ISSUES RELATIVE TO THE CONSTITITIONALITY OF LOCAL SALES TAXATION IN MICHIGAN

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ISSUES RELATIVE TO THE CONSTITUTIONALITY OF LOCAL SALES TAXATION IN MICHIGAN

Introduction

Recently, there has been considerable discussion regarding the use by units of local government of general or selective sales taxes to finance regional public transportation services. Legislation has already been adopted authorizing Wayne County and several other units of local government to levy excise taxes to finance professional sports stadia and convention facilities. Although the state Legislature may employ the term "excise taxes" or "gross receipts taxes" to denominate what are essentially sales taxes, Michigan courts have held that "a court must determine the true nature of a tax and not be misled by legislative legerdemain."

Public Act 180 of 1991 authorizes certain eligible municipalities to impose an excise tax at a rate not to exceed one percent of the gross receipts of restaurants and hotels, and not to exceed two percent of the gross receipts of automobile rental companies. Restaurant meals are already subject to the general state sales tax, which is levied on gross taxable sales at retail of tangible personal property while hotel accommodations and automobile rentals are subject to the state use tax.

Act 180 requires an eligible municipality which intends to avail itself of the taxing authority granted by the act to first seek voter approval. In addition to Wayne County, the act applies to Oakland County and to the City of Pontiac (because Pontiac levies a city income tax) and to Ingham, Kent, Muskegon, and Washtenaw counties and to the most-populous city in each of these latter four counties (Lansing, Grand Rapids, Muskegon, and Ann Arbor, respectively).

Whether units of local government in Michigan may impose, or be authorized to impose, general or selective sales taxes is by no means clear. (In 1970, however, the state Attorney General concluded that local units were without such authority.) There are several basic legal issues involved in the use of local sales taxes that have yet to be resolved:

> First, Section 8 of Article 9 of the Michigan Constitution limits the rate of sales tax that the Legislature may impose on retailers to four percent of their gross taxable sales of tangible personal property. It is arguable whether this limitation was intended to apply only to state sales taxes imposed by the Legislature or also to sales taxes imposed by units of local government.
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> Second, Sections 10 and 11 of Article 9 of the state Constitution require respectively that "of all taxes imposed on retailers on taxable sales at retail of tangible personal property," 15 percent be allocated to townships, cities, and villages and 60 percent to the state school aid fund. The use of the term "all" taxes can be construed to require that 75 percent of both a state sales tax and of any local sales taxes be earmarked to townships, cities, villages, and school districts. Such an allocation would effectively preclude using local sales taxes to finance a sports stadium, convention facility, or regional transportation system.

Third, while Article 7 of the state Constitution accords charter counties (at present, Wayne County) and cities and villages broad authority to impose nonproperty taxes without legislative authorization, but "subject to limitations and prohibitions" set forth in the state Constitution and laws, the four percent limitation upon the rate of the sales tax and the allocation requirements may well be such limitations and prohibitions upon the authority of charter counties cities, and villages to levy nonproperty taxes. In any event, noncharter counties and regional authorities have no constitutional authority to impose nonproperty taxes, but the Legislature might authorize such taxes by law.

The Convention which drafted the present state Constitution drew a distinction between charter counties, cities, and villages, and all other units of local government. The former category of units of local government were to have constitutional authority to levy, without necessity of legislative authorization, any tax not otherwise prohibited, while other units of local government could levy only those taxes explicitly authorized by the Legislature.

The use of local sales taxes in Michigan, if otherwise constitutional, would require legislative authorization, which has already been granted to certain units of local government to finance professional sports stadia and convention facilities, and voter approval as required by Section 31 of Article 9 of the state Constitution. (Section 31 was added to Article 9 by the tax limitation "Headlee" amendment in 1978.) Still, any attempt to collect a local sales tax would likely face legal challenges on one or more of the unresolved legal issues discussed above. While the following analysis is of Public Act 180 of 1991, which authorizes selective sales and use taxes to finance professional sports stadia and convention facilities, it also applies to the proposed use of local sales taxes for other purposes such as regional public transportation services.

Part I. Local Government Taxing Authority

It should be noted at the outset that the state Constitution grants broad taxing authority to charter counties and to cities and villages. The philosophical basis underlying these constitutional grants of authority was that charter counties, cities, and villages should be permitted to levy any taxes not otherwise prohibited, while other units of local government would be limited to those taxes for which there was explicit legislative authorization.

A. Charter Counties

Section 2 of Article 7 of the state Constitution provides to the extent here relevant, as follows:

> 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.

The Legislature has implemented Section 2 through passage of Public Act 293 of 1966, the charter county act. In November 1981, Wayne County voters adopted a proposed charter making Wayne County the sole charter county in Michigan.

B. Cities and Villages

Section 21 of Article 7 of the state Constitution, in language virtually identical to that contained In Section 2, grants to cities and villages authority to levy other taxes for public purposes:

> 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.

In addition to the foregoing constitutional provisions, Section 34 of Article 7 of the state Constitution provides that "[t]he 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."

1. Intent of Provisions

It has been held that resort may be had to the Official Record of the Constitutional Convention and the Address to the People when attempting to determine the meaning of a provision of the state Constitution. **Burdick** v **Secretary of States** (373 Mich 578; 1964). Of the two provisions cited above, the 1961 Constitutional Convention first addressed that which became Section 21. The majority of debate at the Convention regarding the proposed power "to levy other taxes" dealt with whether municipalities would be authorized to impose either an income tax or a payroll tax upon nonresidents.

While the grammatical context of Section 21, and likewise that of Section 2 as well as the Convention proceedings, makes it abundantly clear that the phrase "other taxes" referred to nonproperty taxes, the Convention made no attempt to enumerate what those other taxes might be. To the contrary, the Convention's committee on local government, which originated the proposal, offered the following explanation in its support:

> The grant of power for nonproperty taxes is added to permit cities and villages that wish to ease the burden on the property tax to act on the basis of clear constitutional authority, for legal opinion as to current taxing powers of cities and villages is conflicting. The committee proposal does not attempt to specify the taxes a municipality might or should adopt, but to make possible a local decision on such matters, subject to limitations and prohibitions contained in this constitution or general laws now existing or that might be adopted by a future legislature. 1 Official Record, Constitutional Convention 1961, at 1006; emphasis supplied.

Based upon the foregoing analysis, three considerations may be stated. First, it was the intent of the Constitutional Convention that cities, villages, and charter counties, pursuant to Sections 21 and 2 respectively, have "clear constitutional authority" to impose nonproperty taxes. Second, the Convention left unenumerated the other taxes that might be imposed. Third and last, such other taxes were explicitly to be subject to limitations and prohibitions provided in the state Constitution or by law.

As will be examined in **Part II**, there are several limitations contained in the state Constitution that may apply to the taxes authorized by Public Act 180 of 1991 and, as such, may circumscribe their imposition. At this point, however, it is necessary to review a relevant statutory prohibition. Six months after the present state Constitution went into effect on January 1, 1964, the Legislature adopted Public Act 243 of 1964 which, in its entirety, provides as follows:

> Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964.

The practical effect of Public Act 243 of 1964 was to undermine the taxing authority granted to cities and villages by Section 21 of Arti-

cle 7 of the state Constitution. It may be argued that Act 243 is simply a prohibition provided "by law" and as such is not contrary to the letter of Section 21 of Article 7. However, there is no evidence to suggest the Constitutional Convention intended the Legislature to utilize the phrase "subject to limitations and prohibitions provided by this constitution or by law" to enact a blanket prohibition against cities and villages imposing any taxes not already imposed, unless the Legislature so authorized. As noted earlier, it was this very distinction that the Convention drew between charter counties, cities, and villages on the one hand and other units of local government. Charter counties, cities, and villages would possess constitutional authority to levy, without necessity of legislative authorizations any tax not otherwise prohibited, while other units could levy only those taxes for which there was explicit legislative authorization. (The latter group would include regional transportation authorities.) It should be noted, however, that the constitutionality of Act 243 of 1964 has not been challenged.

Part II. Applicable Constitutional Limitations

A. Sales Tax Limitation

The first sentence of Section 8 of Article 9 of the Michigan Constitution prescribes that "[t]he Legislature shall not impose a sales tax on retailers at a rate of more than four percent of their gross taxable sales of tangible personal property." The limitation may be said to suffer from two deficiencies. First, the limitation does not specify the privilege upon which the sales tax is levied. Second, it is arguable that the limitation applies only to a sales tax imposed directly by the state Legislature, but not to a sales tax imposed by units of local government under legislative authorization.

1. Basis of Sales Tax.

The threshold question with respect to the sales tax limitation is whether the excise taxes, or any of them, authorized by Act 180 are such that, if levied, they would exceed the constitutional limitation.* The basis of the sales tax is the privilege of selling at retail. In absence of defining language in the state Constitutions the Legislature has supplied a statutory definition. Section 1 of Public Act 167 of 1933, the general sales tax act, defines "sales at retail" as consisting essentially of four elements.

First, there must occur a transfer in ownership of tangible personal property. Second, the transfer must be for a consideration; that is, something of value given in exchange for the property received. Typically, this element is satisfied when the buyer remits to the seller the purchase price of the property. Third, the transfer must be in the ordinary course of the seller's business. Fourth, and finally, the purpose of the transfer must be for the buyer's consumption or use as opposed to for resale or lease.

Given the fact that the limitation upon the rate of the sales tax contained in the state Constitution is dependent upon a statutory definition, the Legislature has considerable latitude to avoid the limitation by devising taxes which apply to transactions which lack one or more of the elements of a retail sale. It should be noted in this regard that Act 180 defines the taxes authorized by it as taxes upon "gross receipts," as that term is defined by Public Act 228 of 1975, the single business tax act. Of the three excise taxes authorized by Act 180, neither that upon accommodations nor that upon the rental of automobiles appears to be problematic as concerns the sales tax limitation, the reason being that neither transaction involves a retail sale because there is no transfer of ownership in property.

The tax authorized by Act 180 upon restaurants, however, presents greater difficulty. Restaurant meals appear to satisfy fully the definition of a sale at retail. There is a transfer of ownership in tangible personal property, for a consideration, in the ordinary course of the restaurant's business, and such meals are generally pur-

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*In 1954, voters adopted an amendment (the so-called "Conlin" amendment) to the 1908 state Constitution that, among other things, limited the sales tax to its then-existing rate of three percent. Subsequently, in 1960, voters adopted another amendment that increased the limitation to four percent, which was retained in the present state Constitution.

chased for consumption by the buyer and not for resale. In its clearest expression, then, the issue is whether a gross receipts tax of one percent levied upon a retail sale (which is already subject to the sales tax) is subject to the state constitutional limitation.

Whether it was the intent of voters who ratified the constitutional limitation in question to limit the rate of only one tax -- the sales tax -- or to limit the aggregate rate of taxation which could be imposed upon any retail sale by any combination of taxes cannot be definitively established. However, a salient argument may be advanced that the latter purpose was intended.

In **Lockwood v Commissioner of Revenue,** (357 Mich 517; 1959), the state Supreme Court was confronted by the question whether a one percent use tax levied upon retail sales, which were also subject to the sales tax, violated the constitutional sales tax limitation. At that time, the limitation upon the sales tax was three percent. In 1959, the Legislature had amended the use tax act to increase its rate to four percent. The Legislature further provided that the use tax would be imposed at the rate of only one percent upon any transaction also subject to the sales tax. As a result, retail sales were taxed at an actual rate of four percent.

While the additional tax involved in **Lockwood** was the use tax, rather than the gross receipts tax authorized by Public Act 180 of 1991, the line of reasoning employed in **Lockwood** is relevant to the present inquiry. The Court noted that

> [w]e have seen the situation giving rise to the constitutional enactment, and we have seen the words employed by the people. How are they to be interpreted? At this point the defendants find themselves in a dilemma. If they reply that the people were interested in self-protection, in limiting the threat, clearly visible, of taxes on retail sales mounting as the income tax and other taxes have mounted, then they are bound to hold this tax bad for, in conjunction with the sales tax already imposed, it exceeds the 3% limitation. It is the first step in the familiar pattern of tax increases. But they may take the other horn of the dilemma. They may say that the words used, "sales tax," means literally that, namely, the sales tax levied by the particular statute which the citizen was subject too at the time of the constitutional limitation.
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> But this would freeze, for the life of the constitutional amendment, the sales tax in the precise form used at the time of the amendment, for after change, no manner how slight, it would be no longer the same statute the citizen knew at the time of the constitutional amendment. This literal construction of the words "sales tax" forces the inescapable conclusion that the people have done a futile thing: they have voted themselves a constitutional protection good only until the next session of the legislature.
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> Our question is a new one, without parallel in the cases cited: May tax be piled upon tax despite a constitutional

> limitation prohibiting the pyramid? Is the accumulation provided only that the added taxes are taxes upon different "privileges"? If so, the constitutional limitation is utterly without meaning for the only limitation upon the number of "privileges" of the citizen subject to taxation is the ingenuity of the tax collector. (357 Mich at 554-556; emphasis supplied.)

In striking down the tax at issue in **Lockwood,** the Court reasoned that "[t]he literal construction of the words [of the limitation] without regard to their obvious purpose of protection, is to make the constitutional safeguard no more than a shabby hoax, a barrier of words, easily destroyed by other words." (357 Mich at 556.) Subsequent courts have noted that the essence of the **Lockwood** case is that "a court must determine the true nature of the tax and not be misled by legislative legerdemain." **Bailey v Muskegon County Board of Commissioners,** (122 Mich App 808, 819; 1983).

B. Applicability of Sales Tax Limitation to Units of Local Government

The second deficiency of the sales tax limitation of Section 8 of Article 9 -- the first being an absence of definition -- is that, arguably, it applies only to sales taxes imposed directly by the Legislature, but not to sales taxes imposed by units of local government under legislative authority. Thus, even if the excise tax upon restaurants authorized by Act 180 were held to be in the nature of a sales tax, it might be that the constitutional limitation in question would not apply. If so, then upon this point, the elegant reasoning of **Lockwood** is of scant assistance since at issue in that case was the pyramiding of an additional tax levied directly by the state.

The Constitutional Convention proceedings shed no light upon whether the sales tax limitation was directed exclusively at the Legislature. The majority of Convention debate relative to Committee Proposal 39, which became Section 8 of Article 9, concerned first, whether the sales tax should continue to be levied upon its 1946 base and second, whether the revenues derived should continue to be constitutionally dedicated to schools and local governments or the Legislature given greater flexibility over their allocation.

However, the unambiguous text of Section 8 of Article 9, that "[t]he Legislature shall not impose a sales tax on retailers at a rate of more than four percent of their gross taxable sales of tangible personal property," stands in stark contrast to the equally unambiguous text of Section 7 of the same Article which provides that "[n]o income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions." (Emphasis supplied.) When read together, these two contemporaneously drafted constitutional provisions suggest that when the Constitutional Convention sought to limit the authority of both the Legislature and that of local governments it so stated.

Before proceeding further, the analysis to this juncture of Public Act 180 of 1991 is summarized as follows: First, Sections 2 and 21 of Article 7 of the state Constitution grant respectively charter counties and cities and villages power to levy nonproperty taxes, without specifying their nature, but subject to limitations and prohibitions provided in the state Constitution or by law.

Second, Section 8 of Article 9 of the Michigan Constitution limits the rate of the sales tax to four percent. Neither the tax authorized by Act 180 upon accommodations nor that upon the rental of automobiles appears to be problematic as concerns the sales tax limitation since neither transaction involves a retail sale. On the other hand, the tax upon restaurants presents greater difficulty since the selling of food by a restaurant appears to satisfy fully the definition of a sale at retail. Whether it was the intent of voters who ratified the constitutional limitation in question to limit the rate of only one tax -- the sales tax -- or to limit the aggregate rate of taxation which could be imposed upon any retail sale by any combination of taxes cannot be definitively established. However, a salient argument may be advanced that the latter purpose was intended.

Third, it may be argued that the sales tax limitation of Section 8 of Article 9 applies only to sales taxes imposed directly by the Legislature, but not to sales taxes imposed by units of local government under legislative authority. Thus, even if the excise tax upon restaurants authorized by Act 180 were held to be in the nature of a sales tax, it might be that the constitutional limitation in question would not apply.

C. Applicability of Sales Tax Allocation Provisions

The state Attorney General has concluded that local units are without authority to levy a sales tax. (OAG 1969-70, No. 4694). The conclusion was grounded less upon the language of Sections 2 and 21 of Article 7 -- since neither provision explicitly excludes any particular tax -- than upon that of Sections 10 and 11 of Article 9 of the state Constitution.

1. Allocations to Townships, Cities, and Villages.

Section 10 of Article 9 of the state Constitution provides as follows:

> One-eighth of all taxes imposed on retailers on taxable sales at retail of tangible personal property shall be used exclusively for assistance to townships, cities and villages, on a population basis as provided by law. In determining population the legislature may exclude any portion of the total number of persons who are wards, patients or convicts in any tax supported institution.*

2. Allocations to the School Aid Fund.

Section 11 of Article 9 provides as follows:

> There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education and school employees' retirement systems, as provided by law. One-half of all taxes imposed on retailers on taxable sales at retail of tangible personal

*Both the "one-eighth" (12.5 percent) allocation required by Section 10 and the "one-half" (50 percent) allocation required by Section 11 were increased by twenty percent when food and prescription drugs were removed from the sales tax base by constitutional amendment on January 1, 1975. See Section 8 of Article 9 of the state Constitution.

> property, and other tax revenues provided by law, shall be dedicated to this fund. Payments from this fund shall be made in full on a scheduled basis, as provided by law.*

The Attorney General's opinion reasoned that if local units could levy a sales tax, either of two eventualities would occur, neither of which would have been intended by voters who ratified the Constitution. On the one hand, if a local unit levied a sales tax, and the allocation provisions of Sections 10 and 11 did not apply, then the local unit levying the tax would receive more than the 15 percent of all taxes imposed on taxable retail sales specified by Section 10. Alternatively, if a local unit levied a sales tax, and Sections 10 and 11 did apply, then 75 percent of the locally-generated revenue would be allocated beyond the boundaries of the local unit levying the tax. Regarding the latter point, the Attorney General concluded that local units were "without power to levy taxes for the benefit of other local governmental units such as other cities, villages, townships or school districts." (OAG 1969-70, No. 4694 at 141).

That reasoning of the Attorney General's opinion that local units are without authority to impose taxes "for the benefit of other local governmental units" is not well taken, particularly given the only authority cited by the opinion in support of the proposition was a nineteenth century legal treatise. In any event, the reasoning relied upon by the Attorney General has been greatly undermined by subsequent legislative enactments, such as tax increment financing and school district tax base sharing. Both statutes are examples of laws that require some portion of the revenues generated from taxes imposed by one local unit to be expended for the benefit of another local unit. Although the constitutionality of tax base sharing is presently under challenge, state courts, including those in Michigan, have long upheld the constitutionality of tax increment financing legislation.

Thus, the crux of the matter: First, regardless of whether the tax authorized by Public Act 180 of 1991 upon restaurant gross receipts is in the nature of a sales tax subject to the four percent limitation and regardless of whether the limitation applies exclusively to taxes imposed directly by the Legislature, the tax authorized by Act 180 is clearly authorized to be imposed upon retail sales. Little more need be said in support of this fact than to observe that restaurant meals are presently subject to the sales tax. Second, the allocation requirements of Sections 10 and 11 of Article 9 clearly and unambiguously apply to <u>all</u> taxes imposed upon retail sales of tangible personal property, regardless of whether they be sales taxes or gross receipt taxes and without regard to the level of government by which they are imposed. The operation of Sections 10 and 11 would not prohibit imposition of the tax authorized by Act 180, but would require that 60 percent of the revenue produced be allocated to the school aid fund and another 15 percent to townships, cities, and villages.

However, it may be argued that despite the express language of Sections 10 and 11 of Article 9, the allocation requirements encompass only those taxes imposed on retail sales by the state. To the extent that argument has validity, then it may be argued with equal validity that the limitation of Section 8 of Article 9 is not restricted to the Legislature, but also encompasses units of local governments. Both contentions would at least be consistent in that they would both ignore the actual text of the constitutional provisions themselves. On

the other hand, it would be entirely inconsistent to suggest that Section 8 means what it says, but at the same time suggest that Sections 10 and 11 mean other than what they say. In the final analysis, the tax authorized upon restaurant meals by Public Act 180 of 1991 must be construed not only in light of those constitutional provisions that weigh in support of its validity, but also in light of those provisions that would govern the allocation of its revenue.*

D. The Local or Special Act Prohibition

The considerations addressed thus far in **Part II** have dealt with the nature of the taxes authorized by Act 180 and the several constitutional limitations and prohibitions which potentially may circumscribe their imposition. There remains an additional consideration regarding the nature of Act 180 itself.

Section 29 of Article 4 of the state Constitution provides in pertinent part that

> [t]he Legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act shall take effect until approved by two-thirds of the members elected to and serving

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*Any suggestion that the allocation provisions of Sections 10 and 11 were intended to apply solely to state-imposed taxes is further weakened by the fact that the predecessor provision of the 1908 Constitution was restricted to the state sales tax, but that restriction was removed by the 1961 Constitutional Convention. Section 23 of Article 10 of the 1908 Constitution provided in part that "[t]here shall be returned to local units by the method hereinafter set forth, one-half cent of a state sales tax..." and "[t]here shall be set aside for the school districts 2 cents of a state sales tax ..." (Emphasis supplied.)

Some have contended, however, that the change in phraseology from "state sales tax" to "all taxes" was made not by the Convention but by the style and drafting committee and, as such, did not reflect any intent on the part of the Convention to make any substantive change. Even were it correct, the significance of such a contention would not be readily apparent since it was the Convention that placed the Constitution before the voters. In any event, the changes in question were in fact made by the Convention. The phrase "all taxes" that is contained in Section 10 of Article 9 originated from a substitute proposal offered by Delegate Brake. 2 Official Record, Constitutional Convention 1961, at 2636. After debate, the Convention adopted the substitute proposal by a vote of 85 to 31. Id, at 2640. The phrase "all taxes" in Section 11 of Article 9 originated when the style and drafting committee deleted the word "sales" from the phrase "all sales taxes" which had been contained in an amendment that the Convention had adopted on third reading by a vote of 82 to 49. Id, at 3182.

Finally, while the description of Section 11 of Article 9 contained in the Address to the People does refer to a state sales tax, the persuasive value of this fact is limited by two factors. First, the Address to the People omitted any such reference in describing the same language in Section 10. Second, although as noted above at Page 4, the Address to the People may be consulted to determine the meaning of a provision of the state Constitution, **Burdick v Secretary of States** (373 Mich 578; 1964), it has never been suggested that where the two documents conflict the Address to the People should prevail over the unambiguous text of the state Constitution itself.

in each house and by a majority of electors voting thereon in the district affected.

Although Act 180 does require voter approval before the taxes authorized by it can be imposed, the act passed the House of Representatives by a vote of 63 to 42 and the Senate by a 22 to 9 margin, less than a two-thirds majority of either house. Thus, if Act 180 is a local or special act, it failed to pass by the requisite two-thirds majority in each house.

As noted at the outset, the eligible municipalities to which Public Act 180 of 1991 applies are the counties of Ingham, Kent, Muskegon, Oakland, Washtenaw, and Wayne and the cities of Lansing, Grand Rapids, Muskegon, Pontiac, and Ann Arbor. However, none of these units of government is identified by name. Instead, the act references particular characteristics, chiefly population.*

Michigan courts have developed two tests to distinguish a local or special act from a general act when the Legislature employs population as a defining characteristic. The first consideration is whether there is some reasonable relationship between population and the purpose of the statute. The second is that the statute must apply equally to all other units of government if, and when, they attain the statutory population. In other words, "the classification must not be based upon existing circumstances only, but must be so framed as to include in the class additional members as fast as they acquire the characteristics of the class." **City of Dearborn v Wayne County Board of Supervisors,** (275 Mich 151, 156; 1936). If both tests are satisfied, a statute is usually sustained as a general act. It should be

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*Among the definitions contained in Section I of Act 180 are the following:

Wayne County:

A county with a population of 1,500,000 or more persons that adopts or has adopted a charter under Act No. 293 of the Public Acts of 1966 [the charter county act] ....

Kent County and the City of Grand Rapids:

A county that is not a charter county that has a population of more than 500,000 and contains a city with a population of 180,000 or more persons, or the most populous city in that county....

Muskegon County and the City of Muskegon:

A county with a population of less than 200,000 that contains a city with a population of more than 40,000 but less than 50,000, or the most populous city in that county....

Ingham and Washtenaw counties and the cities of Lansing and Ann Arbor:

A county with a population of less than 300,000 with a city with a population of more than 100,000 persons, or the most populous city in that county....

Oakland County and the City of Pontiac:

A county with a population of more than 250,000 with an optional unified form of government or a city within that county that levies a city income tax....

noted that the improbability that other units of government may attain the statutory population standard is not determinative of whether an act is local or general in nature.

There certainly may be some justification for classifying municipalities by population for financing sports stadia or convention facilities. However, the statutory framework of Public Act 180 of 1991 suggests no common purpose other than a legislative intent to bestow taxing authority on certain units of local government without identifying them by name. This is illustrated by the data contained in **Table 1**, which lists the 28 cities in Michigan with populations greater

Table 1

Cities Over 40,000 Population and Counties Over ISOPOOO Population
(*Denotes eligibility under Public Act 180 of 1991)

CITY	POPULATION	COUNTY	POPULATION
Detroit	1,027,974	Wayne*	2,111,687
Grand Rapids*	189,126	Oakland*	1,013,592
Warren	144,864	Macomb	717,400
Flint	140,761	Kent*	500,631
Lansing*	127,321	Genesee	430,459
Sterling Heights	117,810	Washtenaw*	2820,937
Ann Arbor*	109,592	Ingham*	281,912
Livonia	100,850	Kalamazoo	223,411
Dearborn	89,286	Saginaw	211,946
Westland	84,724	Ottawa	187,768
Kalamazoo	805,277	Berrien	161,378
Southfield	75,728	Muskegon*	158,983
Farmington Hills	74,652		
Troy	72,884		
Pontiac*	71,166		
Taylor	70,811		
Saginaw	69,512		
St. Clair Shores	68,107		
Royal Oak	65,410		
Wyoming	63,891		
Rochester Hills	61,766		
Dearborn Heights	60,838		
Battle Creek	53,540		
Roseville	51,412		
East Lansing	50,677		
Lincoln Park	41,832		
Portage	41,042		
Muskegon*	40,283		

Source: United States Bureau of the Census.

than 40,000 and the 12 counties with populations greater than 150,000. For example, of the 28 cities with populations greater than 40,000, only five (Ann Arbor, Grand Rapids, Lansing, Muskegon, and Pontiac) are eligible to impose taxes under the act. The first four cities are eligible because they are the most-populous municipalities in the counties in which they are located and because the respective counties are also eligible; however, the most-populous city in Oakland County -- Southfield -- is ineligible because Act 180 requires a city in Oakland County to levy a city income tax to be eligible. The City of Pontiac is the only city in Oakland County that presently imposes a municipal income tax. The City of Detroit is not authorized to levy taxes under the act even though it is the most-populous city in Wayne County and levies a city income tax.

Similarly, six of the 12 counties with a population greater than 150,000 (Ingham, Kent, Muskegon, Oakland, Washtenaw, and Wayne) are eligible to levy taxes under Act 180, while six others (Berrien, Genesee, Kalamazoo, Macomb, Ottawa, and Saginaw) are not eligible. If Public Act 180 of 1991 is sustainable as a general act, despite the questionable basis upon which it classifies eligible municipalities then the distinction between a general act and a local or special act found in Section 29 of Article 4 of the state Constitution will be of little practical effect.