

# Local Government Law

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There is occasion at the outset to define, or at least describe, the subject under consideration. An obvious current basis for this is the disposition of the cognizant Section of the American Bar Association and some highly competent legal scholars to identify the field as state and local government law. The Section has just voted a change in name from Local Government Law to State, Urban, and Local Government Law. This writer bears some responsibility for the giving of currency to the local government law title in the United States, a title to which the British have long been committed.

While labels are just that, the important thing is to be clear about what the bottles actually contain. The concern here is not with all levels of government generally but with the public sector at the substate level. Obviously, rational and functional consideration of local government demands perspective in the larger governmental context. Local units are creatures of state policy. And they are affected in myriad ways by the exercise of federal powers by the Congress. The point, however, is that the focus is upon local governmental responsibilities, powers, functions, institutions, and processes—significantly affected as they may be by higher levels of government—and not upon the whole range of state functions not directly related to local government. As a final word on labels, one may say that it makes even less sense to speak of federal, state, and local government law than of state and local government law.

## I. THE NEED FOR A GENERAL OVERVIEW

This symposium is appearing at an extraordinary period in American experience. It is the period of taxpayer revolt. The understandable concern about the financial demands of government that draw into public treasuries some forty percent of the gross national product is very real. The interest of people who are seeking public office in riding the wave of the taxpayer revolt is no less easily grasped. What is distressing is the negative thrust of the movement for tax reduction. Put in simple terms, hard and fast tax or budget limitations embedded in the organic law are a meat-axe way of confronting the problem. What the arresting force of taxpayer concern really bespeaks is an affirmative approach.

Soundly conceived, the function of finance is ancillary even though, as we all know, it is sometimes used for other purposes.<sup>1</sup> The primary

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1. This proposition is too obvious to require citation of authority. In some activities a local government may be allowed to make a profit. The constitution of New York, for example, provides this for municipal utilities. N.Y. CONST. art. 9, § 1(f).

concern is the division of human affairs between the public and private sectors and basic reexamination of governmental responsibilities and authority and their distribution among the several levels of government. This contrasts with the blunt and indiscriminate restraints or limitations such as those of California's Proposition 13. That constitutional amendment is Procrustean, to say the least.

So large and complex is the present American condition with respect to the roles and activities of government that the very thought of undertaking full-scale review of where we are is staggering. Yet there is no hesitancy in expressing the opinion that the public welfare urgently demands it.

As for the "how" of it (there is no thought here of seeking a federal constitutional convention) the function might well embrace three stages. The first would be a preliminary exploration and planning stage in which an appropriate "commission" would project by what agency and—in large terms—by what means the basic assignment would be carried out. The second would be action by the Congress upon the report of the commission. The third would be the making of the study and rendering of a report by the agency actually created by federal legislation. Many readers may be doubtful, but the need for a thoughtful overview is overwhelming and the effort should be made.

In this brief paper there is no effort to cover the whole field of local government law. The treatment is deliberately eclectic.

## II. THE LOCAL IMBROGLIO

Certainly one of the gravest challenges to the political system is confronted at the local level. The present condition is not inspiring. To a very large extent, responses to particular interests and resort to improvisation have given us the local governmental melange that is pandemic. In a particular urban area, there may be a separate incorporated central city, a number of independent cities in the urban fringe, independent school districts, and an uncoordinated profusion of special purpose units of varying jurisdictional reach. All about the country there is an urgent need to reexamine these arrangements in the interest of rendering territorial jurisdiction, as well as responsibility and authority, realistically responsive to the needs of community. In many states this will demand both constitutional and statutory changes.

Urban sprawl and its handmaiden, the private motor vehicle, have been the death of the central city district in many substantial urban areas. It is late indeed, but one hopes that the affliction is not so pervasive that we are left unable to take basic action.

Land use planning and regulation on an adequate territorial and community basis are indispensable to save America's urban communities. The prospect for obtaining requisite enabling legislation in some states is dismal. Unhappily, this is the case in states experiencing rapid population

increase and economic growth. Utah, where this paper was written, is a case in point. Utah's legislation governing incorporation of municipalities and territorial changes is almost completely devoid of policy content. The applicable statute sets no substantive standards to govern either incorporation or annexation;<sup>2</sup> there is no independent governmental body or agency in a position to speak for the larger public interests. The very day this paragraph was written, the *Salt Lake Tribune* reported that a town with a territory of fifty acres had just annexed one thousand acres, located largely in an adjoining county, with a view to encouraging private development for resort and recreational uses.<sup>3</sup>

### III. THE GROWTH SYNDROME

One ventures hesitantly to refer to the national growth syndrome that affects the private sector and all levels of governments. It seems to be assumed that growth in population and in economic activity is a desideratum and inevitable in any event. Of course, it is obvious that the syndrome is international, which complicates matters all the more. The subject gets no expert commentary from this quarter, but one is emboldened to say that a nation state, its member units, if it is a federation, and its organized local communities should confront the complex questions of balance in the context of the natural order and its finite limitations. Is there daylight beyond the tunnel of endless growth, the constant struggle to offset inflation with greater production? Is there any way, short of catastrophe, to persuade ourselves that America's paramount need is to end the mindless wastefulness that now characterizes the exploitation of natural resources?

Land is a basic component of the total environment which our genus shares with all the flora and all the fauna to be found on this earth. In the long view the tenancy of any one human being upon the land is, at most, transitory. During his or her passage, very existence depends upon the land, air, and water. All this is perfectly obvious, yet it has been characteristic of American society, almost from the beginning, to view the land as something to be exploited—a commodity to be trafficked in for economic gain.

The idea of private ownership of land derives from a system of law developed and administered within the framework of politically organized society. Within that system legally recognized interests in relation to land enjoy the protection of law. Without it there would be no such things as property ownership and transfer as we have known them.

What system of values should guide people with respect to land use? This is the basic question. To what ends should we embrace policy concerning land? How are responsibility and authority concerning land

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2. See UTAH CODE ANN. §§ 10-2-101 to 10-2-712 (Supp. 1977).

3. *Soldiers Summit Annexes Acreage*, *Salt Lake Tribune*, Sept. 30, 1978, at D-1, col. 1.

planning and land use to be distributed between and within the public and private sectors? Is it not time to engage in searching societal introspection? If we perceive human domination of the land as our heritage, what are our correlative human responsibilities?

#### IV. POPULAR LAWMAKING

These days there is lively interest in political mechanisms that gained recognition in this country early in the twentieth century: initiative, referendum, and recall. Popular government has an understandably strong appeal, especially during periods in which much of the citizenry is disenchanted with representative government. Quite appropriately, the Initiative, Referendum and Recall Committee of the National Municipal League is just now undertaking a major study of these three mechanisms, which are available at both state and local levels. It hardly need be added that none of the three exists at the federal level.

There is occasion here to point to some of the considerations to be borne in mind in a fresh examination of popular government. The initiative has a positive action characteristic that calls for special attention. A proposed measure comes from the citizenry and achieves legal force by action of the electorate. Under the so-called direct initiative system, drafting and deliberation are characteristically left entirely to the citizen proponents. This is the case regarding initiated amendments to the constitution of California.<sup>4</sup> If the proponents get enough signatures upon an initiative petition, the proposal goes directly to the voters. In contrast to California's system is the qualified indirect initiative for legislative enactments under the constitution of Ohio.<sup>5</sup> The Ohio system calls for submission of the proposal to the legislature for review and modification. Voters may, by supplementary petition, require that the original proposal be submitted to the electorate in pristine form. Obviously, this procedure does not assure controlling effect even to the most thorough legislative consideration. Perhaps the fruits of the National Municipal League study will include a workable, genuinely indirect initiative.

The vagaries of the direct initiative are epitomized by California's Proposition 13, which, as nearly everyone knows, was adopted by the voters of California as a limitation upon ad valorem property taxation. The full text is set out in the margin.<sup>6</sup> The drafting was so faulty that the

4. CAL. CONST. art. 18, §§ 3-4.

5. OHIO CONST. art. II, §§ 1(a)-1(b).

6. CAL. CONST. art. XIII A 4 1978 Cal. Legis. Serv. xxv, provides:

- § 1. AD VALOREM TAX ON REAL PROPERTY; MAXIMUM AMOUNT
- (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.
- (b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

amendment was attacked in the Supreme Court of California as void for vagueness.<sup>7</sup> The attack did not succeed, but it was far from frivolous. Some deficiencies may be noted here.

The limitation of section 1(a) upon "any ad valorem tax on real property" refers literally to a particular levy rather than an aggregate of levies. It is true that the second incomplete sentence speaks of the "one percent (1%) tax." Of course, there will not be such a tax; each unit in an overlapping stance will impose its own levy. Section 1(a) calls for collection of the one percent tax by the counties and apportionment according to law to the districts within the counties, but "districts" is not defined, and neither counties nor cities are expressly included. The lone exception made by section 1(b) to the tax limitation is confined to debt approved by the voters before the amendment became effective, but what is to be the result for pre-Proposition 13 judgments upon contract and tort claims? Section 2 of the amendment defines cash value as the county assessor's valuation, which ignores the fact that public utility property is assessed by the state.

## V. SUNSHINE AND SUNSET POLICIES

The possibilities of effective citizen voice are obviously greatest at the local level, but realization is another matter. Open meeting laws are designed both to place decision-making in public view and offer more

### § 2. FULL CASH VALUE; FAIR MARKET VALUE BASE

- (a) The full cash value means the County Assessors valuation of real property as shown on the 1975-76 tax bill under "full cash value," or thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 tax levels may be reassessed to reflect that valuation.
- (b) The fair market value base may reflect from year to year the inflationary rate not to exceed two percent (2%) for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction.

### § 3. CHANGES IN STATE TAXES; ENACTMENTS TO INCREASE REVENUE; IMPOSITION

From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

### § 4. SPECIAL TAXES, IMPOSITION

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

### § 5. EFFECTIVE DATE OF ARTICLE

This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

### § 6. SEVERABILITY

If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

7. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 33 Cal. 3d 208, 583 P.2d 1283, 149 Cal. Rptr. 239 (1978).

opportunity for citizen contribution. They do not put the quietus upon all informal, closed-door activity in relation to policy but they undoubtedly foster openness to the media and the rest of us. Thus, they do indeed have a place in the scheme of things.

Sunset laws, which call for recurrent justification of programs in order to allow the programs to continue, have recently gained considerable support. They appear, however, to have relatively less significance for local government than for higher levels of government. Certainly, even for basic ongoing functions, the idea of recurrent review of particular programs has much to commend it.

Despite the aggregation of federal, state, and local government programs and activities that address this nation's problems of human shelter, America does not appear to be gaining significantly in the meeting of housing needs. The current staggering inflation in housing costs leaves one aghast. Assuming that national and international developments have substantial meliorating effects, local government can make a contribution by pursuing policies and practices directed to maximizing low- and moderate-income housing opportunities in the context of comprehensive land use planning and regulation.

## VI. EMPLOYEE RELATIONS

An area of very active interest and of very great policy and fiscal bearing upon the public welfare is public employee labor relations law. The movement is strongly toward a dispensation of public employees that is patterned closely upon the law and practice in the private sector.

That there should be a public employee voice concerning elements in the local public service is readily conceded here. At the same time, the private employment model does not seem soundly matched to the public service sector. The absence of the competitive factor is a major difference. In the public sector most public functions and services are on a "monopoly" basis and their interruption can pose grave hazards to public health and safety. In economic terms, moreover, public employment lacks a tempering element that exists in the competitive system. Private employees have to take account of the competitive disadvantage to their enterprise caused by costly disruptions of operations.

More fundamentally, there is a question of compatibility of private employment methods with the political nature of decision-making in the public sector. The conflict becomes most acute under a system of compulsory arbitration that accords ultimate decision-making to arbitrators. Such a system assures to arbitral awards priority over other claims upon local budgets.<sup>8</sup> In the absence of express constitutional enablement, there is a question whether binding arbitration would stand up, for example, in the case of city personnel, since it would present a

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8. PA. CONST. art. III, § 31; 43 PA. STAT. ANN. §§ 217.1-10 (Purdon Supp. 1978-79).

decision by an extragovernmental body regarding substantive policy as well as taxation and appropriations.<sup>9</sup>

The financial consequences of the application of private employment labor relations methods to local government service can be extremely serious. The New York City situation is aggravated, but does not stand alone. Currently, the incidence of strikes by public employees is high. Up to this point neither legislative proscription nor the availability of conciliation, mediation, and arbitration has had the desired effect. The constraints of fiscal capacity afford some sort of outside limitation, but within these boundaries lie extremely difficult questions concerning priorities in serving community needs.

Apart from financial issues, there are questions about collective bargaining with respect to policy matters in which there should clearly be employee participation. For example, school curricula and class size are policies that must reflect teachers' views. For public education, an alternative to collective bargaining is a faculty voice within the academic structure.

## VII. CONSTITUTIONAL LIMITATIONS ON FINANCE

We come to considerations of the substance of constitutional limitations upon the taxing and spending power. The thrust of both types of limitations is to hold down the financial burden imposed by government upon the community. A modified approach that is already common at state and local levels is to exact balanced budgets. In general this third type of restriction is hardly to be challenged; it exacts good husbandry by units that are not perceived to have a responsibility to exercise fiscal powers in a way calculated to exert influence more or less directly upon the private economy. The other two are definitely of a different order. Some of their implications may be noted here.

A spending limitation does not restrict choice of revenue measures but does put limits upon the aggregate extent of their productive use, and may force the making of unwelcome choices in the budgetary process. Although spending limitations may take some account of inflation, their fundamental philosophy is inflexible; they control regardless of community need. An example is Proposition 13 with respect to assessment for ad valorem tax purposes.

A constitutional limitation upon a major source of local government revenue, such as the ad valorem property tax, imposed with no clear idea of how it will affect ability to provide essential public services, and with no shift to other revenue measures, is a dubious policy, to say the least. Of course, some economies may well be achieved, but it is unrealistic to assume that the need or demand for public services is likely to be

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9. See *Salt Lake City v. International Ass'n of Firefighters, Locals 1645, 593, 1654 and 2064, 563 P.2d 786 (Utah 1977)*.

significantly reduced. Life is growing more, not less, complex and interdependent. Thorough reexamination of the distribution of the cost of government is much in order, but rigid limitations must seriously reduce flexibility of action, thus greatly compromising local governmental effectiveness.

#### VIII. PROPERTY TAXATION RECONSIDERED

Criticism of Proposition 13 does not bespeak long-range commitment to the ad valorem property tax as a mainstay of local finance. A thorough reexamination of public finance that would take into account needs of all levels of government would afford the framework for considering whether the ad valorem property tax should be phased out entirely. The suggestion here is that there should be such consideration. Obviously, abolition would take time because of existing commitments to debt service on general obligation bonds and related matters. The contract clause question is clear; a law substantially impairing capacity to pay may not stand up,<sup>10</sup> but if bondholders were left with the recourse of mandamus to compel debt service appropriations there would be a basis for saying that in substance the "stuff" of the obligation was preserved.

From beginning to end the property tax is fraught with vagaries. It is ponderous, regressive, and inequitable. Exemption policies of the various states fail in many respects to relate burden to benefit, and exact taxpayer support of private institutions that may not be compatible with widely held citizen values and views. Assessment, that is, valuation for property tax purposes, is generally unscientific. As a practical matter, it could hardly be otherwise. The same may be said of equalization, which is designed to achieve an even basis of assessment throughout the largest taxing unit in which taxable property is located. Vacant land is taxed on the same basis as that which is improved, although it makes minimum demands for public services. Ad valorem levies by local units are imposed annually, traditionally at levels calculated to meet budgetary demands over and above other anticipated revenues. In some jurisdictions a rate may be set a bit high to offset anticipated noncollections. Property owners may be made personally liable for ad valorem taxes, but there is usually the security of a lien upon taxable property. A so-called green belt mechanism may be employed to treat vacant land in the urban fringe in terms of value for nonurban purposes—notably agriculture—and to favor land speculators and persons interested in development for urban-type uses.<sup>11</sup> An obvious policy question is directed to whether, in terms both of revenue and well-considered development, this serves the larger public interest.

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10. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Van Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535 (1866).

11. See UTAH CONST. art. 13, § 3.



The question concerning the choice of revenue measures to replace the property tax would have to be answered. One may note at once that its contribution to the local fisc is relatively much less than was once the case. There is, moreover, potential in nontax charges that can be exacted in ways that relate benefit to burden. Under a system of progressive state income taxation, it might well be possible to resort to sharing tax receipts with local government. Sales taxes that apply to necessities are both very productive and very regressive. Certainly a thorough reexamination of public finance on a broad basis that would take into account the needs of all levels of government would afford the framework for considering whether the property tax should be phased out and the regressive impact of sales taxes eliminated.

### IX. CAPITAL FINANCING

A basic proposal here is that future issues of general obligation municipal bonds should not be tied to the ad valorem property tax. It is time to recognize that the real security behind a municipal issue is the economic strength of the community and its past and present performance as a governmental entity. Municipal bonds, like federal and many state securities and corporate debentures, should not be tied to particular revenue sources. Such a suggestion may not be palatable to bond counsel, but it is grounded upon what is here asserted to be the rational view: the quality of municipal obligations is actually determined by the overall credit of a local unit as distinguished from reliance upon a particular source of revenue. The movement in private corporate finance from mortgage bonds to unsecured obligations like debentures is a good example for local government.

### X. DEBT READJUSTMENT

It is desirable that the municipal debt readjustment provisions of the federal bankruptcy legislation be strengthened, as has been the thrust of recent congressional consideration.<sup>12</sup> At the same time, the state has a responsibility to shape, adopt, and administer policies concerning local finance directed to continuing local fiscal health. This view is not fully consistent with broad perceptions of home rule, but in a complex society a parent state is not in a position to eschew responsibility.

As a final word it must be said that state action concerning state and local finance should not follow the line of Proposition 13. The course to pursue is to adopt policies directed at thoughtful planning and administration of projects and programs in substantive and fiscal terms.

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12. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (to be codified at 11 U.S.C. §§ 101-151326), was signed by the President on November 6, 1978. Municipal debt adjustment is dealt with in Chapter 9, §§ 901-946.

To this writer, the negative character of a fixed constitutional limitation upon taxation is no less than Procrustean.

#### XI. HOME RULE

As a proponent of local home rule, the author would be remiss were he to make no mention of that subject. He long since eschewed any constitutional home rule dispensation that places local functions and powers beyond legislative control. There should be great autonomy regarding governmental structure; a local unit that adopts a home rule charter should have a full range of governmental powers subject to the overriding authority of the state legislature to enact general law. Beyond this, the need of authority for intergovernmental cooperation extends over a wide range of responsibilities and functions.