

specific language in question is found in section II.H.7 of EO 2009-36, as amended by EO No 2009-43,¹ and provides:

The Director of the Department of Natural Resources shall supervise and administer the assigned functions transferred to the Department of Natural Resources under Section II.H of this Order in such ways as to promote efficient administration and shall make internal organizational changes as may be administratively necessary to complete the realignment of responsibilities under this Order. To achieve efficient administration and effectuate necessary cost savings consistent with appropriations provided by law, the Director shall evaluate and implement measures designed to reduce expenditures, eliminate duplicative services, and generate revenue while protecting the core functions of the former Department of History, Arts, and Libraries transferred to the Department of Natural Resources. The guiding purpose of any and all such measures, consistent with the purpose and intent of this Order, shall be to strike a careful and prudent balance between the goal of achieving efficient administration and necessary cost savings and that of preserving and maintaining public access to the important and unique collections and resources entrusted to the former Department of History, Arts, and Libraries, including, but not limited to, Michigan's Civil War and the other military flags. *Unless the Director determines it to be impracticable, the measures may include, but shall not be limited to, all of the following:*

- a. *Instituting an admission fee for museum facilities and exhibits.*^[2]
[Emphasis added.]

¹ EO No 2009-43 provides that it is to take effect 60 days after September 9, 2009, its date of issuance.

² Before it was amended, EO 2009-36 made the imposition of a fee mandatory rather than discretionary:

The Director of the Department of Natural Resources shall supervise and administer the assigned functions transferred to that Department under Section II.H of this Order in such ways as to promote efficient administration and shall make internal organizational changes as may be administratively necessary to complete the realignment of responsibilities under this Order. In order to achieve efficient administration and effectuate necessary cost savings consistent with available appropriated resources, the Director shall implement cost-saving measures designed to reduce expenditures and generate revenue while protecting the core mission of the former Department of History, Arts, and Libraries transferred to the Department of Natural Resources. Unless the Director determines it to be impracticable, these measures *shall* include, but shall not be limited to, all of the following:

- a. Instituting an admission fee for museum facilities and exhibits. [Emphasis added.]

Among other things, EO 2009-36 abolished the Department of History, Arts and Libraries (HAL) and distributed its functions to different state departments. With the exception of those changes made by EO 2009-43, EO 2009-36 took effect on October 1, 2009.

In order to answer your question, it is helpful to review the purpose and legal effect of an executive reorganization order. The Governor's constitutional power to reorganize the executive branch is found in Const 1963, art 5, § 2:

All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes.

Subsequent to the initial allocation, *the governor may make changes in the organization of the executive branch or in the assignment of functions among its units* which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor. [Emphasis added.]

Under Const 1963, art 5, § 2, the Governor may alter the organization of the executive branch or change the assignment of the functions of the units within the executive branch. Executive reorganization orders must be distinguished from executive directives, as explained in a recent Attorney General opinion:

In contrast to executive *directives*, executive *orders* are specifically provided for in Const 1963, art 5, § 2. This provision was new in the 1963 Constitution and was adopted to facilitate efficiency within the executive branch. The Governor, through the use of executive orders, may "make changes in the

organization of the executive branch or in the assignment of functions among its units." Unless disapproved in each house of the Legislature, executive orders acquire the force and effect of law. For this reason, art 5, § 2 has been described as expressly vesting "legislative power" in the Governor without running afoul of Const 1963, art 3, § 2. [OAG, 2003-2004, No 7157, pp 132, 137 (June 2, 2004); emphasis in original; footnote and citations omitted.]

The Michigan Constitution thus authorizes the Governor to *reorganize* or *reassign* functions in the executive branch, but it does not give the Governor the authority to *create* new powers or duties within the executive branch. In other words, the Governor is prohibited from using an executive reorganization order to "change substantive law that does not directly relate to the exercise of [his or] her *reorganization* authority." OAG No 7157, p 138. (Emphasis in original.)

The Executive Organization Act of 1965, MCL 16.101 *et seq*, implemented the first paragraph of Const 1963, art 5, § 2. *House Speaker v Governor*, 443 Mich 560, 587-590; 506 NW2d 190 (1993); *Soap & Detergent Ass'n v Natural Resources Comm*, 415 Mich 728, 748; 330 NW2d 346 (1982), citing *McDonald v Schnipke*, 380 Mich 14, 26; 155 NW2d 169 (1968). In the Executive Organization Act, the transfer of the executive and administrative agencies of state government may be accomplished using three distinct methods: a Type I, Type II, or Type III transfer. MCL 16.103(a)-(c). EO 2009-36, section II.H.1, and EO 2009-43 effectuate the transfer of the authority, powers, and duties "relating to the promotion of history and the preservation of the state's historical resources" from HAL to the DNR by "Type II" transfer as defined in the Executive Organization Act, which provides in relevant part:

Under this act a type II transfer means transferring of an existing department, board, commission or agency to a principal department established by this act. Any department, board, commission or agency assigned to a type II transfer under this act shall have all its statutory authority, powers, duties and functions, records, personnel, property, unexpended balances of appropriations,

allocations or other funds, including the functions of budgeting and procurement, transferred to that principal department. [MCL 16.103(b).]

Under a Type II transfer, the transferred agency, department, board, or commission continues to exist but its functions are carried out under the supervision and control of the receiving department or agency. OAG, 1965-1966, No 4479A, p 262 (May 2, 1966). The Governor may only assign, and the principal department may only receive, the authority, powers, duties, and functions possessed by the transferred agency, department, board, or commission.

Addressing the question of whether the Governor or the head of a department transferred by a Type II transfer had the authority to fill a vacancy in that department, OAG No 4479A stated:

[T]here is nothing in the language of [the Executive Organization Act] that indicates any legislative intent that additional or new appointive power is conferred upon the governor. In my opinion he [the Governor] retains the appointive power theretofore conferred on him by the basic statutes as reviewed above. [*Id.* p 268.]

The opinion further explained that a "careful reading of [MCL 16.103(b)] will disclose that the powers, duties and functions transferred by a Type II transfer are the powers, duties and functions of the existing department, board, commission or agency to which the transfer is applied." Accordingly, with respect to the particular power at issue there, the power to fill vacancies arising in the membership of any department, board, commission, or agency transferred to a principal department by a Type II transfer, the opinion concluded the vacancies were to be filled in the manner prescribed in the basic act relating to the creation of the agency subject only to any amendment to the basic act. *Id.* p 269.

The Executive Organization Act does not confer any new power, duty, function, or independent action not granted in the originating statutes. OAG, 1965-1966, No 4479, p 209 (March 9, 1966). Thus, in order to determine whether the Director of the DNR has the authority to charge an admission fee to the Michigan Historical Museum or exhibits, it is necessary to determine the powers and duties granted to and possessed by HAL in the originating statutes.

The primary goal of statutory interpretation is to effectuate the intent of the Legislature. *Brown v Detroit Mayor*, 478 Mich 589, 593; 734 NW2d 514 (2007). Legislative intent is discerned from the statutory text. *People v Lively*, 470 Mich 248, 253; 680 NW2d 878 (2004). The first step is to review the language of the statute. *Brown*, 478 Mich at 593. If the statute is unambiguous on its face, it is presumed that the Legislature intended the meaning expressed. *Id.*

The Michigan Historical Commission Act, MCL 399.1 *et seq*, confers on the Michigan Historical Commission certain powers and duties with respect to obtaining, preserving, and promoting historical materials. See MCL 399.3, 399.4, 399.6 and 399.7. It also permits HAL to conduct specific revenue-generating activities at the Michigan Historical Center. Section 7a provides that HAL may establish and operate a store at the center to sell items pertaining to the collections or purpose of the historical center. MCL 399.7a(1). That same section also creates the "museum operations fund" into which the money collected from the museum store sales must be deposited. MCL 399.7a(3). No provision of the law empowered HAL to institute an admission fee for the Michigan Historical Museum or exhibits.

In contrast, the Legislature has expressly authorized the charging of admission fees to certain other state museums. See MCL 399.408(1)(a) and (b) (authorizing a reasonable admission fee for entry into the Michigan Maritime Museum and the establishment of a retail sales store); MCL 399.508(1)(a) and (b) (authorizing a reasonable entry fee into the Michigan Railroad History Museum and the establishment of a retail sales store); MCL 324.76506 (authorizing the levy and collection of fees to use the facilities at the Fort deBaude historical site); and MCL 324.76702(d) (authorizing the Mackinac Island State Park Commission to establish charges for admission to the facilities under its jurisdiction). Under the rule of statutory construction holding that courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply language that is not there, the authority to charge an admission fee for the Michigan Historical Museum and its exhibits cannot be implied. See *Grimes v Dep't of Transportation*, 475 Mich 72, 85 n 43; 715 NW2d 275 (2006).

As you indicate in your letter, both EO 2009-36 and EO 2009-43 contain language in Section II.H.7.a providing for the Director of the DNR to institute an admission fee for the Michigan Historical Museum and its exhibits. EO 2009-36, as originally issued, used mandatory terms in providing that, unless the Director determined it to be impracticable, the cost-saving measures to be employed "shall" include instituting an admission fee. As amended by EO 2009-43, however, EO 2009-36 no longer included the mandatory "shall," stating instead that the DNR Director "may" institute an admission fee for museum facilities and exhibits as a revenue-generating measure if he or she does not find it to be impracticable. This distinction is unimportant here, however, since the Director of the DNR may neither be required nor permitted

to charge an admission fee to the Michigan Historical Museum or its exhibits since that power did not exist in the basic authorizing statutes for the Governor to transfer.³

It is my opinion, therefore, that the Governor may neither compel nor authorize the head of a principal department of state government or other state agency to institute an admission fee for a museum facility and its exhibits pursuant to gubernatorial reorganization authority under Const 1963, art 5, § 2 where the power to institute such a fee has not previously been conferred upon the transferred or receiving department or agency by the Legislature. Thus, as amended by Executive Order 2009-43, Executive Order 2009-36 does not empower the Director of the Department of Natural Resources to institute an admission fee at the Michigan Historical Museum and its exhibits.

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Attorney General

³ The Governor's executive staff has advised this office that it was not the Governor's intent to bestow upon the Director of the DNR the authority to impose an admission fee to the museum or its exhibits, if that authority did not exist under current law.