

**MINUTES OF THE
UTAH CONSTITUTIONAL REVISION COMMISSION**
Friday, September 28, 2001 – 9:00 a.m. – Room 405 State Capitol

Members Present:

Mr. Alan L. Sullivan, Chair
Dr. Jean B. White, Vice Chair
Sen. Mike Dmitrich
Justice Christine Durham
Mr. Byron L. Harward
Mr. Dallin W. Jensen
Mr. Morris D. Linton
Mr. Robin Riggs
Mr. Kevin J. Worthen

Members Absent:

Rep. Patrice M. Arent
Mr. Michael E. Christensen
Rep. Greg J. Curtis
Sen. David L. Gladwell
Mr. W. Craig Jones
Speaker Martin R. Stephens
Sen. John L. Valentine

Staff Present:

Mr. Jerry D. Howe, Research Analyst
Mr. Robert H. Rees, Associate General Counsel
Ms. Cassandra Bauman, Legislative Secretary

Note: A list of others present and a copy of materials can be found at <http://www.image.le.state.ut.us/imaging/history.asp> or contact the Office of Legislative Research and General Counsel.

1. Call to Order and Approval of Minutes

Chair Sullivan called the meeting to order at 9:10 a.m.

MOTION: Mr. Linton moved to approve the minutes of August 24, 2001. The motion passed unanimously with Mr. Riggs absent for the vote.

**2. Presentation of Plaque of Appreciation to Dallin W. Jensen
Selection of Vice Chair and New Member**

Chair Sullivan explained that Mr. Dallin W. Jensen's term has expired after having served with the Commission for 12 years. He expressed appreciation for the many contributions of Mr. Jensen.

Mr. Jensen expressed appreciation for the opportunity to serve and associate with members of the Commission. He also complimented the Commission for its dedication to the State Constitution.

Chair Sullivan explained that Mr. Jensen is a Gubernatorial appointment and noted that he has been asked to continue with the Commission until such time as the governor selects a new member.

Chair Sullivan stated that the Search Committee had met and asked that Mr. Worthen describe how the committee had arrived at its recommendation.

Mr. Worthen explained that five candidates had been selected to interview out of applicant pool of several dozen. Each of these five candidates would have made a significant contribution to the Commission. Mr. Worthen explained although each candidate was more than qualified, one candidate, Mr. Michael

Petersen, Associate Director, Utah Education Network was particularly impressive because he prepared so diligently for the interview.

Mr. Linton explained that Mr. Petersen had an energy for the Commission's work and that he understands the issues under review. Chair Sullivan concurred with these comments, noting that Mr. Petersen would make an excellent contribution. He expressed some regret however that the Commission has only one position to fill because the other candidates were so highly qualified. Mr. Sullivan suggested that the governor's office be advised that the Commission would be fortunate to have any of these candidates appointed so that if the governor were so inclined, he may appoint one or more of them at some future time.

MOTION: Sen. Dmitrich moved that Mr. Michael Petersen be appointed to the Commission for a 6-year term. The motion passed unanimously, including approval from other Commission appointments.

Chair Sullivan explained that, with Dr. Jean White's appointment expired, the position of Vice Chair is vacant. He explained the duties of the Vice Chair and opened the discussion to nominations.

MOTION: Mr. Jensen moved to appoint Mr. Worthen as Vice Chair of the Commission.

Mr. Linton expressed appreciation to Dr. White and acknowledged her many contributions to the Commission and to the State Constitution. He said that Mr. Worthen has a sound understanding of state law, has an ability to critically analyze issues, and that he is thorough and dedicated. As such, he would be an exceptional Vice Chair.

The motion passed unanimously. Mr. Worthen humbly acknowledged that he could not replace Dr. White with her knowledge and experience but that he would do his best to serve the Commission.

3. State School Fund - Article X, Section 5

This item was postponed to a future meeting.

4. State and Local Government Sale/Leaseback Exemption - Article XIII, Section 2

Chair Sullivan stated that he represents the UTA (Utah Transit Authority) on many issues, including the sale/leaseback exemption, and will abstain from voting on this item.

Ms. Katherine Pett, General Counsel, UTA, explained the concept of sale/leaseback exemptions. She stated that the State Constitution needed to be amended to permit this type of transaction. She stated that public entities in many states have utilized sale/leaseback exemptions, but that Utah has not had the opportunity because of how the State Constitution has been drafted. She distributed "Proposed Property Tax Exemption for State and Local Government Property Transferred in Financing Transaction."

Ms. Pett indicated that sale/leaseback is a very important tool because the UTA is required to justify its projects when applying for a federal grant. She stated that current law requires 20 percent local contribution for an 80 percent federal contribution. She indicated that President Bush's administration has recently increased that ratio to a 40 percent local contribution for a 60 percent federal contribution. UTA does not presently have the revenue available to match the percentage required for the funding from the federal government. With a sale/leaseback program, she stated that substantial more revenue could be available to the UTA which, in addition to other projects, could also be used to qualify for additional federal aid.

Mr. Paul Marx, Office of Policy, FTA (Federal Transit Administration), stated that FTA has evolved its policy regarding sale/leaseback exemptions over the last few years. He stated that the sale/leaseback concept initially caused concern. Primarily there was some fear that the assets might be relocated or misused. Mr. Marx explained that the federal assets in the transaction are relatively unique and cannot be misused, at least not without modification.

Mr. Harward inquired whether a letter stating the IRS (Internal Revenue Service) would receive a greater benefit from the sale/leaseback transaction is required before the transactions occur. Mr. Marx explained that a certification letter is required. He stated that the IRS does benefit, because the IRS works on the assumption that a dollar today will be worth the same in 20 years. He explained that the IRS is reluctant to use the future value of money because of the complications it creates with its current accounting methods. The concept he said works arithmetically, but not mathematically.

Mr. Worthen inquired whether a review of all sale/leaseback transactions is required. Mr. Marx stated that the Common Grant Rule requires that the entity using the transaction carry the burden of reviewing the transactions that contain government assets. He indicated that the law requires the entity to go after the initial federal asset if that asset is misused.

Mr. Marx explained that waterworks and wastewater treatment assets would not be required to ascertain misuse. He indicated that loans from the EPA (Environmental Protection Agency) are entirely different. He stated that the EPA rules are written so that a sale/leaseback transaction could not occur.

Chair Sullivan inquired about how these transactions are viewed in the profession. Ms. Pett stated that the issue was brought to the Governor and that he seemed interested and fairly supportive with its prospect of economic benefit to Utah. She also stated that a number of members of the Legislature are interested in these types of transactions. She indicated that she is not aware of any organization that opposes the exemption.

Justice Durham inquired how disasters would affect the transaction. Mr. Marx explained that insurance is required as part of the transaction in the event that the asset is destroyed or needs repair.

Justice Durham also inquired whether other states have allowed the exemption to transit authorities only or if it has been more broadly applied to other public entities. Ms. Pett stated that she was aware of a case that the legislation was transit-specific and later was amended to include public education.

Mr. Worthen stated that opposition to the exemption may come from other taxing entities other than the IRS. He inquired how the transaction occurs without a property tax exemption. Mr. Marx stated that the property tax would be due at the time of sale, if the asset was not property tax exempt. He indicated that the interest rates would require a much more favorable return in order to assure the identical benefits that the property tax exemption would provide.

Mr. Roger Tew, attorney, clarified that the Constitutional provision would enable the Legislature to make a property tax exemption for sale/leaseback transactions in statute. He suggested draft legislation be available for review and perhaps brought to the 2002 General Session at the same time the Legislature considers the constitutional amendment.

5. Revenue and Taxation - Article XIII

Mr. Robert H. Rees, Associate General Counsel, Office of Legislative Research and General Counsel, explained the rewrite to the Article XIII - Revenue and Taxation. He stated that all of the changes had been approved by the Commission in its last meeting, except on subsection 5(6), page 4 of the draft a change had been made to address a concern raised by Ms. Pam Hendrickson, Chair, USTC (Utah State Tax Commission).

MOTION: Mr. Jensen moved to approve that subsection 5(6) of the rewrite read "Except for statutory refunds and adjustments and collection and administration costs, fees, taxes, and other charges related to the operation of motor vehicles on public highways and proceeds from an excise tax on liquid motor fuel used to propel those motor vehicles shall be used. . . ." The motion passed unanimously.

Mr. Rees stated that one major unresolved issue addressed the language in current Section 3 of the Constitution stating that "The Legislature shall provide by law a uniform and equal rate of assessment on all property in the state, according to its value in money. . . ." He distributed and explained "Excerpts From Utah Cases on Article XIII, Sections 2 and 3," "Uniform and Equal," "Assessment," and "Options for Article XIII, Section 2 of the Clarification Draft." He stated that "assessment" was a key word in the language and that its definition was not clear. He indicated that he refrained from using the term in the draft language.

Mr. Rees stated that case law does not provide an explicit distinction between the provision of Section 3 prior to the 1983 amendment and since the amendment. He explained that two principles for the evaluation of property taxes arose in his research: (1) property must be taxed at a uniform and equal rate and (2) just value is the property's value in money or its market value. He explained that the rate of taxation for valuation purposes must be uniform and equal within any taxing jurisdiction. He stated that the value of property which a rate of taxation can then be applied must be viewed as 100 percent of the property value. He stated that, debatably, the concept of assessment has been omitted. One argument, he explained is that the equation for determining assessment would be to apply the uniform and equal rate of taxation to 100 percent of the value of the property in cash.

Justice Durham stated that the 1947 case, referenced in the mailing packet does not require the same method of determining value shall be used with respect to all kinds of property but the different formula

which may be applied to different kinds of property must be such that its aim is too secure for assessment purposes a valuation which is fair and equitable in comparison with and commensurate with the valuation of other kinds of property. She indicated that the court was acknowledging the power of the Legislature to categorize certain kinds of property and to adjust the valuation process for the different categories in a way that would be fair and equitable as well as roughly comparable or commensurate with the valuation of other kinds of property. She stated that it is not very explicit and granted that it would be difficult to quantify, but that the valuation standards used for categories of property in statute is defined by case law.

Mr. Rees stated that the goal of the methodologies is to determine the equivalent of the property's just value in money. He stated that the legislation does not seem to be missing anything regarding this matter since the rate of taxation applied to evaluation is the assessment of the property.

Mr. Linton clarified that instead of a three-step process of (1) evaluating a rate of taxation, (2) applying that rate to the value of the property in monies, and then (3) assessing the property; there are really only two steps which consist of: (1) evaluating a uniform and equal rate of taxation and then (2) applying that rate to the value of the property in monies; which, in turn, is the assessment of the property.

Mr. Bruce Johnson, USTC, stated that property taxation is a three-step process in many states: (1) value property at 100 percent, (2) apply an assessment rate to that property, and (3) apply the jurisdiction's tax rate to the property. He stated that he does not share the concern because subsection 2(1) resolves the problem when it states, "property in the State shall be taxed at a uniform and equal rate in proportion to its just value. . . ." He stated that this language eliminates the ability to use differential assessment ratios.

Mr. Tew stated that there does not seem to be a problem in the draft language. He cautioned the Commission that the degree of paranoia that exists around Article XIII is consequential. He stated that the fact the language is changed is a problem for various agencies and entities even if it is intended to be non-substantive.

Mr. Linton stated that the language would take the Commission closer to its goal than if the language was left out.

Mr. Rees clarified that the term "assessment" was such a broad term that an attempt was made to exclude it in the draft language. He reviewed multiple definitions of the term that were provided in the handout "Assessment." He stated that the ambiguity around the term was so great that the hope of redrafting the language would further clarify the article.

MOTION: Mr. Jensen moved that subsection 2(1) read " . . . in money, based on a uniform and equal rate of assessment, to be provided by law." The motion passed unanimously.

Mr. Rees inquired whether an argument exists for the allowance of local governments to abate the taxes the poor without permission, subsection 3(3) of the draft legislation.

Commissioner Johnson stated that it is clear that the abatement process occurs at the local level. He stated that the local boards have the ability to abate taxes for good cause, but that it is pursuant to

authorization by the Legislature. He stated that provisions provided by the Legislature give discretion to the county legislative body as opposed to the County Board of Equalization and that some programs may be more formulaic.

Mr. Worthen stated that his understanding of Dylan's Rule was that it is subject to narrow interpretation which generally construed the powers of local governments, but there is still no inherit authority in local governments. He explained that interpretation will be broadly construed, including the general welfare provision. He stated that the power to abate taxes would fall under this category, but that it would still require statutory authorization.

Mr. Linton suggested an underscore that the current language is not intended to change the Constitution in any way.

Mr. James Beadles, Legal Counsel, Utah Department of Transportation, distributed "Substitute for Language in CRC Commission Draft of August 29, 2001," regarding subsection 5(6)(a) and (b). He explained how the Commission's draft changes the current provision and his draft is an attempt to clarify the subsection, regarding highway taxes. He stated that the addition of "acquisition of property" in the proposed substitute language, however, is not currently provided for in the Constitution. Mr. Rees suggested that language provided by Mr. Beadles' would represent a substantive change to the Constitution.

Chair Sullivan directed staff to work with Mr. Beadles on reworking subsection 5(6). He asked that further draft legislation for that subsection, without substantive changes, be brought before the Commission before any action is taken.

Mr. John C. McCarrey, Legal Counsel, Utah State Tax Commission, cited *Beaver County v. Wiltel* (January 2000). He stated that language in the decision supports the notion that the courts interpreted the Constitution to exempt intangible property. He recommended that the Commission leave the current language of the Constitution intact until such time that a policy making body considers the provision. He recommended that adding "or exempting" between taxing and intangible property be included as a secondary approach for language of subsection 2(5). Chair Sullivan directed staff to work with Mr. McCarrey on language for subsection 2(5) and bring it back before the Commission for further action.

Mr. McCarrey also stated that the proposed language in subsection 6(4), "decisions of the State Tax Commission," may contradict the language in the current Constitution that reads as "any matter decided by the State Tax Commission." He stated that the phrase is critical and requested that the Commission retain the language that was recently adopted. He stated that language of subsection 7(4) mirrors the language of subsection 6(4) and that the change must be done in both instances.

MOTION: Mr. Jensen moved to adopt the suggested language for subsections 6(4) and 7(4); substituting "decisions of" with "any matter decided by."

Commissioner Johnson indicated possible distinctions between use of the language "decisions of" compared to "any matter decided by."

The motion passed with Mr. Harward voting in opposition.

Chair Sullivan explained that a risk of rewriting the Constitution is that inadvertent changes may occur. He stated that the risk is minimal considering the effort that the Commission has put into the rewrite. One substantial benefit of having so many reviewers is to minimize and possibly eliminate any inadvertent changes.

Mr. McCarrey explained that the risk of rewriting the Constitution should be considered carefully and completely before taking on such an assignment. He stated that the foundation for tax law is contained in the Constitution. He commented that statutory language and administrative rules on tax law should be clarified.

Commissioner Johnson stated that he is more concerned that the Article XIII rewrite may be amended during the legislative process and that this concern is of much greater relevance than any changes that the Commission has made to date. He commended the Commission for its interest, energy, fairness, and openness in the process of rewriting Article XIII.

Dr. White indicated that voters need to be more informed about propositions on the ballot. She stated that, especially with something as important as amending the Constitution, voters need to be aware what they are voting for and why it has been proposed.

6. Other Business

The next meeting is tentatively scheduled for Friday, October 26, 2001. It will be an all-day retreat.

7. Adjourn

Chair Sullivan adjourned the meeting at 11:48 a.m.

