

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

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The Developing Efforts To Address Unfunded Mandates

By Dennis R. Pollard

While it is hardly new news, since 1978 the Michigan Constitution has prohibited the State from mandating local units of government to provide activities and services without funding the related costs. This prohibition extends to requirements imposed by State agencies as well. It is also old news that the Legislature and State agencies have, in many instances, completely ignored this prohibition. They have done so not only in direct violation of the Constitution, but also in direct contravention of a statute that the Legislature ceremoniously adopted in 1979 to implement the Constitutional Amendment. We are referring to Section 29 of the Headlee Amendment to the State Constitution and the implementing legislation contained in Public Act 101 of 1979.

While it was not particularly well known, in the midst of the brief shut down of State government that occurred during the budget battle in the Fall of 2007, the Legislature created the Legislative Commission on Statutory Mandates to study and report back to it about the dimensions of the State's non-compliance with the Constitutional and statutory prohibition on unfunded mandates and to make recommendations to correct the problem.

While the reasons for creating this Commission are not well known, because there were no accompanying explanations or reasons, it was in part an act of contrition for contemporaneously increasing the rate of taxation on Michigan taxpayers' income to 4.35%. The creation of this Commission was apparently intended to convey the notion to the Michigan electorate that, despite imposing this tax increase, the Legislature was serious about reforms in how it and State agencies do their job, by considering the possibility of relieving local units of government from the costs of these mandates. The Commission was directed to identify the unfunded mandates and flesh out the manner of correcting the problem for the Legislature's consideration.

The Commission timely rendered its Final Report on December 31, 2009, containing detailed findings and specific recommendations to correct the State's on-going unconstitutional derelictions. The Report went so far as to include drafts of statutory provisions that would implement the Commission's recommendations. The Report is available on the Secret Wardle website at secretwardle.com under the publications tab-white papers.

The recommendations are several, but they consist, in substance, of the following:

- A) Rescind the long-ignored implementing statute adopted in 1979 due to the many shortcomings of its provisions. Whatever the Legislature's intentions may have been through its adoption, it stands as a monument to futility which even under the best of compliance circumstances would need substantial amendments. The Commission felt that it was best to rescind it.
- B) Adopt a new statute to meaningfully implement Section 29 of the Headlee Amendment. This is explained in more detail below.

SECRET WARDLE NOTES:

Given the significantly reduced revenues being experienced by municipalities, the tendency to accept the costs of unfunded mandates from the State is no longer acceptable to many municipalities. Unfunded mandates have been occurring despite the Constitutional prohibition on them that has existed over the last 31 years, i.e., the Headlee Amendment. Relief may be in sight based on the recent Report issued by the Legislative Commission on Statutory Mandates and the pending legislation that has been generated as a result of that Report, which are discussed in this issue of *Community Watch*.

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C) Amend the Administrative Procedures Act to make it clear that no requirements may become enforceable on local units of government as a result of administrative rules and regulations until the Legislature appropriates funding to pay for the costs of the requirements and make clear that no penalty or sanction can be assessed against local units for noncompliance until the costs are appropriated and disbursed to local units.

D) Amend the Revised Judicature Act to create a new and expedited process for adjudications of claims in the Michigan Court of Appeals for the State's failure to fully fund new requirements or expanded levels of service required by State laws or administrative rules and regulations.

The key reform under B) above is to require the Legislature to create a "fiscal note" during the early course of creating any legislation that will impose requirements on local units of government. This fiscal note process involves the Legislature working in active conjunction with local units to identify the requirements being imposed by legislation under consideration and the anticipated costs of those requirements, and to then create a separate appropriation bill to fund those costs. The two bills are required to be tie-barred. The underlying intent is that mandates cannot be created without the funding necessary to support them becoming part of the same legislation. This will create the environment that was originally intended by Section 29 of Headlee, wherein the Legislature's decision whether to impose a requirement on a local unit is considered *contemporaneous* with the decision of whether the State can afford to pay for the resulting costs. If not, then the mandate never becomes law.

Over the last few weeks, a substantial amount of political support has evolved in support of the Commission's recommendations. Most notably, the Speaker of the House, Andy Dillon, and Senate Majority Leader, Mike Bishop, appeared at a press conference on February 24, 2010, and announced their support for the reforms recommended in the Commission's Report. Seven bills were introduced in the House in mid-February to implement the Commission's recommendations; 4 sponsored by House Democrats and 3 sponsored by House Republicans. Several corresponding bills are also anticipated to be sponsored in the Senate. A significant aspect of these developments is the bi-partisan nature of the support.

We are advised these bills will be scheduled for committee hearings within the near future and, presumably, floor votes. The bills are being moved as government reforms and are not being considered in the more contentious environment of the looming budget battles. It is particularly important that representatives of local units communicate with local legislators in an effort to promote these reforms. The history of State government's defiance or ignorance about their responsibilities under Section 29 of the Headlee Amendment to the State Constitution will not come to an end without a concerted effort by local taxpayers and their municipalities. Now, after 31 years of this occurring, the opportunity to change the environment has finally arrived.

CONTACT US

Farmington Hills

30903 Northwestern Highway, P.O. Box 3040
Farmington Hills, MI 48333-3040
Tel: 248-851-9500 Fax: 248-851-2158

Mt. Clemens

94 Macomb Place, Mt. Clemens, MI 48043-5651
Tel: 586-465-7180 Fax: 586-465-0673

Lansing

6639 Centurion Drive, Ste. 130, Lansing, MI 48917
Tel: 517-886-1224 Fax: 517-886-9284

Grand Rapids

2025 East Beltline, S.E., Ste. 209, Grand Rapids, MI 49546
Tel: 616-285-0143 Fax: 616-285-0145

www.secrestwardle.com

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CONTRIBUTORS

Municipal Practice Group Chair

William P. Hampton

Senior Editor

Steven P. Joppich

Editor

Bonny Craft

We welcome your questions and comments.

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