


## MEMORANDUM

TO: Emmet County Board of Commissioners

FROM: Robert J. Engel, Civil Counsel 

DATE: September 9, 2019

RE: Proposal to Combine County Clerk and Register of Deeds into Clerk Register

There has been recent discussion about the possibility of combining the offices of the County Clerk and County Register of Deeds into one office called "Clerk Register" as a cost effective measure. With the recent retirement of Juli Wallin as County Clerk, I have been requested by County Administrator John Calabrese to address the legal issues and procedures regarding the possibility of combining the elected offices of County Clerk and Register of Deeds into one elected office.

Michigan law provides the procedures for doing so as outlined below. Following the "Law" portion, I will provide a section on the application of the law. Finally, there will be a section on possible time frames for considering the combination of the offices. Please understand that by simply considering the combination of the two offices does not require you to do so.

### Michigan Law

The 1963 Michigan Constitution provides in Article VII, Section 4 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 [now commissioners] in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure.*** [emphasis added]

One court case and an Attorney General opinion addressed a similar provision found in the 1908 Michigan Constitution. In *MacDonald v DeWaele*, 263 Mich 233, 237 (1933), the Michigan Supreme Court stated:

It seems clear to us that this provision should be construed as conferring upon the board of supervisors the power to at any time unite these offices or separate them; but such action on its part may not become effective until the next election, at which, in case the offices have been united, one person would be elected to the office of county clerk and register of deeds and, in case of separation, one person would be elected to each of such offices.

The Attorney General opinion followed the *MacDonald* decision. There, the Attorney General opined that the county board of supervisors cannot consolidate or unite the offices of county

clerk and register of deeds to take effect in the middle of a term of office, and the effective date of any such consolidation must be such that one person may be elected to the combined offices at the next election. *Op. Atty. Gen. 1939-40, p. 286*. At that time, the county officials were elected to two year terms.

Of more recent vintage was an Attorney General opinion issued in 1991 under the 1963 Michigan Constitution provision cited above. The Attorney General was asked to opine on whether the two offices could be combined upon the retirement of the Register of Deeds during the four year term of office. The Attorney General stated that a county board of commissioners may not combine the office of register of deeds and the office of county clerk effective prior to end of terms of those offices under Article VII, Section 4 of the 1963 Michigan Constitution governing terms of county elected officers and ability to combine offices. *Op. Atty. Gen. 1991, No. 6688, p. 62*.

The following year, the Attorney General similarly ruled that the only limitation on a county board of commissioners' uniting of county offices of clerk and register of deeds is that combining of offices may not become effective until it is time for a subsequent election to fill offices or combined office. *Op. Atty. Gen. 1992, No. 6726, p. 168*.

In 1998, the Michigan Legislature amended the statute (MCL 168.200) that followed the constitutional directive. 1998 PA 364 amended MCL 168.200 and MCL 168.643 to provide the procedures and what a combined position would be called..

Subsections 2 through 5 were added by the 1998 amendment to the first statute to provide the procedures for combining the two offices. MCL 168.200, as currently written, reads as follows:

- (1) A county clerk, a county treasurer, a register of deeds, a prosecuting attorney, a sheriff, a drain commissioner, and a surveyor shall be elected at the 2000 general November election and every fourth year after that. However, in a county in which 1 of these offices is abolished or combined as provided by law, no person shall be elected to that office in that county.
- (2) Subject to subsections (3), (4), and (5), a county board of commissioners may by resolution combine the offices of county clerk and register of deeds in 1 office of the clerk register or separate the office of the clerk register into the offices of county clerk and register of deeds. A combination or separation of offices shall not take effect before the expiration of the current term of the affected offices.
- (3) Before adopting a resolution to combine the offices of county clerk and register of deeds or separate the office of clerk register into the offices of county clerk and register of deeds, a county board of commissioners shall study the question of combining or separating the offices. The mandatory requirements of this subsection may be satisfied by conducting a public hearing pursuant to subsection (4).
- (4) The county board of commissioners as a whole body shall hold not less than 1 public hearing, held subject to the open meetings act, 1976 PA 267, MCL 15.261 to 15.275, on the question of combining or separating the offices of county clerk and register of deeds.

The county board of commissioners may vote on the question as a regularly scheduled agenda item not less than 10 days or more than 30 days after the last public hearing held by the county board of commissioners on the question.

(5) Not later than the sixth Tuesday before the deadline for filing the nominating petitions for the office of county clerk, register of deeds, or clerk register, the county board of commissioners may by a vote of 2/3 of the commissioners elected and serving combine the offices of county clerk and register of deeds or separate the office of the clerk register. The resolution shall become effective upon the commencement of the next term of office of the county clerk, register of deeds, or clerk register after the adoption of the resolution.

The same 1998 amendment made changes to MCL 168.643 such that if the offices were combined, the combined office would be referred to as “Clerk Register.” That portion reads:

At the general election, *the following officers shall be elected* when required by law:

....

(1) In each county or district, judges of the court of appeals, a judge or judges of the circuit court, a judge or judges of probate, a judge or judges of the district court, a prosecuting attorney, a sheriff, a treasurer, a mine inspector, a county road commissioner, a drain commissioner, a surveyor, and, *subject to section 200, a clerk and a register of deeds or a clerk register.* [emphasis added]

### **Application of Law by the Board of Commissioners**

As noted above, MCL 168.200 now provides a clear procedure to create the combined elected office of Clerk Register by the Board of Commissioners. The statute does not require you to combine the offices, but provides the legal mechanism if you wish to do so. The board of commissioners is required to approve a resolution to create the combined office. The combination of offices does not take effect until the expiration of the current terms of the two offices. [subsection 2 above]

Before the adoption of such a resolution, the board of commissioners is required to study the question of combining the offices. [subsection 3 above] In so doing, the Board must hold at least one (or more) public hearing(s) on the question of combining the offices. [subsection 4 above] This cannot be handled by a committee or subcommittee - the statute states “the board . . . as a whole body . . .” conducts the public hearing(s).

To study the question, my suggestion would be that the Board of Commissioners entertain a motion to direct staff to research the history where other counties have combined the two offices AND where other counties have separated the two offices after having been combined in the past. The motion would require a simply majority to consider the investigation. If the motion failed, that failure would signal that the Board of Commissioners is not interested in spending further time or money on considering the combination of the offices.

If the motion is passed, part of the staff’s research would include the advantages and disadvantages of a combination, the cost savings, possible combining of office space, etc. A

report then can be generated for the Board's consideration. The report would be a public document so that it is available for the public to review before the date of the required public hearing(s).

There has to be at least one public hearing as part of the study process. The Board could consider multiple public hearings if it so desired.

After holding the public hearing(s), the board of commissioners *may* vote on the question of combining the offices. By using the permissive term "may," it seems that the board of commissioners can simply take no action after holding the public hearing(s). [subsection 4 above]

If the board of commissioners decide to vote on the matter, it must be done as a regularly scheduled agenda item between 10 and 30 days after the last public hearing. [subsection 4 above] Based on this, the Board could not vote on a resolution on the same night as the last public hearing.

The vote to combine the offices by resolution requires a 2/3 majority vote of all commissioners, not just commissioners present at the meeting. [subsection 5 above] Therefore, at least five commissioners must approve the resolution, or it fails.

All of the above must be accomplished at least six weeks before the filing deadline for elected county officials. [subsection 5 above] The filing deadline and other important dates are described more fully below.

Finally, if the Resolution is adopted, the primary and general elections in 2020 would be for the position of Clerk Register. The person winning the election in November 2020 would take the oath of office on or before January 1, 2021 and start his/her duties on January 1, 2021.

### **Suggested Timeframe**

The statute states that a resolution to combine the offices into Clerk Register would need to be approved at least six weeks prior to the filing deadline for nominating petitions for the offices of clerk and register of deeds, so we will start with the filing deadline date.

Per the Michigan Secretary of State's Election Bureau, the filing deadline for these county offices is Tuesday, April 21, 2020. Backing off the required six weeks, the latest date that a resolution could be adopted would be Tuesday, March 10, 2020.

The last public hearing would be anywhere between February 9, 2020 and February 29, 2020.

The above dates are the "last dates" that can be considered for adoption of a resolution. Realistically, I would think that potential candidates for either office or the combined office would want to know sufficiently ahead of the "last dates" on whether the Board adopts the resolution. Also, it would not be good to rush a decision at the last minute.

It is my suggestion that “the sooner, the better” to start the process would be best. This will all take some time to research before a public hearing can be held. Then the Board will still have to wait to vote on it at least 10 days later.

The Board could vote on a motion pursuing the study of the combination of the offices at its meeting on September 19, 2019. If such a motion is passed with at least 4 votes, staff can start the process of gathering information.

I would expect that this investigation phase will take approximately four weeks. A report could be generated in time for the October 24, 2019 Board meeting. If the Board wished to further pursue the combination of the offices, at the October 24, 2019 meeting, the Board could set one or more public hearings to be held in November 2019. (Please keep in mind that the staff and Board will be heavily into the 2020 budget process at that time as well.)

If the final public hearing was held just before the beginning of the Committee of the Whole meeting on November 11, 2019, a Resolution could be considered for adoption at the Regular Board Meeting on November 21, 2019.

Prior to the November 21, 2019 meeting, I would prepare a Resolution to Combine the Offices of Clerk and Register of Deeds into Clerk Register. This would have to be placed on the Agenda ahead of the meeting as an Action Item. At the meeting, if no Board member makes a motion to adopt the Resolution, then the offices would not be combined for the 2020 election. If a Board member wished to make a motion to adopt the Resolution, which is properly seconded, then the Board can vote to adopt the Resolution. There must be five (5) votes to adopt the Resolution. If only four (4) votes for adoption, the Resolution fails and the offices would not be combined into Clerk Register. The 2020 elections would remain the same as the past, a person elected to the office of Clerk and a person elected to the office of Register of Deeds.

If the Resolution is adopted, it is my understanding that the Clerk would notify the State’s Election Bureau of its adoption so that proper nominating petitions may be prepared for those seeking the office of Clerk Register.