

**LEGALIZING LOCAL OPTION SALES TAX FOR PUBLIC TRANSIT COULD BE
THE KEY TO MICHIGAN ECONOMIC GROWTH**

Cheryl Verran Jordan

Introduction

Change is hard. Since the early 1900's, Michigan's economy has been reliant on the manufacture of automobiles, beginning with Henry Ford's assembly line. Unfortunately for Michigan, the birth of the automobile industry in Michigan led to the death of public transit. Detroit's streetcar system was built in the 1900's through the 1920's and consisted of 187 miles of rail, and was, at the time, the largest municipally owned street railway system. The last streetcars were discontinued in 1956. Increased development of highway systems and urban sprawl all but doomed public transit efforts thereafter. Public interest in a mass transit system declined and it became commonplace that every Michigan family has one, if not two or more, automobiles.

However, since the Great Recession and the downturn in the automobile manufacturing industry, public demand for mass transit in Michigan has increased, particularly in Southeast Michigan. Southeast Michigan contains more than half of the total population of the State of Michigan, and is home to a majority of the state's businesses and industries. 17% of the state's population resides in Wayne County alone. Wayne County is the most populous county in the state. Wayne County contains the City of Detroit, which, over the last decade, has seen encouraging growth and investment. But public transit remains lacking in Southeast Michigan, and it is stunting economic growth.

Public Transit Results in Economic Development

There are countless studies on how public transit fosters economic development, real estate investment, and local job creation.¹ It is estimated that a \$1 billion public transportation investment over a 20-year period results in a \$3.7 billion economic boost.² Public transit is thought to create economic agglomeration - a localized economy in which a large number of companies, services, and industries exist in close proximity to one another and benefit from the cost reductions and gains in efficiency that result from this proximity.³ Public transit is attractive to young adults and senior citizens who don't want to own or depend on owning a vehicle to travel, run errands, or get to work. Additionally, accessible public transit undoubtedly reduces vehicle traffic, reducing wear and tear on the roads as well as reducing air pollutants and increases public safety.

¹ See, for example, Weisbrod, G & Reno, A (2009) *Economic Impact of Public Transportation Investment*, prepared for the American Public Transportation Association.

² Voices for Public Transit (Jan. 30, 2017) *Like Economic Development? Support Public Transit*, retrieved at <http://www.voicesforpublictransit.org/blog.aspx?id=01-30-2017>.

³ Jaffe, E. (Aug. 14, 2013) *Public Transit is Worth Way More to a City Than You Might Think*, retrieved at <https://www.citylab.com/life/2013/08/public-transit-worth-way-more-city-you-think/6532/>.

On the flip side, the lack of public transit not only hurts the economy, it works to enhance racial segregation and the economic inequalities inherent therein. Southeast Michigan's economy, like other urban areas that lack sufficient public transit such as Atlanta, is driven (no pun intended) by the highways that connect the urban centers to the suburbs. It is a sad truth that suburban voters consistently resist funding of public transit, resulting in highways for suburbanites and a chronically underfunded transit system for low-income people, many of whom have to get by without cars.

Michigan's Current Transit System Is Inadequate

The State of Michigan has attempted to put in place a means by which mass transit can be coordinated and funded. In 1967 state legislators passed the Metropolitan Transportation Authorities Act⁴, which formed the Southeast Michigan Transportation Authority ("SEMTA"). SEMTA was a seven-county authority (Livingston, Macomb, Monroe, Oakland, St. Clair, Washtenaw, and Wayne) that was tasked with merging the operations of the numerous transit systems across metro Detroit. But the legislation did not provide for SEMTA to levy taxes for a dedicated revenue stream. This lack of funding, coupled with divisive politics among the seven counties, led to repeated failures to develop a truly regional transit system. The most devastating hit to the transit efforts of SEMTA was President Reagan's revocation of a previously made \$600 million (\$2 billion in today's dollars) federal pledge from the Urban Mass Transit Administration.⁵ SEMTA was ultimately dissolved in the late 1980's.

In 2012 the Southeast Michigan Regional Transit Authority ("RTA") was created pursuant to the Regional Transit Authority Act⁶ to represent Macomb, Oakland, Washtenaw, and Wayne counties. The RTA is enabled to levy tax assessments to raise revenues so long as the assessment is approved by a super majority of its board members and by the electors of the region at a general November election. Despite a narrow defeat of a regional transit plan proffered by the RTA in November 2016, Oakland and Macomb County blocked the RTA's ability to place a replacement plan on the ballot in November 2018, refusing the right of its electors to simply vote on the plan. This failure doomed the possibility of additional funds to be dedicated to a truly regional and coordinated transit system, with not much hope in sight that Oakland or Macomb County will change their minds anytime in the near future.

⁴ Public Act 204 of 1967, MCL 124.401 *et seq.*

⁵ Felton, R. (March 11, 2014) *How Detroit ended up with the worst public transit*, retrieved from <https://www.metrotimes.com/detroit/how-detroit-ended-up-with-the-worst-public-transit/Content?oid=2143889>.

⁶ Public Act 387 of 2012, MCL 124.541 *et seq.*

Local Governments Funding is Still at an All-Time Low

The obstacle for counties such as Wayne and Washtenaw, who believe in the benefit of public transit, to raise the necessary funds to support a robust transit system, is the limit on ways it can raise revenues for such an endeavor. Counties in Michigan are limited to funding by way of property taxes, which is particularly a problem given the Headlee Amendment⁷ and Proposition A of 1994⁸, coupled with the great recession of 2008. Property values all across Michigan plummeted, and even with the recent economic comeback and increasing property values, many counties in Michigan are still operating with less revenues than they were prior to 2008. For instance, well into the post-recession recovery period today in 2019, real estate market values in Wayne County are still at only 82% of their 2007 peak, and Wayne County's tax base today is at only 80% of its 2007 peak.⁹ All else being equal based on annual inflation rates averaging 2.2% over the past two decades it will take nine more tax years to regain the lost tax base of the 2007 tax year. However, at that same average annual inflation rate of 2.2% over those 21 years, in real terms there will have been an erosion of nearly one-half of the former purchasing power of the same revenue amount generated by equivalent taxable value in 2007. State revenue sharing also decreased sharply and has not recovered, with revenue shares down twenty percent (20%) from 2002 to 2016.¹⁰

⁷ In 1978 voters approved adding the Headlee Amendment to the Michigan Constitution, specifically, Article IX Sections 25-33, in response to rapidly rising property taxes. Headlee requires voter approval for new taxes or tax increases, limits the amount of property tax revenue that can be gained from a property tax assessment increasing, and limits the amount of revenue that can be collected to the amount a millage was originally expected to generate. If local property tax revenues increase at a rate greater than inflation, then the millage rate for the local government must be decreased so revenues cannot grow at a higher rate than inflation – this is often called a “Headlee rollback.”

⁸ This 1994 addition to the Constitution changed how schools are funded in Michigan, but also included limits on annual increases in taxable value of property. Now these increases are limited to 5% or the rate of inflation (note that the rate of inflation has always been less than 5% since Proposal A was enacted). When ownership of a property changes hands, the taxable value of that property is allowed to “pop-up” past that limitation. Often times these “pop-ups” lead to Headlee rollbacks of millages, leaving little, if any, revenue increase to local governments.

⁹ Vandemergel, Scott, T. (April 2019) Wayne County Equalization Report at p. 20-26.

¹⁰ The Fiscal Health of Michigan's Local Governments, Update since the Great Recession (2018), Michigan Department of Treasury, retrieved at https://www.michigan.gov/documents/treasury/Fiscal_Health_of_Michigans_Local_Governments_2018_638566_7.pdf

Many local governments were forced to respond to these losses in revenue by decreasing their work force and services, while pension and health care liabilities continue to increase. The apparent result is crumbling roads, failing infrastructure, and a diminished quality of life in many areas throughout the state. There is simply no money for local governments to invest in public transit, despite its many benefits.

The Legalization of a Local Option Sales Tax

One way that other states across the country have raised money for infrastructure and transit is by levying a local option sales tax (“LOST”). Currently, thirty (30) states allow some form of a LOST, eleven (11) of which provide for a LOST specifically for public transit.¹¹ The RTA can levy taxes to pay for transit; however, as mentioned above, politics between the Southeast Michigan counties have prevented the RTA from making any significant progress to enhance public transit in the region.

Can Wayne and Washtenaw counties or other local municipalities impose a LOST to raise revenue to invest in transit? There are differences of opinion and interpretation as to whether or not the Michigan Constitution and Michigan laws allow LOSTs to be charged.

On its face, the Michigan Constitution does not seem to prohibit LOSTs, and includes language that seems to support the ability of charter counties to impose a LOST. Article VII §2 provides:

Any county may frame, adopt, amend or repeal a county charter in a manner and with powers and limitations to be provided by general law, which shall among other things provide for the election of a charter commission. The law may permit the organization of county government in form different from that set forth in this constitution and shall limit the rate of ad valorem property taxation for county purposes, and restrict the powers of charter counties to borrow money and contract debts. ***Each charter county is hereby granted power to levy other taxes for county purposes subject to limitations and prohibitions set forth in this constitution or law.*** Subject to law, a county charter may authorize the county through its regularly constituted authority to adopt resolutions and ordinances relating to its concerns. (emphasis added)

¹¹ Colorado, Georgia, Hawaii, Kentucky, Minnesota, Nevada, New Mexico, North Carolina, Ohio, Texas, and Utah all have legislation enabling local option sales taxes to be levied by counties or special districts to fund public transit investments. See B. Afonso, Whiteny. (2017) *A Comprehensive Analysis of the Laws Governing Local Sales Tax by State*.

Article VII §21 provides:

The legislature shall provide by general laws for the incorporation of cities and villages. Such laws shall limit their rate of ad valorem property taxation for municipal purposes, and restrict the powers of cities and villages to borrow money and contract debts. ***Each city and village is granted power to levy other taxes for public purposes, subject to limitations and prohibitions provided by this constitution or by law.*** (emphasis added)

Michigan law is clear that cities and villages are prohibited from collecting any tax other than ad valorem property tax.¹² But there is no corresponding state law prohibition for counties. However, a 1970's Attorney General ("AG") Opinion concluded that all counties, charter or otherwise, as well cities, villages, and townships are prohibited by Article IX §8, §10 and §11 from implementing a LOST.¹³

Article IX §8 provides for the current six percent (6%) state sales tax:

Except as provided in this section, the Legislature shall not impose a sales tax on retailers at a rate of more than 4% of their gross taxable sales of tangible personal property.

Beginning May 1, 1994, the sales tax shall be imposed on retailers at an additional rate of 2% of their gross taxable sales of tangible personal property not exempt by law and the use tax at an additional rate of 2%. The proceeds of the sales and use taxes imposed at the additional rate of 2% shall be deposited in the state school aid fund established in section 11 of this article. The allocation of sales tax revenue required or authorized by sections 9 and 10 of this article does not apply to the revenue from the sales tax imposed at the additional rate of 2%.

No sales tax or use tax shall be charged or collected from and after January 1, 1975 on the sale or use of prescription drugs for human use, or on the sale or use of food for human consumption except in the case of prepared food intended for immediate consumption as defined by law. This provision shall not apply to alcoholic beverages.

¹² MCL § 141.91 states "Except as otherwise provided by law and notwithstanding any provision of its charter, a city or village shall not impose, levy or collect a tax, other than an ad valorem property tax, on any subject of taxation, unless the tax was being imposed by the city or village on January 1, 1964."

¹³ Michigan OAG 1969-70, No. 4694

Article IX §10 provides for a portion of the state sales tax to be used to assist townships, cities, and villages:

Fifteen percent of all taxes imposed on retailers on taxable sales at retail of tangible personal property at a rate of not more than 4% shall be used exclusively for assistance to townships, cities and villages, on a population basis as provided by law. In determining population the legislature may exclude any portion of the total number of persons who are wards, patients or convicts in any tax supported institution.

Article IX §11 provides for a portion of the state sales tax to be used educators retirement funds:

There shall be established a state school aid fund which shall be used exclusively for aid to school districts, higher education, and school employees' retirement systems, as provided by law. Sixty percent of all taxes imposed at a rate of 4% on retailers on taxable sales at retail of tangible personal property, 100% of the proceeds of the sales and use taxes imposed at the additional rate of 2% provided for in section 8 of this article, and other tax revenues provided by law, shall be dedicated to this fund. Payments from this fund shall be made in full on a scheduled basis, as provided by law. Beginning in the 1995-96 state fiscal year and each state fiscal year after 1995-96, the state shall guarantee that the total state and local per pupil revenue for school operating purposes for each local school district shall not be less than the 1994-95 total state and local per pupil revenue for school operating purposes for that local school district, as adjusted for consolidations, annexations, or other boundary changes. However, this guarantee does not apply in a year in which the local school district levies a millage rate for school district operating purposes less than it levied in 1994.

The AG opinion reasoned that the above cited constitutional provisions “manifested a clear intent to dedicate for local government units and school aid fund certain proportions of *all* taxes imposed on retailers on taxable sales at retail of tangible personal property.”¹⁴ The AG opinion reasoned that any other construction of the provisions to permit LOST’s would result in the municipality receiving more than its share of all sales taxes as required by Article IX §10.¹⁵ The AG Opinion further concluded that these constitutional provision prohibited LOST’s since a LOST would result in local units of government levying taxes for the benefit of other local units, which the AG opined was illegal.¹⁶

¹⁴ See OAG 1969-70, No. 4694 at 140

¹⁵ *Id.*

¹⁶ See OAG 1969-70, No. 4694 at 141.

In contradiction to the 1970 OAG opinion, there are several valid arguments that the Constitution and Michigan law do not prohibit charter counties from charging a LOST. As an initial matter, it is important to note that Attorney General Opinions are not binding on Michigan courts, although they can be persuasive authority.¹⁷ In 1992, the Citizens Research Council of Michigan issued a report which took issue with the 1970 AG Opinion, stating that the AG’s reasoning that local units are without authority to impose taxes “for the benefit of other local governmental units” was incorrect or no longer relevant since (1) the only authority cited by the Opinion was a nineteenth century legal treatise, and (2) subsequent legislative enactments, such as tax increment financing and school district tax base sharing, allow for tax base sharing and Michigan courts have long upheld the constitutionality of tax increment financing legislation.¹⁸

While not addressed as a problem in the 1970 AG Opinion, one other challenge that could be expected if a Michigan charter county were to implement a LOST would be that Article IX §8 puts an absolute cap of 6% sales tax on any retailer selling tangible retail goods in the State of Michigan. However, this provision arguably applies only to taxes imposed directly by the legislature, not to sales tax imposed by units of local government with legislative authority. Furthermore, the legislature has approved local excise taxes such as taxes on restaurants and rental car companies, which, in theory, would also run afoul of §8.¹⁹

It is likely that an imposition of a LOST by a charter county would result in a legal challenge. It is therefore prudent to enact legislation that specifically allows charter counties to impose a LOST for specific public purposes, such as public transit and the infrastructure improvements to support it. Counties that want to see its economy flourish by way of agglomeration can then pass ordinances allowing for the LOST, and invest in public transit. For example, Wayne and Washtenaw counties could each impose a LOST for transit and infrastructure and, by forming an intergovernmental agreement or authority, pool its resources to fund a transit system within and between Wayne and Washtenaw counties. It is in this way, by enacted legislation and voluntary regional collaboration, that the law can be used to optimize economic growth and serve a model nationally.

¹⁷ *Frey v Dep't of Management & Budget*, 429 Mich. 315, 338; 414 N.W.2d 873 (1987); *Indenbaum v Michigan Bd of Medicine* (After Remand), 213 Mich. App. 263, 274; 539 N.W.2d 574 (1995).

¹⁸ See *Issues Relative to the Constitutionality of Local Sales Taxation in Michigan*, Citizens Research Council of Michigan Report No. 305, June 1992.

¹⁹ The Stadia or Convention Facility Development Act (Act 180 of 1991) allows eligible municipalities to levy, assess, and collect an “excise tax” on food and alcohol sold at restaurants, motor vehicle rentals, and hotel/motels to fund stadiums and convention facilities. See MCL 207.751 *et seq.*

Conclusion

Southeast Michigan has endured the pitiful lack of public transit for far too long. Political and economic divides have stifled the state's attempts to promote regional cooperation to plan and fund the level of public transit necessary to promote economic change. It is time to allow the local governments who are willing to invest the political and economic resources into a model public transit system that can benefit its citizens. Enacting legislation to allow counties to impose a local option sales tax might be the right way to raise funds for public transit and, in turn, boost the economy.