

Ballot Proposal 6 of 2012



INTERNATIONAL BRIDGES AND TUNNELS

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Ballot Proposal 2012-6
November 2012 General Election
Placed on the ballot by Initiative Petition

Complete to 10-10-12

THE CONTENT OF THE BALLOT PROPOSAL:

The following is the official language as it will appear on the ballot.

**A PROPOSAL TO AMEND THE STATE CONSTITUTION
REGARDING CONSTRUCTION OF
INTERNATIONAL BRIDGES AND TUNNELS**

This proposal would:

Require the approval of a majority of voters at a statewide election and in each municipality where "new international bridges or tunnels for motor vehicles" are to be located before the State of Michigan may expend state funds or resources for acquiring land, designing, soliciting bids for, constructing, financing, or promoting new international bridges or tunnels.

Create a definition of "new international bridges or tunnels for motor vehicles" that means, "any bridge or tunnel which is not open to the public and serving traffic as of January 1, 2012."

Should this proposal be approved?

YES ___
NO ___

BRIEF SUMMARY:

Ballot Proposal 6 would add a new section, Section 6a, to Article III ("General Government") of the 1963 Michigan Constitution. The proposed new section would restrict the state's ability to "*undertake ownership and development*" of any *new international bridges or tunnels* defined as "*any bridge or tunnel which is not open to the public and serving traffic as of January 1, 2012.*"

In order for the state to undertake ownership and development of a new international bridge or tunnel, Ballot Proposal 6 would require both an affirmative statewide vote and an affirmative vote of "*each municipality in which improvements are situated.*" The language of the proposed Article III, Section 6a amendment states that the statewide and

municipal votes would be to determine if proposed new international bridges or tunnels were "*necessary and appropriate*." The language of the proposed amendment also directs that the procedure for seeking a vote of the people be in accordance with the process established for voter-initiated legislation under Article II, Section 9 of the 1963 Michigan Constitution, with the exception that a proposal under the proposed new section could not be approved by the Legislature in lieu of a vote of the people.

The voter initiative provisions of Article II, Section 9 require petitions signed by not less than eight percent of registered electors of the total vote cast for all candidates for Governor at the last preceding General Election for Governor. As a practical matter, since gathering signatures and promoting ballot proposals is not a function of state government, a private group would have to gather petitions and promote both statewide and municipal ballot proposals authorizing the state to undertake ownership or development of a new international bridge or tunnel.

It is generally understood that Ballot Proposal 6 is an attempt to prevent the State of Michigan from proceeding with a proposed publicly-owned crossing of the Detroit River between Detroit and Windsor, Ontario, Canada – a project identified as the New International Trade Crossing (NITC). The ballot proposal was initiated and is supported by the Detroit International Bridge Company, the private company which owns and controls the Ambassador Bridge, currently the only bridge crossing the Detroit River between Detroit and Windsor.

The debate on the pros and cons of the Ballot Proposal 6 is largely a debate on the pros and cons of the NITC project, and Ballot Proposal 6 is seen in some sense as a referendum on the NITC project itself – although it is not exactly that. Ballot Proposal 6 may or may not prevent the completion of the NITC project. Approval of Ballot Proposal 6 may have impacts unrelated to the NITC project.

A DESCRIPTION OF THE PROPOSAL:

Detailed Discussion of the Language of Ballot Proposal 6

Article XII, Section 2 of the 1963 Michigan Constitution, which provides for the amendment of the Constitution by petition and vote of electors, requires a statement of the purpose of proposed amendments in not more than 100 words. Ballot Proposal 6 statement-of-purpose language as it will appear on the November 6, 2012 General Election ballot is two sentences containing a total of 89 words. This statement is found on page one of this analysis.

The language of the amendment that would become Article III, Section 6a of the Michigan Constitution if Ballot Proposal 6 is adopted is 394 words contained in two subsections. The entire text of the proposed amendment is copied on Page 9 of this analysis.

- Section 6a, Subsection (1) would establish the requirement of a statewide and municipal vote before the state could undertake ownership or development of a new international bridge or tunnel.

▪ Section 6a, Subsection (2) includes five subdivisions which "*shall apply in the interpretation of this Section.*" Those subdivisions include definitions of "ownership and development," "state," and "new international bridges or tunnels for motor vehicles," as well as a description of the procedure by which the statewide and municipal votes would be carried out. The final subdivision of Subsection (2) directs that "*Any ambiguity in the interpretation of this section shall be resolved in favor of shielding the people from practical or financial burdens associated with state government ownership and development of international bridges and tunnels for motor vehicles.*"

It is not clear how some parts of the proposed amendment language would be interpreted or carried out in practice – in particular, the election provisions and the definition of "new international bridges or tunnels for motor vehicles".

Election Provisions

In order for state government to undertake ownership or development of a new international bridge or tunnel, Ballot Proposal 6 would require both an affirmative statewide vote and an affirmative vote of "*each municipality in which improvements are situated*". The language of the proposed Article III, Section 6a amendment directs that the statewide and municipal votes be in accordance with the process established for voter initiated legislation under Article II, Section 9 of the 1963 Michigan Constitution. The voter initiative provisions of Article II, Section 9 require petitions signed by not less than eight percent of registered electors of the total vote cast for all candidates for Governor at the last preceding General Election for Governor.

The Constitutional provisions of Article II, Section 9 deal with the enactment of state law through the voter initiative process. It is not clear how those provisions would apply to the municipal election required by Ballot Proposal 6. Would a statewide petition satisfying the eight percent requirement of Article II, Section 9 be sufficient to place a proposal both on a statewide ballot and a municipal ballot? Would proponents of a new international bridge also have to gather sufficient petition signatures to meet the eight percent standard both statewide and in every municipality in which improvements were situated? Or would proponents of a new international bridge have to circulate at least two statewide petitions, one for a statewide ballot and one for each municipality in which improvements are situated? Or since Article II, Section 9 has no applicability to municipalities, do the Ballot Proposal 6 provisions establish a requirement impossible to fulfill?

It is also unclear when the election requirements of Ballot Proposal 6 would apply in the project development process. The development of any large transportation project is a multi-phase, multi-year process following federally-mandated planning requirements. The process that led to the approval by state, federal, and Canadian public agencies of the NITC project began in March 2002 with a Planning/Need and Feasibility study, and was not completed until January 2009 with approval of the U.S. Environmental Impact Statement by the Federal Highway Administration (FHWA), and November 2009 with respect to the Canadian environmental clearance process.

It would be impractical to require a vote of the people on a new international bridge or tunnel project before the selection of a preferred alternative, i.e. before it is even known in which municipality a proposed project would be situated. In the alternative, it would

be unreasonable to go through the rigorous and costly planning and environmental clearance process "on spec" and to then wait for a privately-organized initiative process to put the project on statewide and municipal ballots and hope for an affirmative vote. It is unlikely that the federal government would participate in environmental clearance or project development costs if Ballot Proposal 6 were approved and it is unlikely the state would find a Canadian partner in such a process.

If the language of the proposed Article III, Section 6a amendment had been a part of the original 1963 Michigan Constitution, it would have governed and possibly prevented the construction of the second span of the Blue Water Bridge between Port Huron and Sarnia, Ontario. The second span of the Blue Water Bridge was completed in 1997.

Definition of "New International Bridges or Tunnels for Motor Vehicles"

Subdivision (d) of the proposed Article III, Section 6a amendment has two sentences. The first sentence defines "new international bridges or tunnels for motor vehicles" to mean "any bridge or tunnel which is not open to the public and serving traffic as of January 1, 2012." The use of defined terms is common in Michigan law and also occurs in the Constitution. Typically a term is defined narrowly or defined through specific references to avoid ambiguity. Sometimes the meaning of a defined term can have significant policy implications. In the case of the proposed Article III, Section 6a amendment, the definition appears to create ambiguity.

The term "new international bridges or tunnels for motor vehicles" would appear to have a clear meaning – each word in the term having a straightforward dictionary definition. But the definition in Subsection (2), Subdivision (d) indicates that the phrase means "*any* bridge or tunnel not open to the public and serving traffic as of January 1, 2012." The definition does not narrow or restrict the definition to bridges and tunnels between Michigan and Ontario. While interpreting the language of proposed Section 6a to mean that *any* new state-owned bridge would require a statewide and municipal vote of the people might seem unreasonable or even absurd, it is not outside a possible judicial reading.

The second sentence of Subdivision (d) states that "*No vested rights are attributed to any state international bridge or tunnel initiative that is not serving traffic as of that date [January 1, 2012].*" This sentence would appear to be an attempt to invalidate the Crossing Agreement executed June 15, 2012 by representatives of the Canadian government and the State of Michigan. However, this provision would appear to conflict with Article I, Section 10 of the 1963 Michigan Constitution which prohibits any ex post facto law or law impairing the obligation of contract.

FISCAL IMPACT:

The direct fiscal impact of Ballot Proposal 6 is contingent on whether or not it would prevent the state from completion of the NITC project.

By itself, Ballot Proposal 6 does not appear to have a direct fiscal impact on state government or local units of government. Passage of Ballot Proposal 6 would likely engender litigation by public and private parties to determine meaning and applicability

of the constitutional language. However costs of litigation are indirect impacts, speculative, and cannot be readily estimated.

The passage of Ballot Proposal 6 could have a direct fiscal impact on state government to the extent it prevented the state from proceeding with Canada in completing the proposed NITC project. The potential impacts relate primarily to the repayment of federal funds and the state's ability to match federal-aid transportation funds.

Environmental Clearance and Repayment of Federal Funds

All major federal-participating transportation projects are required to follow what is broadly referred to as an "environmental clearance" process. The process is multi-phased and includes scoping, purpose and need evaluation, evaluation and screening of alternatives, and development and approval of environmental impact statements.

These federal requirements are found in 23 CFR Part 771 (Environmental Protection), 23 CFR Part 710 (Right of Way), and the National Environmental Policy Act of 1969. The federal government provides funding, through federal-aid highway programs, for these environmental clearance activities. However, the federal government does not fund environmental clearance activities for speculative projects. 23 CFR Section 630.112 provides for repayment of federal funds if the state does not proceed with the project: "*In the event that right-of-way acquisition for, or actual construction of, the road for which this preliminary engineering is undertaken is not started by the close of the tenth fiscal year following the fiscal year in which the project is authorized, the STD [state transportation department] will repay to the FHWA the sum or sums of Federal funds paid to the transportation department under the terms of the agreement.*"

The total cost of NITC environmental clearance activities from March 2002 through March 2011 was approximately \$42 million, of which approximately 80% was provided by federal-aid highway funds with the remaining 20% from the state-restricted State Trunkline Fund. If the state is prevented by the conditions of Ballot Proposal 6 from completing the NITC project, the state could be required to repay some or part of the 80% federal share of environmental clearance costs – approximately \$33 million.

Ability to Match Available Federal-Aid Highway Funds

The federal government has long provided funds to states for highway programs. Over the last 15 years, federal funds for Michigan highway programs have averaged approximately \$1.0 billion per year – approximately one-third of annual state transportation budgets. Most federal-aid highway programs require the state to match federal funds in project funding – generally and on average 20% of project cost. In recent years, the state's ability to access federal-aid highway funds has been at risk due to a shortfall in required state matching funds.

In FY 2010-11, FY 2011-12, and FY 2012-13 the shortfall in state matching funds was resolved primarily through short-term or one-time actions, including fund shifts, reductions in state trunkline maintenance, deferral of capital outlay projects, and the use of toll credits. In FY 2011-12 an additional \$40 million was provided to match federal funds through a sale of State Trunkline Fund bonds; in FY 2012-13, matching funds were provided through a one-time redirection of up to \$100 million of state General Fund revenue.

In his 2011 State of the State message, Governor Rick Snyder announced that the Canadian government had agreed to provide up to \$550 million (U.S.) to cover costs that would otherwise be borne by the State of Michigan in relation to the proposed NITC project.¹ In addition, the Governor indicated that the FHWA had agreed to allow the state to use this Canadian contribution to the NITC as a match for federal-aid program funds. The agreement with the FHWA would allow the state to demonstrate that it had met federal matching requirements for the Surface Transportation Program (STP), the largest of the federal-aid highway categorical programs, on a total program basis, and not necessarily on a project-by-project basis.²

The Canadian contribution is recognized in the June 15, 2012 Crossing Agreement, described further below, between Michigan and Canada. If Ballot Proposal 6 is passed and works to prevent the completion of the NITC project, there would be no \$550 million Canadian contribution and the state would have to find alternative means of matching federal-aid highway funds. The most obvious sources of additional state matching funds would be increased transportation taxes (fuel taxes and vehicle registration taxes) or an on-going redirection of state General Fund revenue for state transportation programs.

The Michigan Department of Transportation's 2012-2016 Five-Year Transportation Program indicated that, starting in FY 2012-13, the annual shortfall in matching funds would be between \$75 million and \$100 million, resulting in a potential annual loss of \$440 million to \$600 million in federal aid. Assuming the NITC project proceeds to construction, and depending on the timing of project expenditures, the \$550 million Canadian contribution to the NITC project could provide most of the shortfall amount identified in the Five-Year Transportation Program for the four fiscal years FY 2012-13 through 2015-16. The Canadian contribution could not provide the entire match shortfall because the contribution is only recognized as a match for STP funds.

¹ A briefing paper prepared by Transport Canada and the Michigan Department of Transportation in May 2010 indicated that the \$550 million Canadian contribution would cover certain project costs on the Michigan side of the crossing, including the U.S. Customs Plaza, (\$150.0 million) and the interchange with I-75 (\$385.9 million). As described in an administration briefing paper (September 2011) the Canadian contribution would not be a loan to the State of Michigan. There would be no liability created or reported on the state's financial statements. The Canadian government would be repaid from tolls under the public private partnership agreement to the extent that tolls supported repayment. <http://www.partnershipborderstudy.com/pdf/2010-05-28TCBackgrounderforMILegreDRICFinancialArrangementsUnderaP3.pdf>

² The House Fiscal Agency publication *Federal-Aid Highway Funds in State Transportation Budget*, February 21, 2012 provides additional analysis of the federal aid highway program and the proposed use of the Canadian contribution as a match for federal aid. <http://www.house.mi.gov/hfa/PDFs/Donor%20State%20Issue%202012.pdf>.

Potential Impacts of NITC

The above analysis describes the two potential direct fiscal impacts related to the state's use of and ability to match federal-aid if Ballot Proposal 6 is passed and prevents the completion of the NITC project. The House Fiscal Agency is unable to identify any direct fiscal impact on state government if the NITC project proceeds to construction and operation under the terms of the June 15, 2012 Crossing Agreement. The State of Michigan would have no financial responsibility under terms of that agreement.

On June 15, 2012, Governor Snyder and representatives of the Canadian government executed a Crossing Agreement "*to provide a framework for the Crossing Authority established by Canada to, with the assistance as necessary, but not funding by, Michigan: (a) design, construct, finance, operate and maintain the International Crossing [...] with funding as approved by Canada, through one or more Public Private Agreements with one or more private sector Concessionaires procured through one or more competitive procurement processes [...]*".³

The synopsis of the Crossing Agreement states that "The Michigan Parties are not obligated to pay any of the costs of the new International Bridge." The Crossing Agreement requires that any public-private agreement must state that Michigan is not liable, either directly or indirectly. The Crossing Agreement also prohibits any public-private agreement terms that would obligate use of state funds.

A copy of the June 15, 2012 Crossing Agreement is found on the State of Michigan website http://www.michigan.gov/documents/buildthisbridge/Agreement_389284_7.pdf.

ARGUMENTS MADE BY PROPONENTS:

** Proponents of Ballot Proposal 6 (i.e. opponents of the NITC project) argue that Detroit-Windsor traffic volumes do not justify a second bridge to Canada. NITC opponents also argue that the bridge could cost more than current estimates and additional costs would be borne by Michigan taxpayers. They also argue that if the NITC bridge were built, toll revenue would not support bridge costs, including bond payments, maintenance and operating costs.

Additional and more complete arguments in support of Ballot Proposal 6 and in opposition to the NITC project can be found at *The People Should Decide* website, <http://thepeopleshoulddecide.com/must-read-links/> and at the website for the Ambassador Bridge <http://www.ambassadorbridge.com/>.

ARGUMENTS MADE BY OPPONENTS:

** Opponents of Ballot Proposal 6 (i.e. supporters of the NITC project) cite the importance of the U.S.-Canadian trading partnership, the importance of cross-border trade to the Michigan economy, and in particular, the importance of cross-border connections to the integrated U.S. and Canadian auto industries. The project designated

³ For an analysis of public-private partnerships in transportation see House Fiscal Agency publication. <http://www.house.mi.gov/hfa/PDFs/NCSL%20PPPs%20Sep13%20Web.pdf>.

as NITC has come to be symbolized by the proposed new bridge crossing of the Detroit River.

** The bridge would be one element of a new border crossing system that would also include the U.S. plaza and interchange at I-75, as well as a new Canadian plaza for toll collection and customs processing, and direct freeway connections on the Canadian side of the crossing. NITC supporters argue the bridge and related improvements are needed to address long-term capacity issues at the border crossings. NITC supporters also argue that national and economic security require redundancy with respect to border crossings that could only be achieved through construction of a second bridge. NITC supporters also argue that a new border crossing would have direct and indirect benefits to the regional, state, provincial, and national economies.

** NITC supporters indicate that the bridge would be financed by a private concessionaire with costs of the I-75 interchange and a portion of U.S. Customs Plaza paid for by a Canadian contribution. NITC supporters indicate that the Crossing Agreement that would implement the NITC project relieves the State of Michigan from any financing for the project.

Additional and more complete arguments in opposition to Ballot Proposal 6, and in support of the NITC project, can be found at the New International Trade Crossing website <http://buildthedricnow.com/> and on the Michigan Executive Office website <http://www.michigan.gov/snyder/0,4668,7-277-57577-280608--,00.html> and http://www.michigan.gov/documents/snyder/NITC_Overview_362601_7.pdf.

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■ This analysis was prepared by nonpartisan House staff for use by House members and the general public in their deliberations, and does not constitute an official statement of the intent of the proposal.

**Initiative Petition
Amendment to the Constitution**

Full Text of Proposal

Proposal to amend the Michigan constitution of 1963 by adding a new §6a to Article 3, General Government:

§6a. Improvements for international bridges or tunnels for motor vehicles

Sec. 6a. (1) The people should decide whether state government may construct or finance new international bridges or tunnels for motor vehicles. Consistent with this policy, and to shield the people from unnecessary burdens, the state shall not undertake ownership and development of or use state funds or resources for new international bridges or tunnels for motor vehicles unless first determined to be necessary and appropriate by majority vote of the people.

(2) The provisions in this subsection (2) shall apply in the interpretation of this section.

- (a) "Ownership and development" shall include all activities involving and relating to all or part of commencing, constructing, or financing new international bridges or tunnels for motor vehicles, or related facilities, including but not limited to any one or more of the following: optioning or acquiring interests in property; promoting, designing, bidding, contracting for, or constructing; or in any manner directly or indirectly financing or assisting in financing property acquisition, design, or construction of such improvements.
- (b) "State" shall include the state of Michigan, and any one or more, or a combination of state agencies, authorities, commissions, districts, or other subdivisions or instrumentalities of state government.
- (c) The procedure for seeking a determination by majority vote of the people under this section shall be that procedure provided by law for the submission and approval of petitions to propose, enact, and reject laws by initiative under article 2, §9 of this constitution, with the exceptions that: 1) a proposal under this section may not be approved by the legislature in lieu of a vote of the people; and 2) an approval by the people shall require an affirmative vote of a majority of electors in both (A) the state and (B) each municipality in which improvements are situated, considering the impact on local services and facilities and that public ownership and operation would impact local property taxation.
- (d) "New international bridges or tunnels for motor vehicles" shall mean any bridge or tunnel which is not open to the public and serving traffic as of January 1, 2012. No vested rights are attributed to any state international bridge or tunnel initiative that is not serving traffic as of that date.
- (e) Any ambiguity in the interpretation of this section shall be resolved in favor of shielding the people from practical or financial burdens associated with state government ownership and development of international bridges and tunnels for motor vehicles.