

63107.1

**CONSTITUTIONAL LAW: Election of county officers.**

Article II, Section 5 of the Michigan Constitution of 1963 requires that the first election of county officers shall be held at the general election in November of 1964. A proposal to amend Section 200 of Act 116, P.A. 1954, to hold the first election of county officers at the general election in 1966, is in violation of the Michigan Constitution of 1963.

No. 4201

October 17, 1963.

Hon. Russell H. Strange, Chairman  
Elections Subcommittee on Constitutional Implementation  
House of Representatives  
Lansing, Michigan

You advise me in your recent letter that the Elections Subcommittee on Constitutional Implementation requests my opinion in answer to several questions. You indicate that the Subcommittee has approved a proposed bill draft which would amend Section 200 of Act 116, P.A. 1954, known as the Michigan election law, being C.L.S. 1956 § 168.200 et seq.; M.S.A. 1956 Rev. Vol. § 6.1200 et seq. The amendatory language is capitalized or shown as deleted, resulting in the proposed amended Section 200 of the Michigan election law to read as follows:

“A county clerk, a county treasurer, a register of deeds, a prosecuting attorney, a sheriff, a drain commissioner, a surveyor and 2 coroners shall be elected at each ALTERNATE general November election: ~~Provided, That~~ In any county in which 1 or more of these offices have been or may be abolished, as provided by law, no person shall be elected therefor. The board of supervisors in any county may unite the offices of county clerk and register of deeds in 1 office or separate the same at pleasure.

“THE FIRST ELECTION OF OFFICERS NAMED IN THIS SECTION TO 4 YEAR TERMS SHALL BE HELD AT THE GENERAL ELECTION IN 1966.”

You ask the following questions:

1. Under the new Constitution may the legislature provide that the first election for county officers be held at the general election in 1966?
2. If the first election of county officers is held in 1966, would the present county officers, or their successors in the event of appointment to fill a vacancy, hold over until January 1, 1967?

In the provisions of the State Constitution, the people have not legislated in detail, but generally have set limits upon the authority of the legislature. *Romano v. Auditor General*, 323 Mich. 533 (1949). Thus the Constitution operates as a limitation upon the powers of the legislature. *In re Palm*, 255 Mich. 632 (1931).

Presumably the authority of the legislature to consider the enactment of the proposed amendment to Section 200 of the Michigan election law rests

upon Article II, Section 4 of the Michigan Constitution of 1963, which provides in pertinent part as follows:

“The legislature shall enact laws to regulate the time, place and manner of all nomination and elections, except as otherwise provided in this constitution or in the constitution and laws of the United States.  
\* \* \*”

However, the authority of the legislature to regulate the time, place and manner of elections is subject to other provisions of the Michigan Constitution of 1963, and specifically to Article II, Section 5 thereof which makes explicit reference to and fixes the *time* of the election for county offices.

Article II, Section 5 of the Michigan Constitution of 1963 provides as follows:

“Except for special elections to fill vacancies, or as otherwise provided in this constitution, all elections for national, state, *county* and township *offices* shall be held on the first Tuesday after the first Monday in November in each even-numbered year or on such other date as members of the congress of the United States are regularly elected.” (Emphasis supplied.)

In precise language the people have mandated that an election for county officers be held on the first Tuesday after the first Monday in November of each even-numbered year, or on such other date when members of the Congress of the United States are regularly elected, unless other provisions of the Michigan Constitution of 1963 requires that the election be held on a different date. The first even-numbered year in which the election for county officers must be held under the Michigan Constitution of 1963 is the year 1964.

An examination of the Michigan Constitution of 1963 fails to disclose any provision that would order the first election of county officers to be held at the general election in 1966.

Article VII, Section 4 of the Michigan Constitution of 1963 provides as follows:

“There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deeds and a prosecuting attorney, whose duties and powers shall be provided by law. The board of supervisors in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure.”

These county offices being constitutional and elective, the qualified electors of the county are required to fill them at the first opportunity, being the general election in 1964 as ordered in the Constitution. This right of the electors cannot be taken away from them by the legislature, either directly or indirectly, by an act postponing the choice of the officers until an election at which they might have been elected has passed. *Gemmer v. State, ex rel Stephens*, 71 N.E. 478 (Ind. 1904); *Commonwealth, ex rel. Todd v. Sheatz*, 77 A. 547 (Pa. 1910).

Not only have the people prescribed that the enumerated county officers

be elected by the people but the Constitution directs that they serve terms of four years.

Giving effect to both Article II, Section 5 and Article VII, Section 4 of the Michigan Constitution of 1963, the conclusion is imperative that the county officers listed in Article VII, Section 4 of the Michigan Constitution of 1963 shall be elected at the general election in 1964 to serve terms of four years. *Vetters v. Fowler*, 167 Mich. 499 (1911). It is equally clear that the legislature is without power to determine that they will first be elected at the general election in 1966. As to the county officers designated in the Michigan Constitution of 1963, the proposed amendment to Section 200 of the Michigan election law, supra, must be held to violate the Michigan Constitution of 1963.

Nor does a study of the Schedule and Temporary Provisions of the Michigan Constitution of 1963 demand a different legal conclusion. The Schedule and Temporary Provisions of the Michigan Constitution of 1963 contain the following provisions pertinent to your inquiry:

"Sec. 3. Except as otherwise provided in this constitution, all officers filling any office by election or appointment shall continue to exercise their powers and duties until their offices shall have been abolished or their successors selected and qualified in accordance with this constitution or the laws enacted pursuant thereto."

"Sec. 5. Notwithstanding any other provision in this constitution, the governor, the lieutenant governor, the secretary of state, the attorney general and state senators shall be elected at the general election in 1964 to serve for two-year terms beginning on the first day of January next succeeding their election. The first election of such officers for four-year terms under this constitution shall be held at the general election in 1966."

Under Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963 the people have specified that all officers filling any office by election or appointment shall continue to exercise their powers and duties until their offices shall have been abolished or their successors selected and qualified in accordance with the Constitution or the laws enacted pursuant thereto. Persons presently occupying county offices of sheriff, clerk, treasurer, register of deeds, prosecuting attorney, drain commissioner, surveyor and coroner for each organized county, either elected by the people in November of 1962, or appointed in accordance with law to fill vacancies in those offices since the aforesaid election, have the right to continue to exercise the powers and duties of their offices until their successors are selected and qualified by law. Thus the orderly transition from the Michigan Constitution of 1908 to the Michigan Constitution of 1963 is effected.

It may be argued in light of Section 3 of the Schedule and Temporary Provisions of the Constitution which permits officeholders to continue to exercise their powers and duties until their successors are selected and qualified that the people have conferred implied authority upon the legislature to fix the first election of county officers. The constitutional language "until his successor is elected and qualified" was considered and narrowly construed by the Michigan Supreme Court in *Toy, ex rel. Elliott v. Voelker*,

273 Mich. 205 (1935), and the court concluded that the hold-over term was provided for the benefit of the public and not for the private profit of the officeholder. Thus Section 3 of the Schedule and Temporary Provisions of the Constitution will not allow the hold-over of elected county officers for a period of 2 years until the proposed first election of county officers in 1966.

Therefore, I am unable to find grant of power in the legislature through Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963 by which the legislature could provide for the first election of constitutionally designated county officers at the general election in 1966.

A similar question was presented to the Indiana Supreme Court in *Gemmer v. State*, supra, where the court considered the constitutional provision that a public officeholder shall hold his office until his successor is elected and qualified and found that its purpose was to prevent vacancies in public office, not to confer power upon the legislature to postpone unnecessarily an election of a successor to public office and thereby creating a condition authorizing an officeholder to hold-over after the expiration of his term. The court concluded that such construction of the constitutional provision would result in the mischief of depriving the people from electing their public servants. *Snow v. Keddington*, 195 P. 2d 234 (Utah 1948); see also case annotated in 97 A.L.R. 1428, 1448.

Since the proposal to amend Section 200 of the Michigan election law does not purport to deal with the date that constitutionally designated county officers shall commence their terms upon their election, the decision of the Michigan Supreme Court in *Hunt, ex rel. Snow v. Buhrer*, 133 Mich. 107 (1903), is not applicable, particularly in view of the clear controlling language of Article II, Section 5 and Article VII, Section 4 of the Michigan Constitution of 1963.

Any contention that the people intended to elect the constitutionally enumerated county officers for the first time at the general election in 1966 is completely unsupported by a reading of the provisions of the Michigan Constitution of 1963. Nor is there any basis to contend that such county officers were to be elected for terms of two years at the general election in 1964 and for terms of four years at the general election in 1966. Had the people so intended they would have made express provision therefor in the Schedule and Temporary Provisions as they did in Section 5 thereof relating to the offices of governor, lieutenant governor, secretary of state, attorney general and state senators. Such omission from the Schedule and Temporary Provisions is significant and compels the conclusion that the county officers listed in Article VII, Section 4 of the Michigan Constitution of 1963 are not to be elected for four-year terms at the general election in 1966.

It must be observed that the county offices of drain commissioner, surveyor and coroner are not constitutional offices. A county drain commissioner is provided for in Section 21 of Act 40, P.A. 1956, being C.L.S. 1956 § 280.21; M.S.A. 1960 Rev. Vol. § 11.1021, to be elected by the people to serve a term of two years and until his successor is elected and qualified.

County surveyors, as officers of organized counties, are elected by the

people for terms of two years pursuant to Section 95 of Chapter 14, Revised Statutes 1846, being C.L. 1948 § 54.95; M.S.A. 1961 Rev. Vol § 5.1021. The legislature has provided for the abolition of the office of county surveyor upon approval of the people in counties having a population of 500,000 or more in accordance with Act 196, P.A. 1941, being C.L. 1948 § 54.251 et seq.; M.S.A. 1961 Rev. Vol. § 5.1033 et seq.

The office of county coroner is provided for in Section 86 of Chapter 14 of the Revised Statutes of 1846, being C.L. 1948 § 52.86; M.S.A. 1961 Rev. Vol. § 5.951, and coroners are elected by the people for a term of two years. The office of coroner may be abolished by resolution of the county board of supervisors if the people vote to come under the provisions of Act 181, P.A. 1953, as amended, being C.L.S. 1956 § 52.201 et seq.; M.S.A. 1961 Rev. Vol. § 5.953(1) et seq., or in certain counties having a population of not less than 100,000 nor more than 1,500,000 by action of the county board of supervisors as authorized by Act 143, P.A. 1945, as amended, being C.L. 1948 § 52.141 et seq.; M.S.A. 1961 Rev. Vol. § 5.971(1) et seq.

These statutory county officers must be first elected at the general election to be held in 1964 as prescribed by the people in Article II, Section 5 of the Michigan Constitution of 1963. I find no provision in the Constitution that would empower the legislature to fix the first election of statutory county officers listed in the proposed amendment to Section 200 of the Michigan election law to be held in 1966.

As has been observed, county drain commissioners, surveyors and coroners are elected by the people for terms of two years, in accordance with applicable statute. There appears to be no limitation found in the Michigan Constitution of 1963 upon the authority of the legislature to fix the statutory term of four years for the offices of drain commissioner, surveyor and coroner. Whether the term of office should be changed is in the wisdom of the legislature, but it cannot fix the first election of these officers for the general election to be held in 1966.

The will of the people as expressed in the Michigan Constitution of 1963 is crystal clear. County officers must be elected at the general election to be held in 1964. Those county officers designated in the Constitution are to be elected at that time for a term of four years. Other statutory county officers must be elected at the general election in 1964 for such terms as are provided by law. The will of the people cannot be defeated through amendment of Section 200 of the Michigan election law fixing the first election of county officers in 1966. Therefore, the proposed amendment to Section 200 of the Michigan election law must be ruled as offensive to the Michigan Constitution of 1963 and unconstitutional.

In light of the answer to the first question, it is unnecessary for me to consider your second question.

FRANK J. KELLEY,  
*Attorney General.*