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**STATE HIGHWAY COMMISSION: Powers of members of
SENATE: Advice and consent to appointments of governor.**

Where the governor appoints the members of the state highway commission at a time when the senate is not in session, such members upon filing of oath of office may exercise the powers and duties of their offices. The appointment of members of the state highway commission by the governor is not complete until the senate gives its advice and consent to the appointment as defined in Article V, Sec. 6, Michigan Constitution of 1963. Members of the state highway commission appointed by the governor while the senate is not in session may appoint a state highway director or an acting state highway director.

In the event the senate were to disapprove the appointments of members of the state highway commission, the state highway director or acting state highway director appointed by such members could continue to serve in the respective office until the lawfully constituted state highway commission removed the state highway director or acting state highway director from office or the removal was as otherwise provided by law.

No. 4406

December 30, 1964.

Mr. John C. Mackie
State Highway Commissioner
Stevens T. Mason Building
Lansing, Michigan

You have requested my opinion on the following questions:

"1. Can the Highway Commission be legally appointed between sessions of the Senate?

"2. Can the Highway Commission assume legal jurisdiction after my resignation but prior to their (the Commission's) confirmation?

"3. If the answer to question No. 2 is 'yes,' what continuity of authority would the Highway Department have if the Commission was then not confirmed?

"4. If the answer to question No. 2 is 'no,' who heads the Highway Department after I take the oath of office as congressman?

"5. If the Highway Commission is authorized prior to confirmation and this Commission appoints a highway director, does the highway director continue in office even though the Commission is later rejected by the Senate?

"6. If the Highway Commission is authorized prior to confirmation and this Commission appoints an *acting* director, does the *acting* highway director continue in office even though the Commission is later rejected by the Senate?"

Article V, Section 28 of the Michigan Constitution of 1963 provides as follows:

"There is hereby established a state highway commission, which shall administer the state highway department and have jurisdiction

and control over all state trunkline highways and appurtenant facilities, and such other public works of the state, as provided by law.

"The state highway commission shall consist of four members, not more than two of whom shall be members of the same political party. They shall be appointed by the governor by and with the advice and consent of the senate for four-year terms, no two of which shall expire in the same year, as provided by law.

"The state highway commission shall appoint and may remove a state highway director, who shall be a competent highway engineer and administrator. He shall be the principal executive officer of the state highway department and shall be responsible for executing the policy of the state highway commission."

The statutory office of the state highway commissioner is created by the legislature pursuant to Sec. 2, Chapter V of Act 283, P.A. 1909, as amended, being C.L.S. 1961 § 225.2; M.S.A. 1963 Cum. Supp. § 9.202. This statute requires that he be elected by the people in the same manner and at the same time as justices of the supreme court are nominated and elected. His term of office shall be four years and until his successor is duly elected and qualified, to commence on July 1, following the date of his election. You, as the present incumbent State Highway Commissioner, were last elected for a four-year term commencing July 1, 1961 and expiring June 30, 1965 or until your successor is duly elected and qualified.

Section 3 of the Schedule and Temporary Provisions the Michigan Constitution of 1963 specifies, except as otherwise provided in the Michigan Constitution of 1963, all officers filling any office by election or appointment shall continue to exercise their powers and duties until their office shall have been abolished or their successors selected and qualified in accordance with this Constitution and laws enacted pursuant thereto. Further, no provision of the Constitution of 1963 or of law or of executive order authorized by the Constitution shall shorten the term of any person elected to state office at a statewide election held on or prior to the date the Constitution was submitted to the vote of the people. In the event the duties of such officers shall not have been abolished or incorporated into one or more principal departments at the expiration of his term, such officer shall continue to serve until his duties are so incorporated or abolished.

Act 286, P.A. 1964, being M.S.A. Curr. Mat. § 9.216(1) et seq., provides for the organization of the state highway commission. Section 2 of this act abolishes the office of state highway commissioner and the powers and duties of that office are transferred to and vested in the state highway commission.

Under Section 3 of the act "(t)he governor with the advice and consent of the senate shall appoint the first members of the commission for terms of 1, 2, 3 and 4 years commencing on July 1, 1964."

Section 6 of the act provides as follows:

"Before assuming the powers and duties of the present state highway commissioner the commission shall meet at least monthly at the call of the state highway commissioner and shall have the following powers and duties:

"(a) To consult with the state highway commissioner and serve as members of the advisory board created by section 2a of chapter 5 of Act No. 283 of the Public Acts of 1909, being section 225.2a of the Compiled Laws of 1948, the membership of which board is hereby increased to 9.

"(b) To request information from the state highway commissioner concerning highway matters.

"(c) To assist in the preparation of budget requests for the fiscal year commencing July 1, 1965.

"(d) To designate the director whose employment will not begin until the commission assumes the powers and duties of the present state highway commissioner."

In Section 7 the legislature has listed the powers and duties of the state highway commission to be exercised after the state highway commission assumes all of the powers and duties of the state highway commissioner.

Section 2 of Chapter V of Act 283, P.A. 1909, as amended, supra, which creates the office of state highway commissioner, is expressly repealed by Section 15 of the act.

Section 16 of the act provides as follows:

"Sections 2, 5, 7, 8, 9, 10, 13, 14 and 15 of this act shall take effect on July 1, 1963, or when the present state highway commissioner no longer holds his office, whichever occurs first."

On November 13, 1964 the Governor appointed Ardale W. Ferguson as a member of the State Highway Commission for a term expiring June 30, 1968, Wallace D. Nunn as a member of the State Highway Commission for a term expiring on June 30, 1967, Charles Hewitt as a member of the State Highway Commission for a term expiring on June 30, 1966, and Richard F. VanderVeen as a member of the State Highway Commission for a term expiring on June 30, 1965. Such appointments were made subsequent to the adjournment sine die of the Michigan Legislature in the year 1964.

The State Highway Commission has met and appointed Howard E. Hill as Acting Highway Director.

1. Turning to your first question, you ask whether the members of the state highway commission may be legally appointed between sessions of the senate.

In Article V, Sec. 28 of the Michigan Constitution of 1963, the people have by constitutional provision created the state highway commission and have established the office of member of the state highway commission. They have also mandated that the governor shall appoint the members of the state highway commission by and with the advice and consent of the senate.

The Michigan Constitution of 1963 took effect on January 1, 1964. At that time the office of member of the state highway commission had legal effect by virtue of the Constitution and the governor was free to exercise his power of appointment to fill such office.

Where the power of appointment to fill a vacancy in office is conferred

upon the governor subject to the advice and consent of the senate, the power of appointment is in conjunction with the senate and may not be exercised by one branch of the government to the exclusion of another. Thus, the appointment does not become complete until the senate acts finally upon the appointment. *Attorney General, ex rel McKenzie v. Warner*, 299 Mich. 172 (1941).

The Michigan Constitution of 1908 provided in Article VI, Section 10 that whenever a vacancy shall occur in any state office the governor shall fill the same by appointment by and with the advice and consent of the senate, if in session. The Attorney General has construed this constitutional provision to mean that where an appointment is made by the governor, subject to the advice and consent of the senate, the act of appointment is not completed until the senate has taken affirmative action on the appointment. However, if the senate was not in session at the time the governor exercised the power of appointment, the appointee could assume his office upon the filing of the oath of office. O.A.G. No. 648, 1947-1948, page 522; O.A.G. No. 1341, 1951-1952, page 153; O.A.G. No. 1411, 1951-1952, page 259.

The people have defined the term "appointment by and with the advice and consent of the senate," found in Article V, Section 6 of the Michigan Constitution of 1963, to mean "appointment subject to disapproval by a majority vote of the members elected to and serving in the senate if such action is taken within 60 session days after the date of such appointment. Any appointment not disapproved within such period shall stand confirmed."

In my opinion No. 4329, dated November 3, 1964, the phrase "session days" as found in Article V, Section 6, was ruled to include the day that the legislature convenes in regular or special session and the day the legislature adjourns the regular or special session without day, and all intervening days, including Sundays. In this same opinion the ruling was also made that the people have barred interim appointments of persons to fill vacancies in office requiring the advice and consent of the senate only when the senate has previously disapproved the appointment. The prohibition against an interim appointment of a person whose appointment has been disapproved by the senate is found in Article V, Section 7 of the Michigan Constitution of 1963, which reads as follows:

"Vacancies in any office, appointment to which requires advice and consent of the senate, shall be filled by the governor by and with the advice and consent of the senate. A person whose appointment has been disapproved by the senate shall not be eligible for an interim appointment to the same office."

It must follow that Article V, Section 28 of the Michigan Constitution of 1963 empowers the governor to appoint the original members of the state highway commission by and with the advice and consent of the senate although these appointments are not completed until the senate gives its advice and consent, as defined in Article V, Section 6. Because the governor has exercised his power of appointment while the senate was not in session, the persons appointed to the office of member of the state highway commission, upon filing of oath as required by Article XI, Section 1 of the Mich-

igan Constitution of 1963, may enter into their respective offices and exercise the powers and duties thereof.

Therefore, in answer to your first question, it is the opinion of the Attorney General that the governor is empowered, under Article V, Section 28 of the Michigan Constitution of 1963, to appoint the members of the state highway commission by and with the advice and consent of the senate. Until the advice and consent of the senate, as defined in Article V, Section 6 of the Michigan Constitution of 1963 is obtained, such appointments are not complete. Because the governor appointed the original members of the state highway commission when the senate was not in session, such members may assume their offices upon filing of the oath of office.

2. In Act 286, P.A. 1964, *supra*, the legislature has conferred certain powers upon the state highway commission to be exercised prior to the time that the commission assumes your powers and duties as the present state highway commissioner. These powers and duties are set forth in Section 6 of the act, *supra*. The powers and duties of the highway commission to be exercised by the commission after it assumes your powers and duties as state highway commissioner are found in Section 7 of the act, *supra*. It should be noted that one of the powers that may be exercised by the state highway commission prior to the time that the commission assumes the powers and duties of the present state highway commissioner is to designate the director whose employment will not begin until the commission assumes the powers and duties of the present state highway commissioner. The power to appoint a director is set forth in Section 6 (d) of the act, *supra*.

In answer to your first question, the ruling was made that a person appointed to the office of member of the state highway commission by the governor during the time the senate was not in session can, upon filing an oath of office, assume the powers and duties of the office.

In the event that you should resign as state highway commissioner, Section 16 of the act, *supra*, makes effective Sections 2, 5, 7 and 15 of the act. Under Sections 2 and 15 the office of state highway commissioner is abolished and the powers and duties of that office are transferred to and vested in the commission. The power to appoint a director is vested in the commission under Section 5 of the act, and as set forth in Section 7 the powers and duties of the state highway commission to be exercised after assuming all of the powers and duties of the state highway commissioner are enumerated. All of the aforesaid powers, as found in Article V, Section 28 and Act 286, P.A. 1964, *supra*, are subject to exercise by the members of the state highway commission until such time as the senate may pass adversely upon their appointments in accordance with the definition of advice and consent found in Article V, Section 6 of the Michigan Constitution of 1963. *Attorney General ex rel Eaves, v. State Bridge Commission*, 277 Mich. 373 (1936).

Therefore, in answer to your second question, it is the opinion of the Attorney General that the members of the state highway commission are possessed of power conferred upon it by Article V, Section 28 and Act 286, P.A. 1964, *supra*, prior to the advice and consent by the senate to the

appointment of the members of the state highway commission made by the governor while the senate was not in session.

3. In the event that the senate disapproves the appointment of all four members of the state highway commission, in accordance with the definition of advice and consent as set forth in Article V, Section 6 of the Michigan Constitution of 1963, the appointment of the aforesaid members would not be completed and they could no longer hold office as member of the state highway commission. In addition, in the event such offices were vacant upon recess of the senate, none of the persons disapproved by the senate could receive interim appointments to the office of member of state highway commission.

Upon such disapproval, the offices of member of the state highway commission, as provided for in Article V, Section 28, supra, would be vacant and would be subject to appointment by the governor, by and with the advice and consent of the senate.

Since the state highway commission has appointed an acting state highway director, he would function as the principal executive officer of the state highway department and afford continuity to that department should the senate choose to disapprove all four members appointed to the office of member of the state highway commission.

4. Since the answer to your second question is in the affirmative, no answer is required to your fourth question.

5. Article V, Section 28 of the Michigan Constitution of 1963 empowers the state highway commission to appoint and to remove a state highway director.

Section 5 of Act 286, P.A. 1964, supra, provides that the state highway director shall be appointed and may be removed by the affirmative vote of three members of the commission and shall serve at the pleasure of the commission.

The power to appoint a state highway director is vested in the state highway commission and is subject to be exercised by it even though the senate has not given advice and consent in accordance with Article V, Section 6 of the Michigan Constitution of 1963. *Attorney General ex rel Eaves, State Bridge Commission*, supra.

The lawful action of the state highway commission appointing a state highway director would be a binding act since it is within the clear scope of authority of the commission. See *Hudson Motor Car Co. v. City of Detroit*, 282 Mich. 69 (1937).

Should the senate subsequently disapprove the appointment of the members of the state highway commission, the state highway director could continue in office until the lawfully constituted state highway commission would remove him from office.

Therefore, it is the opinion of the Attorney General that should the state highway commission appoint a director and subsequently the appointments of the members of such commission are disapproved by the senate, the state highway director could continue in his office until the lawfully constituted state highway commission voted to remove him from office or he was otherwise removed from office in accordance with law.

6. The state highway commission has appointed Mr. Howard E. Hill as the acting state highway director. Such an action is clearly within the power of the state highway commission.

Should the senate disapprove the appointment of the members of the state highway commission, the acting state highway director could continue to serve in his office until the lawfully constituted state highway commission would remove him from office or appoint him as state highway director.

The reasoning employed to support the legal conclusion to your fifth question is equally applicable here and need not be restated.

While an acting state highway director does not have precisely the same status as a state highway director under Section 5 of Act 286, P.A. 1964, supra, both offices are subject to be filled by majority vote of the state highway commission and the occupant of either office serves at the pleasure of the state highway commission in that he may be removed from his office by majority vote of the state highway commission.

Therefore, it is the opinion of the Attorney General that should the senate disapprove the appointments of the members of the state highway commission, the acting state highway director appointed by such members of the state highway commission could continue in office until the lawfully constituted state highway commission voted to remove him from office or voted to appoint him as state highway director or until he was otherwise removed from office in accordance with law.

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