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STATE BALLOT ISSUES – PROPOSAL A (LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES) PROPOSAL B (NATURAL RESOURCES TRUST FUND)

Two proposals to amend the Michigan Constitution were placed on the November 6 ballot by the legislature. Proposal A would provide for review by the legislature of administrative rules. This would assure the constitutionality of the current procedure, but raises questions concerning the separation of powers. Proposal B would create a Natural Resources Trust Fund that would receive certain mineral revenues and distribute those revenues for the preservation of scenic and environmentally-threatened land and development of recreational facilities. However, the wording of the amendment may preclude spending a major portion of the savings for the intended purpose.

PROPOSAL A: LEGISLATIVE REVIEW OF ADMINISTRATIVE RULES

Proposal A would amend Section 37 of Article IV of the Michigan Constitution to permit the legislature or a joint committee thereof to approve or disapprove, in the manner provided by law, any rule proposed by an administrative agency. Proposal A has been placed on the ballot to cure questions of unconstitutionality concerning the present legislative role in administrative rule making.

Background

Many statutes require agency rules to give them effect. Laws seldom are specific enough to deal with every unforeseen event and lack of specificity may make passage of a particular measure more likely. Potential conflict in the legislative process may be avoided with the promise that details can be worked out later in the form of rules.

Between 1943, when the first act governing administrative procedures was adopted, and the Michigan constitutional convention in 1963, there were a number of changes in the act and several opinions by attorneys general holding those changes to be unconstitutional. The legislature several times asserted the power to reject, approve, suspend, or amend administrative rules by resolution or by committee action. The attorneys general ruled consistently that the legislature could act on an administrative rule "only by constitutionally ordained legislative process, namely by bill." The state constitution requires that legislation be passed by both houses of the legislative branch and then presented to the executive branch, subject to the veto power.

Thus, at the time of the constitutional convention, the legislature could act on administrative rules only by passing a bill. The constitutional convention placed language in the new constitution that would authorize the legislature to empower a joint committee on administrative rules to suspend any proposed promulgated between legislative sessions. It was clearly the intent that this power of suspension was solely for the purpose of giving the legislature the opportunity when it reconvened to act by bill on those rules promulgated when it was not in session.

At the time of the constitutional convention, year-long sessions of the legislature were the exception. The typical annual session was about six months with long intervals between sessions. Since the late 1960s legislative sessions have lasted nearly 12 months with virtually no intervals.

The Administrative Procedures Act, 1969 PA 306, gave statutory effect to the constitutional provision (Section 37 of Article IV). The joint committee was empowered to do no more than suspend a proposed rule during the legislature's absence. In addition, the legislature could express its opinion that a promulgated rule was unauthorized, outside legislative intent, or inexpedient. However, legislative disapproval of a promulgated rule was an expression of opinion only. Legislative modification or rescission of an existing rule could be accomplished only by enacting a law.

Amendments made to the Administrative Procedures Act in 1971 and 1977 appear to have returned the legislature to a procedure which state attorneys general had invalidated in 1953, 1958 and 1967. The 1977 amendments were passed over the governor's veto. The governor then requested an advisory opinion of the state supreme court as to the constitutionality of the act, but the court declined to issue such an advisory opinion.

The Administrative Procedures Act, as amended, provides for three powers which the joint committee on administrative rules and/or the legislature currently exercise in regard to agency rule making: powers of suspension, powers of disapproval, and powers of approval.

Powers of Suspension

Under the provisions of Article IV, Section 37, the power of suspension of a rule proposed by an agency is legitimate only if (1) the suspension is directed against a rule promulgated between regular sessions of the legislature; (2) the suspension does not extend beyond the next regular legislative session; and, (3) the power is exercised by the joint committee. This is all that Article IV, Section 37 permits. The Administrative Procedures Act, however, includes two additional powers -- disapproval and approval.

Powers of Disapproval and Approval

Under present statutory law, the joint committee has 60 days, from date of receipt, to act upon a proposed rule; if approved, the agency may file copies of the rule with the secretary of state for promulgation. Should the rule be disapproved or an impasse reached, the committee must report such a result to the legislature. The full legislature then has 60 days from receipt of the report to pass a concurrent resolution approving the rule. Under the statute proposed rules approved by neither the joint committee nor the legislature have no effect. Rules that are approved and promulgated have the force of law.

Although the current law requires approval of the joint committee or the legislature for all administrative rules, attorneys general opinions have held that such approval is essentially superfluous. The attorney general has ruled that agency rules promulgated pursuant to law do not require legislative approval in any form to become effective. Nothing in current statutes or in the state constitution, however, prevents the legislature from expressing its opinion to an agency of the executive branch that a proposed rule should be modified or withdrawn.

From the rulings of the attorneys general, it would appear that except for the power of temporary suspension provided for in Section 37 of Article IV of the state constitution, an agency rule promulgated pursuant to law may be affected only by passage of another law. It is this conflict between current statutory law and the attorneys general interpretation of Article IV, Section 37 that has led to placing Proposal A on the ballot.

Table 1 shows the activity of the joint committee during the past five years.

	1979	1980	1981	1982	1983
Pending from prior year	30	11	18	12	10
Proposed	136	161	160	139	138
Approved	114	109	126	107	95
Disapproved	4	3	5	0	2
Withdrawn	31	41	34	32	37
Impasse	6	0	1	1	0
No Action	0	1	0	1	0
Pending	11	18	12	10	14

SOURCE: Joint Administrative Rules Committee, Annual Reports

The Case for Proposal A

Proponents of Proposal A advance several points in its support.

First, the legislature has a legitimate role to play in oversight of executive agencies. The purpose of legislative oversight of administrative rules is to ensure that agency action is faithful to the spirit of the law. The amendment would permit the legislature to exercise its responsibilities.

Second, it may be argued that the present procedure does not encroach upon the powers of the executive branch because rule making is a legislative and not an executive function. This contention is buttressed by the fact that the legislature could eliminate the need for rules by drafting more specific laws.

Third, the current procedure permits an additional opportunity to defeat an objectionable rule, if opponents are unsuccessful at persuading the agency not to propose the rule in the first instance. Members of the joint committee on administrative rules may be persuaded to withhold approval. The elected legislature is more accountable to the voters than appointed officials or career employees and therefore more responsive to citizen problems with administrative rules which have the force of law and which may, in individual cases, be more important than legislation.

The Case against Proposal A

Opponents argue that the proposed amendment would adversely affect the principle of separation of powers. The present state constitution provides for protecting the people against abuses of power by dispersing that power among several branches of government. Section 2 of Article III states that:

> The powers of government are divided into three branches; legislative, executive, and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Thus, the legislature enacts the law but cannot enforce it; the executive enforces the law but cannot enact it; and neither can interpret the law for that is within the province of the courts.

A like principle may be found in the Constitution of the United States. In regard to this principle Madison stated, "the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments" (Federalist No. 48). Madison found the legislative branch to be the most likely to encroach upon the powers granted to the other two because:

> Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the coordinate departments.

Proposal A does not specify the precise procedure by which the legislature would approve or disapprove a proposed agency rule. The proposed amendment states only that the legislature, or a joint committee empowered by it, could approve or disapprove "in the manner provided by law" any proposed rule. Opponents argue that the proposed amendment asks the people to endorse a blank constitutional check upon which the legislature could fill in the amount as it pleased, potentially upsetting the delicate constitutional balance between the executive and the legislature. If the people are being asked to expand the boundaries of legislative power, the people should be told precisely where the new boundaries are to be drawn.

It is also argued that Proposal A is unnecessary because the constitution already provides a method for the legislature to act on rules -- legislative adoption of a bill subject to veto by the governor -- which method preserves the separation of powers.

PROPOSAL B: ESTABLISHMENT OF A MICHIGAN NATURAL RESOURCES TRUST FUND

Proposal B would add a Section 35 to Article IX of the Michigan Constitution. If adopted, the proposal would give constitutional status to a Natural Resources Trust Fund and restrict the uses to which the revenues of the fund could be put. The fund is to consist of revenues derived from leases for the "extraction of nonrenewable resources from state owned lands" except from lands acquired under state or federal game and fish protection funds. The fund would, therefore, be essentially a continuation of the existing Recreational Land Acquisition ("Kammer") Trust Fund, which has been the subject of several controversial diversions since its inception in 1976. The proposal would, however, also permit the legislature to continue the diversion of mineral lease revenues to the Michigan Economic Development Authority. Present law provides for the diversion over a 50-year period of nearly $1 billion of mineral revenues to the Economic Development Authority (MEDA).

Proposal B would limit the accumulation of principal in the natural resources fund to $200 million, but would allow the legislature to increase the limit by law. No more than one-third of the revenues in a given year could be spent from the fund in the following fiscal year. The peculiar wording of the expenditure limit may result in an inability to spend more than one-third of the interest revenue of the natural resources fund when it has reached its maximum level of principal.

Not more than 25 percent of the money spent from the fund in a given year could go toward development of recreational facilities (which is not a purpose of the Kammer Fund), while not less than 25 percent would go toward purchase of land or rights in land to be protected "because of its environmental importance or its scenic beauty." Administrative expenditures of the fund would be outside these limits. The fund would be administered by a board within the Department of Natural Resources.

Background

The Recreational Land Acquisition ("Kammer") Trust Fund was created by Public Act 204 of 1976. Its revenues consist of rents and royalties from private oil, gas, and mineral exploration on state-owned lands, together with bonuses resulting from bids for access to such lands. The basic concept is that of using revenues from non-renewable resources to purchase land for the benefit of future generations.

The legislation provided that of the annual amounts flowing into the fund, the lesser of one-third, or $2.5 million, together with interest earnings could be expended each year for the acquisition of recreational and scenic land. The remaining revenues were to accumulate until the $100 million (later increased to $150 million) aggregate ceiling was reached. At this point, the trust fund was to become self-perpetuating.

The fund has not, however, become self-perpetuating. Diversions of Kammer Fund revenue to purposes other than those designated for the fund have kept fund balances far below the $150 million ceiling established in 1980 (see Table below).

Operations of Recreational Land Acquisition ('Kammer') Fund
FY 1978-1983
(in millions)

	Fiscal Year					
	1978	1979	1980	1981	1982	1983
Beginning balance (10/1)	$2.8	$8.9	$19.8	$12.6	$11.7	$35.3
Income						
Revenue	6.2	12.2	22.5	58.2	40.2	23.1
Other	--	0.01	0.9	0.1	0.1	0.1
Total Income	6.2	12.2	23.4	58.3	40.3	23.1
Total available	9.0	21.1	43.3	70.9	52.1	58.5
Outgo						
Expenditures & Other	0.03	1.3	4.7	13.0	3.7	5.5
Transfer to MEDA	--	--	--	--	13.0	14.0
Transfer to General Fund		--	26.0	46.2	--	--
Total Outgo	0.03	1.3 a	30.7	59.2	16.7	19.5
Ending balance (9/30)	$8.9	$19.8	$12.6	$11.7	$35.3	$39.0

SOURCES: Annual Financial Reports, State of Michigan
NOTE: Figures may not add due to rounding.

[a] Annual Financial Report does not record loans to petroleum carriers.
See text below.

Thus, although 38,400 acres of land have been purchased by the fund, legislation diverting money from the fund has been adopted four times.

- In 1979, Act 204 of 1976 was amended to divert up to $6 million of principal for loans (at a 4% interest rate) to petroleum carriers to modify or replace double bottom tankers. Loans to carriers totaled $3.3 million. The state general fund has reimbursed the Kammer fund a total of $371,000 through fiscal 1983 for the difference between the interest rate on the loans and that earned on other land trust investments.

- In FY 1980 and FY 1981, the legislature transferred $26 million and $46.2 million respectively from the Kammer fund to the general fund in order to help balance the general fund during the recession. The general fund was supposed to pay $3 million annually to repay the $26 million and $4.6 million annually to repay the $46.2 million. No provision was made for paying foregone interest. In 1982, however, the repayment provisions were cancelled by the legislature.

  In 1982 the legislature created the Michigan Economic Development Authority **(**MEDA**)** to provide economic incentives to attract new businesses to the state. Annual funding for MEDA initially came from the Kammer fund. Subsequently, the legislature created the

Heritage trust fund which serves no purpose other than to act as a temporary receptacle for revenues that previously went into the Kammer fund.

The payment schedule of the Heritage Trust Fund provides for the following annual payments to two funds administered by MEDA.

Fiscal Year	Annual Payments to: Economic Development Fund	Research Center Fund
	(in millions)	
1982	$ 10.0	$ 3.0
1983-1984	10.0	4.0
1985-1987	15.0	4.0
1988	20.0	2.0
1989-2032	20.0	0
TOTAL	$975.0	$25.0

Thus, commitments to MEDA from a fund originally intended for resource preservation would total $1 billion over a 50-year period.

- Public Act 72 of 1983 authorized the diversion of $16 million from the Land Acquisition Trust Fund to finance the Michigan Youth Corps program, if there was not sufficient general fund surplus to finance the program. No amounts actually were diverted under this provision.

Conclusion

The basic issue raised by Proposal B is whether the revenues dedicated to the Natural Resources Trust Fund should be permanently allocated to that purpose, regardless of the level of future need for such resources, or whether they should be freed for use as the legislature sees fit. In support of dedication is the fact that the dedicated revenues are both volatile (see table) and unlikely to remain at high levels indefinitely. Therefore, it would be unwise to use those revenues to support ongoing programs of state government. Instead, putting them in a trust fund for use in purchasing threatened land resources appears to be a fiscally prudent approach.

There are, however, some peculiarities in the wording of Proposal B that may lead to unexpected or unintended results. The limitation on expenditures from the fund to 33-1/3 percent of the prior year's revenues was apparently intended to assure a build-up of principal in the fund from the dedication of certain bonuses, rents, and royalties until it reaches $200 million, exclusive of interest. At this point, questions arise. First, there is no explicit provision for disposition of the dedicated revenues once the cap is reached. They could revert to the general fund, or the legislature could increase the cap. Second, since the expenditure limit is determined by the prior year revenues in the fund, the limit may create the perverse effect of a continual accumulation in the fund of interest (which is exempt from the cap on the size of the fund). The reason for this is that in governmental accounting parlance, the term “revenues” includes interest. Thus, if the fund is capped and no longer receiving other forms of revenue, expenditures of the fund could not exceed one-third of the prior year interest, the remainder

accumulating in the fund. The legislature may have intended that the expenditure limit apply only to royalties and rents as is the case under Act 204 of 1976, but the proposal was not worded that way. The fund could, therefore, simply continue growing to no purpose except that of providing a large pot of money.

In addition, the nature of the provision respecting payments to the Michigan Economic Development Authority is such that the legislature could adopt legislation extending payments to MEDA until the year 2032. The proposal would permit the channeling of $1 billion of mineral rights revenues to economic development rather than natural resource protection.