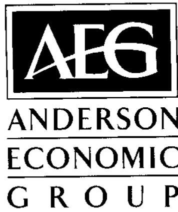

April 6, 2005

Honorable Mike Cox
Attorney General
State of Michigan
G. Mennen Williams Building, 7th Floor
525 W. Ottawa Street
Lansing, MI 48933

Re: Opinion Request Regarding Constitutionality of "Phantom Mills" Practice of Voting School Millage in Excess of 18 Mill Limit Adopted by Voters with Proposal A

Dear Mr. Attorney General,

I have been contacted by State Representative Fulton Sheen and taxpayer representative Rose Bogaert about the constitutionality of a practice that has recently sprung up among school districts, such as the Crestwood District in Wayne County. This practice might be called "phantom mills" as it involves the request for voter approval of operating millage in excess of the 18 mills authorized by law, which then stay in the shadows until they can be levied under the 18-mill limit. The clear intention of these proposals is to avoid the effect of the Headlee Amendment, Article IX, Section 31, which requires that the maximum authorized millage be reduced whenever state equalized value grows faster than the rate of inflation.

Given my extensive background with this issue; including serving as a Deputy Budget Director when we adopted and implemented Proposal A, co-authoring the memorandum within the State government outlining the tax limits protected by Proposal A, and serving on the Headlee Amendment Blue Ribbon Commission, whose report findings on the pertinent section of the Headlee Amendment were adopted by the Supreme Court in the *Bolt v. Lansing* decision; I am providing this additional information to you and your Opinion Review Committee.

Summary of Headlee Article IX, Section 31

It is well established that the purpose of the Headlee Amendment was to place limits on taxes and spending of both state and local governments. The best known of these limits is the "Headlee Rollback" provision of Article IX, Section 31, which requires that the maximum authorized rate of any local property tax levied for operating purposes be reduced whenever the state equalized value, after adjusted for additions, grows faster than the rate of inflation. This reduction is known as a "Headlee Rollback." As in all sections of the Headlee Amendment, voters are allowed to approve an increase in the limit. Elections to allow such increases are commonly known as

"Headlee Override" elections even though the Amendment itself is not overridden; it is properly followed when voters are given the opportunity to approve an increase.

Note on "Taxable Value" Confusion

I must also note at this point some confusion that has arisen about whether Proposal A changed the basis for the Headlee reduction, now that taxes on specific parcels are levied on "taxable value" rather than "state equalized value." In fact, Proposal A did not change a single word of Article IX, Section 31. Furthermore, it did not expunge the existence of "state equalized value" from other sections of the Constitution, including the very section it amended. State equalized value is essential to maintain an equitable system of taxation across the state, and continues to be enshrined in our Constitution and our law. The provision of "taxable value" is solely to limit the increases in property taxes that could be paid by a continuing owner of a single parcel.

Thus, there is nothing in the Constitution that allows for rollbacks to occur on anything other than state equalized value.

Unfortunately, this confusion did gain support from a footnote in a recent Attorney General Opinion (No. 7131, April 2003), which asserted without considering the Constitutional issue that state law now requires rollbacks to occur on taxable value. You may wish at some future time to correct this error.

Authorization of Property Taxes Under the Michigan Constitution

Article IX of our Constitution, the Finance Article, establishes the power to tax. Article IX, Section 6 outlines the tax limits under which local governments operate. This provision is quite confusing, but nonetheless is clear on a simple principle: no tax is authorized unless it falls under a limit established either by the Constitution or by authorizing legislation. This extends even to millage levied to pay principal on interest on bonds approved by the voters, in which the limit is the amount of repayment required, rather than an annual millage limit.

Argument

There is no authorization for school districts, nor any other unit of local government, to ask voters to approve mills that cannot be levied under the Michigan Constitution. Article IX, Section 6 does not allow local units of government to invent their own millage, even with local voter approval.

In particular, the first sentence of Section 6 establishes a 15-mill limit on the "total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year." The succeeding sentences allow these limits to be increased, but only if the increased taxes are authorized by the Constitution and approved in accordance with the Constitution, and further authorized and limited by charter or general law.

Thus, the only property taxes that may be levied in the State of Michigan are those that are (a) authorized by the Constitution; (b) established in State law or charter which must state a limitation; and (c) approved as required under the Constitution.[1] The fact that local approval has been gained

1. Other sections of the Constitution similarly treat the power of taxation as one to be used under strict limits. For example, Art. IV sec. 32 requires any law that imposes a tax to distinctly state the tax, and Art. IX sec. 25-32, added by "Headlee," imposes a number of relevant restriction on the power to tax.

for millage that is not authorized by law and Constitution and approved in accordance with those requirements does not make it legal.

Two Specific Constitutional Authorization Requirements

Given the passage of "Headlee" in 1978, and "Proposal A" in 1994, Section 6 here requires taxes to pass muster under those Constitutional amendments as well. Two provisions added by those amendments are important: the local voter approval requirements added by "Headlee;" and the requirement of a supermajority vote in the legislature for any Act that increases the tax limitations in statute as of the passage of Proposal A in 1994.[1] In this issue, the supermajority requirement for increasing the statutory tax limitation was not even attempted, let alone reached.

Statutory Limit Unchanged Since Proposal A Adopted

The statutory limit on school operating millage in effect at the time of Proposal A is clearly stated in the March 2, 1994 memorandum to Governor John Engler from myself and Nick Khouri, at the time serving as deputy directors for the departments of management and budget and treasury, respectively. It was section 1211 (1) of the School Code, limiting operating millage to 18.

This limit has not been changed since the passage of Proposal A,[2] and reads today as:

> Sec. 1211.
>
> (1) Except as otherwise provided in this section and section 1211c, the board of a school district shall levy not more than 18 mills for school operating purposes or the number of mills levied in 1993 for school operating purposes, whichever is less.

Clearly, there is no statutory authorization for "phantom mills" that exceed the 18 mill limit. Furthermore, neither section 1211c or other portions of section 1211 authorize phantom mills.[3] Indeed, subsection 5 establishes a penalty for levying millage in excess of the limits. You may wish, as part of your review, to indicate whether school districts that illegally levy "phantom mills" must refund the amount or reduce their future millage in accordance with this penalty provision of section 1211.

Transparent Motivation for "Phantom Mills"

The expressed purpose of these "phantom millage" requests is to create a bank of authorized millage that can be put into place whenever the Headlee Amendment reduces the authorized millage. This is a transparent attempt to evade the clear intent of the voters in adopting the Headlee Amendment in 1978. Should this be allowed for, say, three mills, there is no reason why every unit of local government would not eventually seek the adoption of 3 or 10 or even 100 "phantom mills," and therefore perpetually evade the Headlee Amendment.

---

1. The Headlee requirements are stated in Article IX, sections 25 and 31; the Proposal A requirement is in Article IX, section 3.
2. Increasing this limit would require a supermajority vote in both houses of the legislature; see discussion above.
3. Section 1211c authorizes "enhancement" millage as a separate question from 1994 through 1996. The other subsections of 1211 do not allow additional millage beyond the 18-mill authorization.

Misleading Statements in Crestwood Ballot Language

The motivation for the "phantom mills" approach is stated quite clearly in the ballot language for the Crestwood proposal ("levied only to the extent necessary to restore the Headlee reduction"). Although doing so is not constitutional, the district has at least stated the motivation to the voters.

In another area, though, the district is not straightforward. The ballot language states "This millage increase... will allow the school district to levy the statutory rate of 18 mills... required for the school district to receive its revenue per pupil foundation guarantee."

It is not clear what the "guarantee" is. If it is the "guarantee" of per-pupil revenue in Article IX section 11, that guarantee has been more than fulfilled for all school districts given the general increase in state support for schools since 1994. Many voters probably think that is the "guarantee" they are being asked to tax themselves to fulfill.

Is there another guarantee? The relevant section (1211) of the School Code does not contain the word "guarantee," and a quick search of the entire statute found it only once in an unrelated topic.[1]

Even if the "guarantee" is read as "allowance," this statement appears to be incorrect. Section 1211(3) of the School Code describes how the revenue to support the "foundation allowance" of the district is to be raised if there is any Headlee rollback. This subsection establishes that, under certain conditions, the exemptions on homestead and qualified agricultural property should be reduced, rather than the rate on all non-exempt property increased. Obviously, neither Crestwood nor any other district needs to levy 18 mills to receive a foundation allowance.

Thus, the effect of the "phantom mills" being levied could include both additional taxes being imposed, and taxes being imposed on the wrong taxpayers. Furthermore, voters are clearly confused by the use of the term "guarantee," if not purposefully misled.

References

I can cite several references for your use in reviewing this issue:

1. The Headlee Amendment *Blue Ribbon Commission Report,* published by the Department of Treasury in 1994, particularly the section on Article IX, Section 31. The findings of the Commission were adopted, in many places *verbatim*, by the Michigan Supreme Court in the *Bolt v. City of Lansing* decision.
2. *Bolt v. City of Lansing*, which was discussed above.
3. The monographs, "The Tax Limits under Proposal A," by Patrick L. Anderson, 1998; and "Sinking Fund Taxes," by Patrick L. Anderson and Scott Watkins, 2002; both published by the Michigan Chamber of Commerce. These review the adoption of the tax limits under Proposal A. Both are available from the Chamber, or at http://www.AndersonEconomicGroup.com.
4. A March 1994 memorandum coauthored by myself and Nick Khouri, when we were Deputy Directors in the Department of Management Budget and Department of Treasury respectively, which explicitly lists the statutory limits that Proposal A is intended to protect. This is attached.
5. The Citizens Research Council research memorandum No. 1039, January 1996, entitled "Headlee Rollbacks and the Constitutionality of Public Act 415 of 1994." This research brief summarizes the issue of "taxable value" being confused with state equalized value, and

---

1. The word is used in section 1274a concerning energy conservation improvements.

concludes similarly that there is no authorization under Proposal A for local units of government to avoid Headlee rollbacks by substituting taxable value for state equalized value.

6. Attorney General Opinion No. 7131 of April, 2003 regarding the required rollback of voter approved millages for "sinking funds." This opinion correctly summarizes the requirements of the Headlee Amendment to reduce property taxes. As noted above, footnote 1 to this Amendment states without reviewing the issue that it is now the increase in "taxable value" of property that "drives the determination" of to what extent millage reductions occur. The footnote only cites the provision of state law added after Proposal A was passed. The Citizens Research Council brief describes this in more detail. Although not required to correctly answer the question of "phantom mills," is my recommendation the Attorney General review, at some time in the future, the improper use of "taxable value" in this regard.
7. The recent Supreme Court decision in *WPW v. Troy,* which discussed Headlee and Proposal A. The Court's opinion of extraordinary efforts (in this case, having the legislature redefine "additions" in the law in a manner inconsistent with that adopted when the Constitution was passed, and therefore to allow property tax increases to proceed without the Constitutional roadblocks intended by the voters) to circumvent the clear intent of Constitutional amendments was neatly stated in that case:

   > To adopt Troy's position regarding legislative power to amend the meaning of terms understood at the time of ratification, would be to assume the drafters and ratifiers of this amendment desired to place a convenient sabotaging clause within this tax limitation amendment that could be triggered whenever the Legislature chose. Such a skewed view of the intent, to say nothing of the capabilities, of the drafters and ratifiers, should be rejected. Moreover, to adopt such a mode of interpretation would, when applied in the future to other constitutional language, hollow out the people's ability to place limits on legislative power.

Conclusion

I hope this letter provides useful information to you in your deliberation. If you would like additional information on this topic, please contact me at this office.

Sincerely,

Patrick L. Anderson
Principal

CC: Representative Fulton Sheen
Rose Bogaert

Attachment: March 2, 1994 Memorandum to Governor John Engler: "The Property Tax Limitations Protected by Proposal A"

STATE OF MICHIGAN

JOHN ENGLER, Governor

DEPARTMENT OF MANAGEMENT & BUDGET

P.O. BOX 30026, LANSING, MICHIGAN 48909
PATRICIA A. WOODWORTH, Director

March 2, 1994

MEMORANDUM

TO: Governor John Engler

FROM: Patrick L. Anderson
Nick Khouri

SUBJECT: The Property Tax Limitations Protected by Proposal A

Under Proposal A, Article IX, Section 3 of the Michigan Constitution would be amended to read:

> *A law that increases the statutory limits in effect as of February 1, 1994 on the maximum amount of ad valorem property taxes that may be levied for school district operating purposes requires the approval of 3/4 of the members elected to and serving in the Senate and in the House of Representatives.*

Given our experience with the "Headlee" amendment, enforcing this provision will be easier if these limits are identified and publicized before the date of the election. Therefore, we have researched those laws in effect on February 1, 1994 that limit the "maximum amount of ad valorem property taxes that may be levied for school district operating purposes" and identify them below. These fall into two broad categories: school millage limits (including the definitions of "operating" and exceptions to "operating"), and general property tax limits which apply to schools. A table provides a quick reference summary of these limits.

We also identify laws which do not fit this description, and address other related questions.

Quick Reference on Tax Limits Protected by Proposal "A"

The following table outlines, for quick reference, the laws in effect on February 1, 1994 which would be constitutionally protected if proposal "A" passes.

Wednesday, April 06, 2005 (2).max

Limit Applies To:	*Limit:*	*Statute Protected:*
School Districts	6 mills on all property not exempt.	State Education Tax Act, Sec. 3.
School Districts	18 mills on all property, except homesteads.	School Code, Sec. 1211(1).
School Districts (1994-1996) Intermediate School Districts (1997 and after)	Enhancement mills limited to 3.	School Code, Sec. 1211c, 705.
Qualifying School Districts (Those spending above $6,500 per pupil in FY 94-95)	Mills necessary to "hold harmless" total spending in successive year; limited to qualified districts; limited to number of mills necessary in 1994; certified for each district by Department of Treasury.	School Code, Sec. 1211(3), 1211a.
School Districts	Prohibited from levying "allocated" mills.	School Code, Sec. 1211(7); Property Tax Limitation Act.
School Districts	Definition of "operating purposes;" Exceptions to "operating purposes" (Building and Site sinking fund, operating deficit, community college, libraries)	School Code, Sec. 260, 1211(8), 1212, 1351a, 1356(4), 1451; Act 261 of 1913 (Libraries).
Intermediate School Districts	For operation, special education, and vocational-technical education purposes, those mills allocated or levied in 1993 for each purpose.	School Code, Sec. 624a, 681a, 1727a.
Local Units of Government	Definition of "homestead," exemptions from property tax.	School Code, Sec. 1211(8); Public Utility Assessment Act.
Local Units of Government	"Truth in Taxation" notice, hearing, and separate vote requirements.	"Truth in Taxation," General Property Tax Act, Sec. 24e.
Local Units of Government	"Headlee" rollback requirements, formula for rollback, limit on number of annual elections, allowed ballot language, prohibition on "rollups."	General Property Tax Act, Sec. 34d.

All of the following mills would be subject to the supermajority vote requirement of Article IX, section 3, if Proposal A is approved by the voters on March 15.

- The State Education Tax Act would limit to 6 mills property taxes levied by the state on all property not exempt from property taxes under the Public Utility Assessment Act, PA 282 of 1905 (MCL 207.1 to 207.21). This tax would be levied on homesteads as well as other property not exempt from tax.
  Sec. 3 of PA 331 of 1993.

- The school code would limit school operating property taxes to 18 mills, with an exemption provided for principal residences.
  Sec. 1211(1) of PA 451 of 1976, as amended by PA 312 of 1993.

- The School Code would limit "enhancement" mills levied by school districts to 3 mills in 1994 through 1996, with their authorization ending thereafter.
  Sec. 1211c of PA 451 of 1976, as amended by PA 312 of 1994.

- The School Code would allow "enhancement" mills to be levied by an Intermediate School District, and limit the number of mills to 3, beginning in 1997.
  Sec. 705 of PA 451 of 1976, as amended by PA 312 of 1993.

- The School Code would limit the additional "hold harmless" millage levied by school districts which had per-pupil revenue in excess of $6,500 in FY1994-95. Only those districts qualifying in 1994 could levy mills under this section, and only for the purposes stated.
  Sec. 1211(3) of PA 451 of 1976, as amended by PA 312 of 1993.

- The School Code would prohibit levying "allocated" mills under the Property Tax Limitation Act, PA 62 of 1933 (MCL 211.201 to 211.217a).
  Sec. 1211(7) of PA 451 of 1976, as amended by PA 312 of 1993.

- "Homestead" would be defined in the School Code, and the general exemptions to property taxes would be defined in the Public Utilities Assessment Act. These could not be changed to allow *more* property taxes to be levied by schools without a supermajority vote of the legislature. (These Acts could be changed to allow *less* property taxes to be levied; bills currently introduced to expand the definition of "homestead" for this purpose would not require a 3/4 vote.)
  Sec. 1211(8) of PA 451 of 1976, as amended by PA 312 of 1993; Act 282 of 1905 (MCL 207.1 to 207.21).

- The School Code's definitions of "operating" purposes and the exceptions to operating purposes could not be changed from the definitions in effect on February 1, 1994 without a supermajority vote, if such a change allowed more operating property taxes to be levied by school districts. The provisions governing the exceptions to "operating," (sinking funds for building and site acquisition and construction, taxes levied to eliminate an operating deficit, taxes levied for the operation of a community college, and pass-through revenue to libraries), could be changed without a supermajority vote, as long as the changes

Wednesday, April 06, 2005 (2).max

did not allow operating revenue (as defined on February 1, 1994) to be raised through any of these methods.
Sec. 260, 1211(8), 1212, 1351a, 1356(4), 1451 of PA 451 of 1976, as amended by PA 312 of 1993, and Act 261 of 1913 (for libraries; MCL 397.261 to 397.262.)

- The School Code requires the state department of treasury to certify in 1994 the millage allowed to be levied by each school district, other than the "enhancement" mills uniformly subject to a 3-mill limit. Although the School Code does not require this, we recommend that the department certify at the same time the number of mills allowed to be levied by each intermediate school district under Sections 624a and 681a.
Sec. 1211a of PA 451 of 1976, as amended by PA 312 of 1993.

- The School Code would limit Intermediate School District mills to the 1993 allocation for operating mills, and the 1993 levies for vocational-technical education and special education purposes.
Sec. 624a (operating), 681a (vocational-technical education), and 1727a (special education); and Sec. 681 to 690 and 1722 to 1729 (definition of voc-ed and special-ed purposes) of PA 451 of 1976, as amended by PA 312 of 1993.

General Property Tax Limitations

In addition to specific millage limits, the constitution would also protect those laws that otherwise limited the "maximum amount of ad valorem property taxes that may be levied for school district operating purposes." These include the following:

- The "Truth in Taxation" law would require the advance notice, standard disclosure, and separate board action now required for increases in the amount of operating property taxes that could be levied by a school district. For example, eliminating the requirement for a separate vote of the school board to levy taxes in excess of the prior year, or eliminating the disclosure or public notice provisions, would require a 3/4 vote of the legislature, under the proposed constitutional amendment. Changing the exact nature of the process by which that vote is taken, however, would not require a super-majority vote unless it allowed more taxes to be collected in the absence of some action by the voters or the elected board.
Sec. 24e of the General Property Tax Act, Act 206 of 1893 (MCL 211.24e).

- The Property Tax Limitation Act provides the general implementation of Article IX, section 6 of the Constitution, which limits the total amount of property taxes levied by all units of local government. The first paragraph of Article IX section 6 specifically limits the taxes levied by school districts. Although the School Code would prohibit school districts from levying "allocated" mills under the 15-18 mill limit established by this section of the Constitution, the remainder of the Act could not be changed in any manner that would allow school districts to levy more property taxes without a supermajority vote of the legislature. Property Tax Limitation Act, Act 62 of 1933, (MCL 211.201 - 211.217a).

- The General Property Tax Act as amended by 1993 PA 145 (SB 1) would require specific wording on ballots asking for an increase in the maximum authorized

millage rate, prescribe the formula for reducing the maximum authorized millage rate when assessed valuations grow faster than the rate of inflation ("Headlee rollbacks") and prohibit increases in the maximum authorized rate without voter approval ("Headlee rollups"). Municipalities could continue to levy less than their maximum authorized rate, and subsequently increase those rates up to the maximum authorized rate without additional voter approval, subject to Truth in Taxation.
Sec. 34d of the General Property Tax Act, Act 206 of 1893 (MCL 211.34d).

Limits Not Given Constitutional Protection

There are also, of course, many property tax limits and other laws concerning property taxes that would not be given the constitutional protection of a supermajority requirement for change. These include:

- Limits on units of local governments other than school districts, including cities, townships, counties, and villages. The phrase "school district" in the constitutional amendment clearly includes intermediate school districts.
- True general obligation debt for true capital investment. Such debt must be approved by the electors under Article IX section 6 of the Constitution, and must be used for the capital purposes allowed under the School Code in effect on February 1, 1994.
- Laws establishing and limiting TIFA's, DDA's, and Enterprise Zones, as long as such laws allow for the capture of tax revenue or its reimbursement, and a change in such laws would not allow an increase in the amount of taxes levied by school districts.
- Laws providing for true special assessments by units of local government, as defined and limited by our Supreme Court in *Kadzban v City of Granduille* 442 Mich 495 (June 1993) and *Dixon Road Group v City of Novi* 426 Mich 390 (November 1986) to assessments for physical improvements providing an proportional increase in the value of the property. Changes in laws allowing for special assessments to fund operating expenditures of school districts would require a supermajority vote, as well as possibly violating other constitutional provisions.
- Laws establishing the income tax credits based on property taxes paid ("homestead" or "circuit breaker" credits).

Changes Not Increasing Maximum Tax Revenue

Article IX section 3, if approved by the voters, would be read consistently with Article IX, section 31, which states general limitations on local property taxes and property taxes in general. Article IX, section 31 states in part:

> *If the definition of the base of an existing tax is broadened, the maximum authorized rate of taxation on the new base in each unit of Local Government shall be reduced to yield the same estimated gross revenue as on the prior base.*

This states a general principle that could be used to allow changes in the definitions of exemptions, or other changes involved in setting the limits, which would not require a supermajority vote and would comply with the Constitutional provision establishing special protection for school operating property tax limits. A change in a definition of the base of the tax, such as a change in the definition of the "homestead" exemption, could take place without a supermajority vote, if the maximum authorized rate was reduced so that the "statutory limits in effect as of February 1, 1994 on the maximum amount of ad valorem property taxes that may be levied for school district operating purposes" would not be increased.

Thus, the legislature could tighten the general law exemptions from property taxes, so long as it was treated as an expansion in the base of a tax and caused a reduction in the maximum authorized rate of taxation, and therefore the maximum property tax revenue was not increased. Of course, a change in a law that resulted in an expansion of the property tax base, but was not accompanied by a "Headlee" reduction in the rate would require a supermajority vote.

cc: Patricia Woodworth
Doug Roberts
Madhu Anderson
Lucille Taylor
Dan Pero
Carol Viventi
Mark Murray