



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

Ohio Constitutional Modernization Commission

Co-Chair

Sen. Charleta B. Tavares
Assistant Minority Leader

Co-Chair

Rep. Ron Amstutz
Speaker Pro Tempore

June 9, 2016
Ohio Statehouse
Room 313

Ohio Constitutional Modernization Commission

Co-chair Sen. Charleta Tavares

Co-chair Rep. Ron Amstutz

Ms. Janet Abaray

Mr. Herb Asher

Mr. Roger Beckett

Ms. Karla Bell

Ms. Paula Brooks

Rep. Kathleen Clyde

Mr. Douglas Cole

Sen. Bill Coley

Rep. Robert Cupp

Rep. Mike Curtin

Ms. Jo Ann Davidson

Judge Patrick Fischer

Mr. Edward Gilbert

Mr. Jeff Jacobson

Sen. Kris Jordan

Mr. Charles Kurfess

Mr. Larry Macon

Rep. Robert McColley

Mr. Fred Mills

Mr. Dennis Mulvihill

Sen. Bob Peterson

Mr. Chad Readler

Mr. Richard Saphire

Sen. Tom Sawyer

Sen. Michael Skindell

Rep. Emilia Sykes

Governor Bob Taft

Ms. Petee Talley

Ms. Kathleen Trafford

Mr. Mark Wagoner

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

COMMISSION MEETING

THURSDAY, JUNE 9, 2016

1:30 P.M.

OHIO STATEHOUSE ROOM 313

AGENDA

- I. Call to Order
- II. Roll Call
- III. Approval of Minutes
 - Meeting of May 12, 2016
 - [Draft Minutes – attached]*
- IV. Standing Committee Reports
 - No reports
- V. Subject Matter Committee Reports
 - Education, Public Institutions, and Local Government Committee (Readler)
 - Finance, Taxation, and Economic Development Committee (Cole)
 - Judicial Branch and the Administration of Justice Committee (Abaray)
 - Bill of Rights and Voting Committee (Saphire)
 - Constitutional Revision and Updating Committee (Mulvihill)
 - Legislative Branch and Executive Branch Committee (Mills)

VI. Reports and Recommendations

First Presentation

- Article VIII, Sections 1, 2, and 3 (State Debt) (Cole)
 - Review of Report and Recommendation
 - Public Comment
 - Discussion

[Report and Recommendation – attached]

- Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2k, and Proposed Sections 2t and 18 (Authorization of Debt Obligations) (Cole)
 - Review of Report and Recommendation
 - Public Comment
 - Discussion

[Report and Recommendation – attached]

- Article VIII, Sections 7, 8, 9, 10, and 11 (Sinking Fund and Sinking Fund Commission) (Cole)
 - Review of Report and Recommendation
 - Public Comment
 - Discussion

[Report and Recommendation – attached]

VII. Executive Director's Report (Hollon)

VIII. Old Business

IX. New Business

X. Public Comment

X. Adjourn

Co-Chair
Charleta B. Tavares
Assistant Minority Leader
15th Senate District



Co-Chair
Ron Amstutz
Speaker Pro Tempore
1st House District

OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

MINUTES FOR THE MEETING HELD THURSDAY, MAY 12, 2016

Call to Order:

Co-chair Ron Amstutz called the meeting of the Ohio Constitutional Modernization Commission ("Commission") to order at 1:38 p.m.

Members Present:

A quorum was present with Commission Co-chairs Tavares and Amstutz, and Commission members Abaray, Asher, Beckett, Bell, Clyde, Cole, Coley, Cupp, Curtin, Fischer, Gilbert, Jacobson, Jordan, Kurfess, McColley, Mills, Mulvihill, Readler, Sapphire, Sawyer, Skindell, Sykes, Taft, Talley, and Wagoner in attendance.

Approval of Minutes:

The minutes of the April 14, 2016 meeting of the Commission were reviewed and approved.

Standing Committee Reports:

Organization and Administration Committee

Mark Wagoner, chair of the Organization and Administration Committee, provided the Ohio Constitutional Modernization Commission's third quarter budget report. He indicated the Commission has paid out 67 percent of its annual budget of \$600,000. With \$150,000 carried over from the last fiscal year, Mr. Wagoner said the Commission only expended a little more than 54 percent of its budget. He said the greatest percentage of spending was for supplies and maintenance, with \$24,000 out of \$34,000 spent. He said the least percentage of spending was for payroll, at 66 percent, roughly \$318,000. He said the Commission is \$44,000 under budget in the first three quarters, and \$190,000 under budget when including the carry over. Mr. Wagoner commended Steven C. Hollon, executive director, and staff for "running a tight ship." He said Mr. Hollon presented on the Commission's work before the Sunset Review Committee, and that his presentation was well-received.

Subject Matter Committee Reports:

Education, Public Institutions, and Local Government Committee

Chad Readler, chair of the Education, Public Institutions, and Local Government Committee, reported the committee met last month, discussing Article VI, Section 4, relating to the state board of education and superintendent of public instruction. He said the committee may have recommendations for change and will take that subject up again at its next meeting. He noted also, at the next meeting, Senator Bill Coley will present regarding casinos in the state constitution.

Finance, Taxation, and Economic Development Committee

Doug Cole, chair of the Finance, Taxation, and Economic Development Committee, reported the committee held a special meeting that morning, at which it approved two reports and recommendations. He said the committee now has three reports and recommendations regarding Article VIII to go to the Coordinating Committee for its approval. He said the committee is nearing the end of its work on Article VIII and will be turning to the other articles in the coming months.

Judicial Branch and Administration of Justice Committee

Janet Abaray, chair of the Judicial Branch and Administration of Justice Committee, said her committee did not meet last month, but next month has arranged to hear a speaker on the topic of the grand jury system in Hawaii, which has aspects that may be of interest in the committee's consideration of whether to recommend changes to Ohio's system.

Bill of Rights and Voting Committee

Richard Saphire, chair of the Bill of Rights and Voting Committee, reported the committee met earlier, and began its review of Article V, Section 1, relating to the qualifications of an elector. He said the committee heard presentations by Carrie L. Davis, with the League of Women Voters of Ohio, and by Representative Alicia Reece. He said the committee will continue that discussion at its next meeting.

Constitutional Revision and Updating Committee

Dennis Mulvhill, reporting as chair of the Constitutional Revision and Updating Committee, said the committee is continuing its work on the statutory initiative, with a goal of encouraging citizens who want to initiate law to take the statutory, rather than the constitutional, route. He said the committee is working on rewrites of Article II, Sections 1b and 1g, removing the supplemental petition requirement and resolving conflicts if multiple similar petitions result in ballot issues. He said the committee will progress to addressing the constitutional initiative, and is picking up steam and may be reaching consensus soon on these issues.

Legislative Branch and Executive Branch Committee

Fred Mills, chair of the Legislative Branch and Executive Branch Committee, said his committee would be meeting later to again discuss Congressional redistricting and get an update on efforts to reform that process. He said the committee next would be beginning a methodical review of other assigned sections of Article II.

Reports and Recommendations:

Article V, Section 6 (Mental Capacity to Vote)

Co-chair Amstutz then recognized Richard Saphire, chair of the Bill of Rights and Voting Committee, for a second presentation on Article V, Section 6 (Mental Capacity to Vote).

Mr. Saphire reviewed the contents of the report and recommendation, which currently provides language disenfranchising “idiots” and “insane persons.” Mr. Saphire said the committee agreed those descriptors are offensive, but members engaged in extensive discussion regarding whether the constitution should include a provision disqualifying mentally impaired voters, and whether, if such a provision is retained, what the replacement language should say. Mr. Saphire said the majority of the committee wanted to emphasize that, if disenfranchisement occurs, it must be as a result of procedures enacted by the General Assembly. Thus, he said, a majority of the committee agreed that Article V, Section 6 should be repealed and replaced by language stating:

The General Assembly shall provide that no person who has been determined under law to lack the mental capacity to vote shall have the rights and privileges of an elector during the time of incapacity.

Co-chair Amstutz then recognized Senator Michael Skindell, a member of the Commission, who submitted written comments in opposition to the report and recommendation on behalf of himself and Representative Kathleen Clyde.

Sen. Skindell indicated that he and Rep. Clyde agree that the reference to “idiots” and “insane persons” in the section should be repealed, but said they oppose the language recommended by the Bill of Rights and Voting Committee. He said, by denying such persons “the privileges of an elector,” the section not only denies an individual of the fundamental right to vote but also denies individuals all other privileges as an elector. He said Section 6 not only denies the fundamental right to vote, but the ability to run as a candidate, be a signatory on a candidate or issue petition, or to hold public office.

Sen. Skindell noted the contemporary view of the United States Supreme Court is that the right to vote is not to be abridged by the states except in rare circumstances, and so the denial of this right can only be accomplished through laws that are narrowly drawn to serve a compelling state interest.

Thus, he said, there is no need to replace the existing language. Citing Ohio Revised Code Chapter 3599, he said statutory law makes it illegal for a person to vote for another who cannot knowingly and voluntarily cast a vote. Sen. Skindell indicated that if the related statutory

provisions are not sufficient to protect against someone voting for another, the General Assembly can strengthen those provisions without causing conflict with the Ohio Constitution. He indicated that some 15 states do not have constitutional provisions disenfranchising such persons, and that he and Rep. Clyde prefer that the section be repealed and not replaced.

Sen. Skindell said if the Commission's consensus is to replace the existing language, then it should only be replaced with a requirement that disenfranchisement only occur after an adjudication. He said this is the approach taken by the Constitutional Revision Commission in 1975, which recommended the following language:

The General Assembly shall have power to deny the privileges of an elector to any person adjudicated mentally incompetent for the purpose of voting only during the period of such incompetency.

Sen. Skindell said, at the time, the Commission opined that "adjudication" was an adequate safeguard to ensure that people were not improperly denied the right to vote, but noted that some scholars opine that such an adjudication provision cannot withstand strict scrutiny.

Co-chair Amstutz then opened the floor for discussion by Commission members.

Commission member Ed Gilbert said he joins with Sen. Skindell on this alternative course of action. He said he was vocal in the committee, saying that the provision should be repealed, but as a compromise, he would agree to the replacement language Sen. Skindell proposed.

Commission member Janet Abaray asked what was the thought of the committee if the proposed section were adopted but the General Assembly would fail to act to create legislation on this issue. Commission member, and Bill of Rights and Voting Committee Vice-chair, Jeff Jacobson said in that case it would not be possible to disenfranchise anyone. He said that is why the committee used the phrase "under law" in its recommendation. He said there are plenty of provisions in the constitution that give the General Assembly the right to decide, with the idea that a court can come along and invalidate that provision. The General Assembly has to write a law and only under that law could someone be disenfranchised. He said "nothing in what we are proposing changes that, but it does remove the offensive language."

Commenting on Ms. Abaray's question, Mr. Saphire said that same question was directed to him by the Coordinating Committee, saying he agrees with Mr. Jacobson's analysis. He said it is his understanding that, as things now stand, the only way someone can be disenfranchised is through a procedure established for involuntarily committing someone to a mental institution. He said, to the extent that is true, then it is the case that if the General Assembly does not act there is no self-executing provision.

Sen. Skindell said the focus should not be on the person with the disability. He said, as mentioned by Michael Kirkman, executive director of Disability Rights Ohio, the focus should be on the basis of voting. He said, if a person is at such a level of mental incapacity that another must vote for him, he is no longer voluntarily voting. Sen. Skindell said the focus of the discussion is to repeal the archaic language, and then to make sure someone is not improperly voting for someone else. But, he said, "we already have laws about that. If the General

Assembly needs to make adjustments it should be done that way.” He added, if someone fills out a ballot for such a person, that is election fraud. He said “we should ensure that all people have a role in our process of democracy.”

Mr. Jacobson commented that where this issue is most likely to arise is not in the polling place, but when pollworkers go to nursing homes to assist residents. He said, as a former party chairman he got reports that generally one representative from each party would try their best to assist the person in casting a vote, including asking questions and trying to record what the answers to the questions were. To the extent to which elections can be contested, the pollworkers would disagree about the response of the voter. He said “it is a messy part of democracy, but what this proposed replacement section would do is make sure the pollworkers can’t decide on their own that the person is not capable of voting.” He noted the concerns raised by Sen. Skindell are not the issue. He said this is not a situation of someone attempting to cheat but with a situation in which the pollworkers are deciding what to do. He said the committee’s recommended language “lets us get this unhappy issue out of Ohio’s constitution in a way that allows for a compromise going forward.”

Commission member Karla Bell said, to Mr. Jacobson, that he had indicated the pollworkers could be the ones to determine mental capacity. But, she said there is no limitation in this language; the General Assembly could specify that pollworkers could make that determination.

Mr. Jacobson said the General Assembly could write all kinds of laws, but the General Assembly is not the ultimate arbiter of that question. He said the committee is saying that, like other provisions of Ohio law, the General Assembly should decide and let the courts determine if the way the law is written protects people’s rights.

Ms. Bell said the only way there is judicial resolution is if a pollworker disenfranchises and the voter is willing to sue. She said, it puts the burden on the person denying the vote.

Mr. Jacobson said there is already this question in election law, and there is ongoing litigation about these types of issues.

Commission member Pat Fischer said “I beg you, let’s move forward. The language is a compromise; it is a compromise that works” He asked “what we are doing if we continue to debate this word for word? The language from the 1970s group has sat there for 40 years, if it was so great, why has nothing happened?” He said the current language is insulting, and must be removed, but has to be replaced with something. He said “If we can’t push through our first legitimate change after that much scrutiny then we are not doing a very good job. I heartily ask you to support the report and recommendation of the committee.”

Commission member Charles Kurfess noted there are two different approaches in the current recommendation versus the recommendation from 40 years ago. He said the present language attempts to require action by the General Assembly, while the 1970s language says legislative action is discretionary. He asked whether, under the current recommended language, the legislature could simply say as a matter of law those who are patients or residents are determined to be incapable of voting.

Ms. Bell answered that, presently, Ohio law provides that if someone has been committed involuntarily, that person's right to vote cannot be eliminated without a separate determination that they are incapable of voting. That finding itself is not enough.

Mr. Saphire agreed, saying, as a 40-year civil liberties lawyer, if the legislature did that it would be clearly unconstitutional.

Mr. Jacobson said Ohio has had this provision for 100 years or more, but there appear to be no cases that have ever arisen where people have raised objections to the process or been deprived or come to the level where they had to deal with a deprivation of rights. He said, while this is a good theoretical argument, the issue of how to fix it is a solution in search of a problem. He concluded the problem is the offensive language.

Representative Emilia Sykes commented that if a recommendation is not the position or the goal of the full Commission, "it is not fair to say just because a committee has done work the Commission has to rubber stamp it." She added, the goal is to get rid of offensive language but it is also offensive to remove someone's right to vote. She said, if this has not been an issue for over 100 years, why not get rid of the language?

Mr. Gilbert said he joined Rep. Sykes in this statement.

Mr. Saphire said while he agrees with Rep. Sykes that the Commission is not bound by the committee's decision, from the committee's point of view this became a case of "the perfect becoming an enemy of the good." He said the committee spent hours on this, reviewing 15 or 20 different draft proposals. He said this is the best that the group can come up with; if the Commission can do better then do so.

Ms. Abaray asked whether, if this provision is repealed, would it be unconstitutional for the legislature to enact laws.

Mr. Saphire said yes, because Article V, Section 1 provides the only other definition of "qualifications of an elector."

Mr. Wagoner said the issue goes to an elector and not just to voting. He asked what the committee's consideration was regarding holding public office.

Mr. Saphire said this was discussed and is covered in the report and recommendation. He said he is not sure the committee reached a conclusive final assessment of it. He said, it is possible that if this provision is adopted and the General Assembly enacts a provision that is applied to disqualify a person from voting because of lack of capacity, if that person is also a public office holder someone may remove them from office.

Co-chair Amstutz said the proposed language provides the opportunity to put a conditional hold on the privileges of an elector as opposed to a disqualification. So, he said, he feels comfortable that the range applies to all the duties of an elector not just to voting.

Co-chair Tavares said those comments give her pause, since “you can’t take someone out of office and put them back in. If you said a person is no longer a qualified elector and all of those privileges go away, you may not know how long that period is.”

Commission member Herb Asher wondered, if the need for this provision is that, without it, the legislature would not be able to address the issue of voting, could the provision be limited to voting and not the broader “privileges of an elector.”

Mr. Wagoner noted that is what the 1970s Commission was proposing.

Mr. Jacobson disagreed that removing “privileges of an elector” would bring the current proposal in line with the 1970s recommendation. He said the issue was discussed in the committee, and that it was concluded that the phrase “privileges of an elector” was important to retain.

Sen. Skindell said he had asked Professor Wilson Huhn, when he presented to the committee, whether using the phrase “mental capacity to vote” broadened the category of individuals who are being excluded from the rights and privileges of an elector, as versus the words “idiots” and “insane persons.” He said Professor Huhn said that is a broader category, and that the provision would be adding people who could be disenfranchised. Sen. Skindell said Professor Huhn raised multiple times this impact of using the phrase “privileges of an elector.” Sen. Skindell said someone who loses the qualifications of an elector for a temporary amount of time would lose his public office, and could not regain that office when he regains that capacity.

Mr. Jacobson noted the Americans with Disabilities Act indicates a person could not be removed from office in that way.

Co-chair Amstutz thanked the Commission for its discussion and asked if there is a motion. Mr. Jacobson moved to adopt the report and recommendation for Article V, Section 6, with Judge Fischer seconding the motion.

Mr. Mills asked whether Commission members who have left the meeting have the ability to vote later under Commission rules. Co-chair Amstutz said he was not aware of such a rule, but said this could be decided later if the vote is close.

Co-chair Amstutz then called for a roll call vote, which was as follows:

Co-chair Tavares – nay
 Co-chair Amstutz – yea
 Abaray – yea
 Asher – yea
 Beckett – yea
 Bell – nay
 Brooks – absent
 Clyde – nay
 Cole – absent
 Coley – yea
 Cupp – yea

Curtin – yea
 Davidson – absent
 Fischer – yea
 Gilbert – nay
 Jacobson – yea
 Jordan – yea
 Kurfess – yea
 Macon – absent
 McColley – yea
 Mills – yea
 Mulvihill – yea
 Peterson – absent
 Readler – yea
 Sapphire – yea
 Sawyer – nay
 Skindell – nay
 Sykes – nay
 Taft – yea
 Talley – nay
 Trafford – absent
 Wagoner – yea

Requiring a vote of 22 votes to pass, the motion failed, by a vote of 18 in favor, 8 opposed, with six absent.

Co-chair Amstutz said the motion did not pass and that the matter is not recommended at this time.

Adjournment:

With no further business to come before the Commission, the meeting adjourned at 2:53 p.m.

Approval:

The minutes of the May 12, 2016 meeting of the Commission were approved at the June 9, 2016 meeting of the Commission.

Co-chair
 Senator Charleta B. Tavares
 Assistant Minority Leader

Co-chair
 Representative Ron Amstutz
 Speaker Pro Tempore



OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE FINANCE, TAXATION, AND ECONOMIC DEVELOPMENT COMMITTEE

OHIO CONSTITUTION ARTICLE VIII SECTIONS 1, 2, AND 3

STATE DEBT

The Finance, Taxation, and Economic Development Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Sections 1, 2, and 3 of Article VIII of the Ohio Constitution concerning state debt. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Article VIII, Sections 1 and 3 be retained in their current form, and that Section 2 be revised to eliminate an outdated reference.

Specifically, the committee recommends retaining the \$750,000 debt limit in Section 1 because it is important to public perception of state spending, and because the limit has not created an obstacle to state fiscal planning or growth in the years since its adoption in 1851.

The committee further recommends a revision to Section 2 that would remove a reference to the Sinking Fund based on the committee's separate recommendation that sections of Article VIII creating the Sinking Fund and the Sinking Fund Commission be repealed.

Finally, the committee recommends Section 3 be retained in its current form for the reason that it emphasizes a public policy encouraging debt avoidance and sound financial practice.

Background

Article VIII deals with public debt and public works, and was adopted as part of the 1851 constitution. As proposed by delegates to the 1851 Constitutional Convention, Article VIII, Sections 1, 2, and 3 bar the state from incurring debt except in limited circumstances, primarily involving cash flow and military invasions and other emergencies.

Section 1 sets a strict limit on the dollar amount of debt the state may incur, providing:

The state may contract debts to supply casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts, direct and contingent, whether contracted by virtue of one or more acts of the General Assembly, or at different periods of time, shall never exceed seven hundred and fifty thousand dollars; and the money, arising from the creation of such debts, shall be applied to the purpose for which it was obtained, or to repay the debts so contracted, and to no other purpose whatever.

Section 2 recognizes that civil unrest could necessitate exceeding the \$750,000 debt limit created in Section 1, and so provides:

In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; but the money, arising from the contracting of such debts, shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever; and all debts, incurred to redeem the present outstanding indebtedness of the state, shall be so contracted as to be payable by the sinking fund, hereinafter provided for, as the same shall accumulate.

Emphasizing the importance of the limits set in Sections 1 and 2, Section 3 provides:

Except the debts above specified in sections one and two of this article, no debt whatever shall hereafter be created by or on behalf of the state.

Amendments, Proposed Amendments, and Other Review

The Ohio Constitutional Revision Commission (1970s Commission) studied Article VIII in depth and made extensive recommendations concerning how the state incurs debt.¹ The 1970s Commission recommended the repeal of the \$750,000 debt limitation in Article VIII, Section 1, replacing it with a limit based on six percent of the average annual revenue of the state.² In its December 31, 1972 report, the 1970s Commission proposed the following changes in relation to Article VIII, Sections 1 through 3:

- Established “a constitutional debt formula, based on a moving average of state revenues, by which the state, by a three fifths (3/5) vote of the General Assembly, could incur debt for capital improvement purposes. The proposed formula would in effect limit the amount of money which could be spent to repay such debt to six per cent (6%) of the base, which is the average of the revenues of the state, as defined in the Constitution, for the then preceding two fiscal years. The proposed formula would also limit the amount of the principal of new debt which could be issued in any fiscal year to eight per cent (8%) of the base, and require that a specific part of the total be repaid every fiscal year.”

- Continued “the authority of the state to contract debt outside the debt limit to repel invasion, suppress insurrection, and defend the state in war.”
- Authorized “short-term borrowing by the state to meet appropriations and require[d] that money borrowed for this purpose be repaid within the fiscal year in which it is borrowed.”
- Required “voter approval in a referendum for incurring debt outside the debt limit or for purposes other than capital improvements.”
- Required “the General Assembly to prescribe the methods and procedures for evidencing, refunding, and retiring state debt, and to provide for its full and timely payment.”
- Required “the General Assembly to perform certain functions of a technical nature in connection with the state's bonded debt, and impose certain duties on the Treasurer of State in regard to it.”
- Permitted “that state debt be contracted, and the credit of the state be extended, only for a public purpose declared by the General Assembly in the law authorizing such debt or use of credit.” * * *³

Some of these recommendations were the subject of the General Assembly’s 1977 ballot proposal that, among other actions, would have eliminated the \$750,000 debt limitation in Section 1, as well as the debt restrictions contained in Sections 2 and 3. As presented on the November 8, 1977 ballot, Issue 4 stated:

“PROPOSED CONSTITUTIONAL AMENDMENT

To adopt Section 1 of Article VIII and repeal Sections 1, 2, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 3, 7, 9, and 10 of Article VIII and Section 6 of Article XII of the Constitution of Ohio

1. To repeal the general state constitutional debt limit of \$750,000 and replace it with authority to incur debt for capital improvements by a two-thirds majority vote of each house of the general assembly within specified limitations directly related to state revenues.
2. To permit the state to contract debt without limitation on amount of purpose, in addition to the authority specified above, if that debt is submitted to a vote of the electors by a three-fifths majority vote of each house of the general assembly and approved by a majority of the electors voting on the question.
3. To require the general assembly to retire at least 4% of the state’s indebtedness each year.

4. To permit the state to borrow funds to meet a current year's appropriations if any such loan is repaid out of that year's revenues.
5. To repeal part of the constitutional requirements relating to a sinking fund and to require that the general assembly provide for the repayment of state debt.
6. To enumerate purposes and amounts for which the first \$640 million of capital improvement debt would have to be appropriated.

(Proposed by Resolution of the General Assembly of Ohio)⁴

Issue 4 was overwhelmingly defeated by a margin of 72.5 percent to 27.5 percent, and there has been no effort since to revise Article VIII, Sections 1, 2, or 3.⁵

Litigation Involving the Provisions

The Supreme Court of Ohio has issued two influential decisions regarding these sections of Article VIII.

In *State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 513 N.E.2d 1332 (1987), the Court concluded Section 2's reference to the "present outstanding indebtedness of the state" was meant to address the state's fiscal status in 1851. In *Shkurti*, the General Assembly had enacted legislation directing the treasurer of state to issue bonds to repay outstanding advances by the federal government to the Ohio unemployment compensation program. When the treasurer refused to issue the bonds because doing so was not constitutionally authorized, the director of the Office of Budget and Management (OBM), brought an action in mandamus to compel the issuance of the bonds. Rejecting the argument that Section 2 authorized the bond issuance because the intent was to relieve the "present outstanding indebtedness of the state," the Court found the sole purpose of Section 2's exception to the Article VIII debt restrictions was to pay down the debt that existed in 1851:

First, the precise modification of "outstanding indebtedness" by the definite article "the," and the adjective "present," virtually compels this conclusion. Second, examination of the relevant constitutional debates convinces us that the then outstanding debt concerned the framers. They debated the wisdom of the sinking fund procedure for the retirement of that debt, the equity and practicality of relatively early retirement of the debt versus more extended retirement periods and, consequently, the amount that should be committed annually to the sinking fund to retire the principal and interest on the debt. The debates do not indicate any broader purpose for this exception.

Id., 32 Ohio St.3d at 426, 513 N.E.2d at 1334.

State ex rel. Ohio Funds Mgmt. Bd. v. Walker, 55 Ohio St.3d 1, 561 N.E.2d 927 (1990), presented another opportunity for the Court to consider Sections 1, 2, and 3 of Article VIII. In that case, the General Assembly sought to address General Revenue Fund cash flow issues by

enacting R.C. 113.31 *et seq.*, legislation that created the Ohio Funds Management Board (“the Board”) and authorized the state treasurer, at the recommendation of the Board, to issue “revenue anticipation notes.” As part of this procedure, the statute required the director of OBM to provide relevant financial data to the Board and the treasurer, and the OBM director refused, arguing that doing so would allow the issuance of the “revenue anticipation notes,” which are a form of state debt prohibited by Article VIII, Sections 1 and 3. The Board then pursued an action in mandamus, arguing the notes were not debt because they would not be designated as a debt, would not be guaranteed by the faith and credit of the state, and would be paid only from a special repayment fund. The Board further asserted that future taxes would not be levied to pay the notes, that taxes had already been levied, and that the issuance of the notes and the appropriation of monies to pay the notes would occur in the same fiscal year. The Court disagreed, holding that the statutory scheme that created the Board and authorized the issuance of the notes was unconstitutional:

This court, in its history of reviewing Sections 1, 2, and 3 of Article VIII of the Ohio Constitution, has been a watchful guardian of the concern of the framers of these constitutional prohibitions against the creation of state debt not authorized by the Constitution, and we feel constrained to again give heed to such concerns. There have been few exceptions to the constitutional constraints of Sections 1 and 3 of Article VIII allowed by this court. In essence such exceptions have been those financial transactions involving the erection or construction of a revenue-producing public building or facility, whose proceeds were placed in a “special fund.” [Citations omitted.]

* * *

However, both parties agree that a “special fund” obligation is not involved in the instant case. No bonds are to be issued pursuant to this new law, no facilities will be provided or constructed with the note proceeds, and no income will be generated by any facility to retire the obligations. The notes will be retired by tax revenues.

Id., 55 Ohio St.3d at 9, 561 N.E.2d at 934.

Observing that pre-existing statutes afforded the necessary devices for addressing cash flow issues, the Court held the procedure set out in R.C. 113.31 *et seq.* was unconstitutional because the scheme authorized state debt in derogation of Article VIII, Sections 1 and 2. *Id.*, 55 Ohio St.3d at 7, 11; 561 N.E.2d at 932, 935-36.

Presentations and Resources Considered

Metcalf Presentation

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the committee on May 8, 2014, March 12, 2015, and March 10, 2016. Mr. Metcalf pointed out that Section 1’s \$750,000 debt limitation, representing 46 percent of the state’s general

revenue expenditures at the time the limit was set, is no longer meaningful and could be raised. He did not suggest a specific figure, but pointed out that today's debt of \$10.93 billion, as constitutionally authorized by the electors of the state, represents approximately 38 percent of the state's general revenue expenditures.

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.

Prof. Briffault indicated that debt provisions began to be placed in state constitutions in the 1840s as a result of economic distress caused by excessive state borrowing to finance the construction of canals, turnpikes, and railroads. He described how states adopted provisions limiting state governments in their financial transactions, including limiting their ability to invest, to take an equity share in private enterprises, to lend credit, and to act as a surety. Limitations were also placed on the amount of debt that could be accumulated, as well as the procedures for entering into that debt. Prof. Briffault noted that many states, including Ohio, still have dollar caps on debt that are the same as they were in the 1840s or 1850s.

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. To get around the low limits, state constitutions may allow exceptions for invasion, wartime, or emergencies. He said these limitations generally apply to long-term debt, which doesn't have to be paid within the year in which it was issued, but exempt short-term debt, revenue bonds, and other nonguaranteed debt. 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.

Describing other approaches states have taken, Prof. Briffault said it is possible to have a constitution with no debt limit, with the state legislative body amending the debt limit, rather than the voters doing so through an amendment process. He said another approach to debt issuance involves legislative approval followed by voter approval by a simple majority. Prof. Briffault said in this model, the procedure is for classic guaranteed debt, and doesn't cover short-term debt, revenue bonds, or non-guaranteed debt. He described another approach, in which states impose a flexible limit, or "carrying capacity," on debt. In that model, the constitution makers think the state can carry a certain amount of debt and that voter approval is not needed. He said one way states calculate this "carrying capacity" is by considering debt service as a

percentage of state revenues based upon a rolling three- or five-year average. A final approach identified by Prof. Briffault is where a state calculates the acceptable amount of debt or debt service based upon a percentage of state revenues, and then requires voter approval to go beyond that limit.

Summarizing these approaches, Prof. Briffault identified two “big pictures.” One approach is where the legislature proposes and voters decide, based on the notion that debt is long term and the decision to borrow requires a constitutional amendment. He said the other, “carrying capacity,” approach is binding, but recognizes that some financial arrangements are technical, and should not be decided by voters on a ballot proposition basis but left to the legislature to determine how much debt to devote to state enterprises. Prof. Briffault noted that some states have combined these two models.

Keen Presentation

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

Mr. Keen said Ohio’s earliest debt was issued by the Ohio Canal Commission in 1825 to finance the canal system, with the General Assembly in 1837 passing the Ohio Loan Law intended to assist in the building of additional canals by loaning up to one-third of the cost of construction to Ohio businesses that were able to raise the remaining costs. In practice, however, most of the loans went to railroad companies, spurring railroad growth in the state that competed with the canal business. Mr. Keen indicated that the end result of the debt issuance was an improved transportation system, but the debt also over-extended the treasury and the state had to borrow money to meet its expenses. Mr. Keen noted that, by 1839, Ohio had a deficit of more than one quarter of a million dollars and the Ohio Loan Law was repealed the next year. After reforms of the state’s taxation and tax collection system in 1846, the debt was refinanced and Ohio was able to service the debt, but the concern over debt was a subject of discussion at the Constitutional Convention of 1850-1851. Mr. Keen pointed out that this concern is the source of the \$750,000 debt limit in Article VIII, Section 1.

Mr. Keen continued that Section 2, as well as select other sections of Article VIII, expressly authorizes the purposes and amounts for which state debt may be issued, while Section 3 prohibits any other debt except that which has been expressly authorized. Further, he said, Section 4 prohibits the state from lending its aid and credit, and Section 5 prohibits the state from assuming the debts of any political subdivision or corporation. Mr. Keen concluded that the state’s challenging financial history at the time of enactment of Article VIII explains Ohio’s conservative approach to debt, debt authorization, and debt repayment.

Turning to the present-day approach to state debt, 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.

He said non-general obligation lease-appropriation debt is authorized to provide facilities for housing branches and agencies of state government and their functions, including state office buildings, correctional and juvenile detention facilities, and cultural, historical and sports facilities; mental health and developmental disability facilities; and parks and recreational facilities.

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. As a result, Mr. Keen said he would not recommend wholesale reform to Article VIII, and advocated retaining the \$750,000 debt limit in Section 1 because it forms the basis of Ohio's balanced budget requirement.

Azoff Presentation

On April 14, 2016, the committee heard a presentation by Jonathan Azoff, director of the Office of Debt Management and senior counsel to the Ohio Treasurer of State, on the role of his office in relation to state debt.

Mr. Azoff indicated the treasurer's office supports changing the reference to the sinking fund in Section 2 to the word "state." He said this recommendation is based on the fact that a true "sinking fund" no longer exists, further noting that Sections 7 through 11 of Article VIII are recommended for repeal because the state no longer utilizes a sinking fund, with the duties of the Sinking Fund Commission now being performed by the treasurer's office.

Kauffman Presentation

Kurt Kauffman, acting assistant director of the Office of Budget and Management (OBM), appeared before the committee on April 14, 2016 to provide comment related to Article VIII.

In addition to his other comments, Mr. Kauffman said OBM supports the proposal to retain Article VIII, Sections 1 and 3 in their current form, and to revise Section 2 only to eliminate what would be an outdated reference to the Commissioners of the Sinking Fund.

Additional Presentations

In addition to the major presentations by Mr. Metcalf, Prof. Briffault, Mr. Keen, Mr. Azoff, and Mr. Kauffman, as recounted above, the committee benefited from comments by Gregory W. Stype of Squire Patton Boggs (US) LLP, who serves as bond counsel to the Ohio Public

Facilities Commission; and Steven H. Steinglass, senior policy advisor to the Ohio Constitutional Modernization Commission.

On December 10, 2015, Mr. Steinglass pointed out that the framers of the 1851 constitution did not see the \$750,000 limit as a ceiling on borrowing, but rather as part of a constitutional framework that sought to bar incurring debt. He noted that the practice of incurring debt through specific constitutional authorizations did not begin until the 20th century. At the same meeting, Mr. Stype clarified that the \$750,000 limitation set out in Article VIII, Section 1, is not so much a limit on capital financing, as it is a limit on borrowing to contract debts to supply “casual deficits or failures in revenue, or to meet expenses not otherwise provided for.” Mr. Stype also noted that, in contrast to some other states, Ohio has long managed its cash flow needs in each fiscal year by using a “total operating fund” approach, rather than borrowing to meet cash flow needs.⁶

Discussion and Consideration

In reviewing Article VIII, Section 1, the committee discussed whether to recommend retaining or modernizing the \$750,000 debt limit, which dates from 1851. Although committee members recognized that the dollar amount of the debt limit is outdated, they observed that the amount is not an obstacle to state economic growth because voters have approved amendments to Article VIII authorizing the issuance of debt in excess of that amount. Committee members also recognized that raising or removing the debt limit could affect the state’s bond rating as well as potentially affecting state fiscal operations. Finally, committee members expressed concern that a change in the debt limit could be misunderstood by voters. Based on these considerations, the committee concluded that the \$750,000 debt limit in Section 1 should be retained.

With regard to Section 2, the committee recognized the need to retain the state’s ability to contract debt in the event of a calamity such as war or insurrection. However, based on the committee’s decision to recommend repeal of sections relating to the Sinking Fund and the Sinking Fund Commission, as set forth in a companion Report and Recommendation on Article VIII, Sections 7, 8, 9, 10, and 11, titled “The Sinking Fund and the Sinking Fund Commission,” the committee wondered whether the Sinking Fund reference should be removed from Section 2.

The committee considered Section 3 as being related to the question posed by Section 1, which is whether the \$750,000 debt limit should be modernized or eliminated. Section 3 prescribes a general policy of debt avoidance, emphasizing that only the debts specified in Sections 1 and 2, which are accepted as including the debts authorized by Sections 2b through 2s, shall be created by or on behalf of the state. In addressing Section 3, the committee agreed that it was important to maintain that section’s emphasis on avoiding debt, recognizing that all state debt ultimately must be approved by the voters.

Conclusion

The Finance, Taxation, and Economic Development Committee concludes that Article VIII, Section 1 should be retained in its present form. The committee recognizes that, while the debt limit of \$750,000 is outdated, proposing a new dollar amount could be problematic. The

committee further observes that the expression of a debt limit is important to the public's perception of state spending, so that eliminating the debt limit or having a debt limit that is tied to a fluctuating revenue source could affect the state's economy in unforeseen ways. Thus, the committee concludes that, because the \$750,000 debt limit is not an obstacle to the achievement of state financial goals, and because other provisions in the constitution allow the state to incur debt to meet its needs, Section 1 does not require alteration.

Regarding Section 2, the committee concludes that the section's specific reference to the Sinking Fund as a source for paying down state debt is outdated and should be replaced with the more generic word "state." Thus, the committee recommends the provision be modified to read as follows:

In addition to the above limited power, the state may contract debts to repel invasion, suppress insurrection, defend the state in war, or to redeem the present outstanding indebtedness of the state; but the money, arising from the contracting of such debts, shall be applied to the purpose for which it was raised, or to repay such debts, and to no other purpose whatever; and all debts, incurred to redeem the present outstanding indebtedness of the state, shall be so contracted as to be payable by the ~~sinking fund state, hereinafter provided for,~~ as the same shall accumulate.⁷

Although Section 3's reiteration of the restriction on state debt articulated in Section 1 seems redundant, Section 3 expresses and emphasizes a laudable policy of debt avoidance. Thus, the committee does not recommend a change that might serve to diminish the importance of that objective and so recommends that Section 3 be retained in its present form.

Date Issued

After formal consideration by the Finance, Taxation, and Economic Development Committee on April 14, 2016, and May 12, 2016, the committee unanimously voted to issue this report and recommendation on May 12, 2016.

Endnotes

¹ Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

² *Id.* at 23-31.

³ *Id.* at 12-13.

⁴ Source: Youngstown *Vindicator*, Nov. 6, 1977. Available at: <https://news.google.com/newspapers?id=zfRJAAAAIIBAJ&sjid=sYQMAAAAIBAJ&pg=2945,1851669&hl=en> (last visited March 28, 2016).

⁵ See <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110877.aspx> (lasted visited March 28, 2016); and <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited March 28, 2016).

Meanwhile, voters have approved multiple constitutional amendments authorizing the issuance of state debt for the purposes of subsidizing low cost housing (Section 14, approved Nov. 2, 1982; Section 16, approved Nov. 6, 1990); financing coal research (Section 15, approved Nov. 5, 1985); financing local government efforts to improve roads, water, sewer, and other infrastructure (Section 2k, approved Nov. 3, 1987); improving parks, conservation and natural resources (Section 2l, approved Nov. 2, 1993); funding public works and highways (Section 2m, approved Nov. 7, 1995); funding school facilities (Section 2n, Section 17, approved Nov. 2, 1999); funding environmental conservation projects (Section 2o, approved Nov. 7, 2000; Section 2q, approved Nov. 4, 2008); creating jobs and stimulating economic growth (Section 2p, approved Nov. 8, 2005; amendment approved May 4, 2010); compensating veterans of the Persian Gulf, Afghanistan and Iraq Conflicts (Section 2r, approved Nov. 3, 2009); and for capital improvements (Section 2s, approved May 6, 2014). Source: Ohio Constitution Law and History Table of Proposed Amendments, Cleveland-Marshall College of Law Library, available at: <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionamendmentstable> (last visited March 28, 2016).

⁶ R.C. 126.06 describes this process, providing:

The total operating fund consists of all funds in the state treasury except the auto registration distribution fund, local motor vehicle license tax fund, development bond retirement fund, facilities establishment fund, gasoline excise tax fund, higher education improvement fund, highway improvement bond retirement fund, highway capital improvement fund, improvements bond retirement fund, mental health facilities improvement fund, parks and recreation improvement fund, public improvements bond retirement fund, school district income tax fund, state agency facilities improvement fund, state and local government highway distribution fund, state highway safety fund, Vietnam conflict compensation fund, any other fund determined by the director of budget and management to be a bond fund or bond retirement fund, and such portion of the highway operating fund as is determined by the director of budget and management and the director of transportation to be restricted by Section 5a of Article XII, Ohio Constitution.

When determining the availability of money in the total operating fund to pay claims chargeable to a fund contained within the total operating fund, the director of budget and management shall use the same procedures and criteria the director employs in determining the availability of money in a fund contained within the total operating fund. The director may establish limits on the negative cash balance of the general revenue fund within the total operating fund, but in no case shall the negative cash balance of the general revenue fund exceed ten per cent of the total revenue of the general revenue fund in the preceding fiscal year.

⁷ In its report and recommendation titled “The Sinking Fund and the Sinking Fund Commission,” the committee recommends the repeal of Article VIII, Sections 7, 8, 9, 10, and 11. Although the committee found it more logical to review Sections 1, 2, and 3 in a separate document from Sections 7 through 11, any ballot issue proposing to repeal Sections 7 through 11 should also include a proposal to revise Section 2 to eliminate reference to the Sinking Fund.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE FINANCE, TAXATION, AND ECONOMIC DEVELOPMENT COMMITTEE

OHIO CONSTITUTION ARTICLE VIII SECTIONS 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, 2k AND PROPOSED SECTIONS 2t AND 18

AUTHORIZATION OF DEBT OBLIGATIONS

The Finance, Taxation, and Economic Development Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VIII of the Ohio Constitution concerning the authorization of debt obligations. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, dealing with authorization of debt obligations, be repealed for the reason that all involve bonds that have been fully issued and paid off, or for which bonding authority has lapsed due to the passage of time.

Further, in order to protect the holders of any outstanding bonds or obligations issued under the authority of Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, or 2k, the committee recommends the adoption of new Section 18, either through language proposed in Attachment A, or through substantially similar language. The new provision would require that any obligation entered into by the state under the authority of any section of Article VIII that is later repealed remains in full force and effect and continues to be secured in accordance with the original terms of the obligation.

Finally, the committee recommends the adoption of a new Section 2t, either through language proposed in Attachment B, or through substantially similar language, to authorize the issuance of general obligation bonds that could be used to refund obligations previously issued under the authority of Section 2i, and to issue new general obligation bonds for purposes related to facilities for mental health and developmental disabilities, parks and recreation, and housing branches and agencies of state government, as set forth in Section 2i.

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 except in limited circumstances, primarily involving cash flow and military invasions and other emergencies. *See* Article VIII, Sections 1, 2, and 3.

For nearly one hundred years, 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, a provision that authorized debt for establishing a system of adjusted compensation for Ohio veterans of World War I.² Section 2a was later repealed in 1953.

Then, over a forty year period, from 1947 through 1987, voters approved ten constitutional provisions within Article VIII authorizing the creation of additional debt. The ten sections, as discussed herein, include Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2i, 2j, and 2k.

Section 2b concerns the authorization of debt relating to adjusted compensation for service in World War II. It was adopted in 1947 and established a system of compensation for World War II veterans and their survivors by allowing the state to issue up to \$300 million in state bonds. To receive benefits, veterans had to be residents of the state for at least one year before entering service. Qualifying veterans or their survivors could receive up to \$400 in benefits. Veterans who served in the Merchant Marine, who were confined in penal institutions, or who were dishonorably discharged were ineligible. This provision required applications for payment to veterans or their survivors to be made before July 1, 1950.

Section 2c concerns the authorization of debt to construct the state highway system. It was adopted in 1953 and allowed the state to incur debt of up to \$500 million through the sale of bonds for the building and improvement of the state highway system. Section 2c was the first amendment to allow the state to incur debt for internal improvements, and is one of six amendments in Article VIII specifically providing funds for highways and roads.³ No debt could be incurred under this section past March 1962, and all debt incurred under this authority had to be retired by 1972.

Section 2d concerns the authorization of debt for the payment of Korean Conflict bonuses. It was adopted in 1956 for the purpose of compensating Ohio veterans of the Korean Conflict who served on active duty from June 25, 1950 through July 19, 1953. The provision authorized the creation of the Korean Conflict Compensation Fund, funded through the sale of up to \$90 million in bonds and an initial transfer of \$4 million from the World War II fund established under Section 2b. The provision also created the Korean Conflict Compensation Bond Retirement

Fund to retire the debt on the bonds. As with the World War II fund, veterans or their survivors were eligible; however, veterans who served in the Merchant Marines, were confined in penal institutions, or were dishonorably discharged were not. All applications for compensation under this provision had to be made prior to January 1, 1959.

Section 2e relates to securing funds for public buildings. The section was adopted in 1955 to create a capital improvements bond retirement fund that would allocate up to \$150 million for building and improving structures at state penal, mental health, and welfare institutions, and at public schools and state-supported colleges and universities. The bonds and other obligations issued under this section had to be issued by December 1964. In addition, this section provided for the establishment of a state excise tax on cigarettes to pay any deficit in the fund.⁴

Section 2f authorizes the issuance of debt for school classrooms, support for universities, for recreation and conservation, and for state buildings. This section, adopted in 1963, funded many of the same projects referred to in Section 2e, including capital improvement projects for state-supported colleges and universities, as well as state penal, mental health, and welfare institutions. The section also permitted funds to be used for the establishment of parks and recreational areas and for the conservation of natural resources. Obligations issued under the authority of this section could not exceed \$250 million and had to mature in thirty years or less. The debt incurred under this section was to be retired through funds raised by the state's license, fuel, income, and property taxes, as well as through the excise tax on cigarettes established under section 2e, which could be collected through December 31, 1972, or until all the debt was retired.

Section 2g, approved by voters in 1964, allowed the state to issue debt up to \$500 million for highway and road construction. The revenues raised were to be used for the construction and repair of major state thoroughfares and urban extensions in the state's highway system. Retirement of the debt to finance these projects was to be made through fees and taxes, such as vehicle license and registration fees, and fuel and excise taxes. This section requires the entire debt to be discharged no later than 1989.

Section 2h authorizes the issuance of debt for development, specifically permitting the state to raise revenue in an amount up to \$290 million from the sale of bonds and other obligations to pay for state development projects. This section, adopted in 1965, allowed the state to spend funds on state-supported institutions of higher learning, with an emphasis on research and development, and for state projects dealing with flood control, state parks, and natural resource conservation. Funds also could be used to assist political subdivisions in building and extending water and sewage lines. The cutoff date for issuing obligations under this section was December 31, 1970, and all obligations issued under this section had to mature in thirty years or less.

Section 2i, approved by voters in 1968, relates to the state's ability to issue revenue bonds, sometimes referred to as lease-appropriation bonds, which are not supported by the full faith and credit of the state.⁵ Specifically, the fifth paragraph of Article VIII, Section 2i authorizes the issuance of "revenue obligations and other obligations, *the owners or holders of which are not given the right to have excises or taxes levied by the general assembly for the payment of principal thereof or interest thereon*, for * * * capital improvements for mental hygiene and retardation, parks and recreation, and housing of branches and agencies of state government,

which obligations * * * shall not be deemed to be debts or bonded indebtedness of the state under other provisions of this Constitution.” [Emphasis added.] In lieu of a pledge of the state’s taxing power, payment of debt service on these obligations is legally “secured by a pledge under law, without necessity for further appropriation, of all or such portion as the general assembly authorizes of” any charges or other revenues or receipts that the state generates through the facilities that were financed with the debt. Notwithstanding this language, the actual source of payment of debt service on all obligations that have been issued for these purposes under Section 2i has been two-year lease-rental appropriations made by the General Assembly in each biennial state budget.⁶

Section 2j authorizes the creation of a compensation fund for Vietnam Conflict veterans and their survivors. It was adopted in 1973. To be eligible for compensation, veterans had to have served on active duty between August 5, 1964 and July 1, 1973, in the Republic of Vietnam or in hostile areas of Southeast Asia. The initial administrative costs of the fund were to be covered from the remaining balance of the Korean Conflict funds created by Section 2d, with the remaining revenues to be raised through the sale of up to \$300 million in bonds and other obligations. No bonds were to be issued after April 1977, and all applications for compensation had to be filed by January 1, 1978. As with the other amendments creating funds for war veterans and their survivors, compensation was not available for veterans who served in the Merchant Marine, were confined in penal institutions, or were dishonorably discharged.

Section 2k, adopted in 1987, was another amendment used to raise revenue for capital improvements to local public infrastructure. Section 2k provides that not more than \$120 million could be raised per calendar year, and that the total debt could not exceed \$1.2 billion with the condition that all obligations must mature within thirty years.

Amendments, Proposed Amendments, and Other Review

The nine bond-authorizing sections recommended for repeal have never been amended.

The Ohio Constitutional Revision Commission (1970s Commission) studied Article VIII in depth and made extensive recommendations concerning how the state incurs debt.⁷ The 1970s Commission recommended the repeal of the \$750,000 debt limitation in Article VIII, Section 1, replacing it with a limit based on six percent of the average annual revenue of the state.⁸ It also recommended the repeal of seven obsolete debt-authorizing sections of Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, and 2h.⁹

The 1970s Commission recognized that the repeal of Sections 2b through 2h could adversely affect persons who held interest coupons or unredeemed bonds.¹⁰ Therefore, the 1970s Commission included in its proposal a provision that would protect those who had vested interests in the bonds issued under the provisions being repealed.¹¹

In November 1977, the General Assembly presented to voters a ballot issue that, if approved, would have repealed Sections 2b, 2c, 2d, 2e, 2f, 2g, and 2h, among other sections. However, Issue 4 was overwhelmingly defeated by a margin of 72.5 percent to 27.5 percent, and there has been no effort since to repeal those sections of Article VIII.¹²

Litigation Involving the Provisions

No significant litigation has centered on the nine obsolete provisions being recommended for repeal. However, there has been some litigation involving Article VIII that is worthy of note.

An early recognition of the 1851 constitution's restriction on the state's ability to incur debt is set forth in *State v. Medbery*, 7 Ohio St. 522 (1857), in which the Ohio Supreme Court determined a five-year state public works contract, in the absence of revenue or appropriations by the General Assembly to fund the contract, created a debt obligation in violation of Article VIII, Sections 1 and 3.

The 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).

The Court also has recognized the status of revenue bonds. In *State ex rel. Pub. Institutional Bldg. Auth. v. Griffith*, 135 Ohio St. 604, 22 N.E.2d 200 (1939), at syllabus paragraph 1, the Court held that the \$750,000 debt limitation only applies to debt for which the state assumes the risk of default; thus, it is not applicable to revenue bonds. More recently, in *State ex rel. Ohio Funds Mgmt. Bd. v. Walker*, 55 Ohio St.3d 1, 561 N.E.2d 927 (1990), the court reviewed the limitations on borrowing in Article VIII, holding that borrowing for short-term cash flow is state debt within the meaning of the limitations in Article VIII, Sections 1 and 3, and further rejecting the use of revenue bonds to finance short-term deficiencies in tax revenue. *Id.*, 55 Ohio St. 3d at 7, 561 N.E.2d at 932. *Accord State ex rel. Shkurti v. Withrow*, 32 Ohio St.3d 424, 513 N.E.2d 1332.

Presentations and Resources Considered

Metcalf Presentation

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the 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, with 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.

Mr. Metcalf pointed out that the \$750,000 debt limitation, representing 46 percent of the state's general revenue expenditures at the time the limit was set, is no longer meaningful and could be raised. He did not suggest a specific figure, but pointed out that today's debt of \$10.93 billion, as constitutionally authorized by the electors of the state, represents approximately 38 percent of the state's general revenue expenditures.

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Prof. Briffault indicated that debt provisions began to be placed in state constitutions in the 1840s as a result of economic distress caused by excessive state borrowing to finance the construction of canals, turnpikes, and railroads. He described how states adopted provisions limiting state governments in their financial transactions, including limiting their ability to invest, to take an equity share in private enterprises, to lend credit, and to act as a surety. Limitations were also placed on the amount of debt that could be accumulated, as well as the procedures for entering into that debt. Prof. Briffault noted that many states, including Ohio, still have dollar caps on debt that are the same as they were in the 1840s or 1850s.

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. To get around the low limits, state constitutions may allow exceptions for invasion, wartime, or emergencies. He said these limitations generally apply to long-term debt, which doesn't have to be paid within the year in which it was issued, but exempt short-term debt, revenue bonds, and other nonguaranteed debt. 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.

Describing other approaches states have taken, Prof. Briffault said it is possible to have a constitution with no debt limit, with the state legislative body amending the debt limit, rather than the voters doing so through an amendment process. He said another approach to debt issuance involves legislative approval followed by voter approval by a simple majority. Prof. Briffault said in this model, the procedure is for classic guaranteed debt, and doesn't cover short-term debt, revenue bonds, or non-guaranteed debt. He described another approach, in which states impose a flexible limit, or "carrying capacity," on debt. In that model, the constitution makers think the state can carry a certain amount of debt and that voter approval is not needed. He said one way states calculate this "carrying capacity" is by considering debt service as a percentage of state revenues based upon a rolling three- or five-year average. A final approach identified by Prof. Briffault is where a state calculates the acceptable amount of debt or debt service based upon a percentage of state revenues, and then requires voter approval to go beyond that limit.

Summarizing these approaches, Prof. Briffault identified two “big pictures.” One approach is where the legislature proposes and voters decide, based on the notion that debt is long term and the decision to borrow requires a constitutional amendment. He said the other, “carrying capacity,” approach is binding, but recognizes that some financial arrangements are technical, and should not be decided by voters on a ballot proposition basis but left to the legislature to determine how much debt to devote to state enterprises. Prof. Briffault noted that some states have combined these two models.

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 said Ohio’s earliest debt was issued by the Ohio Canal Commission in 1825 to finance the canal system, with the General Assembly in 1837 passing the Ohio Loan Law intended to assist in the building of additional canals by loaning up to one-third of the cost of construction to Ohio businesses that were able to raise the remaining costs. In practice, however, most of the loans went to railroad companies, spurring railroad growth in the state that competed with the canal business. Mr. Keen indicated that the end result of the debt issuance was an improved transportation system, but the debt also over-extended the treasury and the state had to borrow money to meet its expenses. Mr. Keen noted that, by 1839, Ohio had a deficit of more than one quarter of a million dollars and the Ohio Loan Law was repealed the next year. After reforms of the state’s taxation and tax collection system in 1846, the debt was refinanced and Ohio was able to service the debt, but the concern over debt was a subject of discussion at the Constitutional Convention of 1850-1851. Mr. Keen pointed out that this concern is the source of the \$750,000 debt limit in Article VIII, Section 1.

Mr. Keen continued that Section 2, as well as select other sections of Article VIII, expressly authorizes the purposes and amounts for which state debt may be issued, while Section 3 prohibits any other debt except that which has been expressly authorized. Further, he said, Section 4 prohibits the state from lending its aid and credit, and Section 5 prohibits the state from assuming the debts of any political subdivision or corporation. Mr. Keen concluded that the state’s challenging financial history at the time of enactment of Article VIII explains Ohio’s conservative approach to debt, debt authorization, and debt repayment.

Turning to the present-day approach to state debt, 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.

He said non-general obligation lease-appropriation debt is authorized to provide facilities for housing branches and agencies of state government and their functions, including state office

buildings, correctional and juvenile detention facilities, and cultural, historical and sports facilities; mental health and developmental disability facilities; and parks and recreational facilities.

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.

As a result, Mr. Keen said he would not recommend wholesale reform. He noted the credit agencies' ratings emphasize Ohio's conservative debt practice, with Ohio's credit rating being in the second highest possible category, known as "AA+," which keeps the interest rates paid on state bonds very low. Mr. Keen added that, since 1973, constitutional amendments authorizing new state debt have generally provided for general obligation security, but that the state still issues several categories of lease-appropriation debt under Section 2i, a section approved by the voters in 1968. He said that while this debt is functionally no different from the state's perspective, the subject-to-appropriation requirement lowers its credit rating to "AA" and, as a result, the state pays a higher rate of interest, typically ranging from 0.1 percent to 0.3 percent, versus its general obligation counterpart. Because of this, Mr. Keen suggested that the lease-appropriation debt authorization provisions of Section 2i for housing branches and agencies of state government, and for mental health, developmental disability, and parks and recreation facilities, be replaced with a general obligation authorization for those purposes. He estimated that, for each \$100 million of debt issued over 20 years, this change to general obligation security would save state taxpayers \$1.5 to \$4 million over the life of the debt.

In relation to the question of whether to recommend repeal or removal of inactive bond authorization sections, Mr. Keen said while he has no concern with allowing those provisions to remain, elimination of inactive sections could be viewed as helpful cleanup, noting this last occurred when Section 2a, authorizing compensation payments to World War I veterans, was repealed in 1953. He further observed that the 1970s Commission recommended the repeal or modification of additional sections within Article VIII, although only Section 12, providing for a superintendent of public works, was later repealed. Mr. Keen identified current sections for possible repeal as including 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k.

As part of his presentation, Mr. Keen proposed the committee recommend the repeal of the nine obsolete bond-authorizing provisions, plus five other provisions concerning the Commissioners of the Sinking Fund.¹³ In addition, Mr. Keen proposed authorizing the conversion of lease authorization/revenue bonds authorized by Section 2i to general obligation bonds in order to obtain more favorable interest rates.

Azoff Presentation

On April 14, 2016, Jonathan Azoff, director of the Office of Debt Management and senior counsel to the Ohio Treasurer of State, presented to the committee on the role of his office in relation to state debt.

In advocating that the committee recommend the use of the lease-appropriation debt rather than general obligation debt, Mr. Azoff said if the state were to default on a general obligation bond, bond holders would have the ability to bring an action to force the state to increase revenues, but lease-appropriation debt does not provide that remedy. Instead, he said, with lease-appropriation debt, the state's obligation to pay bondholders is entirely contingent on the General Assembly appropriating the funds needed to pay the debt service in its biennial budget.

Mr. Azoff noted that lease-appropriation debt provides the state flexibility in the event of a fiscal emergency. He said the state pays only slightly more interest when it borrows on a lease-appropriation basis, and that investors are “familiar and comfortable with the state's lease-appropriation credit, and are willing to loan money on that basis for a similar rate, even though they lose the ability to force the state to raise revenue to repay the debt.”

Mr. Azoff asserted that the utility of lease-appropriation debt offsets other concerns, including that general obligation debt places more of a burden on taxpayers.

Kauffman Presentation

Kurt Kauffman, acting assistant director of the Office of Budget and Management (OBM), spoke to the committee on April 14, 2016 regarding Article VIII.

Mr. Kauffman said OBM supports the proposal to repeal the identified inactive bond issuance sections and to protect the holders of any outstanding bonds issued under those sections by confirming the bonds continue to be secured pursuant to their original terms. He said OBM also strongly supports modernizing the lease-appropriation debt authorizations of Section 2i by replacing them with a general obligation debt authorization. He noted this change would be consistent with all GRF-backed debt authorizations passed by the voters since 1973, and would save taxpayer dollars by improving the credit rating and thus lowering the interest cost on all future issuances of debt for these purposes.

Additional Presentations

In addition to the major presentations by Mr. Metcalf, Prof. Briffault, Mr. Keen, Mr. Azoff, and Mr. Kauffman, as recounted above, the committee benefited from comments by Gregory W. Stype of Squire Patton Boggs (US) LLP, who serves as bond counsel to the Ohio Public Facilities Commission; and Steven H. Steinglass, senior policy advisor to the Ohio Constitutional Modernization Commission.

On June 13, 2013, Mr. Kauffman presented an introduction to the topic of state debt, including limitation on debt, debt authorizations, and the sinking fund provisions. Mr. Kauffman was supported in his presentation by Mr. Stype.

On December 10, 2015, Mr. Steinglass pointed out that the framers of the 1851 constitution did not see the \$750,000 limit as a ceiling on borrowing, but rather as part of a constitutional framework that sought to bar incurring debt. He noted that the practice of incurring debt through specific constitutional authorizations did not begin until the 20th century. At the same meeting, Mr. Stype clarified that the \$750,000 limitation set out in Article VIII, Section 1, is not so much a limit on capital financing, as it is a limit on borrowing to contract debts to supply “casual deficits or failures in revenue, or to meet expenses not otherwise provided for.” Mr. Stype also noted that, in contrast to some other states, Ohio has long managed its cash flow needs in each fiscal year by using a “total operating fund” approach, rather than borrowing to meet cash flow needs.¹⁴

Discussion and Consideration

In reviewing Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k, the committee discussed whether it should recommend that the state follow the precedent established in 1953, when it repealed Article VIII, Section 2a (dealing with authorization for the issuance of bonds for the benefit of Ohio veterans who served in World War I). The committee also considered whether it is appropriate to leave these provisions in the constitution primarily as a historical reference, even if they are now obsolete, or whether it is better to clear out these provisions that are no longer of any force or effect, so as to make the constitution more readable, and by extension, more transparent.

The committee also discussed whether to recommend adoption of a new section that would recognize the state’s duty to fulfill any obligations issued under the authority of Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k that remain outstanding at the time of the repeal of those sections. This proposed new section also would acknowledge the duty to fulfill obligations issued under the authority of future debt authorization provisions. Such an amendment would prevent adverse consequences to persons holding unredeemed interest coupons and unredeemed bonds, both currently and in the future.

In addition, the committee discussed whether to recommend a new constitutional provision that would allow the General Assembly to authorize the issuance of general obligation bonds for the purposes described in the fifth paragraph of Article VIII, Section 2i. During its discussion, the committee considered whether including a new provision for this purpose would enable the state to obtain more favorable interest rates on the debt.

Finally, the committee considered the potential effect of the repeal of the noted provisions on the length of the constitution. The Ohio Constitution contains approximately 54,000 words, making it the tenth longest state constitution in the nation. The nine provisions at Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k contain approximately 12,000 words. The inclusion of new provisions addressing continuing obligations to bondholders would add no more than 1,000

words. Thus, the committee considered that these changes would shorten the constitution by more than 11,000 words, or approximately 20 percent of its current length.

Conclusion

Upon consideration of the foregoing, the Finance, Taxation, and Economic Development Committee concludes that Article VIII, Sections 2b, 2c, 2d, 2e, 2f, 2g, 2h, 2j, and 2k are obsolete for the reason that they involve bonds that have been fully issued and paid off, or for which bonding authority has lapsed due to the passage of time, and recommends they be repealed.

As a recommendation for future action, the committee encourages the General Assembly periodically to propose to the voters the repeal of debt authorization sections of the constitution that have become obsolete. Regularly reviewing and removing debt authorization provisions that no longer are necessary would reinforce the goals of brevity and transparency in the constitution, as well as eliminating the need for extensive revision in the long term.

Further, the committee concludes that proposed new Article VIII, Section 18, should be adopted in order to require that any obligation entered into by the state under the authority of any section of Article VIII that is later repealed shall remain in full force and effect and continue to be secured in accordance with the original terms of the obligation. The committee recommends the amendment use the language proposed in Attachment A, or substantially similar language.

Finally, the committee concludes that the portion of Article VIII, Section 2i, authorizing the issuance of lease-appropriation revenue bonds for “capital improvements for mental hygiene and retardation, parks and recreation, state-supported and state-assisted institutions of higher education, including those for technical education, water pollution control and abatement, water management, and housing of branches and agencies of state government” should be modified, through the adoption of a proposed new Section 2t, allowing the General Assembly to authorize the issuance of general obligation bonds for the same purposes as to which lease-appropriation revenue bonds currently are issued under the authority of Section 2i. The committee recommends the amendment use the language proposed in Attachment B, or substantially similar language.

Date Issued

After formal consideration by the Finance, Taxation, and Economic Development Committee on March 10, 2016, and April 14, 2016, the committee unanimously voted to issue this report and recommendation on April 14, 2016.

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 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 Steinglass & Scarselli, *supra* at 242.

⁴ *Id.* at 248: “Despite the title given to this section by the secretary of state, this section has nothing to do with securing funds for highway construction. In fact, section 2e specifically excludes ‘highways’ from the projects that can be funded.”

⁵ For an example of a provision pledging the “full faith and credit” of the state, see Oh. Const. art. VIII § 2n(C) (“Obligations issued under this section are general obligations of the state. The full faith and credit, revenue, and taxing power of the state shall be pledged to the payment of debt service on those outstanding obligations as it becomes due.”); See also *State ex. rel. Pub. Institutional Bldg. Auth. v. Griffith*, 135 Ohio St. 604, 22 N.E.2d 200 (1939).

⁶ See, e.g., Legislative Service Commission, *A Guidebook for Ohio Legislators*, Ch. 8, “The Ohio Budget Process,” (14th ed. 2015-16), <http://www.lsc.ohio.gov/guidebook/> (last visited Feb. 8, 2016).

⁷ Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

⁸ *Id.* at 23-31.

⁹ *Id.* at 11, 13.

¹⁰ Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt, 42-43 (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

¹¹ *Id.* That provision reads as follows:

All obligations of the state issued under authority of any section of Article VIII of the Constitution of Ohio repealed by this amendment, or under authority of any law enacted pursuant to or validated by any such section, which obligations are outstanding on the date of the adoption of this amendment, shall remain valid and enforceable obligations of the state according to their terms and conditions. Any law enacted pursuant to or validated by any section of Article VIII of this Constitution repealed by this amendment shall remain valid and enforceable as if such section had not been repealed. The repeal of such sections and the adoption of this amendment shall not be deemed to impair, diminish, or restrict the rights or benefits of any holder or owner of any such obligations, nor any liability, covenant, or pledge of the state with respect thereto, including those for the levy and collection of taxes, the maintenance of funds, and the appropriation and application of money.

¹² See <http://www.sos.state.oh.us/sos/elections/Research/electResultsMain/1970-1979OfficialElectionResults/GenElect110877.aspx> (lasted visited March 28, 2016); and <http://www.sos.state.oh.us/sos/upload/elections/historical/issuehist.pdf> (last visited March 28, 2016).

Meanwhile, voters have approved multiple constitutional amendments authorizing the issuance of state debt for the purposes of subsidizing low cost housing (Section 14, approved Nov. 2, 1982; Section 16, approved Nov. 6, 1990); financing coal research (Section 15, approved Nov. 5, 1985); financing local government efforts to improve roads, water, sewer, and other infrastructure (Section 2k, approved Nov. 3, 1987); improving parks, conservation and natural resources (Section 2l, approved Nov. 2, 1993); funding public works and highways (Section 2m, approved Nov. 7, 1995); funding school facilities (Section 2n, Section 17, approved Nov. 2, 1999); funding environmental conservation projects (Section 2o, approved Nov. 7, 2000; Section 2q, approved Nov. 4, 2008); creating jobs and stimulating economic growth (Section 2p, approved Nov. 8, 2005; amendment approved May 4, 2010); compensating veterans of the Persian Gulf, Afghanistan and Iraq Conflicts (Section 2r, approved Nov. 3, 2009); and for capital improvements (Section 2s, approved May 6, 2014). Source: Ohio Constitution Law and History Table of Proposed Amendments, Cleveland-Marshall College of Law Library, available at: <http://guides.law.csuohio.edu/ohioconstitution/ohioconstitutionamendmentstable> (last visited March 28, 2016).

¹³ Although Mr. Keen proposed a repeal of sections of Article VIII related to the Sinking Fund, this report and recommendation does not address the Sinking Fund provisions. The committee is issuing a separate report and recommendation addressing constitutional provisions related to the Sinking Fund.

¹⁴ R.C. 126.06 provides:

The total operating fund consists of all funds in the state treasury except the auto registration distribution fund, local motor vehicle license tax fund, development bond retirement fund, facilities establishment fund, gasoline excise tax fund, higher education improvement fund, highway improvement bond retirement fund, highway capital improvement fund, improvements bond retirement fund, mental health facilities improvement fund, parks and recreation improvement fund, public improvements bond retirement fund, school district income tax fund, state agency facilities improvement fund, state and local government highway distribution fund, state highway safety fund, Vietnam conflict compensation fund, any other fund determined by the director of budget and management to be a bond fund or bond retirement fund, and such portion of the highway operating fund as is determined by the director of budget and management and the director of transportation to be restricted by Section 5a of Article XII, Ohio Constitution.

When determining the availability of money in the total operating fund to pay claims chargeable to a fund contained within the total operating fund, the director of budget and management shall use the same procedures and criteria the director employs in determining the availability of money in a fund contained within the total operating fund. The director may establish limits on the negative cash balance of the general revenue fund within the total operating fund, but in no case shall the negative cash balance of the general revenue fund exceed ten per cent of the total revenue of the general revenue fund in the preceding fiscal year.

ATTACHMENT A

ARTICLE VIII

Section 18. If any section of Article VIII that authorizes the issuance of debt or other obligation is repealed, any outstanding debt or other obligation issued under authority of the section prior to its repeal shall remain in full force and effect and continue to be secured in accordance with its original terms.

ATTACHMENT B

ARTICLE VIII

Section 2t. (A) The General Assembly may provide by law, subject to the limitations of and in accordance with this section, for the issuance of bonds and other obligations of the state for the purpose of paying costs for facilities for mental health and developmental disabilities, parks and recreation, and housing of branches and agencies of state government, and to refund obligations previously issued under the authority of the fifth paragraph of Section 2i of Article VIII for these purposes (which Section 2i referred to “mental health and developmental disabilities” as “mental hygiene and retardation”).

(B) Each obligation issued under division (A) of section shall mature no later than the thirty-first day of December of the twenty-fifth calendar year after its issuance, except that obligations issued to refund other obligations shall mature not later than the thirty-first day of December of the twenty-fifth calendar year after the year in which the original obligation to pay was issued or entered into.

(C) Obligations issued under division (A) of this section shall be general obligations of the state. The full faith and credit, revenue, and taxing power of the state shall be pledged to the payment of debt service on those outstanding obligations as it becomes due, and bond retirement fund provisions shall be made for payment of that debt service. Provision shall be made by law for the sufficiency and appropriation, for purposes of paying debt service, of excises, taxes, and revenues so pledged or committed to debt service, and for covenants to continue the levy, collection, and application of sufficient excises, taxes, and revenues to the extent needed for that purpose. Notwithstanding section 22 of Article II of this constitution, no further act of

appropriation shall be necessary for that purpose. The obligations and provisions for the payment of debt service on them are not subject to Sections 5, 6, and 11 of Article XII of this constitution. Moneys referred to in Section 5a of Article XII of this constitution may not be pledged or used for the payment of that debt service.

(D) In the case of the issuance of any of those obligations as bond anticipation notes, provision shall be made by law or in the bond or note proceedings for the establishment and maintenance, during the period the notes are outstanding, of special funds into which there shall be paid, from the sources authorized for payment of the bonds anticipated, the amount that would have been sufficient to pay the principal that would have been payable on those bonds during that period if bonds maturing serially in each year over the maximum period of maturity referred to in division (B) of this section had been issued without the prior issuance of the notes. The special funds and investment income on them shall be used solely for the payment of principal of those notes or of the bonds anticipated.

(E) Obligations issued under, or pursuant to, this section, their transfer, and the principal, interest, interest equivalent, and other income or accreted amounts on them, including any profit made on their sale, exchange, or other disposition, shall at all times be free from taxation within the state.

(F) This section shall be implemented in the manner and to the extent provided by the General Assembly by law, including provision for the procedure for incurring, refunding, retiring, and evidencing obligations referred to in this section. The total principal amount of obligations issued under division (A) shall be determined by the General Assembly, subject to the limitation provided for in section 17 of this article.

(G) The authorizations in this section are in addition to, cumulative with, and not a limitation on, authorizations contained in other sections of this article; are in addition to, cumulative with, and not a limitation on, the authority of the General Assembly under other provisions of this constitution; and do not impair any law previously enacted by the General Assembly.

(H) As used in this section:

(1) “Costs” includes, without limitation, the costs of acquisition, construction, improvement, expansion, planning, and equipping.

(2) “Debt service” means the principal and interest and other accreted amounts payable on the obligations referred to.

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

REPORT AND RECOMMENDATION OF THE FINANCE, TAXATION, AND ECONOMIC DEVELOPMENT COMMITTEE

OHIO CONSTITUTION ARTICLE VIII SECTIONS 7, 8, 9, 10, AND 11

THE SINKING FUND AND THE SINKING FUND COMMISSION

The Finance, Taxation, and Economic Development Committee of the Ohio Constitutional Modernization Commission issues this report and recommendation regarding Article VIII of the Ohio Constitution concerning the Sinking Fund and the Sinking Fund Commission. It is issued pursuant to Rule 8.2 of the Ohio Constitutional Modernization Commission's Rules of Procedure and Conduct.

Recommendation

The committee recommends that Sections 7 through 11 of Article VIII dealing with the Sinking Fund and the duties of the Sinking Fund Commission be repealed for the reason that the state no longer utilizes a fund identified as "the Sinking Fund," and the duties of the Sinking Fund Commission are being performed by other state officers and agencies. These provisions include Section 7, creating the Sinking Fund; Section 8, listing the members of the Sinking Fund Commission; and Sections 9, 10, and 11, outlining the duties of the Sinking Fund Commission.

Background

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

In addition to placing a limitation on the actions of the General Assembly in incurring debt, through the adoption of Article VIII, Sections 1, 2, and 3, delegates to the 1851 Constitutional Convention also adopted five sections designed to assure that any debt that was incurred by the state would be paid off responsibly through the creation and operation of a Sinking Fund. The use of such a fund was a popular method of paying off debt by the states in the 19th century.¹ The five sections that directly relate to the Sinking Fund include Sections 7, 8, 9, 10, and 11.

Section 7 creates the “Sinking Fund” for the purpose of paying accruing interest on public debt. This section provides that the fund will annually reduce the principal by a sum of not less than \$100,000, increased yearly by compounding at six percent per year. The source of the fund is described as the net annual income of the public works and stocks owned by the state, any other funds or resources provided by law, and further sums to be raised by taxation as may be required. Section 7 provides as follows:

The faith of the state being pledged for the payment of its public debt, in order to provide therefor, there shall be created a sinking fund, which shall be sufficient to pay the accruing interest on such debt, and, annually, to reduce the principal thereof, by a sum not less than one hundred thousand dollars, increased yearly, and each and every year, by compounding, at the rate of six per cent per annum. The said sinking fund shall consist, of the net annual income of the public works and stocks owned by the state, of any other funds or resources that are, or may be, provided by law, and of such further sum, to be raised by taxation, as may be required for the purposes aforesaid.

Section 8 creates a supervisory body known as “The Commissioners of the Sinking Fund,” consisting of the governor, the treasurer of state, the auditor of state, the secretary of state, and the attorney general. Although originally part of the 1851 constitution, the provision was amended in 1947 to add the governor and state treasurer to the board.² Section 8 reads:

The governor, treasurer of state, auditor of state, secretary of state, and attorney general, are hereby created a board of commissioners, to be styled, “The Commissioners of the Sinking Fund”.

Section 9 prescribes that a biennial report shall be issued by the commissioners before each session of the General Assembly. The report, which is to include information about the amount in the fund from all sources except taxation, is to be provided to the governor, who then transmits the information to the General Assembly. Relying on this information, the General Assembly is directed to make all necessary provision for raising and disbursing the fund in pursuance of the provisions of Article VIII. Section 9 states:

The commissioners of the sinking fund shall, immediately preceding each regular session of the general assembly, make an estimate of the probable amount of the fund, provided for in the seventh section of this article, from all sources except from taxation, and report the same, together with all their proceedings relative to said fund and the public debt, to the governor, who shall transmit the same with his regular message, to the general assembly; and the general assembly shall make all necessary provision for raising and disbursing said sinking fund, in pursuance of the provisions of this article.

Section 10 states that the commissioners shall apply the fund, along with other moneys appropriated by the General Assembly, to the payment of interest as due, as well as to the redemption of the principal of the public debt. Section 10 excludes state school and trust funds from this directive. Section 10 provides:

It shall be the duty of the said commissioners faithfully to apply said fund, together with all moneys that may be, by the general assembly, appropriated to that object, to the payment of the interest, as it becomes due, and the redemption of the principal of the public debt of the state, excepting only, the school and trust funds held by the state.

Section 11 provides that the commissioners shall issue a semi-annual report describing the proceedings of the Sinking Fund Commission, to be published by the governor and communicated to the General Assembly. This report is in addition to the biennial report required by Section 9. Pursuant to Section 11:

The said commissioners shall, semi-annually, make a full and detailed report of their proceedings to the governor, who shall, immediately, cause the same to be published, and shall also communicate the same to the general assembly, forthwith, if it be in session, and if not, then at its first session after such report shall be made.

Amendments, Proposed Amendments, and Other Review

The five provisions concerning the Sinking Fund Commission were adopted in 1851, with their only amendment occurring in 1947, when Article VIII, Section 8, was adopted to add the governor and the state treasurer to the commission.³ Therefore, the commission now includes all five statewide officeholders.

The Ohio Constitutional Revision Commission (1970s Commission) studied Article VIII in depth and made extensive recommendations concerning how the state incurs debt.⁴ The 1970s Commission recommended the repeal of unnecessary provisions concerning the Sinking Fund and the Commissioners of the Sinking Fund, explaining:

The Commission proposes the repeal of Sections 7 through 11 of Article VIII, which deal with the Commissioners of the Sinking Fund and their duties, and the Sinking Fund itself. Whatever justification these sections might have had at one time, in the Commission's view they no longer serve a useful constitutional purpose. The very concept of the sinking fund, in which large sums of money are accumulated until they are needed to pay bonds at maturity, has fallen into disfavor. Today, the bond which is the norm for public financing is the serial bond: "State and local debt nowadays is almost always in serial form, that is, when the debt is incurred, provision is made for annual retirement of the principal, so that the annual carrying charge for a twenty-year issue includes a sum sufficient to redeem, say, one-twentieth of the principal, as well as a sum of interest." [citing James A. Maxwell, *Financing State and Local Governments*, rev. ed. (Washington, The Brookings Institution, 1969) p. 185.] However, in suggesting the deletion of sections relating to the Sinking Fund, the Commission is not suggesting that the General Assembly should not have the power to establish either a sinking fund or a sinking fund commission, should it desire to

do so, and hence Section 1 of the proposed Article VIII would provide ample authority to do so. The deletion of these sections is recommended only because the Commission believes that these sections are not needed in the Constitution.⁵

In November 1977, the General Assembly submitted a ballot issue to the voters that, among other changes, proposed repealing Sections 7, 9, and 10 dealing with the Sinking Fund. However, voters rejected Issue 4 by a margin of 72.5 percent to 27.5 percent, with an over one million vote difference.⁶

Litigation Involving the Provisions

There has been no litigation directly related to Sections 7, 8, 9, 10, and 11.

Presentations and Resources Considered

Metcalf Presentations

Seth Metcalf, deputy treasurer and executive counsel for the Ohio Treasurer of State, presented to the 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 debt limitation in Section 1, Mr. Metcalf addressed the role of the Sinking Fund Commission. Originally adopted as a safeguard, he said the commission is no longer playing an active role in managing the payment of the debt. In fact, Mr. Metcalf noted that the commission has not been an active issuer of state debt since 2001. Mr. Metcalf suggested the state should continue to involve the five statewide executive officeholders in the debt issuance process, further opining that the constitutional references to the Sinking Fund should be replaced with references to the state treasurer, or to the Ohio Public Facilities Commission, which currently issues most of the state's general obligation debt and is comprised of those five statewide officeholders and the director of the Office of Budget and Management (OBM).⁷

Keen Presentation

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

For the purpose of improving efficiency, Mr. Keen advocated eliminating Sections 7 through 11. He noted that the Commissioners of the Sinking Fund – originally consisting of the attorney general, auditor and secretary of state – were established in 1851 to administer a fund that would pay-off, or “sink,” the state's then-existing canal and railroad debt, and to report their activities and progress to the governor and General Assembly. Over the years, the duties of the commissioners expanded to include administering and issuing many types of state debt, with the governor and treasurer being added to the commission in 1947. In the 1950s, new state bond programs began to use dedicated bond service funds separate from the sinking fund, with debt service payments effectuated by the treasurer and OBM. Then, in 2001, the General Assembly transferred bond issuance authority from the commissioners to the Ohio Public Facilities Commission. As a result of these changes, all of the functions historically performed by the

Commissioners of the Sinking Fund are now performed by other state entities, indicating that the sinking fund provisions of Article VIII are viable candidates for repeal.

Azoff Presentation

Jonathan Azoff, director of the Office of Debt Management and senior counsel to the Ohio Treasurer of State, presented to the committee on April 14, 2016 regarding the role of his office in relation to state debt.

Among the changes recommended for Article VIII, Mr. Azoff proposed the reference to the sinking fund in Section 2 should be changed to the word “state.” He said this recommendation is based on the fact that a true “sinking fund” no longer exists. Mr. Azoff further indicated his office supports the repeal of Sections 7 through 11 of Article VIII for the reason that the state no longer utilizes a sinking fund, with the duties of the Sinking Fund Commission now being performed by the treasurer’s office. However, Mr. Azoff expressed the concern that removal of Sections 7 through 11 without replacement language clarifying who should perform those same duties would be detrimental to the interests of public accountability. He expressed that the committee’s review provides the opportunity to recommend constitutional amendments that would reflect current statutory procedures.

In this regard, Mr. Azoff described that his office performs the ongoing roles and responsibilities of the Sinking Fund Commission, including paying debt service on the state’s general obligation debt from the Commissioners of the Sinking Fund’s designated bond service funds, and fulfilling the treasurer’s reporting role as a member of the Commission of the Sinking Fund. He noted that the Office of Debt Management’s operating expenses are funded through the Commissioners of the Sinking Fund GRF line item in the Treasurer of State’s operating budget. As a result, Mr. Azoff urged the committee to recommend the retention of constitutional authorization for the performance of the Sinking Fund Commissioners’ duties.

Kauffman Presentation

On April 14, 2016, Kurt Kauffman, acting assistant director of the Office of Budget and Management (OBM), appeared before the committee to provide comment related to Article VIII.

Mr. Kauffman said OBM supports the repeal of Sections 7 through 11 of Article VIII, because all of the functions historically performed by the Commissioners of the Sinking Fund are now defunct or, in the case of the Sinking Fund report required under Section 11, performed by other state entities. Mr. Kauffman reiterated Mr. Keen’s suggestion that the debt reporting requirement be replaced by a new provision that would assign necessary debt reporting functions to the state treasurer.

Addressing a suggestion by Seth Metcalf, deputy treasurer, that removing the Sinking Fund would compromise public accountability in the debt issuance process, Mr. Kauffman said OBM does not share that concern, instead acknowledging that the interests of the public are protected by the fact that citizens always must approve debt authorization by voting for constitutional amendments. He noted multiple steps that protect public participation, among them that voters

must approve a ballot issue, that the General Assembly's legislative process welcomes public comment, and that the PFC holds open meetings for the purpose of passing bond issuance resolutions.

Mr. Kauffman said these multiple opportunities for consideration of public comment protect the interests of public accountability, adding that unnecessary changes would risk creating uncertainty and confusion in the municipal bond market.

Finally, Mr. Kauffman said OBM supports the proposal to retain Article VIII, Sections 1 and 3 in their current form, and to revise Section 2 only to eliminate what would be an outdated reference to the Commissioners of the Sinking Fund.

Discussion and Consideration

In reviewing the provisions relating to the Sinking Fund and the Commissioners of the Sinking Fund, the committee considered whether the provisions are obsolete for the reason that the widespread use of bonds for the purpose of raising funds, and the transfer of the duties of the commissioners to other state agencies, has left the Sinking Fund Commission with little to do. In considering this concern, the committee found it persuasive that the commissioners have not met since 2008, and that many of the duties assigned to the commissioners are now performed by other state officers and agencies.

The committee also considered language in Article VIII, Section 2 that refers to the Sinking Fund as a source for paying down the "present outstanding indebtedness of the state." Based on its preference to eliminate the Sinking Fund and related provisions, the committee considered whether it would be appropriate to recommend removal of the reference to the Sinking Fund, replacing it with a generic phrase allowing the state to pay state indebtedness.

Conclusion

Upon consideration of the foregoing, the Finance, Taxation, and Economic Development Committee concludes that Sections 7, 8, 9, 10, and 11 of Article VIII (dealing with the Sinking Fund and the duties of the Sinking Fund Commission) are obsolete for the reason that the purpose of the Sinking Fund and duties of the Sinking Fund Commission have been replaced by other state entities primarily through (i) authorizations contained in constitutional amendments approved by the electors of the state; and (ii) by statutory enactment made pursuant to the authorizations contained in these subsequent constitutional amendments. Thus, the committee recommends these sections be repealed.

As further described in the committee's report and recommendation relating to Article VIII, Sections 1, 2, and 3, titled "State Debt," the committee also recommends that Section 2 be revised to eliminate the reference to the Sinking Fund.⁸

Date Issued

After formal consideration by the Finance, Taxation, and Economic Development Committee on April 14, 2016, and May 12, 2016, the committee unanimously voted to issue this report and recommendation on May 12, 2016.

Endnotes

¹ See, e.g., Henry C. Adams, *Public Debts: An Essay in the Science of Finance* 384 (New York: D. Appleton 1890). For a discussion of the history of the use of the sinking fund, see Donald F. Swanson and Andrew P. Trout, *Alexander Hamilton's Hidden Sinking Fund*, 49 *William and Mary Quarterly* 108 (1992).

² Steven H. Steinglass & Gino J. Scarselli, *The Ohio State Constitution* 275 (2nd prtg. 2011).

³ *Id.* at 275, app. B.

⁴ Ohio Constitutional Revision Commission Recommendations for Amendments to the Ohio Constitution, Part 2, State Debt (Dec. 31, 1972), <http://www.lsc.ohio.gov/ocrc/recommendations%20pt2%20state%20debt.pdf> (last visited Feb. 5, 2016).

⁵ *Id.* at 39-40.

⁶ Steinglass & Scarselli, *supra* at app. B.

On the November 8, 1977 ballot, Issue 4 stated:

“PROPOSED CONSTITUTIONAL AMENDMENT

To adopt Section 1 of Article VIII and repeal Sections 1, 2, 2b, 2c, 2d, 2e, 2f, 2g, 2h, 3, 7, 9, and 10 of Article VIII and Section 6 of Article XII of the Constitution of Ohio

1. To repeal the general state constitutional debt limit of \$750,000 and replace it with authority to incur debt for capital improvements by a two-thirds majority vote of each house of the general assembly within specified limitations directly related to state revenues.
2. To permit the state to contract debt without limitation on amount of purpose, in addition to the authority specified above, if that debt is submitted to a vote of the electors by a three-fifths majority vote of each house of the general assembly and approved by a majority of the electors voting on the question.
3. To require the general assembly to retire at least 4% of the state's indebtedness each year.
4. To permit the state to borrow funds to meet a current year's appropriations if any such loan is repaid out of that year's revenues.
5. To repeal part of the constitutional requirements relating to a sinking fund and to require that the general assembly provide for the repayment of state debt.
6. To enumerate purposes and amounts for which the first \$640 million of capital improvement debt would have to be appropriated.

(Proposed by Resolution of the General Assembly of Ohio)”

Source: Youngstown *Vindicator*, Nov. 6, 1977. Available at:
<https://news.google.com/newspapers?id=zfRJAAAAIIBAJ&sjid=sYQMAAAAIBAJ&pg=2945,1851669&hl=en>
(last visited March 28, 2016).

⁷ R.C. 151.02. *See also*, <http://obm.ohio.gov/BondsInvestors/publicfacilities.aspx> (last visited Feb. 8, 2016).

⁸ If the General Assembly should place a ballot issue before the voters to repeal Sections 7, 8, 9, 10, and 11 of Article VIII as recommended herein, the committee recommends the ballot issue also contain a proposal to revise Section 2 to delete reference to the Sinking Fund, as more fully discussed in the committee's report and recommendation on Article VIII, Sections 1, 2, and 3 (State Debt).

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OHIO CONSTITUTIONAL MODERNIZATION COMMISSION

2016 Meeting Dates

July 14

September 8

October 13

November 10

December 8