STATE OF MICHIGAN

COURT OF APPEALS

FRANK HOUSTON, EDNA FREIER, CHRISTY JENSON, LORETTA COLEMAN, JIM NASH, DAVID RICHARDS, and ERIC COLEMAN,

Plaintiffs-Appellees,

v

GOVERNOR,

Defendant,

and

OAKLAND COUNTY BOARD OF COMMISSIONERS,

Defendant-Appellant.

FOR PUBLICATION
March 7, 2012

No. 308724
Ingham Circuit Court
LC No. 12-000010-CZ

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Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

METER, J. (*concurring in part and dissenting in part*).

Because I believe that 2011 PA 280 is constitutional in its entirety, I respectfully dissent from the part of the majority opinion that invalidates the first sentence of § 1(2). I would reverse the decision of the circuit court and uphold the act as written.

In concluding that the first sentence of 2011 PA 280, § 1(2), is unconstitutional as an improperly adopted local law, the majority finds dispositive *Michigan v Wayne County Clerk*, 466 Mich 640; 648 NW2d 202 (2002). The statute at issue in that case applied to a city with a population of 750,000 or more with a city council composed of nine at-large council members. *Id*. at 642. Only Detroit met the criteria and thus was required to place a particular question on the ballot at the August 6, 2002, general election. *Id*. The Supreme Court, in deciding whether the statute was a general or local act, stated:

> In this case, the statute plainly fails to qualify as a general act. Even if another city reaches a population of 750,000, and has a nine-member at-large council, Act 432 would not apply because of its requirement that the proposition appear on the ballot at the August 6, 2002, election. No other city can meet that requirement because there will be no new census before that date. [*Id*. at 643.]

2011 PA 280 states, in § 1:

> (1) Within 60 days after the publication of the latest United States official decennial census figures, the county apportionment commission in each county of this state shall apportion the county into not less than 5 nor more than 21 county commissioner districts as nearly of equal population as is practicable and within the limitations of section 2.
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> (2) If a county is not in compliance with section 2 on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with section 2. For subsequent apportionments in a county that is apportioned under this subsection, the county apportionment commission of that county shall comply with the provisions of subsection (1).

Section 2 states:

County Population	Number of Commissioners
Under 5,001	Not more than 7
5,001 to 10,000	Not more than 10
10,001 to 50,000	Not more than 15
Over 50,000	Not more than 21

Section 3 states, in part:

> (1) Except as otherwise provided in this 26 subsection, the county apportionment commission shall consist of the county clerk, the county treasurer, the prosecuting attorney, and the statutory county chairperson of each of the 2 political parties receiving the greatest number of votes cast for the office of secretary of state in the last preceding general election. If a county does not have a statutory chairperson of a political party, the 2 additional members shall be a party representative from each of the 2 political parties receiving the greatest number of votes cast for the office of secretary of state in the last preceding general election and appointed by the chairperson of the state central committee for each of the political parties. In a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners. The clerk shall convene the apportionment commission and they shall adopt their rules of procedure. A majority of the members of the apportionment commission shall be a quorum sufficient to conduct its business. All action of the apportionment commission shall be by majority vote of the commission.

There is a fundamental difference between the statute at issue in *Wayne County Clerk* and 2011 PA 280. The crux of the statute as discussed in *Wayne County Clerk* was the requirement that a certain question be placed on the ballot on August 6, 2002. *Wayne County Clerk*, 466 Mich at 642. Because of this temporal limitation, it was not possible for a city other than Detroit to be subject to the requirement of the statute. *Id*. at 642-643. All counties, by contrast, are subject to the requirements of 2011 PA 280. As stated by the Oakland County Board of Commissioners on appeal: "The [number] of allowable commissioners applies immediately to every county with a population over 50,000, which includes multiple counties, not just Oakland County. There are at least 35 counties that this limitation will apply to upon the effective date, and it will continue to apply to every county that ever reaches 50,000 in the future." While the ballot requirement in *Wayne County Clerk* applied only to Detroit, the limitation on commissioners at issue here *applies to multiple counties*. It is a general law, not a local law.[1]

[1] Even if I were to focus on the action of "reduction" in determining whether the act, or whether the first sentence of § 1(2) of the act, is general or local—i.e., even if I were to conclude that a "reduction" of commissioners by multiple counties must be necessary in order for the act or the sentence to be a general law—it would be possible for a county such as Wayne to modify its charter before the effective date of 2011 PA 270 in order to have more than 21 commissioners and thus be required to undertake a "reduction." Unlike the majority, I do not find this possibility akin to the possibility of a new census occurring in *Wayne County Clerk*. In *Wayne County Clerk*, the act in question was passed in 2002, with an effective date of June 6, 2002. See 2002 PA 432. It was fundamentally impossible that a time-consuming new census could have been completed before the August 6, 2002, election referred to in the act. See *Wayne County Clerk*, 466 Mich at 643.

The trial court focused, and the majority focuses, on the procedural requirement stating that "[i]f a county is not in compliance with section 2 on the effective date of the amendatory act that added this subsection, the county apportionment commission of that county shall, within 30 days of the effective date of the amendatory act that added this subsection, apportion the county in compliance with section 2." A similar 30-day requirement was included in the county apportionment act as originally enacted. 1966 PA 261.[2] The act stated, in part:

> In counties under 75,000, upon the effective date of this act, the boards of commissioners of such counties shall have not to exceed 30 days in which to apportion their county into commissioner districts in accordance with the provisions of this act. If at the expiration of the time as set forth in this section a board of commissioners has not so apportioned itself, the county apportionment commission shall proceed to apportion the county under the provisions of this act. [*Id*.]

In *Kizer v Livingston Co Bd of Comm'rs*, 38 Mich App 239, 246; 195 NW2d 884 (1972), the Court, analyzing the county apportionment act, considered whether the 30-day period allowing for self-apportionment applied only to the time immediately following the enactment of the statute or whether it applied after each census. The Court concluded that the 30-day period was a single exception allowing for self-apportionment for 30 days after enactment of the statute. *Id*. at 256. The Michigan Supreme Court in *In re Apportionment of Tuscola Bd of Comm'rs*, 466 Mich 78, 84 n 6; 644 NW2d 44 (2002), expressed "concerns" about the holding in *Kizer* but declined to resolve the issue anew. 2011 PA 280 sets forth a clearer directive with regard to the 30-day compliance period following the effective date of the act. I cannot conclude that the inclusion of a compliance provision for the period immediately following the effective date of the act somehow transforms this general act, or a part of this general act, into a local act that must be voided. As noted in *Chamski v Cowan*, 288 Mich 238, 258; 284 NW2d 711 (1939), statutes should be construed, if possible, to give full effect to every provision.

Chamski is a somewhat analogous case. In *Chamski*, the Michigan Supreme Court considered whether a statute that related to the selection and number of probate judges and that contained certain population classifications was a general act or an invalid local act. *Id*. at 253, 257. Although the Court did not provide a particularly detailed analysis concerning the applicability of the law to various counties, it did conclude that, because "[t]he act in question provides a specific method for its application to other counties as they acquire greater population," it came within the rule specifying that an act applying to only one city or county may nonetheless be valid as a general act if it could, in the future, apply to others. *Id*. at 256-257. The Court also stated:

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[2] I include this information not to imply, misleadingly, that the 30-day provision in 1966 PA 261 applied to only one county but instead to illustrate that in enacting 2011 PA 280 the Legislature was following a template, including an immediate compliance provision, set forth years ago for the county apportionment act.

> It is contended by plaintiff the "open end" provided in the act is closed by operation of two clauses contained therein, one that: "A selection as herein provided shall be made within fifteen days of the effective date of this act;" and the other: "Provided, That any county that has failed to elect an additional probate judge, or judges, under this section, prior to July one, nineteen hundred thirty-two, shall be not entitled to elect any additional judge, or judges, under the provisions of this section." [*Id*. at 257.]

The Court stated that "[i]f the legislature had intended the above clauses to prevent inclusion of counties subsequently acquiring the required population, it would not have provided a method for such inclusion," and that "[t]he clauses pointed out were to promote speedy action on the part of counties having the required population." *Id*. at 257-258. The Court held the act in question constitutional. *Id*. at 258.

Although I conclude above that the 21-commissioner limit at issue in the present case clearly applies to multiple counties *already*, 2011 PA 280 also provides a mechanism for counties to be reevaluated in the future to ensure that they comply with the various commissioner limits. There must be a certain reapportionment within 30 days of the effective date of 2011 PA 280, but 2011 PA 280 also provides a mechanism for reapportionments in the future. As such, 2011 PA 280 as a whole falls within the general parameters of the *Chamski* holding and is constitutional.

2011 PA 280 also provides, in § 3, that "[i]n a county with a population of 1,000,000 or more that has adopted an optional unified form of county government under 1973 PA 139, MCL 45.551 to 45.573, with an elected county executive, the county apportionment commission shall be the county board of commissioners." This provision, too, is a general law, not a local law. As again aptly stated by the Oakland County Board of Commissioners on appeal, the requirement "concerning the composition of the county apportionment commission applies to each and every county that ever meets the three stated requirements and there is no time limitation for doing so. Because multiple counties could easily achieve this result,[3] certainly by the next census, 2011 PA 280 easily passes the 'test' for a general law . . . ." *Wayne County Clerk* and *Chamski* are applicable to section 3 of 2011 PA 280 and indicate that this section is constitutional.

I conclude that the trial court erred in finding that 2011 PA 280 is unconstitutional as an improperly applied local act. My conclusion is informed, in part, by the axiom that "[s]tatutes . . . must be construed in a constitutional manner if possible." *Gora v Ferndale*, 456 Mich 704, 711; 576 NW2d 141 (1998). As noted in *Owosso v Pouillon*, 254 Mich App 210, 213; 657 NW2d 538 (2002), "[s]tatutes are presumed to be constitutional unless their unconstitutionality is clearly apparent." I find no clearly apparent unconstitutionality in assessing whether any part of 2011 PA 280 constitutes a local act.

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[3] The majority, in upholding § 3, implicitly concludes that multiple counties could achieve this result, but it simultaneously concludes that it will be impossible for a county such as Wayne to enlarge its number of commissioners before the effective date of 2011 PA 280.

I also conclude that the trial court erred in deeming 2011 PA 280 unconstitutional as a violation of the Headlee Amendment, Const 1963, art 9, § 29. The Headlee Amendment provides, in relevant part:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of Local Government by state law. A new activity or service or an increase in the level of any activity or service beyond that required by existing law shall not be required by the legislature or any state agency of units of Local Government, unless a state appropriation is made and disbursed to pay the unit of Local Government for any necessary increased costs. [Const 1963, art 9, § 29.]

By the plain language of the Headlee Amendment, the state is only required to reimburse a locality for "any necessary increased costs" of a new activity or service or an increase in the level of an activity or service required by a new law adopted by our Legislature. Perhaps the reapportionment of the Oakland County Board of Commissioners required by 2011 PA 280 could be considered a "new activity" because it requires a second or replacement reapportionment in accordance with the new requirements for county commissions adopted by the act. I will assume as much, without actually deciding the issue. Nevertheless, reasonably considered, 2011 PA 280 does not impose "any necessary increased costs" on Oakland County. Considering the aggregate effect of the reapportionment, it is beyond any reasonable question that the cost reduction to Oakland County for county commissioner salaries resulting from the reduction of the Oakland County Board of Commissioners from 35 to 21 members will far outweigh the relatively minimal cost of the reapportionment.

At least implicitly, the circuit court's conclusion to the contrary depends on considering the costs of the initial and mechanical aspects of the reapportionment process for Oakland County under 2011 PA 280 as a distinct "activity" in isolation from the savings flowing to the county from the reduction in size of the county commission under that reapportionment. I simply do not believe that is a reasonable analysis. The overall "activity" required of Oakland County by 2011 PA 280 is to reduce the membership of its county commission from 35 to 21 members and to carry out redistricting as provided for in the act to achieve that requirement. It was unreasonable for the circuit court to disaggregate the minimal costs associated with the redistricting from the substantial savings that will be achieved by that redistricting in considering the costs of this new "activity."[4] Indeed, the "'Headlee [Amendment], at its core, is intended to prevent attempts by the Legislature "to shift responsibility for services to the local government . . . in order to save the money it would have had to use to provide the services itself."'" *Owczarek*

[4] To use an analogy, if a new state law required localities to send certain notices via e-mail that had previously been required by state law to be sent through ordinary mail via the postal service with a resulting cost savings to the localities from substantially reduced postage expenses, it would be absurd to regard any initial cost to the localities from buying the necessary software for the e-mail system as a distinct new "activity" for which the state would have to reimburse the localities under the Headlee Amendment.

v Michigan, 276 Mich App 602, 611; 742 NW2d 380 (2007), quoting *Adair v Michigan*, 470 Mich 105, 112; 680 NW2d 386 (2004), quoting *Judicial Attorneys Ass'n v Michigan*, 460 Mich 590, 602-603; 597 NW2d 113 (1999). It is plain that this purpose would not be served by regarding a redistricting requirement that neither shifts state government services onto a locality nor increases aggregate costs to that locality as involving increased costs for which the state must reimburse the locality.

I also reject the circuit court's conclusion that 2011 PA 280 unconstitutionally deprives Oakland County electors of a right to seek judicial review of the reapportionment required by the act. The circuit court's entire analysis of this issue is predicated on the act's not allowing an elector the full 30-day period provided for by MCL 46.406 to seek review in this Court of a plan for reapportionment of a county commission.[5] However, MCL 46.406 is merely a *statutory* provision, not a constitutional one. The circuit court cites nothing to establish that there is a *constitutional* right to a 30-day period for an elector to seek judicial review of a county commission reapportionment plan, and I am confident that no constitutional provision has been interpreted to provide such a specific time requirement. Moreover, it appears undisputed that Oakland County has adopted resolutions providing for the reapportionment process to be completed by April 27, 2012, which would still provide significant time for judicial review before the May 15, 2012, filing deadline for candidates for the August 2012 primary election. In any event, any claim of a constitutional deprivation of a right to judicial review by 2011 PA 280 would not be ripe until and unless circumstances actually arise in which an elector seeks such review of an actual reapportionment plan and then contends that there is inadequate time for proper judicial review. See *Citizens Protecting Michigan's Constitution v Secretary of State*, 280 Mich App 273, 282; 761 NW2d 210, aff'd on other grounds 482 Mich 960 (2008) (claim not ripe "if it rests upon contingent future events that may not occur as anticipated, or may not occur at all").

I would reverse in its entirety the circuit court's finding of unconstitutionality.

/s/ Patrick M. Meter

[5] MCL 46.406 states:

Any registered voter of the county within 30 days after the filing of the plan for his county may petition the court of appeals to review such plan to determine if the plan meets the requirements of the laws of this state. Any findings of the court of appeals may be appealed to the supreme court of the state as provided by law.