

government and shall not be transferred to or mingled with other funds of the county. Said funds shall be used exclusively for carrying out the purposes of this act: * * *."

In the enumeration of moneys to be deposited in the county social welfare funds the following appears:

"(c) all refunds and collections arising out of reimbursements to the county department of social welfare; and (d) all funds made available to the county department from any other source whatsoever."

These provisions appear to me to be broad enough to cover any rental income received from property conveyed by a person receiving hospitalization under the provisions of the Social Welfare Act. Also income from farms operated by the county social welfare department would be similarly covered. Amounts received as refunds or as reimbursement from responsible relatives would be required to be deposited in the county social welfare fund. Accordingly, under the language of Section 73 all such moneys could only be expended for the purposes of the Social Welfare Act.

I answer your sixth question as I have interpreted it by saying that there is no authority under the law for the county social welfare board to create a special building or improvement fund by transferring to such a fund reimbursements received from indigents and/or relatives or reimbursements for relief funds expended. Act 177 P.A. 1943 as amended permits only the legislative or governing body of a political subdivision to create a special building fund and the county social welfare board does not fall in either of those categories. Neither does the Social Welfare Act itself authorize the county social welfare board to create such a fund. Therefore statutory authority is lacking and the county social welfare board may not create a special building fund either with or without specific authority from the county board of supervisors.

FRANK J. KELLEY,
Attorney General.

641217.2

GOVERNOR: Power to appoint State Treasurer, acting State Treasurer and acting Auditor General.

Power to reorganize executive departments.

STATE TREASURER: Status of incumbent.

AUDITOR GENERAL: Status of incumbent.

LEGISLATURE: Power to reorganize executive departments.

There is presently no vacancy in the office of State Treasurer and the Governor is without lawful authority to fill such office at this time.

The Governor is without power to fill the constitutional office of State Treasurer until the legislature by act or the Governor by appropriate order has initially allocated executive and administrative offices and agencies into not more than twenty departments and has created a department of which the State Treasurer is the single executive head, or the legislature on or after January 1, 1965 abolishes the powers and duties of the incumbent State Treasurer and creates a statutory office of State Treasurer to be filled by appointment of the Governor.

If the incumbent State Treasurer chooses to resign prior to January 1, 1965, the Governor is authorized by law to appoint a successor for the unexpired term, to hold the office of State Treasurer until the legislature abolishes that office or until the constitutional office of State Treasurer, provided in Article V, Sec. 3 of the Michigan Constitution of 1963, comes into being as a single executive heading a principal department.

If the incumbent State Treasurer resigns on or after January 1, 1965, the Governor under his authority as the repository of the executive power is authorized to appoint an acting State Treasurer to serve at the pleasure of the Governor and until the legislature abolishes that office or the constitutional office of State Treasurer as set forth in Article V, Sec. 3 of the Michigan Constitution of 1963 may be filled by appointment of the Governor by and with the advice and consent of the senate.

If the incumbent Auditor General resigns prior to January 1, 1965, the Governor is empowered to appoint a successor for the balance of his unexpired term. Such successor would hold office until the office of Auditor General is abolished or its duties are incorporated in one or more principal departments under executive reorganization as set forth in Article V, Sec. 2 and Sec. 3 and 12 of Schedule and Temporary Provisions of the Michigan Constitution of 1963.

Appointment of a successor State Treasurer or acting State Treasurer or a successor Auditor General or acting Auditor General as the case may be, is not subject to advice and consent of the senate.

If the incumbent Auditor General should resign on or after January 1, 1965, the Governor may appoint an acting Auditor General to serve at the pleasure of the Governor or until the legislature abolishes his office or his duties are incorporated in one or more principal departments or abolished. The appointment of the legislative Auditor General authorized in Article IV, Sec. 53 of the Michigan Constitution of 1963 would relieve the incumbent Auditor General or his successor from post-audit and performance post-audit of state departments and agencies only, and the said Auditor General would remain in office until his office is abolished or all of his duties were incorporated in one or more departments or abolished.

The Michigan Constitution of 1963 contemplates initial allocation of executive and administrative offices into not more than twenty departments as one act of the legislature or one action by the Governor.

No. 4403

December 17, 1964.

The Honorable George Romney
Governor of Michigan
Lansing, Michigan

You ask my opinion on the following question:

Whether the State Treasurer's appointment could be announced to become effective on January 1, 1965?

Under the Michigan Constitution of 1908, the people provided for the constitutional office of State Treasurer in Article VI, Section 1, to be filled by election at the general biennial election for a term of two years com-

mencing the first day of January next succeeding his election, as specified in Article XVI, Section 1.

The legislature has provided in Section 79 of Act 116, P.A. 1954, being C.L.S. 1961 § 168.79; M.S.A. 1956 Rev. Vol. § 6.1079, that the term of the office of State Treasurer shall commence on January 1 next following the election and "shall continue until a successor is elected and qualified." This provision of law must be considered a part of the term of the office of the incumbent State Treasurer.

The incumbent State Treasurer was elected by the people at the biennial election held in November of 1962 for a term of two years, commencing January 1, 1963 and continuing until a successor is elected and qualified, and the incumbent presently occupies that office.

Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963 provides:

"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.

"No provision of this constitution, or of law or of executive order authorized by this constitution shall shorten the term of any person elected to state office at a statewide election on or prior to the date on which this constitution is submitted to a vote. In the event the duties of any such officers shall not have been abolished or incorporated into one or more of the principal departments at the expiration of his term, such officer shall continue to serve until his duties are so incorporated or abolished."

Section 79 of Act 116, P.A. 1954 was amended by Act 4, P.A. 1963, Second Extra Session, to delete the office of State Treasurer therefrom, but such amendment cannot constitutionally shorten the term of office of the incumbent State Treasurer.

It is clear that the present incumbent State Treasurer is entitled to occupy his office until his office is abolished or his successor is selected and qualified in accordance with law, but neither the constitution, the law nor any executive order shall shorten his term.

It must follow that there is presently no vacancy in the office of State Treasurer and the Governor has no power to fill such an office at this time.

The legislature has not abolished the powers and duties of the office of State Treasurer. Nor has the legislature created a statutory office of State Treasurer.

The people have provided for the office of State Treasurer in the following constitutional language found in Article V, Section 3:

"The head of each principal department shall be a single executive unless otherwise provided in this constitution or by law. The single executives heading principal departments shall include a secretary of state, a state treasurer and an attorney general. When a single executive is the head of a principal department, unless elected or appointed as otherwise provided in this constitution, he shall be appointed by

the governor by and with the advice and consent of the senate and he shall serve at the pleasure of the governor.

"When a board or commission is at the head of a principal department, unless elected or appointed as otherwise provided in this constitution, the members thereof shall be appointed by the governor by and with the advice and consent of the senate. The term of office and procedure for removal of such members shall be as prescribed in this constitution or by law.

"Terms of office of any board or commission created or enlarged after the effective date of this constitution shall not exceed four years except as otherwise authorized in this constitution. The terms of office of existing boards and commissions which are longer than four years shall not be further extended except as provided in this constitution."

The principal departments referred to in Article V, Section 3 are to be established in accordance with Article V, Section 2, but neither the legislature nor the Governor may exceed the constitutional limitation of twenty departments. For the power of the Governor over the initial allocation of executive and administrative offices and agencies into not more than twenty departments, see Section 12 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963.

It must follow that the office of State Treasurer does not come into being until the legislature or the Governor, as the case may be, initially allocates executive and administrative offices and agencies into not more than twenty principal departments and creates a department of which the State Treasurer is the single executive head. When this is done, the power of the Governor to fill the office of State Treasurer may be exercised in accordance with Article V, Section 3 of the Michigan Constitution, and not before.

The language of the Constitution and the pertinent debates of its framers support this conclusion.

It must also be observed that the clear intent of the constitutional convention and the people in ratifying the Constitution was to require the initial allocation of executive and administrative offices and agencies into not more than twenty departments as one act of the legislature or one action by the Governor.

Therefore, the Governor is without lawful authority to fill the office of State Treasurer until the legislature by act or the Governor by appropriate order has initially allocated executive and administrative offices and agencies into not more than twenty departments and has created a department of which the State Treasurer is the single executive head, or the legislature abolishes the powers and duties of the incumbent State Treasurer and creates a statutory office of State Treasurer to be filled by appointment by the Governor.

These rulings, which have heretofore been communicated to you in writing, give rise to the following questions upon which you request my opinion:

1. If the State Treasurer resigns prior to December 31, 1964, can the Governor appoint a successor and will this successor hold office

until the Office of State Treasurer is either abolished or incorporated into one of the 20 principal departments?

"2. If the Auditor General resigns prior to December 31, 1964 can the Governor appoint a successor to the office of Auditor General, and does this successor hold office until the office of Auditor General is either abolished or incorporated into one of the 20 principal departments?

"3. If the State Treasurer resigns subsequent to January 1, 1965 can the Governor appoint an acting State Treasurer and what is his tenure on this office?

"4. If the Auditor General resigns subsequent to January 1, 1965 can the Governor appoint an acting Auditor General and what is his tenure on this office?

"5. If the Legislature appoints a legislative auditor as provided in the 1963 Constitution, and said legislative auditor assumes his duties, will either the Auditor General, if one is appointed prior to December 31, 1964 or an acting Auditor General, if one can be appointed after January 1, 1965, continue to remain in office to perform those duties which cannot constitutionally be performed by the legislative auditor? If said officer can remain in office how long does he hold this office?

"6. Which of the foregoing appointments, if they can be made, are subject to confirmation by the Senate?"

1. Your first question makes reference to the incumbent State Treasurer who presently occupies that office and is premised upon the assumption that he will resign his office prior to January 1, 1965. He was elected to the constitutional office of State Treasurer at the general biennial election held in November 1962 for a term of two years as required by Article VI, Sec. 1 of the Michigan Constitution of 1908. In accordance with Article XVI, Sec. 1, the term of his office commenced on January 1, 1963.

Section 79 of Act 116, P.A. 1954, supra, provided in the case of the State Treasurer that the term of his office "shall continue until a successor is elected and qualified."

The Michigan Supreme Court has held that the statutory provision that an elective officer shall hold office until his successor is elected and qualified is a part of his term of office. *Common Council of Detroit v. Schmid*, 128 Mich. 379 (1901); *Doyle v. Election Commission of City of Detroit*, 261 Mich. 546 (1933). While the legislature has amended Sec. 79 of Act 116, P.A. 1954, supra, through Act 4, P.A. 1963, Second Extra Session, being M.S.A. Cur. Mat. § 6.1079, to delete the office of State Treasurer therefrom, such legislative action cannot shorten the term of incumbent State Treasurer in light of the mandate contained in Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963, which provides that "no provision of this constitution, or of law or of executive order authorized by this constitution shall shorten the term of any person elected to a state office at a statewide election on or prior to the date on which this constitution is submitted to a vote." This portion of the Constitution also provides 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 this constitution or the laws enacted pursuant thereto."

Section 79 of Act 116, P.A. 1954, supra, would appear to confer upon the State Treasurer the right to hold over in his office until a successor is elected and qualified. Of course the Constitution does not contemplate the election of a successor. Reliance is placed upon the holding over afforded by Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963, which specifies 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. Thus, it is clear that the incumbent State Treasurer has the lawful right to continue in office after December 31, 1964.

The legislature has neither abolished the office of State Treasurer effective on or after January 1, 1965 nor has it created a statutory office of State Treasurer and transferred the duties of the incumbent State Treasurer to that office.

It is abundantly clear that when the people in Article V, Sec. 3 of the Michigan Constitution of 1963 provided for the constitutional office of State Treasurer they did not contemplate that office coming into being until either the legislature or the Governor had allocated all of the executive or administrative offices, agencies and instrumentalities in the executive branch into not more than 20 principal departments as required by Article V, Sec. 2 and Sec. 12 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963, in that the single executive heading one of such principal departments was to be the State Treasurer. Until this event takes place in the absence of the legislature abolishing the office of State Treasurer and/or creating a statutory office of State Treasurer but only if such action is taken after January 1, 1965, the incumbent State Treasurer was to continue in office.

If the State Treasurer should resign prior to January 1, 1965, a vacancy in the office of State Treasurer would exist with an unexpired term of office ending December 31, 1964 or until his successor is elected and qualified under Sec. 1 of Act 199, P.A. 1923, being C.L. 1948 § 201.31; M.S.A. 1956 Rev. Vol. § 6.711, the vacancy in the office of State Treasurer is subject to the power of the Governor to fill such vacancy by appointment for the remainder of the unexpired term of such office.

Therefore, it is the opinion of the Attorney General that should the incumbent State Treasurer choose to resign prior to January 1, 1965, the Governor is authorized by law to appoint a successor to hold the office of State Treasurer until the legislature abolishes that office or until the constitutional office of State Treasurer, contemplated in Article V, Sec. 3 of the Michigan Constitution of 1963, comes into being as the single executive heading a principal department which is one of 20 departments allocated by law by action of the legislature or by order of the Governor pursuant to the Michigan Constitution of 1963.

2. Your second question is premised upon the assumption that the incumbent Auditor General will resign his office prior to January 1, 1965.

The incumbent Auditor General was elected by the people at the general election held in November 1962 to the constitutional office of Auditor

General for a term of two years as required by Article VI, Section 1 of the Michigan Constitution of 1908. His term of office commenced on January 1, 1963 in accordance with Article XVI, Section 1 of the Michigan Constitution of 1908.

As specified in Section 79 of Act 116, P.A. 1954, *supra*, the term of office of the incumbent Auditor General continues until a successor is elected and qualified. This statutory provision must be considered a part of the term of his office. *Common Council of Detroit v. Schmid, supra; Doyle v. Election Commission of the City of Detroit, supra.*

Although the legislature amended Section 79 of Act 116, P.A. 1954, *supra*, through Act 4, P.A. 1963, Second Extra Session, *supra*, to delete therefrom the office of Auditor General, such legislative action does not serve to shorten the term of the incumbent Auditor General in light of Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963, *supra*.

Section 79 of Act 116, P.A. 1954, *supra*, would appear to confer upon the Auditor General the right to hold over in his office until a successor is elected and qualified. Of course the Constitution does not contemplate the election of a successor. Reliance is placed upon the holding over afforded by Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963, which specifies 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. Thus, it is clear that the incumbent Auditor General has the lawful right to continue in office after December 31, 1964.

Should the incumbent Auditor General resign prior to January 1, 1965 a vacancy in that office would exist and the Governor, under authority vested in him by Section 1 of Act 199, P.A. 1923, *supra*, could fill the vacancy in that state office for the remainder of the unexpired term of such office.

The legislature has not abolished the office of Auditor General.

In accordance with Section 3 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963, the Auditor General is empowered to exercise his powers and duties until his office has been abolished. The successor to the Auditor General, appointed prior to January 1, 1965, would stand in the shoes of the incumbent Auditor General. The legislature would be free to abolish the office of Auditor General at any time on or after January 1, 1965.

Unlike the office of State Treasurer contemplated by Article V, Section 3 of the Michigan Constitution of 1963, the people have made no similar provision for the office of Auditor General. On the contrary, the duty to conduct post audits and performance post audits of all branches, departments, offices, boards, commissions, agencies, authorities and institutions of the state is vested by Article IV, Sec. 53 of the Michigan Constitution of 1963 in an Auditor General that is appointed by the legislature. The office of Auditor General provided for in Article V, Sec. 1 of the Michigan Constitution of 1908 may be abolished by act of the legislature.

Therefore, it is the opinion of the Attorney General that in the event the incumbent Auditor General resigns prior to January 1, 1965 the

Governor is empowered to appoint a successor to the office of Auditor General and the successor will hold office until the office of Auditor General is abolished or its duties are transferred to some other officer or all his duties are incorporated into one or more principal departments or abolished.

3. If the incumbent State Treasurer resigns on or after January 1, 1965 the power of the Governor to fill such a vacancy cannot rest upon Section 1 of Act 199, P.A. 1923, supra, for the reason that the authority of the Governor to fill such vacancy by appointment would be for the remainder of the unexpired term. Such term would have expired at midnight on December 31, 1964.

It is equally clear that the people in approving the Michigan Constitution of 1963 did not contemplate by its terms to abolish the office of State Treasurer prior to the time that the legislature or the Governor reorganized the executive and administrative offices, agencies and instrumentalities of the executive branch of state government among and within not more than 20 principal departments. Upon such reorganization the single executive head in one of the principal departments would be a State Treasurer appointed by the Governor by and with the advice and consent of the Senate under Section 3 of Article V of the Constitution. At the same time it should be observed that the people did not, under the terms of the Constitution, bar the legislature from abolishing that office and creating a statutory one so long as such action did not take place during the term of the incumbent State Treasurer as required in Section 3 of the Schedule and Temporary Provisions of the Constitution.

Thus, the office of State Treasurer continues until such time as the legislature abolishes it on or after January 1, 1965, or the legislature or the Governor reorganizes the executive and administrative offices, agencies and instrumentalities of the executive branch of state government among and within not more than 20 principal departments as set forth in Article V, Section 2 and Section 12 of the Schedule and Temporary Provisions of the Michigan Constitution of 1963.

While the *de jure* office of State Treasurer continues, there is no provision in law for the *de jure* appointment of the successor to the State Treasurer if he should resign on or after January 1, 1965.

Considerations of necessity and public policy require that an acting State Treasurer who shall be State Treasurer *de facto* to the *de jure* office of State Treasurer be appointed to discharge the duties of State Treasurer. *Carleton v. People*, 10 Mich. 250 (1862). This power of appointment of an acting State Treasurer must be found in the Governor under grant of Article V, Section 1 of the Michigan Constitution of 1963 where the executive power is vested in the Governor. Necessity requires such action since the State Treasurer's office must be filled in order to conduct the public business and the person appointed by the Governor to be Acting State Treasurer would serve at the will of the Governor.

Therefore, it is the opinion of the Attorney General that if the incumbent State Treasurer resigns on or after January 1, 1965, the Governor may appoint an acting State Treasurer to serve at the pleasure of the Governor since there is no term for such officer fixed by law. At the pleasure of the Governor, he would continue to serve until the legislature abolishes

his office or the legislature or the Governor establishes not more than 20 principal departments, of which the State Treasurer is the single executive.

4. The reasoning employed in answering question 3 is applicable also to answer your fourth question. Under such reasoning the Governor could appoint an acting Auditor General to replace the incumbent Auditor General who would resign on or after January 1, 1965. No purpose would be served to restate such reasons. The acting Auditor General so appointed would serve at the pleasure of the Governor or until the legislature abolished his office or his duties are incorporated in one or more principal departments or abolished.

5. In Opinion No. 4284, dated February 18, 1964, the Attorney General ruled that the people have commanded in Article IV, Section 53, of the Michigan Constitution of 1963, that the appointed Auditor General shall perform only such duties as are specified in the Michigan Constitution. These functions concern themselves with post audits and performance post audits of state agencies and departments. The incumbent Auditor General is charged by the legislature with certain statutory duties that are unrelated to post audits or performance post audits of state agencies and departments. For example, the duty of the Auditor General to approve Plats is found in Section 34 of Act 172, P.A. 1929, as amended, being C.L.S. 1961 § 560.34; M.S.A. 1953 Rev. Vol. Cum. Supp. § 26.464. The duties of the Auditor General under the General Property Tax Law are generally set forth in Section 124 of Act 206, P.A. 1893, as amended, being C.L. 1948 § 211.124; M.S.A. 1960 Rev. Vol. § 7.178. Other statutory duties of the Auditor General may be found in appropriate statutes and need not be recited here in full.

The statutory duties of the incumbent Auditor General which do not concern post audits or performance post audits of state agencies and departments are to be performed by the Auditor General appointed by the Governor to succeed the incumbent Auditor General if the appointment is made prior to January 1, 1965 or by the acting Auditor General if he is appointed on or after January 1, 1965 until such time as the legislature abolishes the office of Auditor General, or such duties of the office are incorporated into one or more principal departments or abolished. Until such time as the legislature lawfully appoints the legislative Auditor General and he qualifies for that office pursuant to Article IV, Section 53, the incumbent Auditor General, or his successor, shall continue to conduct audits and post audits of state agencies and departments.

6. If either the incumbent State Treasurer or incumbent Auditor General resigns prior to January 1, 1965 the Governor is empowered to appoint a successor for the remainder of the unexpired term of such offices pursuant to Section 1 of Act 199, P.A. 1923, *supra*. Such appointments are not subject to the advice and consent of the Senate under the Michigan Constitution or law.

Appointment of an acting State Treasurer and an acting Auditor General, if made on or after January 1, 1965, does not require the advice and consent of the Senate under the Michigan Constitution and law.

FRANK J. KELLEY,
Attorney General.