



TO: Members of Troy City Council
FROM: Lori Grigg Bluhm, City Attorney *LG*
DATE: October 28, 2009
SUBJECT: Article on Constitutional and Charter Revision

Enclosed please find a print out of an article that I authored, titled *Effective Constitution and/or Charter Revision is Futile Without A Comprehensive Change to the Ballot Question Process*. It appeared in today's version of the quarterly newsletter, the Public Corporation Section of the State Bar of Michigan. This article was a re-print of an article that appeared in the June 2009 issue of the Oakland County Bar Association's monthly publication, *Laches*.

I am happy to answer any questions that you have.

Effective Constitution and/or Charter Revision is Futile Without a Comprehensive Change to the Ballot Question Process

By Lori Grigg Bluhm, City Attorney, City of Troy

State officials are preparing the process to select convention delegates, in the event that the voters approve a statewide constitutional revision on the November 2, 2010, ballot. Our 1835 state constitution was amended in 1850, as well as in 1908 and 1963. Under the current state constitution (1963 version), the question of constitutional revision is required to be submitted to the voters every 16 years, starting in 1978.¹ The voters did not initiate the constitutional review and/or revision process in 1978 or 1994. However, in light of the significant number of recent constitutional amendments, the voters could be ready to initiate the process in 2010.

If the majority of the Michigan electors vote in favor of a constitutional revision convention, the delegates to such² convention would be elected at the February 2011 election. Convention delegates would be elected from each state senate district and each state representative district, and all 148 elected delegates would convene as of October 2011, un-

less an earlier date is provided by law.³ Michigan Secretary of State Terry Lynn Land has proposed amendments to the law that would convene the constitutional revision convention in July 2011 (as opposed to October 2011). Secretary Land's proposal also addresses other procedural details that would streamline a constitutional revision convention.

At this time, the secretary of state's efforts are complemented by some grassroots efforts encouraging a constitutional revision convention. The political parties are not yet participating in the constitutional revision debate, and therefore, it is premature to predict the success or failure of the ballot question. However, the constitutional revision question is valuable, since it causes us to review how ballot questions impact the entire constitutional, as well as the municipal charter, amendment process.

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The federal and state constitution, as well as municipal charters, set forth the organizational format for governmental entities. The documents have longevity and serve as the basis for hundreds of other federal, state, and local laws. A revision to the constitution or municipal charter could lead to fundamental change in the governmental entity or entities to which it applies. For example, a municipal charter revision could change a strong-mayor form of government to a manager-council form of government. Since a constitutional or charter revision could implement drastic change, revisions should only be pursued after deliberate and careful scrutiny. When a constitutional or charter change is required because of societal changes occurring since the latest version of the constitution or charter, a less intensive amendment will likely suffice.

Constitutional and charter amendments are also required to be approved by the electorate. They can be proposed in one of two ways. First, the Michigan legislature is empowered to propose constitutional amendments in those cases where state statutes or amendments are not adequate. Either chamber of the Michigan legislature can propose a state constitutional amendment question. Upon receipt of 2/3 approval vote from the members in each chamber, the proposed constitutional amendment question shall be submitted to the voters.⁴ Many municipal charters contain similar provisions, allowing for a supermajority of the legislative body to frame and submit a charter amendment ballot question. With the legislative process, voters can be assured that there has been a vetting of the proposed charter amendment.

The constitution could also be amended through a grassroots campaign, or other citizen effort, pursuant to M.C.L.A. Const. Art. 12, Section 2. Under this provision, citizens can circulate petitions with a proposed ballot question. The citizens must timely submit the requisite number of qualified voter signatures and comply with the form requirements. Once these items are verified, then the question, as identified on the circulated petitions, is placed on the statewide ballot. The required number of qualified voter signatures varies from election to election, but is based on 10 percent of the votes cast for all candidates in the past gubernatorial election.

At first glance, the collection of the required number of signatures on a state constitutional amendment petition may appear to be insurmountable. However, there have been several statewide constitutional amendments proposed during the past few elections. There has also been a significant amount of money expended for these statewide constitutional amendment ballot questions. For example, the November 2006 ballot contained Proposal 06-02, where \$8,716,954 was spent in support of or in opposition to the proposal to ban affirmative

action in public employment and education.⁵ This proposal, which was ultimately approved by the voters, is now known as M.C.L.A. Const. Art. 1, Section 26.

Although many would argue that citizens should not be deprived of the opportunity to undertake initiatory petitions seeking constitutional or charter amendments, this process is currently resulting in conflicting or irreconcilable mandates.

As with Proposal 06-02, most of the recent initiatory petitions seeking to amend the state constitution have been controversial, since they are part of the "declaration of rights" section of the state constitution, M.C.L.A. Const. Art. 1. These constitutional amendment petitions generally address modern dilemmas that have arisen subsequent to the last draft of the Michigan constitution. According to the Campaign Finance Reports for the November 2006 election, ballot question committees spent \$18,211,048 on five constitutional amendment proposals.⁶ In 2004, ballot question committees spent \$30,222,266 in support or in opposition to the two constitutional amendment proposals. In reviewing these reports, there is no uniformity in the amount of money spent on each ballot question. However, there were controversial societal issues that generated strong support and opposition, and the most significant amounts of campaign money were expended on these questions.

Another reason for the substantial amount of money being expended in constitutional amendment campaigns is tied to the 100-word limit for initiative ballot questions, which is set forth in M.C.L.A. Const. Art. 12, Section 2. It is difficult to educate the public about a complicated ballot question within the allocated 100-word limitation. It is also difficult to craft a ballot question that is impartial, which is also a requirement of the constitutional section. Due, in part, to these limitations, special interest groups and ballot question committees generate promotional and educational material in order to sway the voters.

Under Michigan law, there is limited regulation governing these promotional materials. Ballot question committees are required to report all campaign expenditures to the State. However, the filing date for these campaign finance statements is generally after the election has occurred. In addition, each promotional piece supporting or opposing a ballot question must identify the entity that paid for the promotional ma-

terial. Ballot question committees can essentially be created overnight, and without many procedural requirements. As a result, there have been situations where a ballot question committee has distributed promotional materials before being required to register and/or identify its officers and contributors. This process results in a lack of accountability in election materials, which is exacerbated by the fact that there are very few meaningful regulations governing promotional campaign materials for ballot questions. Although persons circulating materials that are liberal with the facts or stretch the truth can be found liable for damages in a subsequent lawsuit (under defamation or slander claims), the post-election adjudication of this type of lawsuit will have no impact on the election results. In addition, well-executed election timing works against persons who seek to clarify misleading promotional materials, since the questionable promotional materials are generally targeted for distribution just prior to the vote, leaving no time for the opposition to counter the promotional piece. As a result, misleading promotional materials are not clarified until after the election has occurred. For many of these same reasons, the ability to manipulate the election process is also a concern in the amendment of municipal charters. Similar to the constitutional amendment process, municipal charters can also be amended by an initiatory petition process, as set forth in MCL 117.25. Under this statute, at least 5 percent of the qualified voters must sign the proper petition form in order to submit a proposed charter amendment question to the voters. Once the minimum number of signatures is collected, the item is submitted to the voters at the election. As with initiatory constitutional amendment provisions, these proposed amendments are not vetted, researched, or deliberated in a legislative or administrative setting. As a result, vague or ambiguous amendments may be submitted to the voters.

Recently, the City of Troy was presented with an initiatory petition to limit the maximum tax levy through an addition to the charter. Although the legislative body retained the ability to limit the maximum tax levy on an annual basis through the budget process, the petition circulators were concerned that future legislative bodies would not responsibly exercise this power and therefore sought a charter amendment that would be binding on future city councils. The petition had the requisite number of signatures. However, the petition used the words "assessed," "levied," and "collected" interchangeably, even though the terms had different meanings. There was also a concern that the proposed language was in conflict with the mandatory requirements of the Home Rule City Act. As a result, the charter amendment petition was not approved by the State of Michigan. However, under current law, there is no ability to pull an initiatory charter amendment from a ballot once the procedural requirements are satisfied. Therefore, the ballot question was submitted to the voters of the City of Troy. This process, where questions proposed by initiative are required to

be placed on a ballot, even when there are conflicts with other laws, could place a municipality in the position of having to defend substantive challenges to a charter amendment that is ultimately approved by the voters after an initiatory process.

A similar situation was discovered in another community, where taxpayer dollars were required to clarify a substantively defective initiatory charter amendment, after it was approved by the electorate. In this other community, there was a citizen-initiated charter amendment proposal that mandated that all fire stations be required to be staffed by a minimum of four fire fighters at all times. The initiative proposal did not make any accommodation for those times when there was a fire. The proposal was passed by the voters. However, compliance with this act would have significantly impacted the ability to fight fires, since four of the able-bodied fire fighters were prohibited from leaving the fire station. In order to be excused from the strict charter requirements, the city initiated a declaratory lawsuit, seeking permission to leave the fire station unoccupied in the event of a fire. The declaratory judgment was issued, and the charter provision is now qualified by a footnote referencing the declaratory judgment.

Although many would argue that citizens should not be deprived of the opportunity to undertake initiatory petitions seeking constitutional or charter amendments, this process is currently resulting in conflicting or irreconcilable mandates. Due, in part, to the increasingly frequent use of the initiatory process, the weaknesses in the current regulatory structure are illuminated. If the voters approve a state constitutional revision convention in 2010, then these issues will presumably be closely scrutinized. However, if the voters do not approve a constitutional revision convention in 2010, then perhaps amendments should be implemented legislatively. 🏠

Lori Grigg Bluhm is the city attorney for the City of Troy. She received her B.A. in English and history from Albion College, and her J.D. from Wayne State University. Ms. Bluhm has been designated as a local government fellow by the International Municipal Association of Municipal Lawyers. She is a past chair and current council member of the Public Corporation Section of the State Bar of Michigan and a board member of the Michigan Association of Municipal Attorneys. She is a past chair of the Oakland County Bar Association's Municipal Law Committee and Public Service Committee. She practices municipal law exclusively, representing her sole client, the City of Troy.

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Endnotes

- 1 M.C.L.A. Const. Article 12, Section 3.
- 2 The election consolidation statutory revisions have limited the regular election dates, so that elections occur in the months of February, May, August, and November (MCL 168.641).
- 3 M.C.L.A. Const. Art. 12, Section 3.
- 4 M.C.L.A. Const. Art. 12, Section 1.
- 5 State of Michigan, Secretary of State website, On-line Campaign Finance Disclosures—Expenditures by Ballot Question Committees on 2006 Statewide Ballot Issues, www.michigan.gov/sos.
- 6 *Id.*
- 7 *Id.*