

TO BE PUBLISHED IN THE OFFICIAL REPORTS

OFFICE OF THE ATTORNEY GENERAL  
State of California

JOHN K. VAN DE KAMP  
Attorney General

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OPINION	:	No. 84-705
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of	:	<u>AUGUST 29, 1984</u>
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JOHN K. VAN DE KAMP	:	
Attorney General	:	
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ANTHONY S. DA VIGO	:	
Deputy Attorney General	:	
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THE HONORABLE JAMES P. LANG, DISTRICT ATTORNEY,  
COUNTY OF TEHAMA, has requested an opinion on the following question:

May a clerk of the board of supervisors of a charter county be appointed by the board pursuant to Government Code section 25100.5 despite a contrary provision in the county charter?

CONCLUSION

The board of supervisors of a charter county may not appoint a clerk of the board pursuant to Government Code section 25100.5 where such appointment would be contrary to the county charter.

## ANALYSIS

Except as may be otherwise provided by law, the county clerk is ex officio clerk of the county board of supervisors. (§§ 25100, 26801.)<sup>1</sup> Section 25100.5 provides:

"The board of supervisors of any county may provide by ordinance that the clerk of the board of supervisors may be appointed by the board in the same manner as other county officers are appointed. In such counties, the county clerk is not ex officio clerk of the board of supervisors.

"The clerk of the board of supervisors shall perform those duties prescribed by law for the county clerk as ex officio clerk of the board of supervisors or for the clerk of the board of supervisors and such additional duties as the board of supervisors shall prescribe by ordinance. Such person may perform all the duties vested in the county clerk other than those vested in the county clerk as ex officio clerk of the superior court or registrar of voters and may take acknowledgements and administer and certify oaths in the performance of such person's official duties."

We are asked whether the board of supervisors of a charter county may appoint a clerk of the board despite a provision of the charter requiring such duties to be performed by the elected county clerk. (Cf. § 24009.) The issue is whether the authority provided under section 25100.5 is superseded by an inconsistent charter provision.

Section 25100.5 is authorized under California Constitution, article XI, section 1, subdivision (b), providing in part:

"The Legislature shall provide for county powers . . . The Legislature or the governing body may provide for other officers . . . ."

Article XI, section 3, however, provides for the adoption of a county charter. Subdivision (a) provides in part:

"For its own government, a county or city may adopt a charter . . . The provisions of a charter are the law of the State and have the force and effect of legislative enactments."

Article XI, section 4, prescribes those matters which shall be provided for in a county charter. Included in subdivisions (c) and (e), respectively, are the following:

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<sup>1</sup> All section references are to the Government Code.

"An elected sheriff, other officers, their election or appointment, compensation, terms and removal."

"The powers and duties of governing bodies and all other county officers, and for consolidation and segregation of county officers, and for the manner of filling all vacancies occurring therein."

Clearly, the reference to "other officers" includes the county clerk. (§ 24000, subd. (c).) It is, therefore, competent to provide by charter for the election or appointment, compensation, terms and removal, and for the powers and duties of the county clerk, as well as the consolidation and segregation of that office with or from other county offices. Thus, it is competent to provide by charter that the county clerk shall serve and perform the duties of clerk of the county board of supervisors.

The issue remains whether such a provision<sup>2</sup> in the charter would supersede the provisions of section 25100.5, *supra*, expressly authorizing the board of supervisors of *any county* to "provide by ordinance that the clerk of the board of supervisors may be appointed by the board . . . ." Article XI, section 3, subdivision (a), provides in part that a county charter "shall supersede . . . all laws inconsistent therewith." It has been generally conceded, however, that the authority of a charter county to regulate in contravention of state statutes is restricted to matters which, as in the matter here considered, are constitutionally authorized for inclusion and which are actually contained within the charter. (*Younger v. Board of Supervisors* (1979) 93 Cal.App.3d 864, 870; *Williams v. McClellan* (1953) 119 Cal.App.2d 138, 141; 66 Ops.Cal.Atty.Gen. 293, 297 n. 5 (1983); 61 Ops.Cal.Atty.Gen. 512, 519 (1978); 61 Ops.Cal.Atty.Gen. 31, 33 (1978).)

Further, as previously observed, section 25100.5 was enacted pursuant to article XI, section 1, subdivision (b). (54 Ops.Cal.Atty.Gen. 51, 52-53 (1971).) In this regard, article XI, section 4, subdivision (g), provides:

"Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature as herein provided, the general laws, adopted by the Legislature in pursuance of Section 1(b) of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, and for which provision is made therein, except as herein otherwise expressly provided."

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<sup>2</sup> We have not been provided with and hence do not purport to interpret any such specific provision. For purposes of this analysis, it is assumed that the enactment of an ordinance under section 25100.5 would be inconsistent with the charter.

Thus, we have stated, at least with respect to matters of local rather than statewide concern (cf. *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 316; 64 Ops.Cal.Atty.Gen. 234, 237-238 (1981)), that charter provisions will supersede all general laws adopted by the Legislature pursuant to article XI, section 1, subdivision (b), whether such laws are consistent or inconsistent with the charter. (*Curphey v. Superior Court* (1959) 169 Cal.App.2d 261, 266-267; 61 Ops.Cal.Atty.Gen. 31, 33 (1978).)

We perceive no statewide concern with respect to the power of a board of supervisors to provide by ordinance for the appointment of its clerk. What the state statutes have provided is a mere option in the matter. (§§ 25100, 26801, 25100.5.) While the segregation of the traditional roles of the elected county clerk may, without regard to section 25100.5, undoubtedly be accomplished by charter (22 Ops.Cal.Atty.Gen. 177 (1953)), the charter provision under consideration has simply foreclosed the opportunity so to provide by ordinance.

Further, while not all general laws which might impinge to a limited extent upon some phase of management or control by a local agency of its employees are superseded by an inconsistent charter provision (cf. *Baggett v. Gates* (1982) 32 Cal.3d 128, 138-139; 61 Ops.Cal.Atty.Gen. 31, 34-35 (1978)), it has been held that the manner of appointment or removal of a county officer is not a matter of statewide concern but of local concern. (*Curphey v. Superior Court, supra*, 169 Cal.App.2d at 265-266.)

Nevertheless, article XI, section 4, subdivision (g), *supra*, provides that the general laws shall be superseded by a charter provision "except as herein otherwise expressly provided." Subdivision (h) provides:

"Charter counties shall have all the powers that are provided by this Constitution or by statute for counties."

Thus, a charter county has, in addition to those powers enumerated in article XI, section 4, all powers provided for counties under the general laws, including those powers "necessarily implied for those expressed." (§ 23003; *Younger v. Board of Supervisors, supra*, 93 Cal.App.3d at 870.) Again, section 25100.5 provides that the board of supervisors may provide by ordinance for the appointment of its clerk. Does this statutory power supersede an inconsistent charter provision which is authorized under section 4 of article XI? In our view, subdivision (h) must be rationally construed as an addition to, rather than a limitation upon, the express constitutional powers of a charter county. Subdivision (h) was added as part of the general revision of article XI adopted at the special primary election of June 2, 1970. Also enacted as part of the same legislative constitutional amendment was section 13 of article XI:

"The provisions of Section 1(b) (except for the second sentence), 3(a), 4, and 5 of this Article relating to matters affecting the distribution of powers between the Legislature and cities and counties, including matters affecting supersession, shall be construed as a restatement of all related provisions of the Constitution in effect immediately prior to the effective date of this amendment, and as making no substantive change."

Hence, subdivision (h) may not be construed as a grant of any power which would conflict with the constitutionally authorized provisions of a duly established county charter.

It is concluded that the charter provision requiring the duties of clerk of the board of supervisors to be performed by the elected county clerk supersedes the provision of section 25100.5 authorizing the board to provide by ordinance for the appointment of its clerk.

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