

MEMORANDUM ANSWERING QUESTIONS FROM 11/20/09 MEETING

Following the November 21, 2009 “Brainstorming Session,” the Wayne Law Research Group evaluated the following three research questions:

- A. Does the “home rule” language of Article VII, Section 22 of the Michigan Constitution of 1963 prohibit the legislature’s creation of a development entity that would conflict with municipal resolutions or ordinances adopted thereunder?
- B. Are there any other provisions of the Michigan Constitution of 1963 that would affect the legislature’s creation of the development entity?
- C. Should the development entity be referred to as an authority or a corporation?

A. Does the “home rule” language of Article VII, Section 22 of the Michigan Constitution of 1963 prohibit the legislature’s creation of a development entity that would conflict with municipal resolutions or ordinances adopted thereunder?

No, there does not appear to be any implications caused by the language from Article VII, Section 22. Under Michigan law, cities and villages “are local governmental organizations deriving their power and authority from the state, organized for the purpose of carrying on local municipal government.”¹ Prior to the Michigan Constitution of 1908, “municipal corporations exercised only such powers as were expressly granted to them by the legislature in very much the same manner that the powers of private corporations were limited.”² The Michigan Constitution of 1963 expanded the grant of powers to municipalities first given in 1908. The grant provides:

Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, *subject to the constitution and law*. No enumeration of powers granted to cities and villages in this constitution shall limit or restrict the general grant of authority conferred by this

¹ Marxer v. City of Saginaw, 270 Mich. 256, 258 (1935).

² Dooley v. City of Detroit, 370 Mich. 194, 207 (1963).

section.³

This grant of power includes only those powers fairly implied and not otherwise prohibited by the Constitution.⁴ At the same time, the Michigan Home Rule Act provides municipalities with further power to exercise “any power, enumerated or not, that advances the interests of the city.”⁵

Therefore, home rule municipalities

enjoy not only those powers specifically granted, but they may also exercise powers not expressly denied. Home rule cities are empowered to form for themselves a plan of government suited to their unique needs and, upon local matters, exercise the treasured right of self-governance.⁶

The text of the Constitutional provision limits the powers exercised by home rule municipalities to matters of local or municipal concerns.⁷ Municipalities generally have no authority extraterritorially.⁸ For legal challenges to municipal charters, ordinances or resolutions, as one court put it, “[t]he nub of the dispute” is whether the municipal act relates “to matters of strictly municipal concerns . . . or are of State-wide interest subject to general laws of the State.”⁹ Matters of solely and exclusively local concern are limited. Some examples include: the appointment of local fire department heads,¹⁰ a charter provision providing that the village cannot become a party to a contract for a term longer than one year without three-fifths of the

³ M.I. CONST. of 1963, art. VII, § 22.

⁴ See *Risk v. Lincoln Charter Twp. Bd. of Trustees*, 279 Mich. App. 389 (2008), *appeal dismissed*, 759 N.W.2d 405 (Mich. 2009).

⁵ *In re Wilcox*, 233 F.3d 899, 901-902 (6th Cir. 2000). See also MICH. COMP. LAWS ANN. § 117.4j(3) (“Municipal powers. For the exercise of all municipal powers in the management and control of municipal property and in the administration of the municipal government, whether such powers be expressly enumerated or not; for any act to advance the interests of the city, the good government and prosperity of the municipality and its inhabitants and through its regularly constituted authority to pass all laws and ordinances relating to its municipal concerns subject to the constitution and general laws of this state.”).

⁶ *Adams Outdoor Advertising, Inc. v. City of Holland*, 234 Mich. App. 681, 687-688 (1999).

⁷ See also *Davock v. Moore*, 105 Mich. 120, 127-128 (1895).

⁸ See *Attorney General v. City of Detroit*, 225 Mich. 631 (1923); *City of Coldwater v. Tucker*, 36 Mich. 474 (1877). At the same time, municipalities are free to adopt ordinances that complement state-wide regulation of matters, especially in the area of criminal offenses. See *Delta County v. City of Gladstone*, 305 Mich. 50 (1943); *Brennan v. Connolly*, 207 Mich. 35 (1919).

⁹ *Brimmer v. Village of Elk Rapids*, 365 Mich. 6, 14 (1961).

¹⁰ See *Davidson v. Hines*, 151 Mich. 294 (1908).

electors approving,¹¹ and salaries of village officers.¹² It appears that when the Legislature interferes with municipal concerns it does so by virtue of special legislation in violation of the Constitution,¹³ as opposed to general legislation. Conversely, matters of statewide concern include examples such as the maintenance and construction of sewers¹⁴ and housing.¹⁵ It is clear that the aims of the proposed enabling legislation are matters of statewide concern, including, among others,¹⁶ economic development and job creation.

Municipalities may still enact ordinances touching matters of statewide concern, so long as their resolutions and ordinances relate also to their municipal concerns. However, general State laws will supercede local ordinances on the basis of two distinct doctrines: conflict and preemption.¹⁶ Therefore, “a municipality is precluded from enacting an ordinance if the ordinance directly conflicts with a state statute or if the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, even where no direct conflict exists.”¹⁷ A direct conflict exists when a municipal ordinance “permits what the statute prohibits or the ordinance prohibits what the statute permits.”¹⁸ The Michigan Supreme Court has set forth four guidelines for determining whether a state statute has preempted a municipal ordinance:

First, where the state law expressly provides that the state’s authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is pre-empted. Second, pre-emption of a field of regulation may be implied upon an examination of legislative history. Third, the pervasiveness of

¹¹ See *Utica State Savings Bank v. Village of Oak Park*, 279 Mich. 568 ().

¹² See *Gildersleeve v. Lamont*, 331 Mich. 8 ().

¹³ M.I. CONST. of 1963, art. IV, § 29.

¹⁴ See *Brimmer*, 365 Mich. 6.

¹⁵ See *Advisory Opinion on Constitutionality of Act No. 346 of Public Acts of 1966*, 380 Mich. 554 (1968)[hereinafter “Advisory Opinion”].

¹⁶ *City of Detroit v. Recorder’s Court Traffic and Ordinance Judge*, 104 Mich. App. 214, 231 (1981).

¹⁷ *American Federation of State, County, and Mun. Employees, Michigan Council 25 v. City of Detroit*, 252 Mich. App. 293, 309-310 (2002).

¹⁸ *Cascade Twp. V. Cascade Resource Recovery, Inc.*, 118 Mich. App. 580, 585 (1982), *app. held in abeyance* 335 N.W.2d 472 (1983), *remanded* 367 N.W.2d 68 (1985).

the state regulatory scheme may support a finding of pre-emption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of pre-emption. Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.¹⁹

Accordingly, municipal regulations must yield to prevailing state statutes on matters of statewide concern. As economic development and job creation are matters of statewide concern, the proposed enabling legislation would comply with the Home Rule Provision of Article VII, Section 22. At the same time, it may be advisable to include within the proposed enabling legislation a clear statement that the legislation overrides any conflicting municipal charter provisions, ordinances or resolutions that conflict with the legislation's provisions.

B. Are there any other provisions of the Michigan Constitution of 1963 that would affect the legislature's creation of the development entity?

There are five areas of the Michigan Constitution that relate to the proposed enabling legislation. First, courts must read the Home Rule Provision, Article VII, Section 22, discussed above, in light of Article VII, Section 34, which provides that the Home Rule Provision "shall be liberally construed" in cities' and counties' favor.²⁰ Nevertheless, the discussion above concerning the relevant precedent touching on the Home Rule Provision still holds. Even construing the provision in favor of local units of government, the doctrines of conflict and preemption prevent an issue from arising.

Michigan courts and the Attorney General has also approved of tax increment financing. In Attorney General Opinion Number 5087, the Attorney General found that the tax increment financing provisions of the Downtown Development Authority Act did not violate Article IX,

¹⁹ Rental Property Owners Ass'n of Kent County v. City of Grand Rapids, 455 Mich. 246, 257 (1997)(internal citations omitted).

²⁰ M.I. CONST. of 1963, Art. VII, § 34.

Section 3.²¹ Section 3 requires that general ad valorem taxation not exempted by law for taxes levied for school operating expenses be uniform. The tax increment financing provisions did not violate the requirement, because the requirement applies only to taxation and not government expenditures.²² Moreover, an advisory opinion from the Supreme Court held that the capture of tax increment revenues by a local development finance authority and the use of such revenues for the purposes authorized by the Local Development Financing Authority Act are not unconstitutional diversions of tax revenues from the taxing entity or unconstitutional lendings of credit by the state or a municipality.²³

Courts have also approved of the use of revenue bonds by development entities in several instances. The Industrial Development Revenue Bond Act authorizes municipalities the power to issue revenue bonds to finance the acquisition, construction, or reconstruction of industrial buildings and to lease the buildings to private companies. In *Gaylord v. Beckett*, the Michigan Supreme Court held that the act did not violate Article VII, Section 26 nor Article IX, Section 18.²⁴ Article IX, Section 18 prohibits the lending of state credit to any person, association or corporation, public or private, except as authorized by the Constitution.²⁵ Article VII, Section 26 prohibits cities and villages from lending their credit for any private purpose or, except as provided by law, for any public purpose.²⁶ In *Beckett*, the Supreme Court found that the issuance of municipal bonds to secure the location of a plywood plant in an area of city serves a public purpose as required by the constitution, in view of employment and other benefits to the city and the surrounding area.²⁷ Additionally, in evaluating the constitutionality of the State Housing

²¹ Op. Atty. Gen., Dec. 6, 1976, No. 5087.

²² *Id.* at 692.

²³ See Advisory Opinion on Constitutionality of 1986 PA 281, 430 Mich. 93 (1988).

²⁴ See *Gaylord v. Beckett*, 378 Mich. 273 (1966).

²⁵ M.I. CONST. of 1963, Art. IX, § 18.

²⁶ M.I. CONST. of 1963, Art. VII, § 26.

²⁷ See *Beckett*, 379 Mich. 273.

Development Authority Act of 1966, the Supreme Court stated the Court often held “revenue bonds and self-liquidating bonds do not constitute the obligations of the State of Michigan.”²⁸

In the same advisory opinion, the Court found that State Housing Development Authority was a quasi-corporate entity that was the clothing of an agency of state government to perform public works.²⁹ As such, the enabling legislation did not violate the prohibition on special legislation in Article IV, Section 29.³⁰ Moreover, the Court found that constructing affordable housing served a public purpose.³¹ The advisory opinion addressed two more constitutional questions of importance.

Article III, Section 6 provides that the state cannot be a party to nor financially interested in any work of internal improvement, except for public internal improvements as provided by law.³² The Court found that the construction of housing as encouraged by the act constituted internal improvements, but was also a private improvement.³³ However, the money from the construction would originate came from a trust fund.³⁴ The Court stated that such funds were not the State’s and, therefore, as the State Housing Development Authority would be using nongovernmental money to pay for private improvements, the State would not be a party to or financially interested in the improvements.³⁵ Accordingly, the arrangement complied with Article III, Section 6.

Additionally, the State Housing Development Authority had authority to make loans and advances to private corporations; to finance the loans, the Authority used the “housing

²⁸ Advisory Opinion, 380 Mich. at 565.

²⁹ *Id.* at 570.

³⁰ *Id.*

³¹ *Id.* at 575, 583.

³² M.I. CONST. of 1963, art. III, § 6.

³³ Advisory Opinion, 380 Mich. at 582.

³⁴ *Id.* at 583.

³⁵ *Id.*

development fund.”³⁶ Also, another trust fund was used to repay bonds issued for similar purposes.³⁷ The Supreme Court found that State appropriations to both funds did not constitute appropriations for public purposes in violation of Article IV, Section 30.³⁸ Section 30 requires that appropriations for local or private purposes be approved by two-thirds majority of each legislative house.³⁹ In light its finding, the Court stated that the State could appropriate funds to the Authority for administrative purposes or upon two-thirds consent of both houses of the Legislature.⁴⁰

Lastly, Article X, Section 2 significantly limits the ability of the entity created by the proposed legislation to exercise the power of eminent domain. This provision would impact the operation of the development entity created by the proposed enabling legislation, but will not create any implications for the constitutionality of the legislation itself.

C. Should the development entity be referred to as an authority or a corporation?

In the Advisory Opinion on the Constitutionality of the State Housing Development Authority, the Michigan Supreme Court stated that it looks “behind the name to the thing named.”⁴¹ Rather, the Court looks to “[i]ts character, its relations, and its functions . . . not the mere title.”⁴² Moreover, based on a review of statutory schemes and relevant case law, names given to development entities appear to be merely descriptive nomenclatures that do not necessarily influence or control the powers and/or flexibility of the entity itself. The Research Group could not find any substantive differences between entities named “corporations” or

³⁶ *Id.* 584.

³⁷ *Id.*

³⁸ *Id.*

³⁹ M.I. CONST. of 1963, art. IV, § 30.

⁴⁰ Advisory Opinion, 380 Mich. at 584-585.

⁴¹ *Id.* at 569.

⁴² *Id.*

entities named “authorities.” In reviewing the entities from the Group’s previous research conducted for the Engineering Society of Detroit Institute, the varying names used did not reflect any real difference in powers or attributes among a majority of the entities that included either “corporation” and/or “authority” in their names. At the same time, in some programs in which a larger entity controlled lower bodies of governance, the enabling legislation specified the larger entity as a “corporation” whereas the legislation specified the lower bodies as “authorities.” However, in most instances, authorities and corporations exercise the same powers and possess the same attributes. For example, in Michigan, it appears that the Legislature termed various entities as corporations when the entity exercised broad developmental powers and had control over a wider location and range of issues; conversely, the Legislature deemed entities as authorities when the entities’ powers address more specific policies or goals.

Some examples from Michigan include:

- Michigan Economic Development Corporation;⁴³
- Downtown Development Authority;⁴⁴
- Detroit Brownfield Redevelopment Authority;⁴⁵

⁴³ Michigan Economic Development Corporation, About the MEDC, <http://www.michiganadvantage.org/About-the-MEDC/Default.aspx> (last visited Jan. 3, 2010) (“[A] public corporation created through an interlocal agreement between state and local governments, the MEDC is a liaison with local communities and agencies across the state. It is guided by a broad comprised of members who represent a cross section of the state economy, business owners and executives, local economic developers and college presidents. **A corporation, not a bureaucracy**, our policies and procedures meet the needs of the private sector. The MEDC brings together supply and demand and matches up resources and services with the needs of our business customers.”)(emphasis added).

⁴⁴ MICH. COMP. LAWS ANN. § 125.1657 (West 2010).

⁴⁵ University Cultural Center Association, Incentive Programs, http://www.detroitmidtown.com/05/development_incentive.php?msub= (last visited Jan. 3, 2010) (“The Detroit Brownfield Redevelopment Authority (DBRA) was established in order to promote the revitalization of environmentally distressed areas, or brownfields, within the city of Detroit. The DBRA approves two types of brownfield redevelopment plans. Brownfield Redevelopment Authority Tax Increment Financing allows municipalities to implement brownfield redevelopment financing plans to capture state and local property taxes that result from the increased value of the redeveloped parcel. The Brownfield Investment Single Business Tax Credit applies a 10% Single Business Tax Credit to the cost of the redevelopment of a brownfield site. This includes demolition of an abandoned property, construction, or renovation of buildings on an eligible property, and site improvements.”)

- Neighborhood Development Corporation;⁴⁶
- Local Development Finance Authority;⁴⁷ and
- Tax Increment Finance Authority.⁴⁸

⁴⁶ MICH. COMP. LAWS ANN. § 125.1606(a) (West 2010)(referring to subsidiary neighborhood development corporations).

⁴⁷ MICH. COMP. LAWS ANN. § 125.2152 (West 2010).

⁴⁸ MICH. COMP. LAWS ANN. § 125.2162 (West 2010).