

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

08.09.10

Local Units Prevail Over State Government On Unfunded Mandates

By Dennis R. Pollard

The Michigan Supreme Court rendered a significant decision on July 14, 2010, concerning unfunded mandates imposed by state government on local units of government in a suit handled by Dennis R. Pollard of Secrest Wardle.

As recently reported to the Legislature by the Legislative Commission on Statutory Mandates, of which Mr. Pollard is a member, state government has been ignoring the Constitutional prohibition on the State imposing unfunded mandates on local units of government. This has been occurring over the last 32 years since the Headlee Amendment to the Michigan Constitution was approved by Michigan voters in 1978. This prohibition applies to both requirements imposed by state statute and by rules and regulations created by state administrative agencies. Indeed, it has become routine that requirements have been imposed on local cities, townships, counties and other forms of local government over the last 32 years without any thought about the application of this Constitutional limitation or concern with the costs that will be incurred by local units to meet the mandates. Costs are almost universally treated as the problem of local units, not the state.

The Constitutional limitation is very straight forward:

A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of local government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. Article 9, §29 of the Michigan Constitution.

SECRET WARDLE NOTES:

In a recent decision, the Michigan Supreme Court ruled that when mandates are imposed by the state on local units of government, without fully funding the costs of those mandates, they are unconstitutional because they violate the Headlee Amendment. As such, they are unenforceable on local units unless the state provides full funding of the costs. The Court also ruled that the local units are entitled to be fully reimbursed for the costs of the suit to enforce the Headlee Amendment, including all reasonable attorney fees. This is a landmark decision under § 29 of the Headlee Amendment which has been in place since 1978, but largely ignored by state government.

CONTINUED...

Suits were being filed to enforce compliance, but they didn't change the state's behavior. At least that was true up until a decision was rendered July 14, 2010. The source of the problem has been that the Michigan courts have not effectively draw a line on this constitutional misbehavior. The courts are expressly assigned the responsibility in §32 of the Headlee Amendment "to enforce" its provisions, including §29. In fact, what has occurred over the last 32 years were desultory attacks brought in the courts by local units of government to contest the state's failure to fund various required services. School districts throughout the state have been the most persistent in challenging the lack of the required funding. In one case, it cost the state approximately \$1 billion in terms of reimbursed costs paid to schools in 1997 for its failure to fund required special education services.

The recent decision of the Michigan Supreme Court has the promise of finally drawing the line on this conduct. The pattern that the Attorney Generals of Michigan have developed over the last 32 years is to throw up procedural roadblocks when suits were filed by local units, arguing and frequently re-arguing even previously decided legal issues adverse to the state's position and, when that ultimately failed, to argue that the local units of government had not met their responsibility to quantify the full extent of the state's violation of the Headlee funding requirement. The main line of argument was that the local units did not adequately prove the precise extent of the underfunding that occurred to all similarly situated local units statewide. They argued further that even if that burden was met, the local units did not establish that the costs they incurred were "necessary" costs within the meaning of §29 of the Amendment, quoted above. These arguments could be exploited to the extent that final decisions in these suits were dragged out for years and caused local units to incur inordinate legal expenses. Indeed, this strategy, relying on access to the state treasury to fund it, worked so well that most local units of government chose to absorb the unwarranted costs without contesting them.

The Supreme Court's decision was rendered in a suit known as the *Adair* case. In order to succeed, the school district plaintiffs (and a named taxpayer for each participating school district) had to secure a reversal in the Supreme Court on three separate appeals within the suit from adverse decisions of the Michigan Court of Appeals. This absorbed a great deal of money and time to fight through the state's tactics. However, it is quite clear from a reading of the Court's decision that it does not intend to tolerate the state attempts to deflect its funding responsibility by trying to force the burden of proving the extent of the constitutional violation on local units of government. The Court also clarified that if local units succeed in their claim they are entitled, as a matter of law, to be awarded reimbursement for the costs incurred, foremost including their attorneys' fees.

Specifically, the Court ruled in no uncertain terms that if a local unit can establish that it is providing an activity or service because it is required to do so by operation of either a state statute or because of a state administrative rule or regulation, and that it is incurring costs to do so, the state then has the burden to demonstrate that either the activity or service is not required to be provided or, if it is conceded that it is required, of establishing through evidence that the state is fully paying for the costs of same. Relative to the state's typical reliance on the argument that the costs local units are incurring are not "necessary" (i.e., are excessive), the Court specified that the state has to first establish through credible evidence the costs it would incur if it were to provide the same activities and services, rather than requiring local units to do so. The state must then measure whether the costs actually being incurred by local units to provide those activities and services are in excess of the costs the state would be expected to incur using its own resources. If they are not greater, then the costs being incurred by the local units are deemed "necessary" and, thus, must be fully funded by the state.

These two points of law should serve to eliminate the incentive of using delaying strategies during the course of defending suits for underfunded mandates. The Court pointed out in reaching this conclusion that the placement of the burden of proof on state government follows from the clearly expressed intent of the voters approving the Headlee Amendment that the Legislature is required to meet its funding responsibility at the point that the mandate or requirement is created, not years after the fact when it is challenged. To place responsibility on the affected local units of government to establish the extent of the underfunding after the fact is to require

CONTINUED...

the reverse of what the voters' intended.

Finally, the Court ruled on the question of whether the Court of Appeals had discretion to deny local units recovery of costs of the litigation, including reasonable attorney fees, because they did not prevail entirely on the claims asserted in the suit as originally filed. The Supreme Court ruled that the local units in these suits are entitled as a matter of law (i.e. §32 of the Headlee Amendment) to receive an award of such costs for any part of the suit upon which they prevailed. This *should*, hopefully, cause the state to carefully consider endlessly protracting Headlee suits through arguments that serve no constructive purpose other than achieving delay. Nothing sharpens the focus of litigation decision-makers more effectively than when they have to be accountable for the attorney fees of the other side for the costs of delaying or spurious tactics.

This decision of the Supreme Court represents a monumental change in the complexion of responsible Headlee litigation. In the end, it may also cause the Legislature, the governors, and state administrative agencies to respect the funding obligation of the state at the point in time when mandates are originally considered.

It should also be pointed out that this suit was brought to secure a form of remedy known as declaratory judgment. A judgment for money damages against the state for underfunding for the past costs of the required services was not sought. Rather the Supreme Court affirmed the issuance of a declaratory judgment concluding that the state is violating the constitution by failing to fund the subject activities and services and thus must discontinue to impose those requirements. This limitation in terms of a remedy relates back to a decision of the Supreme Court reached in 1985. As a result, when future violations arise there will be a premium in reacting sooner rather than later to the state's failure to fund the costs of required activities and services.

WHAT DOES THIS DECISION MEAN AT THE PRACTICAL LEVEL?

At the practical level, you may wish to consider how many of the activities and services that your municipality provides are being provided because of the requirements of either a state statute or state administrative rule or regulation. This analysis would apply even if the activity or service is highly valued by the community, because the state's funding obligation under §29 of the Headlee Amendment exists regardless of the popularity of what is required by state law. The next question is what are the costs that you are annually incurring to provide the services? These costs include wages and benefits of employees, administrative overhead, customized computer software and hardware costs, physical equipment, such as vehicles, to name a few.

The next question is when were the subject activities and services first required by the state? The state's funding obligations under §29 are two-fold. The first sentence of that section requires the state to continue to provide the same level or proportion of funding for activities and services that were required to be provided by local units at the time the Headlee Amendment was adopted; i.e., 1978. Since no attempt was made by state government at that time to document these levels of funding, this required level of funding, with few exceptions, cannot be practically established.

However the second sentence of §29 requires that the state must pay local units for the full costs of A) newly required activities and services (i.e., newly required after 1978), or B) any increase in the level of any of any activity or service beyond that required by state law in 1978. It is the latter requirement that was the subject of the *Adair* decision and presents the most formidable challenge to the state in terms of enforcing many of its mandates going forward.

The final point is that, unlike in virtually all other forms of litigation, if a municipality has a viable challenge under the Headlee Amendment and suit is filed and ultimately sustained, the state must reimburse the municipality for all reasonable attorney fees and other costs of the suit. How the state reacts to this very real cost

CONTINUED...

problem at the inception of a suit remains to be seen. However, it would seem unlikely that the attorney General's office will be indifferent to its accountability if its opinion on the state's funding obligation on the underlying question raised in the suit is not well founded, particularly given its heavy burden of proof as a result of the Supreme Court's recent ruling.

If we may be of assistance in evaluating your municipality's possible claims under the Headlee Amendment, Mr. Pollard of our office will be available to assist and provide advice on pursuing a claim.

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

SECRET
SW
WARDLE

Copyright 2010 Secrest, Wardle, Lynch, Hampton,
Truex and Morley, P.C.

This newsletter is published for the purpose of providing information and does not constitute legal advice and should not be considered as such. This newsletter or any portion of this newsletter is not to be distributed or copied without the express written consent of Secrest Wardle.

CONTRIBUTORS

Municipal Practice Group Chair

William P. Hampton

Senior Editor

Steven P. Joppich

Editor

Bonny Craft

We welcome your questions and comments.

OTHER MATERIALS

If you would like to be on the distribution list for Community Watch, or for newsletters pertaining to any of our other practice groups, please contact Secrest Wardle Marketing at swsubscriptions@secrestwardle.com or 248-539-2850.

Other newsletters include:

Benchmarks – Navigating the hazards of legal malpractice

Blueprints – Mapping legal solutions for the construction industry

Boundaries – A guide for property owners and insurers in a litigious society

Contingencies – A guide for dealing with catastrophic property loss

Fair Use – Protecting ideas in a competitive world

In the Margin – Charting legal trends affecting businesses

Industry Line – Managing the hazards of environmental toxic tort litigation

Landowner's Alert – Defense strategies for property owners and managers

No-Fault Newslines – A road map for motor vehicle insurers and owners

On the Beat – Responding to litigation affecting law enforcement

On the Job – Tracking developments in employment law

Safeguards – Helping insurers protect their clients

Standards – A guide to avoiding risks for professionals

State of the Art – Exploring the changing face of product liability

Structures – A framework for defending architects and engineers

Vital Signs – Diagnosing the changing state of medical malpractice and nursing home liability