



CRC SPECIAL REPORT

MICHIGAN CONSTITUTIONAL ISSUES



No. 360-06

A publication of the Citizens Research Council of Michigan

April 2010

Sixth in a series of papers about state constitutional issues

ARTICLE III - GENERAL GOVERNMENT

In Brief

At the November 2, 2010 general election, the voters of Michigan will decide whether to call a constitutional convention to revise the 1963 Michigan Constitution. The state Constitution itself requires that the question of calling a constitutional convention appears on the statewide ballot every 16 years. If the proposal is approved, the convention would convene in Lansing on October 4, 2011. If the proposal is not approved, the question will automatically appear again on the ballot in 2026.

The Citizens Research Council of Michigan takes no position on the calling of a constitutional convention. It is hoped that examination of the matters identified in the series of publications, of which this report is a part, will promote a discussion of vital constitutional issues and assist citizens in deliberations on the question of calling a constitutional convention.

Should a constitutional convention be convened, it would examine the provisions of Article III, General Government. Among the eight sections in Article III are two that are of special interest from a public policy perspective (and one of those only because of the use of the word "militia," the popular association of which has changed over time).

Introduction

Article III of the current Michigan Constitution contains provisions relating to the general structure of the state government. In Section 1, Lansing is designated as the state capital (in 1847, the state legislature determined that Detroit's location on the border made it vulnerable to invasion by British forces in Canada and relocated the capital to Lansing). The state government is organized into

legislative, executive, and judicial branches, patterned on the federal model (Section 2). Section 7 provides that laws in force at the time of adoption of the constitution, and not contradicted by the constitution, remain in force. The governor and legislature are authorized to ask the opinion of the state supreme court on important questions of law (Section 8).

Constitutional Convention Issues

If the people of Michigan decide to call a state constitutional convention, it is likely such a convention would take a closer look at three sections of Article III.

Michigan's Militia

Section 4 provides that "The militia shall be organized, equipped and disciplined as provided by law." The militia referred to in Section 4 should not be confused with the Michigan Militia, a volunteer organization which at one time claimed over 10,000

members. Rather, the militia referred to in Section 4, now known as the Michigan National Guard, has a history that predates Michigan statehood. This history is recounted in detail on the website of the Michigan Department of Military and Veterans Affairs.¹

In the early days of settlement, the militia fought in the War of 1812, the Black Hawk War, and border

¹ www.michigan.gov/dmva/0,1607,7-126-2364--00.html



CITIZENS RESEARCH COUNCIL OF MICHIGAN

MAIN OFFICE 38777 West Six Mile Road, Suite 208 • Livonia, MI 48152-3974 • 734-542-8001 • Fax 734-542-8004
LANSING OFFICE 124 West Allegan, Suite 620 • Lansing, MI 48933-1738 • 517-485-9444 • Fax 517-485-0423

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disputes (the “Toledo War” and the “Patriot War”). The First Michigan Volunteers served in the Mexican War in 1847-1848; several Michigan regiments served in the Civil War. In 1870, the militia became the “Michigan State Troops,” and in 1891, the name was changed to the “Michigan National Guard.” Michigan National Guard units have been mobilized and fought in the Spanish American War, World War I, World War II, the Korean Conflict, and the Persian Gulf Conflict. Currently, members of the Michigan National Guard are deployed in Kuwait, Iraq, Afghanistan, and the United Arab Emirates.

The Michigan National Guard includes both Army and Air Guard components. These units can be called into action by the Governor to assist in the event of local emergencies or civil disturbances, or by the President to serve with active duty troops in foreign wars or national emergencies. Reflecting the dual mission of all states’ Guard units, the Michigan National Guard has been deployed to keep the peace and to provide security both within the state and across the world.

All states are required by federal law to maintain a militia, but a constitutional convention could clarify the language of Article III, Section 4 to identify the Michi-

gan National Guard as this state’s militia.

Intergovernmental Agreements

Section 5 allows the state and local governments to enter into agreements with other states, the United States, Canada, or their political subdivisions, for the performance, financing, or execution of their functions, subject to other provisions of the constitution and general law. This authority for cooperation with governments outside of Michigan is related to other constitutional provisions that provide for local government cooperation (Article VII, Section 28) and that allow the establishment of multi-purpose authorities in metropolitan areas (Article VII, Section 27).²

Section 5 was a new section to the Michigan Constitution when it was added in 1963. The framers of the Constitution envisioned a need for such provisions to deal with matters such as flood control, navigation, water conservation, protection of wildlife and

game, and harbor development and regulation. The authority provided by Section 5 is far narrower than is provided by Article VII, Section 28 and there are far fewer examples to illustrate its usefulness. Section 5 allows communities along Michigan’s borders with Ohio, Indiana, and Wisconsin to cooperate with communities in those states. It also allows for cooperation with Canadian communities, most notably at the bridges between Detroit and Windsor, Port Huron and Sarnia, and the cities of Sault Ste. Marie in Michigan and Ontario. It allows municipalities and the state to participate in cooperative bodies such as the Great Lakes Commission, which deals with Great Lakes watershed issues.

Internal Improvements

Section 6 prohibits the state from participating in internal improvements, except as provided by law. “Internal improvements” are now known as public infrastructure, especially infrastructure that is developed for the benefit of private investors.

The debate about the proper role of government in the building of roads, canals, harbors, and railroads dates to the 19th Century. Prior to the Civil War, strict constructionists and defenders of states’ rights objected to federal investment in internal improve-

² These issues are explored in great detail in CRC Report 346, *Authorization for Interlocal Agreements and Intergovernmental Cooperation in Michigan*, www.crcmich.org/PUBLICAT/2000s/2008/rpt354.html.

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ments. Both the federal and state governments provided subsidies for the construction of internal improvements, most of which were also privately funded and expected to generate returns for the private investors. Many states had provided state funds for the construction of privately owned infrastructure, or had incurred considerable debt in constructing toll roads, canals, and railroads. Governmental involvement was justified in order to facilitate trade, transportation, national defense, national unity, and economic prosperity. Unfortunately, many of these projects were characterized by corruption and ended in financial catastrophe; a number of states had trouble repaying debts incurred for internal improvements. In response to those experiences, many states amended their constitutions to prevent investment in internal improvements. Generally, if there is no essential governmental purpose for a capital project, these constitutional provisions apply.

Michigan continues to be one of many states with constitutions that include an internal improvements clause, which limits the state's ability to engage in capital projects. Judicial interpretations of states' internal improvements clauses are based on "essential" government purposes, "predominantly" governmental purposes, or other defining terms.

The 1835, 1850, 1908, and 1963 Michigan Constitutions all addressed the issue of internal improvements, but in very different

ways.³

The 1835 constitution encouraged internal improvement and directed the legislature to develop infrastructure goals and provide funds to meet those goals.⁴ In contrast, the 1850 constitution forbade the state from becoming "a party to, or interested in any work of internal improvement, nor engaged in carrying on any such work, except in the expenditure of grants to the state of lands or other property."⁵

The constitution of 1908 stated that "The state shall not be a party to, nor be interested in any work of internal improvement, nor engage in carrying on any such work, except in the improvement of, or aiding in the improvement of the public wagon roads, in the reforestation and protection of lands owned by the state and in the expenditure of grants to the state of land or other property."⁶ That language was

amended in 1945 and 1946 to include a number of exceptions, including development, improvement and control of public roads, harbors of refuge, waterways, airways, airports, landing fields and aeronautical facilities; the development, improvement and control of rivers, streams, lakes and water levels, for purposes of drainage, public health, control of flood waters and soil erosion; reforestation and protection and improvement of lands.

The current, 1963 state constitution states that "The state shall not be a party to, nor be financially interested in, any work of internal improvements, nor engage in carrying on any such work, except for public internal improvements provided by law."

Michigan funds and participates in roads, ports, airports, housing, broadband, and other improvements that are specifically authorized in state statute. The traditional way that states have circumvented internal improvements clauses has been to create dummy corporations or independent public bodies to administer funds for private projects.

The state's capital outlay process controls the planning and financing of acquisition, construction, renovation, and maintenance of facilities used by a state agency, public university, or community college. Nearly all major state owned facility renovations and new construction are financed by the State Building Authority (SBA) from bond proceeds. SBA bonds are limited obligations of the SBA,

³ This history is explained in *A Comparative Analysis of the Michigan Constitution*, a Citizens Research Council analysis of state constitutional provisions written in 1961, to assist the constitutional convention that developed the 1963 Constitution. www.crcmich.org/PUBLICAT/1960s/1961/rpt208.pdf

⁴ 1835 Constitution, Article XII, Section 3

⁵ 1850 Constitution, Article XIV, Section 9

⁶ 1908 Constitution, Article X, Section 14

payable from the annual SBA rent payment in a state budget bill, and are not general obligations of the state. Highway and bridge construction projects are covered by other administrative and legislative procedures.⁷

In order to support the development of housing for low and moderate income residents, and still accommodate the internal improvements clause, the State of Michigan created the Michigan State Housing Development Authority, which sells bonds and channels federal grants to fund that development.

Then-Governor George Romney requested an advisory opinion from the state Supreme Court as to the constitutionality of the law that created the Michigan State Housing Development Authority (MSHDA) in 1966. Advisory Opinion re Constitutionality of PA 1966, No 346 addresses three constitutional provisions: the internal improvements clause, the prohibition on the lending of state credit (Article IX, Section 18), and the requirement of the approval of two-thirds of the members serving in each house of the legislature for the appropriation of public money or property for local or private purposes (Article IV, Section 30). The opinion ruled

the law to be constitutional, and stated that:

- The State may not directly engage in the financing or construction of private housing.
- The encouragement of housing construction is a proper public purpose for the creation of a State agency.
- The funds of the State housing development authority are not State funds.
- The bonds of the State housing development authority are not obligations of the State.
- An appropriation to the State housing development authority for the purpose of administration is a proper public function.
- An appropriation to the housing development fund, or the capital reserve fund of the State housing development authority is not a proper public purpose.

As to the internal improvements clause:

Moneys of the State housing development authority are not moneys of the State. The funds to be established under the act are trust funds to be administered by the State housing development authority. The State has no beneficial interest in such funds, and when such funds are used to finance the construction of housing, the State cannot be said to be financially interested in such construction. We conclude, therefore, that while the construction of private

housing is not a public work of internal improvement, the act does not make the State a party to, financially interested in, or engaged in carrying on such work, and the act does not therefore offend against Constitution 1963, Article 3, Section 6.

As a constitutional policy issue, restrictions on the state's involvement in internal improvements, designed to promote the wise use of state resources, must be weighed against the necessity to ensure that the residents of this state have the infrastructure necessary to compete successfully in the 21st Century economy. Consideration should include the governmental interest in reducing unemployment; building healthy neighborhoods; promoting manufacturing, tourism, or agriculture; and making technology more widely available. Further, consideration should recognize developments in the investment environment and in the use of public-private partnerships to develop, maintain, and operate infrastructure. While the exception provided ("except for public internal improvements provided by law") allows projects that receive legislative approval, the constitutional convention may wish to review the internal improvements clause to determine whether the conditions that justified the prohibition are still persuasive, and whether there are better approaches to protect taxpayers and ensure provision of modern infrastructure (e.g. high speed Internet connections) that is necessary to economic competitiveness and prosperity.

⁷ Al Valenzio, House Fiscal Agency, *Michigan's Capital Outlay Process*, March 2007. www.house.mi.gov/hfa/PDFs/capoutl.pdf