

Constitutional Highlights

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Wisconsin Constitution Article VIII, Section 10 INTERNAL IMPROVEMENTS

[With certain exceptions,] the state may never contract any debt for works of internal improvement, or be a party in carrying on such works.

History and purposes of this section

The internal improvements clause was included in the original state constitution. The reason for the adoption of the provision was that many states had incurred considerable debt in constructing toll roads and canals and in making improvements to harbors and navigable streams and either were unable to meet the heavy financial burden of this debt or were forced to raise considerable revenues to pay off the debt. The framers of our state constitution wanted to ensure that this did not occur in Wisconsin. See *Sloan, Stevens & Morris v. the State*, 51 Wis. 623, 629-630 (1881).

Internal improvements are basically construction or building projects, but not all internal improvements are prohibited. The state constitution currently authorizes all of the following: particular works of internal improvement for which grants of land or other property are made to the state; construction or improvement of public highways; development, improvement, and construction of airports or other aeronautical projects; acquisition, improvement, or construction of veterans' housing; improvement of port facilities; acquisition, development, improvement, or construction of railways and other railroad facilities; and acquisition, preservation, and development of the forests of the state.

While the constitution allows certain internal improvements, it has fallen on the courts to determine which internal improvements are prohibited. In *State ex rel. Jones v. Froehlich*, 115 Wis. 32, 38 (1902), the court defined internal improvements as "those things which ordinarily might, in human experience, be expected to be undertaken for profit or benefit to the property interests of private promoters, as distinguished from those other things which primarily and preponderantly merely facilitate the essential functions of government." In *State ex rel. Owen v. Donald*, 160 Wis. 21, 79 (1915), the court added that internal

improvements mean “not merely the construction or improvement of channels of trade and commerce, but any kind of public works, except those used by and for the state in performance of its governmental functions, such as a state capitol, state university, penitentiaries, reformatories, asylums, quarantine buildings, and the like, for the purposes of education, the prevention of crime, charity, the preservation of public health, furnishing accommodations for the transaction of public business by state officers, and other like recognized functions of state government.”

How courts interpret the section

Froehlich and *Donald* form the starting point for the court’s analysis in cases on the internal improvements clause. Generally, the court asks: is there an essential governmental purpose for the improvement and is private capital inadequate for the improvement? If there is no essential governmental purpose for a certain project or if private capital is readily available for the project, the project is a prohibited internal improvement. Using this test, the court has consistently held that the following types of construction or building are permitted under the state constitution:

1. Any project undertaken by a political subdivision of the state, because the prohibition applies only to the state itself. *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57 (1967), *State ex rel. LaFollette v. Reuter*, 36 Wis. 2d 96 (1967), *State ex rel. Hammermill Paper Co. v. La Plante*, 58 Wis. 2d 32 (1973).
2. State office buildings and similar structures because they furnish accommodations for the transaction of public business by state officers. *State ex rel. Thomson v. Giessel*, 267 Wis. 331 (1954).
3. Appropriations made for the purpose of “encouraging” another to perform a work of internal improvement. *State ex rel. Wisconsin Dev. Authority v. Dammann*, 228 Wis. 147 (1938) (on rehearing).
4. Appropriations made for operating, rather than construction, expenses. *State ex rel. Warren v. Reuter*, 44 Wis. 2d 201 (1969).
5. Improvements that are incidental to but necessary for the performance or completion of a proper governmental function, such as construction of a dam for the establishment of a wildlife refuge at *Horicon Marsh*. *State ex rel. Hammann v. Levitan*, 200 Wis. 271 (1929).

Strategies for reconciling legislation with the section

An analysis of the case law relating to the internal improvements clause generally shows a strict construction by the court in the years before the Great Depression, the development of certain strategies by the state in the post-World War II period to enable it to perform works of internal improvement that would otherwise be prohibited by the constitution, and a growing awareness on the part of the court in recent decades that the clause must be interpreted in light of changing conditions and the changing function of government. Two particular developments merit comment: the use of authorities to circumvent the internal improvements clause and *Libertarian Party v. State*, 199 Wis. 2d 790 (1996).

Before 1969, the state used “dummy” corporations to circumvent the internal improvements clause in an arrangement in which the state would create corporations whose purpose was to construct or finance a facility for use or occupancy by the state. See *State ex rel. Thomson v. Giessel*, 271 Wis. 15 (1955). In 1969, the state constitution was amended to prevent the use of such “dummy” corporations for this purpose.

Thus, beginning in the 1970s, the state began to create authorities, public bodies that are independent of the state, to circumvent the internal improvements clause. In *State ex rel. Warren v. Nusbaum*, 59 Wis. 2d 391 (1973), and *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464 (1975), the court recognized that authorities were independent of the state and not covered by the internal improvements clause and that, in these instances, the state funds provided to the authorities were either for simply encouraging internal improvements or for operating expenses of the authority. At the same time, the court was reluctant to abandon the *Froehlich* and *Donald* test entirely and looked at whether there was a dominant governmental purpose for the improvement and whether private capital was inadequate. Indeed, in *Development Dept. v. Bldg. Comm'n*, 139 Wis. 2d 1 (1987), the court used the test to rule unconstitutional the use of state funds as loans for the construction of low and moderate income housing.

The line of reasoning regarding the internal improvements clause apparently changed in *Libertarian Party*. At issue in *Libertarian Party* was the constitutionality of legislation authorizing the construction of a baseball stadium for the Milwaukee Brewers, financed in part by a tax imposed by a local professional baseball park district. In this instance, the state's participation in the construction of the stadium was clear; the issue, therefore, was whether the state was a party in carrying on works of internal improvement. While acknowledging the *Froehlich* and *Donald* test, the court seemingly put forth a new test for determining whether a project was a prohibited internal improvement: "The state may directly engage in construction or other activities if those activities are incident to a predominantly governmental purpose..." *Id.* at 814. The court claimed that predominant government functions change over time and concluded that the construction of the stadium for the Milwaukee Brewers did not serve "a predominantly private purpose." *Id.* at 815. The court never considered the issue of whether the construction of the stadium entailed an essential governmental function or whether private capital was available for the project. Instead, the court concluded: "The reduction of unemployment, the promotion of tourism, and the encouragement of industry are all predominantly governmental purposes sufficient to avoid a violation of the internal improvements clause." *Id.* at 816.

Because *Libertarian Party* departs from previous construction of the internal improvements clause, and because the test for constitutionality that comes out of the case appears to duplicate the requirement under the state constitution that the expenditure of state funds must serve a public purpose (the public purpose doctrine), it is difficult to determine the precedential value of the case. If *Libertarian Party* provides the new test for the internal improvements clause, any building or construction project for which the state incurs debt, or to which the state is a party, need have only a *predominantly* governmental purpose, which could be the reduction of unemployment, the promotion of tourism, or the encouragement of industry. However, if the court returns to the *Froehlich* and *Donald* test, any building or construction project for which the state incurs debt, or to which the state is a party, must have an *essential* governmental purpose and private capital must be unavailable for the project.

If there is any question as to whether a project for which you would like to have legislation drafted has an essential governmental purpose or whether private capital is unavailable for the project, it may be

advisable to have the project undertaken by a public entity other than the state, such as a political subdivision of the state or an authority, or to limit the state's role simply to encouraging the project.

The Legislative Reference Bureau attorneys would be happy to help you reconcile your proposal with article VIII, section 10.



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