Research Department

Patrick J. McCormack, Director

600 State Office Building
St. Paul, Minnesota 55155-1298
651-296-6753 [FAX 651-296-9887]
www.house.mn/hrd/hrd.htm

Minnesota House of Representatives

February 18, 2009

TO: Interested Legislators

FROM: Mark Shepard, Legislative Analyst

RE: Constitutional Issue: Supplement/Substitute

The new Article XI, section 15 of the Minnesota Constitution increases the sales and use tax rate for 25 years, and dedicates the proceeds of the increased taxes to four newly created funds. The constitutional language also provides that:

> *"The money dedicated under this section must supplement traditional sources of funding for these purposes and may not be used as a substitute. "*

This memo analyzes the supplement/substitute language. This memo should be read with the following in mind:

- The constitutional language is not clear. This memo offers my thoughts as a starting point for discussion, recognizing that others may have information or analysis that might lead me to change some of my conclusions. It is likely that interpretation of certain ambiguous language will need to be addressed in the context of particular appropriations or potential appropriations, and in some cases there may not be clear answers until courts interpret the new constitutional language.
- The discussion in this memo is focused only on legal issues and does not discuss policy options that the legislature may consider within the permissible legal boundaries.
- The memo reviews legislative history only from the 2007-2008 biennium. I limited my research to the most recent biennium because of time limitations and because the most recent legislative history seems most directly relevant.
- I did not participate as a staff person in any of the legislative deliberations of H.F. 2285/S.F. 6.

Overall Conclusions:

- The overall intent and effect of the language is clear—that the newly dedicated funding should provide additional revenue for the specified purposes, not replace prior funding sources. The terms "supplement" and "substitute" should be given their commonly understood meanings, as there is no indication that these constitutional terms have a special technical meaning.
- The exact scope and impact of this language is not clear, either on its face, or based on the legislative history.
- The language likely applies both to legislative decisions and to recipients of legislative appropriations.
- The language has potential application to all traditional sources of funding: general fund, dedicated funds, funds provided by units of local government, and private funds.
- It is not clear what constitutes a "traditional source of funding." Trying to give effect to both the language and the purpose of the constitutional amendment, a reasonable argument can be made that the "traditional source of funding" is the level of funding that would have occurred if the new 3/8 sales tax money were not available.

Legislative history

The constitutional amendment eventually proposed to the voters in Laws 2008, Chapter 151 originated as H.F. 2285 (Chief Author, Representative Sertich). S.F. 6 (Chief Author Senator Pogemiller) was the companion bill acted upon in the Senate.[1] The original language of H.F. 2285 with respect to the supplement/substitute issue was identical to the final language of Chapter 151. The original language of S.F. 6 had somewhat different phrasing, but almost identical substance: "The money dedicated under this section… shall not be used as a substitute for traditional funding sources for the purposes specified, but the dedicated money shall supplement traditional sources of funding for those purposes." Because the original versions of the bill were very similar to the final version of the bill on this issue, there were not amendments adopted to the bill during the legislative process that offer help in interpreting the supplement/substitute issue.

Legislative discussions of this issue may be instructive, but do not appear to be conclusive with respect to the substitute/supplement language. These discussions are summarized below.

The most direct legislative discussion of the substitute/supplement language occurred on the Senate Floor during the debate on the final conference report on H.F. 2285. The following exchange occurred between Senator Robling , Senator Pogemiller, and Senator Hann: [2]

> Senator Robling: [Referring to the substitute/supplement language] …I'm just wondering what the legislative intent on that is….Would the programs that have always received a certain level of

[1] Originally, S.F. 2146 was the companion to H.F. 2285. But the Senate action on this topic occurred on S.F.6, which eventually became the companion bill to H.F. 2285.

[2] This discussion occurred on February 14, 2008, on the Senate Floor. The discussion can be heard on the Senate video recording, approximately 1 hour and 8 minutes from the beginning of the recording. The discussion reproduced here is an excerpt, not a transcript of the complete remarks of the Senators.

> funding have to always continue to receive those in our general fund budget?…And I'm concerned about potential lawsuits about this. What is our traditional funding source that we would need to protect? Would it be the highest level we have ever achieved for funding these programs, or would it be something else?
>
> Senator Pogemiller: …This is an attempt to say that these are additional revenues that we want to put to these purposes. We don't intend that you go in and now take down fees and so forth that are being used for water programs…The idea here is that this is not supposed to be money that takes over general fund expenditures that we have historically made. It is meant to be over and above that money. And it is not a perfect science how that works. But it is meant to be language to future legislatures to the effect of…don't use this money to do what you typically have been doing. This is meant to provide additional language for legacy activities that we were not doing because we didn't have the money.
>
> Senator Robling: On the issue then of if budgets are being cut, could we do across the board cuts that would include these programs that we are currently saying should not be supplanted with this money?...
>
> Senator Pogemiller: …This language cannot lock in a future legislature. So if in its wisdom the legislature needs to make reductions for other reasons, a particular water program has become outdated or something, they could do that. This doesn't prevent that. So, again, I think that needs to be viewed as an intent to describe for future legislatures the intent of this revenue, not so much to lock them in as to what they are doing with their current expenditures.
>
> Senator Hann: …Senator Pogemiller, with all respect, the language that is in the bill doesn't conform with what you just described. What it says here is that you can't reduce those funds at all. And you say "well the future legislature could do that." But not without repealing the law…or amending the law…The law here says you cannot reduce the funds, you can't use this tax to supplement *[sic]* existing funding…Whatever the budget is for these expenditures cannot ever be reduced if this is passed unless we go back and change the law….It says whatever that budget is today can never be reduced…I would recommend that we vote "no," and I think this is a particularly egregious restriction on the power of the legislature to manage budgets…"

[Senator Pogemiller did not respond to Senator Hann.]

There was other discussion of the concept of not supplanting traditional sources of funding during legislative debates on H.F. 2285 and S.F. 6:

- Senator Pogemiller discussed topics relating to this issue in a February 7, 2007 meeting of the Senate Environment and Natural Resources Committee.[3] Senator Pogemiller indicated that the new revenue will not supplant revenue that is already being spent; that the bill was not looking to replace current revenue sources. He stated that one of the challenges is to get an understanding of what we are asking new revenue for versus what it is that the legislature should be funding regularly, and that it would be a mistake to ask voters to do something the legislative was supposed to do in the general budget. He also stated that we should put money into things that fundamentally are legacy things.
- In the same meeting of the Senate Environment and Natural Resources Committee, Senator Gen Olson (as part of a series of remarks on various topics) noted that the bill

[3] The discussion can be found on the Senate television archive approximately 18 minutes into the meeting.

had language to discourage the supplanting of funds. Senator Olson noted that while the proposed constitutional language stated that the new money was not to be used as a substitute for traditional funding *sources*, it doesn't say anything about *levels* of funding. Senator Olson went on to state that one could reduce the general fund spending substantially without going against the language in the Constitution.[4]

- Senators Neuville and Pogemiller had an exchange on this topic in the Senate Finance committee. Senator Neuville asked what would happen under this language if there were another large budget deficit. He noted that the amendment would guarantee a level of funding, and asked if during a shortfall period it would be true that the dedicated money can't be used to restore cuts that might otherwise happen. Senator Pogemiller responded that in a perfect world no one would do that, but in the real world someone might try to do that. He indicated that the language was intended to say as strongly as you can that the intent is for additional purposes, not to replace the regular budgetary process in the legislature. Senator Neuville asked if the language would not allow the legislature to replace a base spending level for habitat and clean water with the new dedicated money. Senator Pogemiller responded that it should not replace the various fees that are going on now, but that people can fudge around that. He noted his experience that there has been an attempt by legislators to live up to that as best they can.[5]
- Senators Bakk and Pogemiller discussed this issue in a Senate Tax Committee meeting. Senator Bakk expressed a concern that future legislatures would not put new general fund inflationary increases into areas that received newly dedicated funding. Senate Pogemiller said he also was concerned about that. He then pointed to the non-supplantation language in the bill, and noted it is clear that the dedicated funding is not meant to supplant traditional sources of funding.[6]
- A House floor amendment was offered on May 19, which would have added to the end of the supplement/substitute sentence "*, nor may other operating budget items in the environment and arts budgets be reduced because of these newly dedicated funds.*" The amendment was rejected 21-112.[7]

Comparison to similar statutory language

Minnesota Statutes section 116P.03 governs money deposited in the environment and natural resources trust fund from certain constitutionally dedicated state lottery proceeds. The Legislative-Citizen Commission on Minnesota Resources (LCCMR) makes recommendations to the legislature for expenditure of this money. Section 116P.03 provides, in part:

[4] The discussion can be found on the Senate television archive approximately 51 minutes into the meeting. Senator Pogemiller responded to other aspects of Senator Olson's remarks, but did not comment on Senator Olson's reading of the "traditional sources" language.

[5] The discussion can be found on the Senate audio archive of the March 24, 2007 meeting of the Finance Committee, approximately 3 hours and 16 minutes into the meeting.

[6] The discussion can be found on the Senate audio archive of the April 24, 2007 meeting, approximately 1 hour and 22 minutes into the meeting.

[7] This amendment was offered by Representative Mark Olson during the House Floor debate on May 19, 2007. The discussion of the amendment can be found on the House video recording approximately 2 hours and 32 minutes into the recording.

(a) The trust fund may not be used as a substitute for traditional sources of funding environmental and natural resources activities, but the trust fund shall supplement the traditional sources, including those sources used to support the criteria in section 116P.08, subdivision 1. The trust fund must be used primarily to support activities whose benefits become available only over an extended period of time.

(b) The commission must determine the amount of the state budget spent from traditional sources to fund environmental and natural resources activities before and after the trust fund is established and include a comparison of the amount in the report under section 116P.09, subdivision 7.

The substance of the supplement/substitute language in section 116P.03 is nearly identical to the language in Article XI, section 15.[8] There is a reasonable argument that the drafters of the constitutional language knew about this statute, and may have intended the constitutional language to have similar effect to the statutory language. Therefore, while interpretation of the statutory language is not binding on interpretation of the constitutional language, the administrative practices and customs of the LCCMR[9] in applying the supplement/substitute language in section 116P.03 may be helpful in interpreting the constitutional language.

The following is my understanding of general LCCMR practices:

- LCCMR does not have a set of written guidelines or principles defining the supplement/substitute language in its governing law.
- There is no case law interpreting the statutory language governing LCCMR.
- LCCMR members have considered this issue on a case-by-case basis. LCCMR requires entities to provide information about past sources of funding.
- LCCMR applies the supplement/substitute language to particular grants, both in evaluating proposals and in overseeing work plans for projects receiving appropriations. For example, LCCMR is concerned with recipients' use of trust fund money to pay for items of overhead or general expenses (e.g. computers, desks) that previously were paid for from another source. In general, trust fund money is not used to pay for general operations or overhead expenses, unless these costs directly relate to a project funded from the trust fund.

Application of the statutory supplement/substitute language to LCCMR is different from applying the same language in the context of the 3/8 sales tax money dedicated under the constitution. Because the LCCMR supplement/substitute language is statutory, the legislature can override it by enacting a new statute. Thus when the legislature appropriates LCCMR money it likely ends the argument about whether the legislature has illegally substituted trust

[8] Similar language is contained in Minnesota Statutes, section 297A.94(f), which governs proceeds from the in-lieu tax imposed on sale of lottery tickets. Paragraph (f) provides in part that the revenue: …may not be used as a substitute for traditional sources of funding for the purposes specified, but the dedicated revenue shall supplement traditional sources of funding for those purposes. LCCMR does not make recommendations for this expenditure of this money.

[9] The comments here also apply to the former LCMR, before citizen members were added to form the current LCCMR. These comments are presented as an effort to summarize the collective experience of the LCMR/LCCMR, recognizing that individual members of the groups may have different views.

fund money for traditional sources of funding, because the new, specific appropriation arguably supersedes the general standard in the older law. This analysis does not apply to legislative appropriations of the new 3/8 sales tax money, because an appropriation in a new law cannot override the supplement/substitute language in the Constitution.

Minnesota Statutes, section 114D.45 establishes the Clean Water Legacy Account and provides that money in the account must be made available for implementation of specified statutory purposes *"without supplanting or taking the place of any other funds which are currently available or may become available from any other sources, whether federal, state, local, or private for implementation of those sections"*. This section was enacted in 2006. I am not aware of a history of administrative practices or interpretations of this language. This statutory language is different from the language of Article XI, section 15 of the Constitution in some significant ways:

- Section 114D.45 refers to "funds which are currently available" or "may become available from any other sources" rather than to "traditional" sources of funding.
- Section 114D.45 makes clear that the non-supplantation concept applies to any other sources of money, public or private.

It is not clear what relevance the language in section 114D.45 has to interpreting the 3/8 constitutional language. For example, it could be argued that the references in section 114D.45 to federal, state, local, and private funding clarify that the constitutional provision also includes all of those sources. A contrary argument is that because the drafters of the constitutional provision used more general terms, they meant something different from all of the specific sources of funding listed in section 114D.45.

There also are federal laws that require that federal funding be used to supplement and not supplant non-federal money. Because the language in these federal laws is different from the language in Article XI, section 15, it is not clear the extent to which analysis of the federal laws would be relevant to interpretation of the Minnesota Constitution.[10]

To whom does the restriction apply?

The requirement that dedicated money supplement and not substitute for traditional sources of funding clearly applies to legislative appropriations. The language comes immediately after the sentence requiring that dedicated money be appropriated by law, and is contained in the article of the Constitution dealing with appropriations and finances.

There is a good argument that the supplement/substitute requirement also applies to state agencies that receive appropriations from the dedicated funds. The language does not say "*Legislative appropriations* must supplement…not substitute." Rather, the language is focused on the use of the money. Thus an agency recipient likely would not be allowed to use a legislative appropriation of dedicated money to substitute for traditional sources of funding for an activity.

[10] For an example of a discussion of such a federal law, see *Bennett v. Kentucky Dept. of Educ.* 470 U.S. 656 (1985).

It also seems likely that the supplement/substitute language applies to other entities, including nonstate entities, that receive grants or other funding from an appropriation of the dedicated money. The constitutional language speaks passively of the purpose for which money "may not be used," and does not specify who may not use it in the prohibited manner. Arguably, the constitution requires each recipient to use dedicated money to supplement and not substitute for the recipient's traditional source of funding for an activity.[11]

At what level does the supplement/substitute analysis occur?

It is not completely clear if the supplement/substitute analysis should involve a comparison of:

> (1) aggregate spending for all purposes covered by each of the constitutionally created funds (i.e. all spending for outdoor heritage, all spending for clean water, all spending for parks and trails, and all spending for arts, history and cultural heritage;
>
> OR
>
> (2) individual spending for each activity/recipient within each broad purpose;

As discussed above, it is likely that the supplement/substitute language applies to every individual entity that receives funding from the funds created in Article XI, section 15. If the funding for every individual entity meets the supplement/substitute requirement, the aggregate spending for all entities receiving money from each of the dedicated funds also will meet the constitutional requirement. In summary, an analysis showing that aggregate state spending for natural resources purposes increased as a result of use of money appropriated from the outdoor heritage fund likely would not be sufficient, by itself, to overcome an instance of dedicated funding for a particular natural resource activity replacing the prior source of funding for that activity.[12]

To what "sources" of funding does the language apply?

The supplement/substitute language applies to "traditional sources of funding for these purposes" without mentioning any specific sources. Thus the language would potentially seem to apply to any source of funding (other than the newly dedicated sales tax money) if these sources were "traditional." The other sources could include the state general fund, game and fish funds, trust

[11] A potential argument against this interpretation, at least with respect to nonstate entities, is that the supplement/substitute language appears in an article of the constitution dealing with public funding, state funds, and legislative appropriations, and thus might not have been intended to apply to nonstate entities. But because the nonstate entities are receiving state funds, the stronger argument appears to be that the supplement/substitute language applies to a nonstate recipient, as well as to the legislature and other public agencies.

[12] There also may be instances in which the aggregate spending for a constitutional purpose could decline in any year, without violating the supplement/substitute language. For example, the legislature might decide to eliminate one or more traditional programs completely. In a given year, it may be possible that additional funds appropriated for completely different activities in that area could be less than the prior appropriation for the eliminated program. Arguably, this would not be an unconstitutional substitution.

fund revenues for which the LCCMR makes recommendations, bonding funds, other state funds, federal funds, local government funds, or private funds. An argument could be made that because the prohibition on substitution is contained in a section of the constitution dealing with public funds, the constitutional language is not intended to deal with substitution for traditional private sources of funding. But a counter-argument is that the constitutional language was focused broadly on best use of the new dedicated money, and was intended to ensure supplementation, not substitution, for any traditional source of funding, private or public.

What are "traditional" sources of funding ?

The Constitution does not define "traditional sources of funding." The answer may be different for different activities, and it may not be possible to come up with clear standards without court interpretation. There is no indication that the word "traditional" was intended to have a special technical meaning for constitutional purposes that would be different from the common understanding of "traditional" to refer to an established custom or practice.

One possibility is that the "traditional" source of funding is the immediately prior level of funding. Under this interpretation, the newly dedicated revenue could not be used to support an activity if the immediately prior amount of funding for that activity had been reduced. This interpretation has some support, based on the plain language of the Constitution. That is, if an activity received a $100,000 appropriation last year, and the legislature reduces the appropriation to $90,000 this year, it could be argued that using the newly dedicated money to make up the difference would be an unconstitutional substitution of the new money for the traditional source of funding. However, the Constitution does not refer to a specific funding level from a prior year. In this way the constitutional language is different from some "maintenance of effort" requirements in other statutes.[13]

An alternative reading of "traditional" is that it means some type of average level of funding over a period of time. The difficulty with this interpretation is that the Constitution does not specifically say this. Further, the Constitution does not provide guidance on what time period would be appropriate for determining the "traditional" level.

In the absence of clear constitutional language defining "traditional," it may be helpful to think about the "traditional sources of funding" in light of the overall purpose of the dedicated funding amendment. A primary purpose of the amendment was to provide additional money for certain purposes. In some cases, it is possible this additional funding may be needed because the "traditional" level of funding is declining. For example, funding for an activity traditionally financed by revenues from sale of game or fish licenses could be declining for a variety of reasons unrelated to legislative decision-making (e.g. if shrinking habitat for game or fish contributed to fewer license sales). Similarly, "traditional" funding could be declining over time because a lower level of federal or private funding was available. Arguably, it would not advance the purposes of the constitutional amendment if "traditional source of funding" were

[13] For some examples, see Minnesota Statutes, section 245.4835 (spending for certain mental health services); section 254B.03 (chemical dependency spending); 119B.11 (child care programs); 134.34 (libraries).

interpreted to forbid using the newly dedicated money to support an activity any time its prior source of funding had been reduced.[14]

Another way of interpreting the "traditional sources of funding" would be to ask what level of funding would have existed from prior sources if the newly dedicated constitutional money were not available. For example, if the level of federal funding, game and fish funding, or state general fund money for an activity this year would have declined by 10 percent from last year even if the voters had not approved the constitutional amendment, an argument can be made that the "traditional" source of funding is 90 percent of last year's budget, not 100 percent. Under this interpretation, use of the constitutionally dedicated money to provide funding between the 90 and 100 percent level would be permissible.

This issue is likely to arise in the 2009 session if the legislature makes general, across-the-board reductions in a variety of state programs to address the projected budget deficit.[15] The argument that it is permissible to appropriate the newly dedicated sales tax money to an activity even if the legislature has reduced the general fund appropriation for the activity would seem to be strongest if the general fund reduction for the activity was less than or equal to the amount of the general fund appropriation reduction applied across the board, or applied to activities similar to those funded through the newly dedicated sales tax revenue.[16]

A somewhat different issue is how many times an activity needs to have been funded from a particular source to make that source "traditional." This too may need to be evaluated on a case-by-case basis. For example, if the legislature or another funding source has begun to provide money for an activity and has indicated that the program is intended to be ongoing, that funding source may be "traditional" after one year. On the other hand, if the legislature (for example, through bonding or Environment and Natural Resources Trust Fund money) has indicated that funding is one-time or otherwise limited in nature, that funding source may not be "traditional" even if it has occurred more than once.

[14] If "traditional" were interpreted to refer to any prior source of funding, it is not clear how far back to look. There was testimony in at least one legislative committee considering H.F.2285 from an organization stating that the new dedicated funding was needed, in part, because several years ago the legislature had eliminated state general fund appropriations to the organization (Testimony of Minnesota Humanities Commission executive director in the House Heritage Finance Division, May 9, 2007).

[15] In the future, a parallel issue could arise if the legislature made across-the-board increases in state funding. That is, if the legislature increased most agency budgets by 5 percent, but made no increases in activities funded in part with dedicated money, it could be argued that the dedicated money was being used to substitute for the traditional source of funding.

[16] If a court determined that an appropriation from one of the newly-created trust funds to an entity whose general fund budget were reduced constituted an illegal substitution of dedicated money for traditional sources, it is likely that only a portion of the appropriation of dedicated funds would be illegal. For example, if the legislature reduced the general fund appropriation for an activity from $100,000 to $90,000 and the legislature appropriated $50,000 of dedicated money for the activity, $40,000 of the dedicated fund appropriation would clearly be a supplement, and it is likely that only $10,000 could be questioned as a potential substitution.

Remedy for potential violations

It is not clear if the judicial remedy for the legislature substituting newly dedicated money for the traditional source would be to prohibit spending of the dedicated 3/8 money or to order the legislature to appropriate more money from the traditional source. The appropriate remedies may vary, depending on the facts of particular appropriations decisions.

Some thoughts on this issue:

- The language of Article XI, section 15 arguably focuses on the money dedicated under that section; i.e. "The money dedicated under this section…may not be used as a substitute." This suggests the appropriate remedy for violating this language would be to prohibit expenditure of the dedicated money.
- Courts traditionally have been reluctant to order the legislature to appropriate money from the state treasury. But courts have done this when they have determined such an order is necessary to remedy constitutional violations. In some cases, courts may determine that ordering the legislature to appropriate money is imperative to serve the purposes of the constitutional amendment—that in some cases enjoining expenditure of the 3/8 money would result in less, not more, resources being available for a purpose specified in the constitution.
- In some cases, it may not be practical or possible for the legislature to appropriate money from the traditional source; e.g. if the traditional source of money comes only from declining dedicated fees, from federal funds, or from private sources. This suggests that the remedy for illegally substituting would be to enjoin expenditure of the dedicated money, not to mandate spending from another source.
- It is not clear if the legislature is constitutionally required to appropriate money from the newly dedicated funds in any particular year. The constitution provides that "The money dedicated under this section shall be appropriated by law." It is not clear if this means that the legislature always must appropriate the available dedicated money, or if it means that the money cannot be spent unless it is appropriated.
- It clearly seems permissible, with respect to any particular activity or program for the legislature to reduce the traditional level of funding and not replace it from any source
- It is not clear if legislation making appropriations could influence the remedy that a court would apply for a constitutional violation (e.g. by stating in an appropriation bill something to the effect of "if a court determines that the appropriation for "……." would violate the requirement that dedicated money may not be used as a substitute for traditional sources of funding, the appropriation from the [the dedicated 3/8 money] is reduced so as to avoid an unconstitutional substitution.

MS/jlh