



Court ruling offers locals the means to stop state-imposed unfunded mandates

Editor's note: On July 14, 2010, the Michigan Supreme Court rendered a very significant decision in the case Adair v State of Michigan concerning unfunded mandates imposed by state government on local units of government. While the suit was brought on behalf of local and intermediate school districts, the Court's decision is applicable to all local units of government in Michigan. The suit was handled by attorney Dennis R. Pollard. Following the Court's ruling, Michigan Township News asked Pollard to author an article to offer insights on the background and the significance of this historic decision.

When the Headlee Amendment was approved by Michigan voters in November 1978, its principle thrust was to place limits on the escalating property values for purposes of property taxes. There were no limitations on the increases at that time, which, of course, translated into surging property tax increases—that, in some cases, were driving people out of their homes. Thus, the idea was to create a constitutional amendment that would limit increases to the lesser of the cost of living or the actual or assessed increase in value of the taxable property.

There were several other provisions contained in the amendment, but one of the lesser discussed provisions during

the debate leading up to adoption of the Headlee Amendment was the prohibition on state government—including the Legislature, governor and state administrative agencies—from imposing requirements on local units of government that were not being paid for by the state.

Attorneys had the opportunity to discuss this particular section of the amendment—Section 29—with amendment author Richard Headlee in the 1980s while handling a suit against the state for its substantial underfunding of special education services for students being provided specialized and costly services. Headlee described his intent through Section 29 in very simple terms. The idea was that if state government concludes that activities and services will serve the public interest and thus should be provided, it should either provide them through state agencies or through local units of government, but subject to paying the costs for them through state revenues—even if that involved requesting the voters to authorize new taxes.

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In the view of Richard Headlee—author of the 1978 Headlee Amendment that prohibited unfunded state mandates—the state needs to be financially accountable for what it requires to occur.

He viewed the unpaid imposition of mandates on local units as creating one of two reprehensible consequences: 1) reductions in existing services provided by local units in order to meet the cost requirements of the newly imposed state requirement, or 2) the need to ask local voters to increase taxes at the local level caused not by normal inflationary influences, but for the stealth reason that the state was causing the need for more revenues through its imposed requirements over which the local units had no control.

STATE IGNORES CONSTITUTIONAL AMENDMENT

As recently reported to the Michigan Legislature by the Legislative Commission on Statutory Mandates [*Editor's Note: Author Dennis Pollard is a member of the commission, in which MTA has also participated.*], 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 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 townships, cities, 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 straightforward:

"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, Section 29 of the Michigan Constitution

Lawsuits were being filed to enforce compliance, but they did not change the state's behavior. At least that was true up until a decision was rendered this July.

The source of the problem has been that the Michigan courts have not effectively drawn a line on this constitutional misbehavior. The courts are expressly assigned the responsibility in Section 32 of the Headlee Amendment "to enforce" its provisions, including Section 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.

RECENT DECISION OFFERS PROMISE

The recent *Adair v State of Michigan* decision by 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 Section 29 of the Headlee Amendment. 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.

In order to succeed in the *Adair* case, 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 unfunded and 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 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 litigation costs, including reasonable attorney fees, because



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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., Section 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 Supreme Court decision represents a monumental change in the complexion of responsible Headlee litigation. In the end, it may also cause the Legislature, governor 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 Supreme Court decision 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 REALLY MEAN?

At the practical level, township officials may wish to consider how many of the activities and services that their township offers 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 Section 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 the township is annually incurring to provide the services? These costs include wages and benefits of employees, administrative overhead, customized computer software and hardware costs, and 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 Section 29 are twofold. 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 (1978). Conveniently, 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 Section 29 requires that the state must pay local units for the full costs of: 1) newly required activities and services (i.e., newly required after 1978), or 2) 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 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.

Only time will tell if the Court's ruling in this case will make a real difference in terms of the state or its agencies imposing costly services for which no funding is provided. However, it should be clear that, going forward, state government will not simply order costly services and then worry about the financial consequences later. ■

Dennis Pollard, Attorney,
Secrest Wardle, Farmington Hills

Pollard can be reached at (248) 539-2806 or
dpollard@secrestwardle.com.

