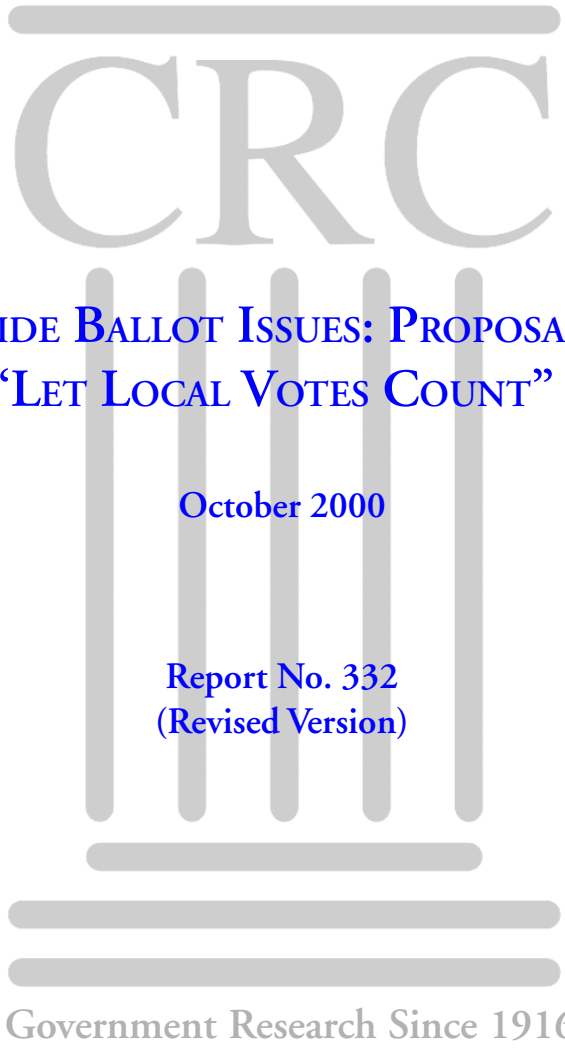


# Statewide Ballot Issues: Proposal 00-2
# "Let Local Votes Count"

October 2000

Report No. 332
(Revised Version)

Government Research Since 1916

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# Statewide Ballot Issues: Proposal 00-2
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## I. Introduction

Proposal 00-2, on the November 7, 2000, statewide ballot as a result of petitions circulated by the Michigan Municipal League, asks the voters to amend the 1963 Michigan Constitution to add a Section 55 to Article IV, the article dealing with the legislative branch. The amendment would require two-thirds majority votes in each house of the legislature, rather than simple majority votes, to enact laws that intervene in the municipal concerns, property or government of cities, villages, counties, townships, or any municipal authorities as they existed on March 1, 2000.

This proposed amendment is a response to a perceived increase in the frequency with which the legislature is intervening in the concerns of local governments. Restriction on residency requirements for municipal employees and changes to the state construction code and gun control laws are the most recent examples of legislation that "intervenes" in the concerns of local governments. While the proposed amendment would not directly increase the powers of local governments, it would be more difficult for the state to enact laws restricting municipal powers.

## II. Proposal 00-2 Ballot Language

Article XII, Section 2, of the Michigan Constitution requires that the purpose of a proposed amendment be stated on the ballot in not more than 100 words, exclusive of caption. As approved by the Board of State Canvassers, the ballot language is as follows:

**A PROPOSAL TO AMEND THE CONSTITUTION TO REQUIRE A SUPER MAJORITY VOTE (2/3 VOTE) OF THE STATE LEGISLATURE TO ENACT CERTAIN LAWS AFFECTING LOCAL GOVERNMENTS**

The proposed constitutional amendment would:

1.) Require a super majority vote (2/3 vote) of the State Legislature to enact any law which addresses a matter which a county, city, township, village or municipal authority could otherwise address under its governing powers or which places a condition on unrestricted aid extended local governments by the State. (Currently, a simple majority vote of legislature is required to enact such laws.)

2.) Retroactively apply the super majority vote requirement to any such law enacted on or after March 1, 2000.

3.) Exempt from the super majority vote requirement any such law which can be applied at the option of local governments.

Should this proposal be adopted?

## III. Language of the Proposed Amendment

The proposal would amend the 1963 Michigan Constitution to add a Section 55 to Article IV (the "Legislative Branch" article) to read as follows:

The Proposed Article IV, Section 55:

The legislature shall enact no law on or after March 1, 2000, that intervenes, or increases the scope of its intervention, in the municipal concerns, property or government of a city, village, county, township or any municipal authority without the approval of two-thirds of the members elected to and serving in each house of the legislature. In addition, no condition imposed upon receipt of any appropriation of unrestricted aid contained in a law enacted on or after March 1, 2000, that intervenes, or increases the scope of the legislature's intervention, in the municipal concerns, property or government of a city, village, county, township or municipal authority shall be effective unless the law imposing the condition is approved by two-thirds of the members elected to and serving in each house of the legislature.

Municipal concerns, property or government of a city, village, county, township, or municipal authority are all matters over which a city, village, county, township, or municipal authority could exercise its powers, under the constitution or law effective as of March 1, 2000, by adoption of appropriate charter provisions, ordinances, resolutions or contracts, whether exercised or not. A law enacted on or after March 1, 2000, does not intervene in the municipal concerns, property or government of a city, village, county, township, or municipal authority if the city, village, county, township, or municipal authority has the option to apply that specific law, in the manner provided by law.

## IV. Proposal 00-2 Analysis

The amendment would require two-thirds majority votes in each house of the legislature – rather than simple-majority votes – to enact laws that intervene in the municipal concerns, property or government of cities, villages, counties, townships, or any municipal authorities as they existed on March 1, 2000. Omitted from the list of local governments encompassed in this proposal are school districts, intermediate school districts, and community college districts. Bills that would distribute unrestricted state aid based on conditions that intervene in municipal concerns, property or government would also require super-majority votes.

According to the drafters, the proposed amendment would create a three-part test to be used to determine whether a law would require a two-thirds majority for passage.

1.) Was the law enacted on or after March 1, 2000?
2.) Does the bill involve municipal concerns, property or government?
3.) Does the law "intervene?"

**March 1, 2000.** The proposed amendment refers to the date March 1, 2000, in two contexts. First, that date is used to determine the point at which it became necessary for the legislature to use a two-thirds majority to enact laws that "intervene" in the municipal concerns, property and government of local government. Second, that date is used to establish a benchmark for determining which municipal concerns, property and government belong to local government, and therefore which laws require a two-thirds vote to enact.

**Municipal Concerns, Property and Government.** The second paragraph defines municipal concerns, property or government as anything over which a local government could, as of March 1, 2000, exercise powers through charters, ordinances, resolutions, or contracts. The phrase "municipal concerns, property or government" is taken from Article VII, Section 22, which provides authority for cities and villages to adopt charters, resolutions, and ordinances.

The proposed amendment would apply both to municipal concerns, property and government existing on March 1, 2000, and to those that might be extended to local governments in the future.

*Existing Municipal Concerns, Property and Government.* Existing municipal concerns, property and government are those issues over which local government could exercise its powers on March 1, 2000, *whether exercised or not*. Some of these concerns, property and government are relatively clear. For example, cities, villages, townships, and counties all have the power to provide police services for the protection of their residents, whether they are providing those services at present or not.

Other powers are more ambiguous. Home rule governments are presumed to have all powers not specifically preempted by the state. If the need for a new government service arises in the future, these local governments would not have to go to the legislature for the authorization to provide it.

The phrase "whether exercised or not" is meant to protect powers that have not been implemented. For example, although all townships are authorized to provide police services, many do not provide that service and instead rely on the county for police services. They would not be precluded from establishing police services in the future because they had not exercised that power on March 1, 2000. Similarly, the Uniform City Income Tax Act, Public Act 284 of 1964, established the authority for cities to levy an income tax. Only 22 cities currently levy an income tax. If an amendment were offered to lessen the authority of cities to levy this tax, it would require a two-thirds vote under this proposal, even though not all cities exercise their authority.

*The Future Alteration of Municipal Concerns, Property and Government.* Any laws intervening in municipal concerns, property and government enacted on or after March 1, 2000, must have a two-thirds vote unless local governments have the option to apply or not apply that specific law. Laws creating new powers for local governments would be subject to a test of whether their implementation is optional. Optional powers are those permitted by authorizing legislation. Mandated powers are those that local units of government subject to the law must implement. Most legislation authorizing local governments to do something new tends to be optional, and therefore, would not be subject to the two-thirds majority requirements of the proposed amendment. Laws that grant powers requiring mandatory implementation or laws that preempt local powers, on the other hand would require a two-thirds majority vote for enactment under the proposal.

The proposed amendment likely would affect home rule and non-home rule units differently. Home rule units of government – cities, villages, and charter counties – are presumed to have the power to perform any service not restricted by the legislature or the Constitution, so legislation usually is not necessary to authorize a new power. General law units of government – counties and townships – have their roots as local extensions of the state and do not have the same presumption of powers afforded home rule governments. These units are much more dependent on the enactment of legislation authorizing them to provide new services. To the extent that new powers are not optional, their enactment would necessitate a two-thirds vote.

**Intervention.** No definition of "intervene" or "intervention" is supplied in either the proposed amendment or the drafter's notes. By leaving these terms undefined, it is open to interpretation whether they apply not only to constraints on, but also to enhancements of, municipal concerns, property and government, and whether they broadly include actions that have no discernible effect.

## A. Retroactive to March 1, 2000

This proposal will not be voted on until November 7, 2000. The Constitution specifies that if an amendment is approved by a majority of the electors voting on the question, it shall become effective at the end of 45 days after the date of the election, in this case December 22, 2000. By that time, 9½ months will have passed since March 1, 2000.

Presumably, the legislature has conducted business as usual during those 9½ months, under the current rules for enacting legislation that requires only a simple-majority vote (except in the instances referenced below). A number of laws have been enacted during that time affecting local government, most of which have carried more than a two-thirds majority. However, in at least four instances, bills received less than a two-thirds majority in the House, which requires at least 74 votes, or the Senate, which requires at least 26 votes, or both, that might be determined to "intervene" in municipal concerns, property and government.

- Public Act 19 of 2000, which amended Public Act 184 of 1943, the "Township Zoning Act," received only 25 votes in the Senate;
- Public Act 20 of 2000, which amended Public Act 207 of 1921, the "City and Village Zoning Act," again only received 25 votes in the Senate;
- Public Act 141 of 2000, which amended Public Act 3 of 1939, providing for electric deregulation, received only 72 votes in the House and 25 votes in the Senate;
- Public Act 265 of 2000, which amended Public Act 372 of 1927, prohibits local units of government from bringing a civil action against firearms or ammunition manufacturers, received only 71 votes in the House.

Each of these acts contains provisions that potentially *could* be viewed as intervening in municipal concerns, property and government and therefore subject to invalidation, in whole or in part, under this constitutional amendment.

### Ban on Residency Residency Requirements and Right to Farm

Two pieces of legislation at issue in the consideration of Proposal 00-2 are Public Acts 212 and 261 of 1999. Public Act 212 prohibits "public employers" from requiring, with minor exceptions, residence within a specified geographic area or within specified distance or travel time from the place of employment as a condition of employment or promotion. Public Act 261 amended the Michigan Right to Farm Act to preempt any local ordinance, regulation, or resolution that purports to extend or revise the provisions of the act or generally accepted agricultural management practices developed under the act. Public Act 212 was signed by the Governor and filed with the Secretary of State on December 22, 1999, with Public Act 261 following on December 28.

In order to make meaningful the right to referendum, the Michigan Constitution provides that laws take effect 90 days after the Legislature adjourns *sine die*, unless they are given immediate effect through a two-thirds vote of the members of each house. This provides those who disagree with a new statute with time to collect signatures on a referendum petition to prevent the bill from taking effect and either gaining legislative reconsideration of the legislation, or having it placed before the electorate. Neither Public Act 212 nor Public Act 261 received a two-thirds vote of each house or was given immediate effect and both became effective on March 10, 2000.

The proponents of Proposal 00-2 suggest that the determination of whether a statute would be subject to the two-thirds majority requirement turns on the answers to three questions: Was the statute enacted on or after March 1, 2000? Did it involve municipal concerns, property, or government? Did it intervene in those concerns, property, or government? If the answer to any of these questions is "no," the statute would not fall under the requirement for a two-thirds vote.

As the term is used by the Legislative Service Bureau, "enactment" of a bill occurs when it is filed with the Secretary of State. (Normally, this is preceded by a gubernatorial signature, but a bill may also become law if the Governor fails to sign a bill within 14 days when the Legislature is in session, through veto override, or by initiative petition.) The term, however, is not defined in the Michigan Constitution.[1] If the date of enactment of a bill is defined as the date it is filed with the Secretary of State, apparently neither the ban on residency requirements nor the Right to Farm amendments would be deemed to have required a two-thirds vote for passage, since they were signed by the Governor and filed with the Secretary of State over two months before March 1, 2000.

When read in its entirety, however, the clear intent of Proposal 00-2 is to provide a layer of insulation, in the form of a two-thirds majority requirement, against legislative diminution of "municipal concerns, property, and government" as they existed on March 1, 2000. In the second paragraph of the proposal, "municipal concerns, property, and government" are defined as

> all matters over which a city, village, county, township, or municipal authority *could exercise its powers under the constitution or law, effective as of March 1, 2000,* by adoption of appropriate charter provisions, ordinances, resolutions, or contracts, whether exercised or not. [Emphasis added]

Since Public Acts 212 and 261 did not go into effect until March 10, local units still had, on March 1, the power to require residency of their employees and to adopt soon-to-be-prohibited local ordinances, regulations, or resolutions related to the Right to Farm Act. If the courts were to determine that there is a conflict regarding the significance of March 1 and resolve it in favor of the definition in the second paragraph of the proposed amendment, the two acts could be deemed to have had insufficient majorities to survive under the provisions of Proposal 00-2.

[1] In a 1977 case, the Michigan Court of Appeals noted that "the phrase 'effective date,' as it is used in discussing legislative action, means the date upon which an act becomes law and is enforceable." *Schweitzer* v. *Board of Forensic Polygraph Examiners* (77 Mich. App. 749, 259 N. W. 2d 362). The term "enact" was not defined, however.

### B. Content Germane to Local Government

Aside from the question of whether the acts mentioned above "intervene" in municipal concerns, they also illustrate how the proposed amendment could affect laws in which local government was not the primary issue. Future bills not primarily aimed at local government – such as environmental or labor laws – also could require a super-majority vote if local governments were able to affect these subjects through charters, ordinances, resolutions, or contracts as of March 1, 2000.

Two of the laws subject to repeal by this proposal illustrate how far-reaching this might be. Public Act 141 of 2000, provides for electricity deregulation. In addition to the private electric companies affected by this law, a few municipalities provide electricity and all cities have the authority to establish electric utilities. The second act, Public Act 265, requires trigger locks to accompany the sale of firearms and provides immunity for firearms dealers, in addition to the prohibition against civil actions by local units of government.

If these laws are determined to "intervene" in municipal concerns, property and government, the courts could choose to invalidate them in their entirety, or it could sever only the parts of the law that "intervene" in municipal concerns, property and government. Severing only parts relevant to municipal concerns, property and government would remove the local governmental provisions in the law, leaving the balance of these laws unaffected by the proposed amendment. While Public Act 141 provides a severance clause in the event that any provision of the act is found to be invalid, Public Act 265 contains no such provisions, leaving it as a prerogative of the courts to sever any provisions found unconstitutional.

Should the courts decide to sever specific provisions from these laws, the decision would fall on judges who were not involved in the debate, negotiation, and compromise that takes place in the legislative process. Provisions of bills often are so intertwined that severing a single provision runs the risk of altering the effect of the bills from the legislative intent at the time of enactment. At other times, provisions that do not deal with local governments might be included in a final bill only as a result of compromises on the provisions that address local government authority. To sever a particular provision, leaving the balance as law, may produce a result that would not have been possible in the legislative consideration of the bill.

## V. National Perspective

While state/local relations range from vesting strong oversight powers with the states to completely restricting the powers of state oversight by providing for municipal powers in state constitutions, no other state has adopted an amendment similar to this proposal requiring a super-majority vote for laws that intervene in municipal affairs. Maine and Massachusetts adopted constitutional amendments that prohibit the enactment of laws placing unfunded mandates on local governments unless adopted by a two-thirds majority of each house of their legislatures. (Michigan has a similar provision in its Constitution. The Headlee Amendment (Article IX, Section 29), adopted in 1979, states that the state is prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of local governments.)

## VI. Issues

Proposal 00-2 raises several issues, including: (a) separating statewide concerns from local concerns; (b) the state's role in restricting local powers, (c) grouping non-charter units of local government together with charter units, (d) the undefined terms "intervene" and "intervention," (e) tax policy issues; (f) minority rule issues, (g) the status of state revenue distribution programs, (h) the problems presented for any future intergovernmental reform efforts, and (i) the issue of federal regulatory policy.

### A. Statewide Concerns versus Local Concerns

At the root of the tension between the state government and its local units is the inability to establish a clear distinction between statewide and local concerns. It is a problem that existed even before Michigan created home rule options and is a problem that is not unique to Michigan.

Some matters – such as garbage collection, public safety, and zoning – are generally considered local concerns. Other matters – such as higher education, corrections, and interstate highways – are generally considered statewide concerns. However, most issues are mutual concerns of state and local government. These issues make up a large gray area where defining a matter as a statewide or local concern depends on whom one asks. Article VII, Section 34, (see page 12) intended to establish that doubts regarding local concerns should be resolved in favor of the local units.

An example of this tension is the debate over House Bill 4777, identified as one of the threats to local control. This bill was introduced in the 1999 legislative session in reaction to the adoption of Detroit's living wage ordinance but was expanded to include a wide range of subjects limiting the powers of local government. Supporters of this bill argued that an undue burden is created by subjecting a multi-state or multi-national corporation to the rules and regulations of every city, village, and township within which facilities might be located. It is a statewide concern to promote economic development and full state employment, and as such, preempting local regulations on construction codes, billboards, wages, and other matters makes it easier for businesses to operate in Michigan. Opponents of this bill argued that these matters are rightfully local concerns and should remain within the purview of local governments. Different regulations are what allow different communities to create a unique character, and uniform statewide regulations would force more homogeneous communities.

It is impossible to place most governmental functions in a state government category or a local government category. As a result, the state has enacted laws in functional areas where there is a substantial state concern, even though intermingled with it are concerns of local governments. While local government officials claim that recently passed legislation creating residency requirement restrictions, right to farm legislation, and efforts to ban living wage ordinances were local matters being preempted by the state, state policymakers felt that a statewide concern was served by adopting these bills.

The proposed amendment would tend to reinforce Article VII, Section 34. It would begin with the assumption that all matters over which the state has not established preemption, as of March 1, 2000, are local concerns and it would make it harder for the legislature to enact laws diminishing those concerns. The hope of the drafters is that this amendment will force the state to work more closely with local governments rather than attempting to circumvent local governments with state legislation and with the local government associations to see ideas through the legislative process. While the proposed amendment would not directly increase the powers of local governments, it would make it more difficult for the state to enact laws restricting municipal powers.

## B. State Restriction of Local Powers

In the first case before the Michigan Supreme Court on home rule, the Court opined:

> The new system is one of a general grant of rights and powers subject only to enumerated restrictions instead of the old method of only granting enumerated rights and powers definitely specified. *Gallup* v. *City of Saginaw* (170 Mich. 195, 1912)

While local units of government may not agree with the restrictions that are placed on them, the state is within its role in formulating those restrictions. Furthermore, the state bears some responsibility in overseeing the actions of its local units of government. As mentioned above, the powers and structure of non-charter counties, all townships, and municipal authorities are defined by law. The Home Rule City and Village acts, as well as the Charter County Act, provide the framework within which cities, villages, and charter counties are organized. The legislature's ability to amend these laws could be affected in some circumstances by these super-majority vote requirements if this amendment is adopted.

State law also affects the ways in which local governments conduct some of the functions they are required or empowered to provide. The proposed amendment puts state policymakers in a difficult position of walking a thin line between ensuring the efficient, effective use of financial resources and intervening in local affairs. Regardless of the level of home rule, the state still must endeavor to keep its local units from becoming bankrupt. One would expect state policymakers, in their fiduciary role, to have an interest in how and what services are provided, how local units are managing their debt, and the use of sound financial accounting practices. This language would constrain the ability of state policymakers to express that interest.

Proponents argue that "intervention," which is not defined, only includes actions that restrict or preempt local government authority. However, many actions taken by the legislature may change local processes without any obvious restrictions or preemption of local government authority. For example, while elections are conducted through municipalities, the conduct of elections is provided under state law. Would a state law providing for online voting be defined to intervene in municipal concerns, property and government? Property assessment provides another example. While property is assessed locally, local assessors must operate within a system created to provide a uniform assessment of property for the purpose of taxation as required by the State Constitution and State law. Would a state law that changed the method local assessors should use for assessing personal property be defined to intervene in municipal concerns, property and government? Other state laws provide for the health and public safety of the residents of Michigan. Because a number of functions performed by local government are done on behalf of the state government, the definition of the term intervention could have broad implications.

## C. Types of Local Units Included

Home rule powers permit the people to structure their charter units of government and to determine local regulations and ordinances in a way that best reflects the needs of the community. Most counties, all townships, and all municipal authorities do not operate under locally adopted charters, making the effect of this proposed amendment very different for these types of government relative to cities, villages, and charter counties.

Michigan has 535 cities and villages. Of the 273 cities, eight are fourth class or special charter cities. Of the 262 villages, only 46 have organized under a locally drafted charter. The others are general law villages. Only one Michigan county, Wayne County, has adopted a charter under the Charter County Act. Oakland and Bay counties, are organized under the optional unified form of county government. This option allows for some variation from the general law organization of counties, but does not involve drafting a charter. The other 80 counties remain organized under Michigan general law. Neither the 1,241 Michigan townships nor any of the municipal authorities have home rule powers. For this reason, cities, villages, and the charter county must be treated separately from the non-charter counties, townships, and municipal authorities.

Two competing legal opinions, referred to generally as Dillon's Rule and the Cooley Doctrine, provide a broad overview of the extent of powers within which local governments may operate. The former, set forth in *Clinton v Cedar Rapids and the Missouri River Railroad,* (24 Iowa 455 at 461; 1868), held that "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from,

the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control."

In contrast to Dillon's Rule, the Cooley Doctrine stands for an inherent right to local governance. That doctrine, as enunciated by Michigan Supreme Court Justice Thomas M. Cooley in *People v Hurlbut,* (24 Mich 44, 95; 1871), held that "[l]ocal government is a matter of absolute right, and the state cannot take it away."

Michigan cities, villages, and charter counties operate with a presumption of powers most closely associated with the Cooley Doctrine. If state law does not intervene, "[a] municipal corporation possesses and can exercise powers granted in express words, necessarily or fairly implied in or incident to powers expressly granted, and essential to accomplishment of declared objects and purposes of the corporation…" *Toebe* v. *City of Munising*, (282 Mich. 1, 1937) With this broad grant of powers, any legislation affecting the powers of these units has limited or restricted their powers. For instance, the act affecting residency requirements did not extend the powers of local governments, but restricted their powers in this area.

Non-charter counties, townships, and municipal authorities, on the other hand, do not possess this broad grant of powers. Unlike cities and villages, counties and townships were created by the state without regard to the residents inhabiting them. Counties were established as administrative units of the state to provide decentralized services. Townships, originally surveyed areas six miles to a side, were established as subdivisions of counties. Municipal authorities are based on the State Constitutional provision that "… the legislature may establish … authorities with powers, duties and jurisdictions as the legislature shall provide…." Michigan currently has at least 20 laws permitting municipalities to create authorities for everything from parks, water provision, mass transportation, and airports to swimming pools, hospitals, irrigation districts, and libraries.

Non-charter counties, townships, and municipal authorities operate under a presumption of powers most closely associated with Dillon's Rule. The Constitution provides that the powers of these types of local government shall be "provided by law." The Michigan Supreme Court has held that county boards, as administrative bodies, have no inherent powers. *Mason County Civic Research Council* v. *Mason County, 343 Mich. 313.* It also has held that townships have only such powers as statutes confer, and are subject to no obligations except such as are derived from statutory provisions. *Township of Royal Oak* v. *City of Pleasant Ridge, 295 Mich. 284.* The township board is of special and limited jurisdiction, having no power or authority by constitutional mandate, but deriving sole authority from the legislature which is authorized but not compelled by the constitution to delegate certain legislative powers to the township board. *Township of Dearborn* v. *Dearborn Township Clerk, 334 Mich. 673.*

Legislation affecting cities, villages, and charter counties is often limited to actions that restricts or preempts the powers of these units, since broad powers have been granted under the applicable home rule acts. In contrast, legislation is necessary to extend or broaden the powers of general law counties, townships, or municipal authorities (local units without charter powers). Without such legislation, these units could not perform some functions. Thus, while non-charter types of government would experience the same protection against state preemption of powers and regulations, their reliance on the state to enact legislation providing desired powers and authority necessitates a different relationship with the state than that with the cities, villages, and charter counties.

Counties perform such tasks as property value equalization, record keeping, courts, police services, and health services as administrative arms of the state. In this capacity, the degree of discretion counties have in implementing these functions is usually provided in legislation. Much of the funding they receive is directly tied to their provision of these services. Community mental health and court funding, for instance, can be used only for those purposes. The relationship between the state and the counties is in constant flux relative to these functions as state and county policymakers search for the most efficient way of funding and delivering these services. Because of that relationship, it is not unusual for state legislation to deal with the way in which health services are to be delivered or what steps are necessary for their record keeping responsibilities. This relationship would be affected by the proposed amendment. With the terms "intervene" and "intervention" left undefined, the implications of this proposal for counties, townships, and municipal authorities might be as restrictive as it is protective.

### D. "Intervene" and "Intervention"

The proposed amendment does not define what is meant by the terms "intervene" and "intervention." The drafters of the proposal say that this term was intentionally chosen, over possibilities such as preempt, interfere, hinder, obstruct, impede, or encumber, to include any manner of non-discretionary involvement in the municipal concerns, property or government of local governments. However, by not being more concrete in the proposed language, it will ultimately fall to the courts to define "intervene" and "intervention." The courts have few sources to begin attempting to define these terms.

First, Webster's New Collegiate Dictionary defines "intervene" as "to come in or between by way of hindrance or modifications."

Second, the courts could rely on existing statutes to arrive at an understood application of these terms in Michigan law. The use of these terms is not infrequent in the Michigan statutes, but most of their use tends to be of no assistance for defining "intervene" as it is used in this proposal. Intervene is generally used:

- as a directive that a state agency or local unit shall get involved in a matter when certain conditions arise – "The state office shall *intervene* as necessary to act on behalf of recipients…"; or
- to permit government involvement, such as is provided in Article VII, Section 15 of the Michigan Constitution, which provides for county intervention in public utility service and rate proceedings.

> Any county, when authorized by its board of supervisors shall have the authority to enter or to *intervene* in any action or certificate proceeding involving the services, charges or rates of any privately owned public utility furnishing services or commodities to rate payers within the county.

Intervention in the context noted above involves requirements for discrete action in specific instances. Proposal 00-2, however, creates the necessity of dividing all actions related to local government into two categories – intervening and non-intervening, with no definition of these terms to guide policymakers. Intervening is used by the proponents as "limiting" or "preempting." Intervention could, however, be defined more broadly to include other actions that either expand local government authority or that have no discernable limiting or expanding effect.

### E. Tax Policy

**Tax Reduction.** The Michigan Constitution includes two provisions for super-majority votes that relate either directly or indirectly to tax increases. As a result of Proposal A of 1994, Article IX, Section 3, contains a requirement for a three-fourths vote of each house of the Legislature to increase the statutory limits on school district operating millage rates, and Article IX, Section 27, part of the Headlee Amendment of 1978, requires a two-thirds vote of each house in order to exceed the state revenue limit. Moreover, proposals to require super-majorities for any tax increase are made from time to time.

In contrast, Proposal 00-2 would require a two-thirds majority for a legislated reduction in local taxes. For example, a key element in the adoption of the new revenue sharing formula in December 1998 was a phased reduction in the Detroit income tax in exchange for freezing Detroit's allocation of revenue sharing dollars, rather than permitting them to decline. It is reasonably clear that the income tax reduction called for in this agreement would have required a two-thirds majority if Proposal 00-2 had been in effect at that time.

**Tax Increase.** Local taxes cannot be imposed unilaterally by the state legislature in Michigan. Provisions of the Headlee Amendment in the Michigan Constitution, adopted in 1978, require voters in the unit seeking new or increased local taxes to approve any such changes. Therefore, any state legislation authorizing new or increased local taxes must be optional. The implications of this are that the super-majority vote requirement would not apply to new laws authorizing local governments to levy new or increased taxes.

## F. Minority Rule

Super-majority vote requirements raise two issues. First is the ability of a minority of representatives in either chamber of the legislature to keep legislation from moving forward. Super-majority requirements allow a minority of legislators representing more than one-third, but less than one-half, of the members of either house to prevent a bill with majority support from becoming law. More specifically, 13 senators or 37 representatives could hold "veto" power over a local government bill.

Most bills pass with more than a two-thirds majority. However, most bills are not very controversial. Super-majority vote requirements could introduce a new dynamic to legislative voting on more controversial bills. Members of the legislature that might otherwise be inclined to vote against an issue sometimes find themselves voting for that issue in recognition that a vote against would not likely be sufficient to keep a bill from being enacted. They vote with the majority in the hope of getting support for one of their issues later.

The ability to halt a bill in the legislative process with 13 senators or 37 representatives could change that dynamic. Knowing that it would no longer be necessary to garner

### Michigan Constitution Provisions Requiring a Super-Majority Vote of the Legislature

**1. Initiative and referendum; amendment and repeal.** Article II, Section 9.

… No law initiated or adopted by the people shall be subject to the veto power of the governor, and no law adopted by the people at the polls under the initiative provisions of this section shall be amended or repealed, except by a vote of the electors unless otherwise provided in the initiative measure or *by three-fourths of the members elected to and serving in each house of the legislature*. …

**2. State officers compensation commission; powers and duties.** Article IV, Section 12.

... The commission shall determine the salaries and expense allowances of the members of the legislature, the governor, the lieutenant governor and the justices of the supreme court which determinations shall be the salaries and expense allowances unless the legislature by concurrent resolution adopted *by 2/3 of the members elected to and serving in each house of the legislature* reject them. ...

**3. Legislature; officers, rules of procedure, expulsion of members.** Article IV, Section 16.

... Each house shall be the sole judge of the qualifications, elections and returns of its members, and may, *with the concurrence of two-thirds of all the members elected thereto and serving therein*, expel a member. ...

**4. Immediate effect on bills.** Article IV, Section 27.

No act shall take effect until the expiration of 90 days from the end of the session at which it was passed, but the legislature may give immediate effect to acts *by a two-thirds vote of the members elected to and serving in each house.*

**5. Local or special acts.** Article IV, Section 29.

... No local or special act shall take effect until approved *by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected.* ...

**6. Appropriations for private purposes.** Article IV, Section 30.

*The assent of two-thirds of the members elected to and serving in each house of the legislature* shall be required for the appropriation of public money or property for local or private purposes.

**7. Override of governor's veto.** Article IV, Section 33.

... If *two-thirds of the members elected to and serving in that house* pass the bill notwithstanding the objections of the governor, it shall be sent with the objections to the other house for reconsideration. The bill shall become law if *passed by two-thirds of the members elected to and serving in that house.* ...

**8. Amendments to the banking code.** Article IV, Section 43.

No general law providing for the incorporation of trust companies or corporations for banking purposes, or regulating the business thereof, shall be enacted, amended or repealed except *by a vote of two-thirds of the members elected to and serving in each house*.

**9. Auditor general; appointment, qualifications, term, removal, post audits.** Article IV, Section 53.

... He [the auditor general] may be removed for cause at any time *by a two-thirds vote of the members elected to and serving in each house.*

**10. Judicial power in court of justice; divisions.** Article VI, Section 1.

The judicial power of the state is vested exclusively in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and *courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house.*

support from 50 percent of the members of either house to defeat a bill, more members who find themselves in opposition to a bill might be inclined to maintain their no votes.

A second issue raised by granting the necessity for super-majority votes to local government issues is the precedent it sets for amending the Constitution in the future to require super-majority votes. Does approval of this amendment open the door a little wider for future amendments requiring super-majority votes for tax increases or new taxes, environmental laws, or other controversial topics? The State Constitution has created requirements for super-majority votes in a select number of issues. These requirements, in most cases, relate to extraordinary situations that the delegates to the Constitutional Convention felt the legislature should not act upon without a clear consensus, such as overturning voter-approved legislation or removing judges or the auditor general, who should be insulated from political retribution. While the case is made that laws affecting municipal affairs should be given the same deference, this amendment would create a precedent for requiring a super-majority vote for a broad spectrum of legislation that falls within the regular role of the legislature.

### Michigan Constitution Provisions Requiring a Super-Majority Vote of the Legislature

**11. Removal of a judge from the bench.** Article VI, Section 25.

For reasonable cause, which is not sufficient ground for impeachment, the governor shall remove any judge *on a concurrent resolution of two-thirds of the members elected to and serving in each house of the legislature*. ...

**12. Property taxation; assessment; uniformity; classes; annual increase; legislative approval.** Article IX, Section 3.

... A law that increases the statutory limits in effect as of February 1, 1994 on the maximum amount of ad valorem property taxes that may be levied for school district operating purposes *requires the approval of 3/4 of the members elected to and serving in the Senate and in the House of Representatives*.

**13. Long term borrowing by state.** Article IX, Section 15.

The state may borrow money for specific purposes in amounts as may be provided by acts of the legislature adopted *by a vote of two-thirds of the members elected to and serving in each house*, and approved by a majority of the electors voting thereon at any general election. ...

**14. Exceeding revenue limit, conditions.** Article IX, Sec. 27.

The revenue limit of Section 26 of this Article may be exceeded only if all of the following conditions are met: (1) The governor requests the legislature to declare an emergency; (2) the request is specific as to the nature of the emergency, the dollar amount of the emergency, and the method by which the emergency will be funded; and (3) the legislature thereafter declares an emergency in accordance with the specific [sic] of the governor's request *by a two-thirds vote of the members elected to and serving in each house*. ...

**15. State lands.** Article X, Section 5.

… The legislature *by an act adopted by two-thirds of the members elected to and serving in each house* may designate any part of such lands as a state land reserve. ...

**16. State civil service; exemptions.** Article XI, Section 5.

… Within 60 calendar days following such transmission [from the governor as part of his budget], the legislature may, *by a two-thirds vote of the members elected to and serving in each house*, reject or reduce increases in rates of compensation authorized by the [civil service] commission. …

**17. Amendment by legislative proposal and vote of electors.** Article XII, Section 1.

Amendments to this constitution may be proposed in the senate or house of representatives. Proposed amendments agreed to *by two-thirds of the members elected to and serving in each house* on a vote with the names and vote of those voting entered in the respective journals shall be submitted, not less than 60 days thereafter, to the electors at the next general election or special election as the legislature shall direct. …

**18. Mackinac Bridge Authority; refunding of bonds, transfer of functions to highway department.** Schedule and Temporary Provisions, Section 14.

The legislature *by a vote of two-thirds of the members elected to and serving in each house* may provide that the state may borrow money and may pledge its full faith and credit for refunding any bonds issued by the Mackinac Bridge Authority and at the time of refunding the Mackinac Bridge Authority shall be abolished and the operation of the bridge shall be assumed by the state highway department. ...

## G. State Revenue Distribution Programs

Over 70 percent of all state-raised revenues are sent to other units of government for the implementation of government programs. These programs must be separated into two groups: the unrestricted state revenue sharing program and the other programs that distribute state revenues for specific, restricted, local government functions – such as the distribution of funds for highway, mental health, and courts.

**Unrestricted Revenue Sharing.** The proposed amendment restrains the legislature from enacting optional programs with the condition that they will exercise those options if they want to receive funding from state revenue sharing. The federal government often uses this practice to persuade the states to act in a desired way.

Current state revenue sharing law contains certain provisions that could be construed as conditions. For instance, the State Revenue Sharing Act of 1971 provides authority to the state to withhold revenue sharing payments if a local unit fails to provide an adequate financial report or audit. Provisions in Public Act 532 of 1998, which amended the 1971 act, establish conditions on the receipt of shared revenues by some townships. These conditions state that townships with populations between 10,000 and 20,000 are to be treated as cities for calculating a portion of the three-part formula if the units provide 24-hour police and fire services and water services for at least 50 percent of their residents. Twenty townships satisfy this condition. If the state wished to alter these conditions, would that be construed as being subject to a two-thirds majority vote?

**Restricted Revenue Sharing.** Restricted revenue, which is not mentioned in the proposed amendment, by definition contains conditions for its receipt by local units. However, if a change in the conditions for receipt of restricted revenue were viewed as intervening in the power of local government to adopt appropriate charter provisions, ordinances, resolutions, or contracts, it is possible that restricted revenue could be affected by the proposal.

For example, townships have proposed to receive funds directly from the State under Public Act 51 of 1951, the highway funding act, rather than relying on county road commissions to determine road construction in the township. An action of this nature would clearly affect the ability of both townships and counties to build roads (for example, through contracts with private firms). Such a change could be interpreted as intervention in municipal government.

**Potential Impact on Shared Revenues.** Local governments, through charters, ordinances, resolutions, or contracts, can affect the expenditure of local revenues, but they cannot affect the level of state revenues shared with local government, implying that the level of shared revenues is not a municipal concern, and, therefore, would be exempt from the two-thirds majority vote requirement.

The sharing of state revenues, through unrestricted and restricted distribution programs, however, is a major source of local government revenue. Some units are more reliant on shared state revenues than they are on local tax sources. The ability under charter, ordinance, or contract to provide local government services may depend on the receipt of these revenues. A reduction of revenue sharing would reduce the ability of municipalities to meet their "concerns" and could be viewed as intervention requiring a two-thirds majority vote.

## H. Intergovernmental Powers

It is not clear how a transfer of powers between two levels of local government should be treated under the proposed amendment. The legislature, as the law making body, occasionally attempts to deal with the division of governmental responsibilities among the different types of local governments. Whether dealing with courts, highways, zoning, or a myriad of other issues, reform efforts do not necessarily involve an increase or decrease of powers for local governments as a whole, but types of governments may gain or lose powers.

An example of such a transfer of powers might be the provision of additional powers to townships at the expense of counties. Would legislation that shifts some traffic control responsibilities to townships from county road commissions imply state intervention? The state has not gained any powers relative to local governments under such a scenario, and local governments have not ceded any powers to the state. But the powers of one type of local government would be adversely affected, and the powers of another type of government would be strengthened. The legislation, therefore, could be determined to have intervened in municipal affairs.

## I. Federal Regulatory Policy

Some state statutes intervening in the concerns of local government are enacted to meet federal regulatory requirements. For example, the federal government has broad power, under the Commerce Clause of the U.S. Constitution, to establish environmental controls. Many federal environmental statutes contain specific non-preemption provisions that authorize states to enact complementary laws. These state laws must at least meet the federal minimums established under federal law, but they may go further. By enacting state laws, the Michigan Legislature enables the Michigan Department of Environmental Quality to act as the administering agency for water and air quality programs, rather than the U.S. Environmental Protection Agency administering the Clear Water Act and the Clean Air Act. Most states have enacted state laws to move administration to the state level.

Other state statutes – dealing with issues such as highway safety, labor, and health care – are enacted to meet federal requirements established to qualify for federal funds. If new laws, or amendments to existing laws, are necessary due to the state's relationship with the federal government, and those changes are determined to intervene in local government concerns, property and government, then a two-thirds majority would be necessary for enactment of those laws.

# VI. Local Home Rule

## A. Home Rule Concept

Constitutional apportionment of authority is different for the national government and states than it is for the state governments and their local units. The United States Constitution defines the powers that the national government may exercise. The U.S. government has only those powers that have been granted to it by the United States Constitution, together with those necessary powers as may be implied from that grant. All remaining powers reside in the states and with the people.

The Michigan Constitution, on the other hand, is not a grant of powers to the State of Michigan. Rather, it is an expression of the limitations on those powers. The state is presumed to have the power to act unless some federal or Michigan constitutional provision acts as a limitation on that power.

The ability of municipalities to provide municipal services and create charters is an extension of those powers. Cities and villages are municipal corporations deriving their powers from the state, of which they are agencies for carrying on local municipal government. Prior to home rule, it was a legislative responsibility to provide for local government and the delivery of municipal services. By providing for home rule powers, the 1908 Constitution passed that responsibility to the people in creating their own local governments, as defined by the adopted charters.

## B. Home Rule Provisions in the Michigan Constitution

The current Michigan Constitution, adopted by the voters in 1963, is the fourth. The first two constitutions, those adopted in 1835 and 1850, did not address the division of authority among the levels of government, and made only passing reference to local governments as they exist today. Under these constitutions, the authority of local governments was handed down by the state legislature. Municipal charters were established through special acts, and local acts were commonplace as state legislators were typically called upon to address local issues.

This system of government created a burden for the state legislature as more and more of their attention was directed at local issues. In the session prior to the 1907 Constitutional Convention, more than 400 special or local acts were enacted by the legislature. It also created contention, as the local government officials and the representatives of the community elected to the legislature did not always agree on the best solutions to local problems. The desire of the legislature to unburden itself of these special and local acts, and a desire of local officials to have the authority to establish their own local governments according to the needs of the community, led to the inclusion of home rule provisions for cities and villages in the 1908 Constitution.

Many cities and villages replaced their legislative charters with home rule charters under the home rule provisions of the 1908 Constitution and enabling legislation. New communities wishing to incorporate were able to do so on their own terms with the home rule powers available to them. While a few issues arose that needed to be settled in the courts, Michigan's experiment with home rule was generally viewed as a success.

Delegates to the 1961 Constitutional Convention attempted to build on that success by strengthening the provisions for cities and villages, extending home rule authority to counties, and stating in Section 34 that the intent of the delegates was to presume that power rests with the local governments.

Today, Michigan is one of 37 states with constitutions that provide home rule for cities and villages and one of 23 state constitutions that give home rule powers to counties. These provisions have positioned Michigan as one of the strongest home rule states in the nation. Almost 20 years ago, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) studied the degree of local discretion state constitutions and state laws afford local governments.[1] Michigan cities ranked as the third highest degree of local discretion. While Michigan counties ranked fairly low (28th), state law affording counties local discretion remains unused.

[1] U.S. Advisory Commission on Intergovernmental Relations, Measuring Local Discretionary Authority, M-131, (Washington D.C.; November 1981).

### Home Rule Provisions in the Michigan Constitution

**County Charters.** Article VII, Section 2 provides:

> Any county may frame, adopt, amend or repeal a county charter in a manner and with powers and limitations to be provided by general law, which shall among other things provide for the election of a charter commission. The law may permit the organization of county government in form different from that set forth in this constitution and shall limit the rate of ad valorem property taxation for county purposes, and restrict the powers of charter counties to borrow money and contract debts. Each charter county is hereby granted power to levy other taxes for county purposes subject to limitations and prohibitions set forth in this constitution or law. Subject to law, a county charter may authorize the county through its regularly constituted authority to adopt resolutions and ordinances relating to its concerns.

**Cities and Villages; Incorporation, Taxes, Indebtedness.** Article VII, Section 21 provides:

> The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall limit their rate of ad valorem property taxation for municipal purposes, and restrict the powers of cities and villages to borrow money and contract debts. Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law.

**Charters, Resolutions, Ordinances; Enumeration of Powers.** Article VII, Section 22 provides:

> Under general laws the electors of each city and village shall have the power and authority to frame, adopt and amend its charter, and to amend an existing charter of the city or village heretofore granted or enacted by the legislature for the government of the city or village. Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this section.

**Construction of Constitution and Law Concerning Counties, Townships, Cities, Villages.** Article VII, Section 34 provides:

> The provisions of this constitution and law concerning counties, townships, cities and villages shall be liberally construed in their favor. Powers granted to counties and townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution.

## C. Power is Presumed to Rest with Local Government

Home rule is a general grant of rights and powers to local governments, subject only to certain enumerated restrictions, instead of the former method of the legislature granting enumerated rights and specifying powers. Cities, villages, and charter counties are presumed to have the powers to perform all tasks unless that power has been specifically preempted by the legislature. But that presumption of powers does not exempt local governments from legislative oversight. Article VII, Section 22, contains the phrase, "subject to limitations and prohibitions provided by this constitution *or by law*" [emphasis added]. Clearly the constitutional delegates intended for the State to continue to provide laws within which local governments would operate.

The Michigan Constitution provides the foundation upon which home rule powers are provided, but those provisions are not self-executing. The legislature had to enact enabling legislation – the Home Rule Cities Act, the Home Rule Villages Act, and the Charter County Act – for home rule powers to take form. These laws provide certain elements that a charter must include and permissive powers that a charter may provide. Charter units are presumed to have power to act on everything else.

## D. Past Efforts to Limit the State's Ability to Impose Restrictions

The propensity of the state to "intervene" in the affairs of local units should not be viewed as a new problem, since under home rule, the role of the state is the limited one of providing restrictions and limitations under which local units must operate.

In 1942, the *Preliminary Report of the Michigan Constitutional Revision Study Commission* offered the possibility of prohibiting general legislative acts, "which revoke, decrease, or limit any power or immunity possessed by the city at the time of their passage or which add burdens to cities or villages, from becoming effective unless approved by the municipality affected." (p. 7)

In a 1961 CRC Report, *A Comparative Analysis of the Michigan Constitution*, (No. 208), Louis Friedland, Ph.D. of the Wayne State University Department of Political Science, wrote that one possibility for improving the system of home rule is "a more effective delineation of matters of statewide and local concern. The question of legislative encroachment continues to be vexatious." He suggested strengthening municipal home rule by strengthening "the concept of state and local sharing of regulatory functions by saving local powers unless there is a specific pre-emption of authority by the state." This suggestion took form in the recommendations of the Constitutional Convention's Committee on Local Government. The committee report offered a second paragraph to what was to become Article VII, Section 21:

> Each such city and village is hereby granted full power to pass laws and ordinances relating to its municipal concerns, property and government, but the legislature may enact laws of statewide concern which will preempt the field only when the intention is so stated therein. . . .

The reasoning behind this proposed language was that if the state wants to preempt local regulation, it should say so in the legislation and not leave it to judicial interpretation. That paragraph was not adopted as part of the new Constitution.

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The Citizens Research Council of Michigan is a private, not-for-profit public affairs research organizaiton founded in 1916 to provde unbiased, nonpartisan analysis of issues concerning state and local government organization and finance in Michigan. CRC is supported by the voluntary contributions of business, industry, foundations, and individual citizens.

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