



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION

OHIO CONSTITUTION ARTICLE VIII SECTIONS 2l, 2m, 2n, 2o, 2p, 2q, 2r, AND 2s

ADDITIONAL AUTHORIZATION OF DEBT OBLIGATIONS

The Ohio Constitutional Modernization Commission adopts this report and recommendation regarding Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s of Article VIII of the Ohio Constitution concerning public debt and public works. It is issued pursuant to Rule 10.3 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The Commission recommends that Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s of Article VIII dealing with authorization of debt obligations be retained in their present form.

Background

Article VIII deals with public debt and public works, and was adopted as part of the 1851 constitution.

Delegates to the 1851 Constitutional Convention sought to limit the actions of the General Assembly in obligating the financial interests of the state so as to avoid problems that had arisen when the state extended its credit to private interests and to prevent another debt crisis, such as the one resulting from the construction of the state's transportation system.¹ As proposed by delegates to the 1851 Constitutional Convention, Article VIII initially barred the state from incurring debt in excess of \$750,000, except in limited circumstances, primarily involving cash flow and military invasions and other emergencies. *See* Article VIII, Sections 1, 2, and 3.

From the adoption of the 1851 Constitution through 1947, the voters of the state approved just one constitutional provision authorizing the issuance of additional debt. That occurred in 1921, when the voters approved section 2a authorizing debt for establishing a system of adjusted compensation for Ohio veterans of World War I.² From 1947 through 1987, voters subsequently adopted other constitutional provisions authorizing the issuance of state debt for purposes that included compensation to veterans of World War II and the Korean and Vietnam Conflicts; construction of the state highway system, public buildings, and local public infrastructure; and

the preservation and conservation of natural resources and the establishment of state recreational areas. These sections, enumerated as Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, through a separate report and recommendation, have been recommended for repeal based on their obsolescence.

Beginning with Section 2l in 1993, voters approved eight additional constitutional provisions within Article VIII authorizing the creation of debt, which are Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s. In contrast to Sections 2b, 2c, 2d, 2e, 2f, 2h, 2j, and 2k, the sections covered in this report and recommendation do not involve bonds that have been fully issued and paid off, or their bonding authority has not yet lapsed.³

Section 2l authorizes the issuance of bonds and other obligations to finance the costs of capital improvements to state and local parks, land and water recreation facilities, soil and water restoration and protection, land and water management, fish and wildlife resource management, and other projects that enhance the use and enjoyment of natural resources. Adopted in 1993, the provision contains a statement of purpose that the capital improvements are necessary and appropriate to improve the quality of life of the people of Ohio, to ensure public health, safety and welfare, and to enhance employment opportunities. The section permits the state to support, by grants or contributions, capital improvements of this nature that are undertaken by local government entities. Significantly, the section exempts the bonds issued pursuant to its authority from operation of other constitutional provisions that strictly limit debt, or that limit the state's ability to enter into cooperative financial arrangements with private enterprise or local government.

Section 2m similarly provides for the issuance of bonds and other obligations to finance public infrastructure capital improvements of municipal corporations, counties, townships, and other governmental entities, and for highway capital improvements. The section defines "public infrastructure capital improvements" as being limited to roads and bridges, wastewater treatment and water supply systems, solid waste disposal facilities, and storm water and sanitary collection, storage, and treatment facilities, including costs related to real property, facilities, and equipment. Adopted in 1995, the section updates and modifies Section 2k, which had limited debt for public infrastructure to not more than \$120 million per calendar year, with the total debt not to exceed \$1.2 billion and a requirement that all obligations must mature within thirty years. Under Section 2m, the state is authorized to issue an additional \$1.2 billion, with no infrastructure obligations to be issued under Section 2m until at least \$1.2 billion aggregate principal amount of obligations have been issued pursuant to Section 2k. The provision also requires the use, where practicable, of Ohio products, materials, services, and labor for projects financed under Section 2m.

Section 2n authorizes debt issuance for the purpose of funding public school facilities for both K-12 and for state-supported and state-assisted institutions of higher education. Adopted in 1999, Section 2n also provides that net state lottery proceeds may be pledged or used to pay the debt service on bonds issued under the provision for K-12 educational purposes. As acknowledged by the Ohio Supreme Court in *DeRolph v. State*, 93 Ohio St.3d 309, 2001-Ohio-1343, 754 N.E.2d 1184 (*DeRolph III*), Section 2n enhanced the state's ability to issue bonds to fund schools, and was proposed and adopted subsequent to Court's decision in *DeRolph v. State*,

78 Ohio St.3d 193, 208, 1997-Ohio-84, 677 N.E.2d 733, 744 (*DeRolph I*).⁴ In *DeRolph I*, a majority of the Court concluded that state funding of schools is not adequate if school districts lack sufficient funds to provide a safe and healthy learning environment. Division (F) of Section 2n limits the total principal amount of obligations issued to an amount determined by the General Assembly, subject to the limitation provided in Section 17, which was adopted by voters on the same ballot. Article VIII, Section 17 provides, in part, that direct obligations of the state may not be issued if the amount needed in a future fiscal year to service the direct obligation debt exceeds five percent of the total estimated state revenue for the issuing year. Thus, the amount of debt issued under Section 2n for a given year is limited to five percent of the total estimated revenues of the state from the General Revenue Fund and from net state lottery proceeds for that year.

Section 2o, adopted in 2000, authorizes bonds for environmental, conservation, preservation, and revitalization projects in order to protect water and natural resources, preserve natural areas and farmlands, improve urban areas, clean up pollution, and enhance the use and enjoyment of natural areas and resources. Under the provision, while the full faith and credit of the state is pledged to conservation projects, it is not pledged to revitalization projects, the bonds for which are designated to be repaid from “all or such portion of designated revenues and receipts of the state as the General Assembly authorizes.” Section 2o(B)(2). The section requires the General Assembly to provide by law for limitations on the granting or lending of proceeds of these obligations to parties to pay costs of cleanup or remediation of contamination for which they are determined to be responsible. The section allows the state to provide grants, loans, or other support to finance projects undertaken by local government, or by non-profit organizations at the direction of local government, exempting such obligations from application of constitutional sections that limit or prohibit such arrangements. As with Section 2n, Section 17’s five percent limitation on the amount of debt issued applies.

Section 2p relates to bonds for economic and educational purposes and local government projects, specifically for the purpose of capital improvements to infrastructure, and for research and development in support of Ohio industry, commerce, and business. Adopted in 2005, the section was amended in 2010 to expand the Third Frontier program, an initiative designed to encourage state economic growth through grants and loans to private industry and educational institutions. The 2010 amendment continued the funding approved in 2005. The section allows the General Assembly to provide by law for the issuance of general obligation bonds and other obligations for the purpose of financing related projects, with prescribed limitations on the dollar amount to be issued in fulfillment of the purposes of the provision.

Section 2q, adopted in 2008 and titled the “Clean Ohio Fund Amendment,” authorizes the General Assembly to issue up to \$200 million in bonds for conservation and preservation of natural areas, farmlands, park and recreation facilities, and to support other natural areas and natural resource management projects. The provision also authorizes the issuance of bonds up to \$200 million for environmental revitalization and cleanup projects. Section 2q limits the amount borrowed in any one fiscal year to \$50 million, plus the principal amount of obligations that, in any prior fiscal year, could have been issued but were not.

Section 2r was adopted in 2009 to provide compensation to the veterans of the Persian Gulf, Afghanistan, and Iraq Conflicts, and their survivors. To be eligible for compensation, veterans

had to have served on active duty in one or more of those locations during the specified time periods. Unlike previous war veteran compensation amendments, Section 2r authorizes the Public Facilities Commission, rather than the Sinking Fund Commission, to issue and sell bonds and other obligations to fund payment, pledging the state's full faith and credit, revenue, and taxing power to pay the debt service. Additionally, the section gives responsibility to the Ohio Department of Veterans Services for paying compensation and adopting rules regarding amounts, residency, or other relevant factors, in accordance with Revised Code Chapter 119.

Section 2s, adopted in 2014, authorized the General Assembly to issue bonds to finance public infrastructure capital improvements of municipal corporations, counties, townships, and other governmental entities, with the improvements being limited to roads and bridges, wastewater treatment and water supply systems, solid waste disposal facilities, and storm water and sanitary collection, storage, and treatment facilities. With broad, nearly unanimous bipartisan support in the General Assembly, the ballot measure was submitted to voters on May 6, 2014, and was approved by a margin of 65.11 percent to 34.89 percent.⁵

Amendments, Proposed Amendments, and Other Review

Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s, are of relatively recent adoption and have not been amended.

Litigation Involving the Provisions

There has been no litigation involving Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, or 2s.

The Ohio Supreme Court generally has upheld the adoption of constitutionally-based exceptions to the limitations on incurring debt. *See, e.g., Kasch v. Miller*, 104 Ohio St. 281, 135 N.E. 813 (1922), at syllabus (where statute provides that an improvement is to be paid for by the issue and sale of state bonds, with the principal and interest to be paid by revenues derived from the improvement, a state debt is not incurred within the purview of the state constitution).

Presentations and Resources Considered

Metcalf Presentation

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the Finance, Taxation, and Economic Development Committee on May 8, 2014, March 12, 2015, and March 10, 2016. In addition to reviewing the history of Article VIII, including the \$750,000 limitation in Section 1, Mr. Metcalf noted the difficulties inherent in needing to go to the ballot for approval of additional borrowing. Although he identified areas of possible reform, Mr. Metcalf expressed that the state framework for authorizing debt has served the state exceptionally well.

As a supplement to an increased overall debt limitation, Mr. Metcalf pointed to the adoption in 1999 of Article VIII, Section 17, which contains a sliding scale under which the total debt service of the state is limited to five percent of the total estimated revenues of the state for the

general revenue fund. He also pointed out that this approach would not tie borrowing to specific purposes, thus giving the General Assembly flexibility as to how to use the public debt.

Briffault Presentation

On June 4, 2015, Professor Richard Briffault of the Columbia University Law School, provided ideas for modernizing Article VIII to eliminate obsolete provisions and to prevent the need for provisions that might become obsolete in the future.

Describing the different ways states have dealt with the subject of state debt, Prof. Briffault recognized some states' approach of using a constitutional ban on debt. While those limits are considered low today, they were not necessarily low at the time of adoption. Prof. Briffault noted that no state has learned to live without debt, with the result that, if the state constitution prohibits debt, states will amend their constitutions to allow it. The real debt limit then becomes the complicated nature of enacting a constitutional amendment, according to Prof. Briffault.

Keen Presentation

On October 8, 2015, Timothy S. Keen, director of the Ohio Office of Budget and Management, provided an in-depth analysis of the history and purpose of Article VIII, as well as suggestions for modernizing its debt provisions.

Mr. Keen noted that, by 22 constitutional amendments approved from 1921 to the present, Ohio voters have expressly authorized the incurrence of state debt for specific categories of capital facilities, to support research and development activities, and provide bonuses for Ohio's war veterans. He said, currently, general obligation debt is authorized to be incurred for highways, K-12 and higher education facilities, local public works infrastructure, natural resources, parks and conservation, and third frontier and coal research and development.

Mr. Keen emphasized that Article VIII's framework for authorizing debt has served the state exceptionally well for more than 150 years. He said the process of asking voters to review and approve bond authorizations sets an appropriately high bar for committing the tax resources of the state over the long term, adding that Ohio's long tradition of requiring voter approval ensures that debt is proposed only for essential needs, and those needs must be explained and presented to voters for their careful consideration. He complimented voters, calling them "worthy arbiters," based on their having approved 26 and rejected 17 Article VIII debt-related ballot issues since 1900.

Discussion and Consideration

In reviewing Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s, the Finance, Taxation, and Economic Development Committee discussed whether the provisions should be retained because their bonding authority remains current, and for the reason that the bonds issued pursuant to their authority have not been paid off. The committee also considered, but left for future resolution, the concept of a constitutional amendment allowing for the automatic retirement of bond

authority provisions once they become obsolete, so as to relieve the need to go to the ballot to repeal expired provisions.

Action by the Finance, Taxation, and Economic Development Committee

After formal consideration by the Finance, Taxation, and Economic Development Committee on November 10, 2016, the committee voted on November 10, 2016 to issue a report and recommendation recommending that Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s be retained in their current form.

Presentation to the Commission

On December 15, 2016, on behalf of the Finance, Taxation, and Economic Development Committee, committee Chair Doug Cole appeared before the Commission to present the committee's report and recommendation, by which it recommended retaining Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s in their present form. Chair Cole explained the history and purpose of the provisions, indicating that the committee determined it would be appropriate to retain them because they are relatively recent, and because the bonds they authorize are still outstanding.

On March 9, 2017, Mr. Cole provided a second presentation of the report and recommendation, indicating the sections covered by the report and recommendation contrast with other debt authorization sections in Article VIII in that they still have outstanding bonding amounts and are still in use, therefore the report recommends retaining Sections 2l through 2s. Mr. Cole indicated the report and recommendation outlines that the sections authorize debt to fund projects relating to state infrastructure, and that the sections are relatively recent and, for the most part, have not been amended. He said the report indicates there has been no litigation relating to the sections and concludes that because the bonds are still outstanding, the committee did not recommend change.

Action by the Commission

At the Commission meeting held March 9, 2017, Commission member Ed Gilbert moved to adopt the report and recommendation for Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s, a motion that was seconded by Senator Bill Coley.

A roll call vote was taken, and the motion passed unanimously, by a vote of 21 in favor, with none opposed, one abstention, and seven absent.

Conclusion

The Ohio Constitutional Modernization Commission concludes that Article VIII, Sections 2l, 2m, 2n, 2o, 2p, 2q, 2r, and 2s should be retained in their current form.

Date Adopted

After formal consideration by the Ohio Constitutional Modernization Commission on December 15, 2016, and March 9, 2017, the Commission voted to issue this report and recommendation on March 9, 2017.

/s/ Charleta B. Tavares
Senator Charleta B. Tavares, Co-chair

/s/ Jonathan Dever
Representative Jonathan Dever, Co-chair

Endnotes

¹ Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 233 (2nd prtg. 2011). Ohio was not unique in facing the economic consequences of overspending on transportation infrastructure, nor in adopting constitutional limitations on state debt as a result. By 1860, 19 states had constitutional debt limitations, and by the early 20th Century, nearly all state constitutions contained such limitations. Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 Rutgers L.J. 907, 917, citing B. U. Ratchford, *American State Debts* (1941); Alberta M. Sbragia, *Debt Wish, Entrepreneurial Cities, U.S. Federalism, and Economic Development* (1996). See also Richard Briffault, "State and Local Finance," in *State Constitutions for the Twenty-first Century* (G. Alan Tarr & Robert F. Williams, eds. New York: SUNY Press. 2006); Stewart E. Sterk & Elizabeth S. Goldman, *Controlling Legislative Shortsightedness: The Effectiveness of Constitutional Debt Limitations*, 1991 Wis. L.Rev. 1301 (1991).

For more on the history of the 1850-51 Constitutional Convention in relation to the state debt provisions in Article VIII, see David M. Gold, *Public Aid to Private Enterprise Under the Ohio Constitution: Sections 4, 6, and 13 of Article VIII in Historical Perspective*, 16 U. Tol. L.Rev. 405 (1984-85).

² Section 2a was later repealed in 1953. The text of repealed Section 2a may be found at: Page's Ohio Rev. Code Ann., 518 (Carl L. Meier & John L. Mason, eds. 1953).

³ The committee's review of Section 2p is not included in this report and recommendation, but will be included in the committee's consideration of Article VIII, Sections 4, 5, and 6.

⁴ In *DeRolph III*, the Court observed:

One recent development with significant potential is that the state has enhanced its ability to issue bonds to pay part of the state share of the costs of local projects. In *DeRolph II*, 89 Ohio St. 3d at 14, 728 N.E.2d at 1004, this court noted that Senate Joint Resolution No. 1 placed on the November 2, 1999 ballot a proposal, approved by Ohio voters, to amend the Ohio Constitution "to allow the state to issue general obligation bonds to pay for school facilities." See, principally, Section 2n, Article VIII, Ohio Constitution; see, also, 1997 Am.Sub.S.B. No. 102, Section 8, 147 Ohio Laws, Part IV, 7417. The deposition of Randall A. Fischer, executive director of the Ohio School Facilities Commission, reveals that these bonds are being issued. However, it is unclear from the record before us how effectively the bonds are being utilized and whether the state has fully taken advantage of the opportunities presented by bond issuance. Our state could benefit greatly if our legislators were able to exercise additional vision to put in place plans that would make bonds a more efficacious method of paying for school facilities.

DeRolph III, 93 Ohio St.3d at 368, 754 N.E.2d at 1235.

⁵ See <http://www.sos.state.oh.us/SOS/elections/Research/electResultsMain/2014Results.aspx> (last visited May 25, 2016).