the budget-fixing process for the intermediate school district abrogated the common law principle to the extent that the same person may simultaneously occupy the office of member of a board of education of a local school district within the intermediate district and office of member of the intermediate board of education.

The law is well settled that when a person accepts a second incompatible office he vacates the first office. *Weza v. Auditor General,* 297 Mich. 686 (1941).

It is, therefore, the opinion of the Attorney General that the same person may not simultaneously hold the office of member of a board of education of a local school district and the office of member of the intermediate board of education.

Since the two offices may not be held simultaneously, it becomes unnecessary for me to consider whether or not it is proper for a member of an intermediate board of education, who is also a member of a local board of education of a school district, to take part in matters which deal directly with a school district of which he is president of the board of education.

FRANK J. KELLEY,
Attorney General.

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PROPERTY TAXES: Drain Taxes—A township may spread drain taxes assessed against the township at large upon the taxable property within the township. The township board may provide for the payment of drain assessments at large in any year from the general or contingent fund of the township.

CONSTITUTION: 15-mill Limitation—Drain taxes at large, when levied against the taxable properties within the township, are general ad valorem taxes within the meaning of the tax limitation of Article IX, § 6, Michigan Constitution of 1963.

No. 4438 May 19, 1965.

Mr. Donald A. Burge
Prosecuting Attorney
County Building
Kalamazoo, Michigan

You have requested the opinion of this office relative to drain assessments at large pursuant to the provisions of the drain code of 1956,[1] and specifically, you desire an answer to the following questions:

1. May a tax be levied upon the assessable property within a township to cover the assessment of drain taxes at large against the township?

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[1] Act No. 40, P.A. 1956, as amended, C.L.S. 1961, § 280.1, et seq.; M.S.A. 1960 Rev. Vol., § 11.1001, et seq.

2. Are drain taxes at large levied against taxable properties within a local unit general ad valorem taxes which combined with all other general ad valorem taxes imposed upon such property may not exceed in any one year the tax limitation set forth in Article IX, § 6, Michigan Constitution of 1963?

The drain code of 1956, as well as the drain laws preceding the code, contemplate two distinct types of assessments,[2] i.e., special assessments for benefits to individual parcels of property within the drainage district and/or assessments at large against local units within the drainage district depending upon the type of drainage district and the nature of the project?

The Court states in the case of

City of Lansing v. Township of Lansing, 356 Mich. 641, 661,

"Under C.L.S. 1954, § 270.3 (Stat. Ann. 1952 Rev. § 11.89) the township drain tax at-large is merged with the regular township tax and becomes a part thereof. And that portion of the merged spread at-large township drain tax cannot be returned as unpaid separately from the township tax proper. * * *"

The section,[3] cited within the foregoing quote was the forerunner of § 263 of the drain code of 1956,[4] which, in reference to the drain tax at large, provides in pertinent part:

"It shall be the duty of the supervisor, village or city assessor, to spread on his roll the total amount of all drain taxes determined upon by the county drain commissioner to be assessed upon the county, township, city or village at large by adding to the county, township, city or village tax for the year in which the same was assessed and extending said tax in the same column with the general county, township, city or village tax: * * * Provided further, That in lieu of the addition of such tax to the county, township, city or village tax, the legislative body thereof may in any year provide for the payment thereof from the general or contingent fund of such county, township, city or village. * * *"

Prior to the effective date of Act No. 146, P.A. 1949, drain taxes assessed at large were to be extended against the properties within the local unit. Act No. 146, P.A. 1949, added the alternative method by which the legislative body of a county, township, city or village may, in any year, provide for the payment of at large drain taxes from the general or contingent fund of such local unit. While noting the alternative methods provided by Act No. 146, P.A. 1949, for the payment of drain taxes at large, the court, in the *City of Lansing* case, *supra,* did not pass upon their constitutionality.

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[2] Sec. 262 of Act No. 40, P.A. 1956, as last amended by Act No. 82, P.A. 1963, M.S.A. 1963 Cum. Supp, § 11.1262.

[3] Section 3 of Chapter X of the General Drain Law as amended by Act No. 146, P.A. 1949.

[4] C.L.S. 1961, § 280.263; M.S.A. 1960 Rev. Vol., § 11.1263.

The Court states as follows in the case of

Township of Southfield v. Drainage Board for Twelve Towns Relief Drains, 357 Mich. 59, 75-76:

"The legislature has lately provided that the township board in its discretion may provide for the payment of a township-at-large drain assessment out of the general or contingent fund of the township. C.L.S. 1956, § 280.263 (Stat. Ann. 1957 Cum. Supp. § 11.1263).

"* * *

"The general principle that the legislature has supreme power in matters affecting the public health was stated by Justice COOLEY in *Sheley v. City of Detroit,* 45 Mich. 431, 432, 433, as follows:

" 'The questions, then, are questions of legislative power. Whether this method of apportioning the cost of pavement or of repavement is equitable or just or politic, is in no way involved in this suit, and we should depart from our legitimate province if we were to volunteer an opinion upon it. The legislature, acting within the sphere of its powers in the making of laws, judges, and judges finally, upon all questions of policy and of equity. If the legislature declares the cost shall be collected by general levy, or on the other hand shall be levied upon abutting lots or their owners according to values, or to assessed benefits or to frontage, the determination binds us absolutely and conclusively, provided we discover no want of legislative authority.'

"In adopting section 474 of the drain code the legislature exercised its prerogative that moneys belonging to the township could be used for a health project. * * *"

Although the Supreme Court specifically dealt with the constitutionality of § 474 of the drain code of 1956[5] as to public health, its holding is equally applicable to § 263.[6]

In answer to your first question, it is my opinion that drain taxes at large assessed against a township may be raised by levy upon the assessable property within the township. Further, it is my opinion that in lieu of such levy, the township board may, in any year, provide for payment of the drain taxes at large from the general or contingent fund of the township.

Article IX, § 6 of the Michigan Constitution of 1963, provides in part pertinent to your second inquiry that:

"* * * the total amount of general ad valorem taxes imposed upon real and tangible personal property for all purposes in any one year shall not exceed 15 mills on each dollar of the assessed valuation of property as finally equalized. * * *"

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[5] Section 474 as last amended by Act No. 215, P.A. 1963 [M.S.A. 1963 Cum. Supp., § 11.1474].

[6] In the *Township of Southfield* case, *supra,* 357 Mich 59, 80, it is stated:

"The city of Troy as a unit is responsible for the health of the entire city and each part thereof. Contaminations and diseases do not respect lot lines or even city border lines."

This poignant statement clearly is indicative of the community-wide scope of many problems and benefits connected with drainage.

This constitutional tax limitation continues in substance the 15-mill limitation of Article X, § 21, Constitution of 1908. The Michigan Supreme Court states as follows in the case of

Graham v. City of Saginaw, 317 Mich. 427, 431-433:

"The distinction between taxes levied for general purposes and special assessments is well recognized.

" 'Special assessments are a peculiar species of taxation, standing apart from the general burdens imposed for State and municipal purposes and governed by principles that do not apply universally. The general levy of taxes is understood to exact contributions in return for the general benefits of government, and it promises nothing to the persons taxed, beyond what may be anticipated from an administration of the laws for individual protection and the general public good. Special assessments, on the other hand, are made upon the assumption that a portion of the community is to be specially and peculiarly benefitted, in the enhancement of the value of property peculiarly situated as regards a contemplated expenditure of public funds; and in addition to the general levy, they demand that special contributions, in consideration of the special benefit, shall be made by the persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the time to suffer no pecuniary loss thereby; their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay.' 2 Cooley on Taxation (3d Ed.), p. 1153.

"This distinction was emphasized in *Re Petition of Auditor General,* 226 Mich. 170, where Mr. Justice NELSON SHARPE, speaking for the Court, said:

" 'There is a clear distinction between what are termed general taxes and special assessments. The former are burdens imposed generally upon property owners for governmental purposes without regard to any special benefit which will inure to the taxpayer. The latter are sustained upon the theory that the value of the property in the special assessment district is enhanced by the improvement for which the assessment is made.' (See, also, authorities therein cited.)

"This distinction has been followed by various attorneys general in their advice to those charged with the levying and collection of special assessments. (See Opinions of the Attorney General, November 7, 1933, p. 387, March 7, 1940, April 16, 1940, March 30, 1944, p. 693, and October 17, 1944, 1945-1946, p. 96.) See, also, *Blake v. Metropolitan Chain Stores,* 247 Mich. 73 (63 A.L.R. 1386), and *School District of City of Pontiac v. City of Pontiac,* 262 Mich. 338.

"We must therefore conclude that special assessments are not within the constitutional tax limit of 1½ per cent. of the assessed valuation of property. * * *"

In three of the Attorney General's opinions cited with approval by the

Supreme Court within the foregoing quote,[7] as well as a later opinion, No. 472, dated January 29, 1948 (O.A.G. 1947-1948, p. 367), the Attorney General has held that

(a) Drain taxes asessed against individual parcels for specific benefits constitute special assessments which do not fall within the constitutional 15-mill limitation; and

(b) The drain tax spread at large against taxable properties within a local unit is a general tax which cannot be imposed upon the taxable properties within such unit if such imposition would increase the total burden of general property taxes above the tax limitation.

Under the drain code, assessments at large may be levied against local units irrespective of whether they have or have not any uncommitted millage. The levy against the individual properties within the local unit is, however, only allowable to the extent of available millage within the tax limitation.

There has occurred no change in constitutional or statutory law relative to the effective scope of the property tax limitation which would affect or alter the conclusions announced in the cited opinions.

In answer to your second question, I hold that drain taxes at large levied against taxable properties within a local unit, are general ad valorem taxes, the total amount of which may not exceed the tax limitations set forth in Article IX, § 6, Michigan Constitution of 1963.

FRANK J. KELLEY,
Attorney General.

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[7] Opinion dated November 7, 1933 (O.A.G., 1933-1934, p. 387);
Opinion No. 0-2042, dated March 30, 1944 (O.A.G., 1943-1944, p. 693);
Opinion No. 0-2785, dated October 17, 1944 (O.A.G. 1945-1946, p. 96).