by Article 7, § 33 of the 1963 Constitution. The term, "political subdivision," that is used in that section was interpreted to include local municipalities (including school districts), and the removal of school board members has not been provided for by law. *See Mich. Op. Att'y Gen. No. 5395, supra*, at 706-707.

IV. THE REMOVAL PROCESS

The Governor's power to remove public officials generally is not subject to judicial review. "Where the removal power has been assigned to the Governor or to a state agency, this court has refused to interfere with the exercise of that power." *Burback v Romney*, 380 Mich. 209, 217, 156 N.W.2d 549, 553 (1968). However, an arbitrary exercise of the removal power is subject to judicial review. *See McDonald v Schnipke*, 380 Mich. 14, 155 N.W.2d 169 (1968).

Regardless of the constitutional source of the Governor's removal power, in exercising that power, the Governor must afford the accused public officer notice and a reasonable opportunity to present a defense. *People ex rel. Clardy v Balch*, 268 Mich. 196, 201, 255 N.W. 762, 764 (1934). While public officials do not have vested contract or property rights in a public office, *Molinaro v Driver*, 36 Mich. 341 (1962), an accused public officer is also entitled to fair and just treatment in the course of the removal proceedings:

The right of all individuals . . . to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Const. 1963, art. 1, § 17. *Accord Burback v Romney*, 380 Mich. 209, 218-219, 156 N.W.2d 549, 553-554 (1968).

Despite these protections for the accused, the Governor is the sole tribunal in removal proceedings, with no right of appeal or review afforded the accused. If the Governor acts within the law, the Governor's decision is final. *Balch, supra*, 268 Mich. at 201-202, 255 N.W. at 764. The Governor's exercise of this quasi-judicial removal power has been long recognized under Michigan law:

Dullam v Willson is authority for the proposition that the incumbent is entitled to notice of the charge, and an opportunity to be heard in his defense. This necessarily implies that the Governor's action is, in a sense, judicial. But it does not follow that the investigation must be made by some other person or officer, who must make complaint to the Governor; that the complainant must procure counsel; or that the Governor is necessarily interested, and thereby disqualified from hearing and determining, because he performs the other duties which are specifically imposed upon him by this section of the Constitution.

Jochim, supra, 99 Mich. at 375.

Michigan courts have generally refused to interfere with the removal power of the Governor. *See, e.g., Burback*, 380 Mich. at 217, 156 N.W. at 553, *citing People ex rel. Clay v Stuart*, 74 Mich. 411, 41 N.W. 1091 (1889); *Fuller v Attorney General*, 98 Mich. 96, 57 N.W. 33 (1893); *Speed v City of Detroit Common Council*, 98 Mich. 360, 57 N.W. 406 (1894); *Jochim*, 99 Mich. 358, 58 N.W. 611; *Attorney General v Berry*, 99 Mich. 379, 58 N.W. 617 (1894); *Attorney General v Hambitzer*, 99 Mich. 380, 58 N.W. 617 (1894); *In re Fredericks*, 285 Mich. 262, 280 N.W. 464 (1938); *Lilienthal v City of Wyandotte*, 286 Mich. 604, 282 N.W. 837 (1938). However, an arbitrary exercise of the removal power is subject to judicial review. *See, e.g., Burback*, 380 Mich. at 217, 156 N.W. at 553, *citing People ex rel. Andrews v Lord*, 9 Mich. 227 (1861); *Dullam v Willson*, 53 Mich. 392, 19 N.W. 112 (1884); *Lilienthal v City of Wyandotte, supra*; *McDonald v Schnipke*, 380 Mich. 14, 155 N.W.2d 169 (1968).

Recommendation to the Legislature

The Commission recommends that the Legislature fill the statutory gaps in the Governor's power to remove other officials of political subdivisions by enacting specific statutory provisions, including but not limited to, governing the removal of elected county executives, members of community college boards, members of boards created under the Urban Cooperation Act (M.C.L. §§124.501-124.512), and school board members.

Alternatively, the Commission recommends repealing all existing removal statutes and replacing them with a general removal statute that tracks the language of Article 5, § 10, but whose scope would cover the removal of all public officials, both state and local.

MICHIGAN LAW REVISION COMMISSION
REPORT ON ACCESS TO GOVERNMENT

PURPOSE

The purpose of the following compilation of statutes of the State of Michigan is to provide a comprehensive picture of the law pertaining to access to government currently on the books. The general theme of statutes regarding public access to government is that transparency in government is good as it fosters the sort of informed public necessary to a working democracy. United States Supreme Court Justice Louis D. Brandeis wrote, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman." This is the mentality through which access to government statutes were created and are to be analyzed. The Freedom of Information Act is the crux of this body of legislation, and is the public's primary tool for accessing the functions of the government and the decision-making process behind policy, allowing the sort of vigilance of the citizenry upon which our nation is founded and our government monitored. Other statutes contained within this collection are, at least in part, relevant to understanding the entirety of this type of legislation.

After assembling this comprehensive collection of Michigan's access to government statutes, the Law Revision Commission, pursuant to its enacting legislation, M.C.L. 4.1401(e), will examine and analyze the statutes therein for "defects and anachronisms in the law." Are any to be found, the Commission will "recommend[] needed reforms."

Michigan Law Revision Commission
GOVERNMENT TRANSPARENCY PROJECT

September 24, 2008

Laws for Review

1. Freedom of Information Act
2. Open Meetings Act
3. Department of Management and Budget Act
4. Others

Constitutional Principles of Transparency In Government

- Public record of all legislative committee actions
- Published proceedings of the Legislature
- Published votes on legislative elections and advice and consent votes in the senate
- Doors of the house and senate “shall be open....”
- Required statement of estimated revenue in budget bill
- Every law which imposes, continues or revives a tax shall distinctly state the tax
- All laws enacted shall be published within 60 days after final adjournment
- Decisions of the supreme court...shall be in writing....
- All financial records, accountings, audit reports and other reports of public moneys shall be public records and open to inspection. A statement of all revenues and expenditures of public moneys shall be published and distributed annually....