could be held at the same time as the "odd year general election" if the legislature so directs.

3. There is no authority for submission of a proposed constitutional amendment by petition of the people to the electors at such "odd year general election." Proposed constitutional amendments submitted by petition of the people must be voted upon by the electors at the general election required by the people under art. 2, § 5.

4. There is no authority for vacancies in the office of circuit judge to be filled at such "odd year general election." Vacancies in the office of circuit judge must be filled at the general election held in November of 1972 as required by the people in art. 2, § 5.

5. Precinct delegates are officers of political parties, not public officers. O.A.G. 1928-30, p. 195. The Michigan Constitution of 1963 neither provides for their election nor restricts the time of holding elections for such purpose. The matter is entirely one for the legislature. There is no restriction upon the power of the legislature, should it see fit, to enact legislation to require the holding of an election for the purpose of electing precinct delegates, to be held at the same time as "odd year general election" when city officers are elected in certain cities in Michigan.

FRANK J. KELLEY,
Attorney General.

7/0324.1

CONSTITUTIONAL LAW: Equal Protection of the laws.

PUBLIC OFFICES & OFFICERS: Qualifications for.

SCHOOL DISTRICTS: Qualifications for office of member of a board of education.

The statutory requirement of ownership of real or personal property assessed for taxes as a qualification for the office of member of a board of education, as provided in Sec. 492 of the school code of 1955, is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

No. 4723 March 24, 1971.

Hon. Bill S. Huffman
State Representative
The Capitol
Lansing, Michigan

You have requested an opinion determining whether a duly elected school board member who has sold his home in the school district from which he was elected may continue as a school board member in the district. The school board member involved is presently living as a tenant in the home which he previously owned.

1955 P.A. 269, as amended, being M.C.L.A. 340.1 et seq.; M.S.A.

15.3001 et seq., is known as the school code of 1955. Your question is raised because of Sections 492 and 494 of the school code of 1955, supra.

Sec. 492 provides:

> "Any school elector in a school district, who is the owner in his own right of property which is assessed for taxes, shall be eligible to election or appointment to office in such school district: Provided, That where a husband and wife own property jointly, if otherwise qualified, each shall be eligible to appointment or election to school office: Provided further, That in any school district which registers its school electors, if less than 25% of the registered school electors are school tax electors, any qualified school elector is eligible to be elected as a member of the board of education."

Sec. 494 provides, in pertinent part:

> "The office of a member of the board shall become vacant immediately, without declaration by any officer or acceptance by any board or its members, upon any of the following events: . . .
>
> "Eighth, His ceasing to possess the legal qualifications for holding office; . . . "

Your question relates to a school district of the third class. Such a school district is a registration district by virtue of Sec. 110 of the school code of 1955, supra, but if more than 25% of the registered school electors are school tax electors, the last provision of Sec. 492, supra, does not come into play.

The local assessor is unable to determine by his records whether more than 25% of the registered electors of the school district are school tax electors or whether the school board member involved here owns property assessed for taxes in such school district. In light of my conclusions, however, it is unnecessary to determine this fact. Recent Federal court decisions lead to the conclusion that a property requirement for holding the office of school board member is unconstitutional as a violation of the Equal Protection Clause of the United States Constitution.

The question has not been precisely determined in Michigan although the Michigan Supreme Court in *Schweitzer v. Plymouth City Clerk*, 381 Mich. 485 (1969), determined that the provision of the Plymouth City Charter requiring all candidates for elective or appointive city office to own real or personal property assessed for taxes was constitutional. This provision was challenged by residents of Plymouth, who were otherwise qualified to hold office, on the ground that it violated that part of the Fourteenth Amendment to the United States Constitution which provides:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

In deciding the case the Michigan Supreme Court noted that the United States Supreme Court had held that a property requirement for *voting* in certain elections was unconstitutional. In upholding the property requirement for *office holding*, the Michigan court said, at page 491:

> "The application of the equal protection clause to qualifications for holding public office, as opposed to voting, is a step which the United States Supreme Court has not yet taken."

That step was taken in January of 1970 with the decision of the United States Supreme Court in *Turner v. Fouche,* 396 U.S. 346; 90 S. Ct. 532; 24 L Ed. 2d 567 (1970). This case involved a challenge of a Georgia law providing that only owners of real property could serve as school board members. The requirement was struck down as being invidious discrimination which violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The Court pointed out that there are two tests to determine whether a qualification results in invidious discrimination in violation of the Fourteenth Amendment. The first test determines "whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective."[1] Unless the grounds are wholly irrelevant the requirement will be upheld. This test the court called the "traditional" test. The second test is used when a basic right, such as the right to vote, is involved and is more demanding in that it requires a governmental unit to show a "compelling interest" in support of the restrictions.[2] The Court found it unnecessary to determine in the *Turner* case whether the restriction on the right to run for a school board office required application of the "traditional" test or the "compelling interest" consideration, since it ruled that under either standard the requirement of real property ownership would not stand.

In reaching its decision, the Court concluded that persons need not own real property to have a valid interest in the operation of the school system.

> "It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent[3] or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property."[4]

Shortly after the decision in *Turner, supra,* a decision was rendered in *Stapleton v. Clerk for City of Inkster,* 311 F. Supp. 1187 (Ed. Mich., 1970), which was a challenge of the City of Inkster's real property requirement for holding various city offices. Although the Federal District Court determined that the real property requirement met neither the "traditional" nor the "compelling interest" tests, it concluded at page 1190, that in

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[1] *Turner v. Fouche,* supra, at 362; 90 S. Ct. at 541; 24 L. Ed. 2d at 580.

[2] Id.

[3] Michigan law recognizes that when a person rents property he ultimately receives the burden of the taxation of that property. The Income Tax Act of 1967, being 1967 P.A. 281 M.C.L.A. 206.1 et. seq.; M.S.A. 7.557(101) et. seq., at section 258, provides an income tax credit for property taxes paid by the property owner. Recognizing that a tenant indirectly pays property taxes through his rent, a further provision of section 258 allows a credit to persons renting or leasing a homestead by allowing them to list, as their ad valorem tax, 17% of their gross rent paid.

[4] *Turner v. Fouche, supra,* at 363, 364; 90 S. Ct. at 542; 24 L. Ed. 2d at 581.

challenges of qualifications for public office the "compelling interest" standard must be used:

> "It appears to this court that the reasons given for requiring the compelling interest standard in voting cases are equally applicable to cases challenging qualifications for public office; in both situations the challenge is directed to the assumption that the institutions of state government are structured so as to fairly represent all the people. Thus, the City must demonstrate a compelling interest to justify the ownership of real property in the City as a qualification to hold office and the City does not have the advantage of the usual presumption that the Charter is constitutional.
>
> "It also appears to the court that the 'compelling interest' standard must be applied, since this requirement also burdens the voter plaintiffs' right to vote. It is unquestioned that a voter has a constitutionally protected right to vote for the candidate of his choice and to have his votes counted. *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). It is also established, as pointed out previously, that a person has a constitutionally protected right to be considered for public office without the burden of invidiously discriminatory disqualifications. *Turner v. Fouche,* 396 U.S. 346, 362, 90 S. Ct. 532, 24 L. Ed. 2d 567 (1970). It seems clear to this court that a restriction upon who may be a candidate necessarily affects the efficacy of a person's vote. The effectiveness of the franchise can just as certainly be curtailed by restricting the group from whom candidates may be drawn as by restricting those entitled to cast a vote or by malapportioning a legislative body."

No appeal was taken in the *Stapleton* case.

The *Turner* and *Stapleton* decisions, supra, are two of several recent court decisions striking down property ownership or property taxpayer requirements as they pertain to the election process. See, also *Landes v. North Hempstead,* 20 N.Y. 2d 417, 284 N.Y.S. 2d 441; 231 N.E. 2d 120 (1967), (real property ownership qualification for holding city office); *Kramer v. Union Free School District No. 15,* 395 U.S. 621; 89 S. Ct. 1886; 23 L. Ed. 2d 583 (1969), (real property lease or ownership qualification for voting in school district election); *Cipriano v. Houma,* 395 U.S. 701; 89 S. Ct. 1897; 23 L. Ed. 2d 647 (1969), (property taxpayer qualification for voting on revenue bonds); *Phoenix v. Kolodziejski,* 399 U.S. 204; 90 S. Ct. 1990; 26 L. Ed. 523 (1970), (real property taxpayer qualification for voting on general obligation bonds).

The fact that the school code might also allow persons who own personal property, but not real property, to be eligible for the office of school board member does not save the provision. Michigan's General Property Tax Act, 1893 P.A. 206, being M.C.L.A. 211.1 et seq.; M.S.A. 7.1 et seq., is replete with personal property tax exemptions, M.C.L.A. 211.9; M.S.A. 7.9, and as Justice Adams noted in his dissent in *Schweitzer, supra,* at page 498, the property requirement disqualifies many people who have substantial amounts of personal property. The broad scope of the exemption provisions in Michigan's personal property law has therefore deprived any

meaning from the traditional argument that this property qualification reflects on a candidate's stake in and ties to the community.

Applying either the "traditional" or "compelling interest" test to the qualification at hand, the controlling decision of the United States Supreme Court in *Turner v. Fouche, supra,* and the well-reasoned decision of the Federal District Court for the Eastern District of Michigan in *Stapleton v. Clerk for City of Inkster, supra,* require me to conclude that the ownership of real or personal property assessed for taxes in a school district is not a valid requirement for the office of member of a board of education.

Therefore, I am constrained to conclude that the statutory requirement of ownership of real or personal property assessed for taxes as a qualification for the office of member of a board of education, as provided in Section 492 of the school code of 1955, is unconstitutional as violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

FRANK J. KELLEY,
Attorney General.

710406.Z

COMMISSION OF NATURAL RESOURCES: Regulation of oil and gas operations on State owned lands.

SUPERVISOR OF WELLS: Regulation of oil and gas operations.

OIL AND GAS: Discretionary authority of Supervisor of Wells with regard to the issuance of drilling permits.

DRILLING PERMITS: Basis for denial by Supervisor of Wells.

The Supervisor of Wells may regulate or prohibit drilling for oil and gas if such operations cannot be conducted without causing or threatening to cause serious or unnecessary damage to or destruction of the surface, soil, animal, fish or aquatic life and property.

The Commission of Natural Resources may promulgate rules regulating and prohibiting the drilling for oil and gas on lands owned by the State and under the control and supervision of the Commission, when necessary to protect such lands from molestation, spoliation, destruction or depredation.

No. 4718 April 6, 1971.

Dr. Ralph A. MacMullan, Director
Michigan Department of Natural Resources
Stevens T. Mason Building
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You have requested my opinion on the following question:

". . . whether or not the environmental encroachment that would be caused by drilling operations on leased State lands in areas valuable for aesthetic and game propagation purposes is sufficient reason for