Frequently Asked Questions

The Suspension of The Emergency Manager Law and its Implications

Contents

State governments are responsible for ensuring the fiscal health and stability of local governments, counties, cities, townships, school districts and others within its boundaries. A common concern at the state level is the impact local fiscal stress can have on a state's credit rating as well as the future cost of borrowing.

In Michigan, Public Act 72 (called the "Local Government Fiscal Responsibility Act") was enacted in 1990, and it recognized the impact that a fiscal crisis can have on the health, safety and welfare of residents in addition to increased borrowing costs. This law is commonly known as the Emergency Financial Manager law. Subject to a process outlined in the statute, an EFM could be appointed by the governor to address a local government's financial crisis.

Critics of the law said because of shortcomings in how PA 72 allowed EFMs to address a financial emergency a new law was needed. Consequently, PA 72 was replaced with Public Act 4 (the "Local Government and School District Fiscal Accountability Act") in March 2011. This law expanded the scope and powers of an emergency manager to include temporary pre-emption of collective bargaining laws and the ability to address operational concerns to reign in significant budgetary and cash flow shortfalls.

The expanded powers of an emergency manager (commonly known as an EM) in PA 4 have been contentious since its inception, culminating in a November 2012 ballot proposal, authorized in August 2012, asking voters to repeal the emergency financial manager law, PA 4.[1]

The events surrounding PA 4 have presented numerous legal and operational questions, many of which will be worked out through the legal system. This FAQ document will outline many of the questions, identify some sources of guidance during this period of confusion, and will serve as a platform for better understanding the challenges in addressing local government financial crises.

[1] State of Michigan, Department of the State. Statewide Ballot Proposal Status. http://www.michigan.gov/documents/sos/Bal_Prop_Status_2011_2_346859_7.pdf. Updated August 15, 2012. (Last accessed August 22, 2012).

Introduction

PA 72 of 1990, the Local Government Fiscal Responsibility Act, authorized the state to directly intervene in the financial affairs of local governments and school districts deemed to be in a financial emergency. PA 72 had some perceived weaknesses, which included the limited powers of the emergency financial managers. In recent years, economic conditions, such as job loss, foreclosure, population loss, declining tax base, reductions in state revenue sharing, increasing cost of health care, and other external factors have caused increased economic stress on cities and school districts. The result is increased fiscal stress at an unprecedented level since the Great Depression in some cities and school districts.

In response to these conditions and what critics considered weaknesses of PA 72, PA 4, the Local Government and School District Fiscal Accountability Act, was introduced and enacted in early 2011, replacing PA 72. The legislature intended that PA 4 shift from an emphasis on short-term financial fixes to longer-term financial and operational stability. In order to better address structural budget imbalances in an expeditious manner, PA 4 granted emergency managers the power to reject, modify or terminate contracts and collective bargaining agreements subject to certain conditions.

The increased authority of emergency managers under PA 4 caused contentious public discourse and a related effort to repeal PA 4. This FAQ will explain the legal process, perspectives, and implications of the events that led to the November 2012 referendum to repeal PA 4. It is important to note that many questions regarding the legal issues that are presently arising due to the repeal of PA 4 will be decided in the near future, and therefore, opinions and perspectives on the topic are in constant flux.

Public Act 4 and Referendum

It is helpful to begin with defining Public Act 4 and the referendum process in Michigan.

» What is Public Act 4 of 2011?

The Local Government and School District Fiscal Accountability Act (PA 4 of 2011) authorizes the state to directly intervene in the financial affairs of local governments and school districts deemed to be in a financial emergency.[2] It is interesting to note that this is Michigan's third statute to address local government fiscal stress. The first statute to grant intervention was PA 101 of 1988. Then in 1990, Public Act 72, the Local Government Fiscal Responsibility Act, allowed state officials to intervene in the affairs of financially distressed school districts in addition to municipalities. PA 4 of 2011 was first introduced on Feb. 9, 2011, as House Bill 4214. It came into effect March 16, 2011, when signed into law by the governor, thereby replacing PA 72.[3]

» How is PA 4 different from PA 72?

Although PA 4 of 2011 replaced PA 72, PA 4 preserves the same basic process for allowing the state to intervene in a fiscally troubled municipality's financial affairs. However, PA 4 differs from its predecessor act in several basic ways. PA 4 expands the powers of state appointed emergency managers and state officials, provides clearer direction and greater specificity in the development of consent agreements, and lowers the threshold for state intervention by increasing the number of trigger events that allow for intervention.

» What is a referendum?

A referendum is a process for direct citizen participation in lawmaking provided for in the Constitution of Michigan. The people's power to "propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum" is a constitutional right reserved to the people under Article 2, Section 9 of the state constitution.[4]

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[2] For a more complete overview of Public Act 4 see The Citizens Research Council of Michigan. http://www.crcmich.org/PUBLICAT/2010s/2011/rpt368.html. (Last Accessed August 22, 2012).

[3] Const 1963, art 4, § 27.

[4] Const 1963, art 2, § 9.

» How does the process of referendum work?

Under the Constitution of Michigan and Michigan election law, citizens can utilize the referendum process by:

1. preparing a petition that meets the requirements of MCL 168.482;
2. gathering the requisite number of valid signatures under art 2, § 9; and
3. filing the petitions in a timely manner with the secretary of state under MCL 168.473 and art 2, § 9 (no later than 90 days following the final adjournment of the legislative session at which the law was enacted).[5]

To invoke referendum, the requisite number of signatures needed is a minimum of 5 percent of the total votes cast for all candidates for governor in the last election. Once the requisite number of signatures is gathered and the other requirements are met, a referendum petition is filed with the secretary of state. The Board of State Canvassers reviews the petition to ensure it meets the requirements of Michigan election law and the state constitution. Specifically, MCLA 168.482 governs referendums and includes such formatting requirements as: page size, print size, heading requirements, the full text of the proposed law to appear on the petition, and the inclusion of certain statements beneath the petition heading. Once the Board of State Canvassers establishes that the petition meets the criteria, the board will certify the petition for sufficiency. The referendum issue is then placed on the ballot in the next general election.[6]

» What is the Board of State Canvassers?

The Board of State Canvassers consists of four members who are appointed by the governor with the advice and consent of the senate. These board members serve staggered four-year terms. The duties of the board include actions such as: certifying statewide elections, conducting recounts for state-level offices, canvassing recounts for state-level offices, approving electronic voting systems, and canvassing state-level ballot proposal petitions.[7]

» What happens after a petition for referendum is certified by the board?

After a petition is certified by the Board of State Canvassers, the law subject to referendum is suspended until it is voted on at the next general election.[8]

» When was the referendum petition filed for PA 4?

On Feb. 29, 2012, citizens filed a referendum petition of PA 4 with the secretary of state, requesting certification from the Board of State Canvassers. The petition contained 203,238 signatures, which exceeded the 5 percent minimum required by the Constitution of Michigan.[9]

» When did PA 4 become suspended?

PA of 2011 was suspended when the Board of State Canvassers made the official declaration of the sufficiency of the referendum petition Aug. 8, 2012.

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5 Michigan Farm Bureau v Secretary of State, 379 Mich 387, 390-391; 151 NW2d 797 (1967); and see Bill Schuette, Attorney General Opinion No. 7267. August 6, 2012. http://www.ag.state.mi.us/opinion/datafiles/2010s/op10346.htm. (Last Accessed Aug. 9, 2012).

6 MCL 168.477(1).

7 Department of the State. http://www.michigan.gov/sos/0,4670,7-127-1633_41221-141451--,00.html. (Last Accessed August 22, 2012).

8 MCL 168.477(2) ("[A] law that is the subject of the referendum continues to be effective until the referendum is properly invoked, which occurs when the board of state canvassers makes its official declaration of the sufficiency of the referendum petition."); Const 1963, art 2, § 9 (No law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election.).

9 State Of Michigan Bureau Of Elections Lansing. STAFF REVIEW OF "STAND UP FOR DEMOCRACY" PETITION.

The Suspension of PA 4 of 2011

The ultimate suspension of PA 4 on Aug. 8, 2012, is plagued with a history of court proceedings, appeals and complex legal arguments. A basic overview is provided to explain how the validity of the petition for referendum of PA 4 found itself before the Supreme Court of Michigan, and the outcome of that litigation which led to the suspension of the act.

» What actions led to the suspension of PA 4 of 2011?

The suspension of PA 4 came after five months of legal challenges that ended with a Michigan Supreme Court decision. The timeline of those events is outlined below.

» The Initial Challenge to the Petition for Referendum

On Feb. 29, 2012, citizens filed a referendum petition of PA 4 with the secretary of state, requesting certification from the Board of State Canvassers. On April 9, 2012, Citizens for Fiscal Responsibility, a political action group, filed a challenge to the petition for referendum with the Board of State Canvassers. Its claim was that the petition did not meet the requirements for certification set forth in MCLA 168.482. Specifically, the group claimed that the heading, "REFERENDUM OF LEGISLATION PROPOSED BY INITIATIVE PETITION," did not comply with the requirements of MCL 168.482(2).[10] The challengers asserted that the font size did not meet the requirements as defined by that statute.

On April 26, 2012, a hearing was held by the Board of State Canvassers, regarding the font size of the petition's heading. At the close of the hearing, two board members voted in favor of certification, and two board members voted to deny certification. The split vote meant that the petition was not certified and therefore rejected.

» The Decision of the Court of Appeals

In response to the Board of State Canvassers' vote, the petitioners filed a complaint for a writ of mandamus in the Court of Appeals in May 2012. A writ of mandamus is a command issued by a superior court to a private or municipal corporation, a lower court, or any government officer, executive, or other administrator of such entities which compels performance of a particular act. Usually the act is something that the person or entity has a legal duty to perform but are refusing to perform, or they are not performing correctly. In other words, the higher court is ordering someone or some entity to do something.

In this case, the petitioners "request[ed] the Court to order the Board of State Canvassers and the Secretary of State, to certify the petition for inclusion on the November 2012 ballot because the board had a clear legal duty to certify the petition, because [petitioners] either substantially or actually complied with the 14-point-type statutory requirement." [11]

The court of appeals found that the petition's heading did not actually comply with the 14-point-type statutory requirement. However, on June 8, 2012, the court of appeals found the petition substantially complied with the requirements, but stayed its own ruling in order to decide whether to poll a panel of judges for the decision. On June 14, 2012, a majority of the court decided not to put the issue before a seven-judge conflict panel, and the writ of mandamus was granted. The Board of State Canvassers therefore had a legal duty to certify the petition for the ballot, but PA 4 would not be suspended until the board met to officially certify the petition.

» The Decision of the Supreme Court of Michigan

The court of appeals' decision was then appealed to the Supreme Court of Michigan. On June 29, 2012, an application for leave to appeal to the Supreme Court was filed. On Aug. 3, 2012, the court reversed the court of appeals decision, declining to follow the doctrine of general substantial compliance articulated by the court of appeals. The Supreme Court of Michigan found this doctrine inconsistent with the statute, MCL 168.482(2), which clearly utilized the mandatory language "shall." [12] The Court then determined the

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[10] MCL 168.482(2) If the measure to be submitted proposes a . . . referendum of legislation, the heading of each part of the petition **shall** be . . . printed in capital letters in 14-point boldfaced type . . . "

[11] Stand up for Democracy v. Secretary of State and Board of State Canvassers, State of Michigan Supreme Court. No. 145387. Filed August 3, 2012.

[12] Supra, note 3.

meaning of "14-point boldfaced type" as used in the statute, and held in favor of the petitioners, noting that petitioners had actually complied with the statute. Because the court found actual compliance with MCL 168.482(2), the court stated that the Board of State Canvassers had a clear legal duty to certify the petition, and the court issued a new writ of mandamus compelling certification.

» Official Declaration of the Sufficiency of the Referendum Petition

On Aug. 8, 2012, the Board of State Canvassers met and certified the petition; thus, the Court's decision was implemented, and the repeal of PA 4 2011 will be placed on the ballot in the November 2012 election for acceptance or rejection by the voters.

» What is the current status of Public Act 4?

As previously stated, pursuant to MCL 168.477(2), after the Board of State Canvassers makes its official declaration of sufficiency of the petition for referendum, but before the next general election, the law to be placed on the ballot is no longer in effect until it is voted on at the next general election.

In an opinion issued Aug. 6, 2012, the attorney general stated that the Supreme Court of Michigan has referred to the status of a law during this period as "suspended," and thus, PA 4 is suspended pending the referendum in November 2012.[13]

» What is the attorney general's position on whether or not PA 72 is now in effect?

In the Aug. 6, 2012, opinion, the attorney general provides further guidance during this unusual period of suspension as noted below.

a) The predecessor law, PA 72, is reinstated. The rationale is that PA 4 specifically repealed PA 72. If, as a result of referendum, PA 4 is no longer effective until voter approval in the November election, then the repeal of PA 72 by PA 4 is also suspended until that time.

b) The attorney general also explained that Michigan's anti-revival statute does not apply to the nullification of a statute by a referendum because the term "repeal," as used in the statute, does not refer to a referendum.[14] Michigan's anti-revival statute provides: "Whenever a statute or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the *repeal* of such subsequent repealing statute." [15] The attorney general explains that the term "repeal," when given its ordinary meaning, refers to express *legislative* enactment. Accordingly, because the disapproval of an act by referendum does not constitute a "legislative enactment," Michigan's anti-revival statute does not apply to referendums.

c) Additionally, the attorney general stated that there is no policy reason to not allow PA 72 to take effect while the vote on PA 4 is pending. The attorney general stated that Michigan has had an emergency manager statute in place for 20 years. He said that it is not the concept of having emergency managers that is being questioned by the referendum, but rather, how that concept is addressed pursuant to PA 4.

» What is the status of prior actions taken under Public Act 4?

The attorney general's opinion is that PA 4 is not void but "suspended" until November 2012 election results are certified. This language infers that the previous actions taken under PA 4 were valid and will remain in place while the vote is pending. The governor and Department of Treasury have taken the position that the suspension of PA 4 will not impair any actions taken by emergency managers because these actions were valid and lawful at the time they were made.

Legal challenges on the actions by emergency managers have begun. Unions are likely to argue that if PA 72 is in effect, there is no mechanism in place to impose contract terms beyond the scope of previously existing labor laws such as Public Employment Relations Act (PERA) and the Compulsory Arbitration Act (Act 312).

For example, the City of Detroit entered into a consent agreement with the State of Michigan in April

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[13] Bill Schuette, Attorney General Opinion No. 7267. August 6, 2012. http://www.ag.state.mi.us/opinion/datafiles/2010s/op10346.htm. (Last Accessed Aug. 9, 2012) ("The effect of Public Act 4 will be suspended as a matter of law until the outcome of the November 6, 2012 general election." See *Michigan Farm Bureau*, 379 Mich at 396, quoting *McBride v Kerby*, 260 P 435 (Ariz 1927); *Wolverine Golf Club v Hare*, 384 Mich 461, 463; 185 NW2d 329 (1971)).

[14] MCL 8.4 ("Whenever a statute, or any part thereof shall be repealed by a subsequent statute, such statute, or any part thereof, so repealed, shall not be revived by the repeal of such subsequent repealing statute.")

[15] MCL 8.4

2012. Certain cost-control efforts in that agreement related to labor contracts cited authority granted by PA 4. Based on the referendum approval, the Detroit Police Officers Association (DPOA) filed a complaint in Wayne County Circuit Court. DPOA requested a temporary restraining order to prevent wage cuts and other changes imposed by the City of Detroit in July 2012 pursuant to the consent agreement. On Aug. 16, 2012, Judge John Murphy, acting for Judge Kathleen Macdonald, issued a temporary restraining order that prevents the city from altering the employment conditions of police officers because they have certain protections under Act 312. After hearing arguments from both sides, Judge Macdonald could decide if the restraining order remains in place, at least until PA 4 is voted on in November.

Similarly, the Board of Education for Detroit Public Schools has challenged actions initiated by an emergency manager under PA 4 now that the scope of powers reverts back to that of an emergency financial manager under PA 72. Remember that the emphasis is on "financial" rather than operational decisions under the more restrictive PA 72. On Aug. 14, 2012, Wayne County Circuit Court Judge John Murphy ruled that the emergency financial manager has financial control over the district under Public Act 72 and must justify every decision as financial. If the board and emergency financial manager can't agree on what is financial and what is academic, the judge will decide on a case-by-case basis.[16]

» What has the state done in response to the suspension of Public Act 4?

The state has appointed the previous emergency managers under PA 4, as emergency financial managers under the revived PA 72 in three cities and three school districts. In one city, the previous emergency manager under PA 4, was not appointed as emergency financial manager. He is not eligible to serve under PA 72 because he was an employee of the city within the previous five years, which is barred under PA 72.[17] Therefore, the city's previous emergency financial manager from 2002 was appointed to again serve in the same role.

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[16] Jennifer Chambers, "Judge: DPS Board Controls Academics But Can't Take Back EAA Schools", *The Detroit News*, August 14, 2012. http://www.detroitnews.com/article/20120814/SCHOOLS/208140365/1409/metro/Judge-DPS-board-controls-academics-can-t-take-back-EAA-schools. (Last Accessed August 23, 2012).

[17] MCL 141.1218 ("The emergency financial manager shall be chosen solely on the basis of his or her competence and shall not have been either an elected or appointed official or employee of the local government for which appointed for not less than 5 years before the appointment.")

The Impact On Consent Agreements

» The suspension of Public Act 4 and consent agreements

Local governments may enter into consent agreements to prevent the appointment of an emergency manager. The consent agreement outlines what the government entity consents to in order to ensure long term-financial recovery. A consent agreement must be approved by the governing body of the local government and approved by the state treasurer. Thus, unlike an emergency manager scenario, the local governing body remains in control as outlined in the consent agreement.

There is significant confusion, despite the attorney general's opinion, surrounding consent agreements because of references to PA 4 in those documents. Further, the state's largest city, Detroit, is operating under a consent agreement. The magnitude of the City of Detroit's challenges is only heightened by the increased confusion.

» How does PA 4 impact labor laws for cities with a consent agreement?

Section 14a(10) of PA 4 provides that local governments operating under a consent agreement are not subject to Public Employment Relations Act (PERA) Section 15(1). That section of PERA requires a public employer to bargain or confer with employee labor representatives over wages, hours, terms and conditions of employment, and negotiate agreements. The essence of PA 4 is that a public employer's duty to bargain is suspended for the term of the consent agreement.

» Does PA 72 address consent agreements?

Yes. In PA 72, similar to PA 4, the local government with a severe financial problem could enter into a consent agreement. The agreement would include the measures necessary to achieve long-term financial recovery, provide for periodic fiscal status reports to the state treasurer, and be approved by the governing body of the local government.

» What does this mean for the City of Detroit's consent agreement?

Except for those provisions which relate specifically to labor law exceptions under PA 4, it is the position of the state treasurer and the mayor that the remainder of the consent agreement remains in place. However, as noted above, there are likely to be legal challenges.

After the November Election

» What happens after Public Act 4 is voted on in the November election?

There are at least three possible outcomes from the November referendum.

» If voters disapprove of PA 4 of 2011:

In the opinion issued on Aug. 6, 2012, the attorney general states that if PA 4 is voted down pursuant to the power of referendum under the Constitution of Michigan, art 2, § 9, that law will no longer have any effect and the formerly repealed law, PA 72, is permanently revived upon certification of the November 2012 general election results.[18]

» If voters approve of PA 4 of 2011?

If, on the other hand, the voters approve PA 4 in November, then the revival of PA 72 will be temporary and will cease with voter approval of Public Act 4.[19] Thus, Public Act 4 will be reinstated.

» Could the legislature introduce an alternative law?

Yes. In either of the above scenarios (if PA 4 is either accepted or rejected by the voters), the legislature could always introduce an alternative law or replacement law that could repeal or modify either PA 4 or PA 72.

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[18] Bill Schuette, Attorney General Opinion No. 7267. August 6, 2012. http://www.ag.state.mi.us/opinion/datafiles/2010s/op10346.htm. (Last Accessed Aug. 9, 2012).

[19] Id.

For More Information

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