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INTERNET www.ramermoore.com

JAMES T. RAMER
JOEL B. MOORE

TELEPHONE (231) 526-6214
TELEFAX (231) 526-9343

November 25, 2025

JAMES T. RAMER
jramer@ramermoore.com

ATTORNEY CLIENT PRIVILEGED
Hon. Mayor and Members of City Council
City Hall
160 Zoll Street
Harbor Springs, Michigan 49740

Re: Conflict of Interest – Litigation Matter

Dear Mayor Graham and Members of the City Council:

At the City Council meeting of November 17, the Council asked that I provide a memorandum on how to deal with a possible conflict of interest by a Council member with regard to a pending legal matter involving the City. The law on conflicts of interest with regard to City Councilmembers is summarized below:

The Michigan Supreme Court applied established legal principles governing municipal council voting conflicts in *Woodward v. City of Wakefield*, 236 Mich. 417 (1926) citing the principle that "it is universally recognized that it is improper and illegal for a member of a municipal council to vote upon any question brought before the council in which he is personally interested" and that "if the statute is violated, the action of the council may be avoided without regard to actual fraud or whether it was beneficial to the municipality." The court emphasized that "it is the policy of the law to keep municipal officials far enough removed from temptation as to insure the exercise of their unselfish interest in behalf of the municipality."

Michigan has a conflict of interest statute MCL 15.342(6) that prohibits state employees and officials from engaging in or rendering services for a private or public interest when that service would be "incompatible or in conflict with the discharge of the officer or employee's official duties" or that "may tend to impair his or her independence of judgment or action in the performance of official duties." Although, by its terms, this provision does not apply to local government officials, the City Charter contains similar language. See Section 5.1 of the City Charter:

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Section 5.1 Financial Interests Prohibited: No person holding any elective or appointive office under the city government shall take any official action on any contract with the city or other matter in which he is financially interested, or be a bondsman or surety on any contract of bond given to the city

Section 6.9 of the City Charter that states as follows:

Section 6.9 The Council shall determine its own rules and order of business subject to the following provisions:

- (a) The Clerk shall keep a journal of the proceedings in the English language, which shall be signed by the presiding officer and Clerk of the meeting.
- (b) A vote upon all ordinances and resolutions shall be taken by "Yes" and "No" votes and entered upon the record, but where the vote is unanimous it shall only be necessary to record the total negative or affirmative vote.
- (c) No member of the Council shall vote on any question in which he is financially interested, or any question concerning his official conduct; but on all other questions every member of the Council present shall vote, unless he shall state his reason for not voting, which shall be recorded in the minutes.

The Michigan Attorney General has stated that participation in municipal action by an official or employee with a personal or financial interest may result in the final decision being held void, citing the Michigan case of *Barkey v Nick*, 11 Mich App 381, 385; 161 NW2d 445 (1968). See OAG No. 6005 (1981).

The question of whether a Councilperson who has a conflict of interest for a personal interest as compared to a financial interest should be precluded from voting is not covered by Michigan statutes or by Section 5.1 or Section 6.9(c) of the City Charter. City Attorney opinions on conflict of interest were presented to the Council in 2006 and in 1993, (copies are attached) that are still the law in Michigan, and in the memo of 2006, a protocol was recommended for dealing with conflicts of interest at the Council level. Nonetheless, with regard to matters involving a personal rather than a financial interest, it is important to note that under the City Charter unless the Councilmember voluntarily abstains from voting on or from participation in open or closed session on the matter in which he or she has a personal interest, there is nothing that can prevent that Councilmember from voting on such matter or from joining in a closed or open session discussion on the matter under consideration.

If a hearing was held on the question of the degree that a personal relationship might or would impair the Councilperson's ability to fairly represent the City on issues

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involving that person, and if the City Council decided that the Councilmember should not vote on or participate in discussions about matters involving such person, because such actions would create the appearance of impropriety, voluntary abstention by the Councilperson would be the preferred outcome, based on a principled approach to fiduciary duties owed to the electorate. However, absent such a voluntary abstention, there is nothing that can prevent that Councilmember from voting on such matters or from joining in a closed or open session discussion on the matters under consideration.

I will be available to discuss these issues at a City Council meeting if the Council has questions on this opinion.

Thank you.

Very truly yours,

A handwritten signature in blue ink, appearing to read "J. T. Ramer", written over a horizontal line.

James T. Ramer, City Attorney
City of Harbor Springs

Enclosures

cc: City Manager

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ONE HUNDRED SPRING STREET
POST OFFICE BOX 5

HARBOR SPRINGS, MICHIGAN 49740-0005
INTERNET www.ramerandmoore.com

JAMES T. RAMER
JOEL B. MOORE

TELEPHONE (231) 526-8214
TELEFAX (231) 526-9343

Memorandum

To: City Manager
From: City Attorney
Date: November 9, 2006
Re: Conflicts of Interest

There are two primary tests to determine if an individual has a conflict of interest:

- (1) Does the public official have a direct financial interest, beneficial or detrimental, in the outcome of a decision or action?
- (2) Would the public official's participation in a decision or action create the appearance of impropriety?

Both the nature of the conflict of interest and the specific decision or action that is under consideration must be analyzed. That being said, there are varying degrees of conflict of interest, some of which will require abstention and some of which will not require abstention. I have attached an opinion of the City Attorney rendered in 1993 on this topic. The law has not materially changed since this opinion was prepared, and it accurately states the current law in Michigan on conflict of interest in the zoning area.

In addition, conflict of interest must be considered in the context of the equally compelling public policy that a public official has a duty to vote on matters that are presented for decision. Absent a true conflict of interest, a public official must vote on matters that are presented for decision.

If a public official conflicted about the possibility of voting on a particular decision or action, or about whom it is contended there is a conflict of interest, the public official should disclose the specific nature of the conflict of interest, and describe how voting on a particular decision or action might directly or indirectly affect the financial interest of the public official; or, how voting on the issue might create the appearance of impropriety. Then, the following rules should apply:

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(1) If the conflict of interest arises out of a concern that a financial interest of the public official would be affected by the outcome of the decision, the following rules should apply to determining whether the official should abstain or vote on the question:

(a) If the financial conflict of interest is sufficiently substantial that a reasonable person would seriously question whether the public official's personal interest in the outcome outweighs the public official's ability to impartially decide the issue, the public official should abstain from voting. The City Attorney can be consulted on this question, who can give an opinion as to this issue. Alternatively, the City Attorney may indicate that this is a matter that can be decided by the public body, as set forth in Rule (1)(b) below.

(b) On questions of "substantiality" and of "degree of conflict" and whether the conflict of interest affecting the public official is unique to that individual or common to the public at large, or common to a smaller class of which the public official is only one member, and upon approval of the City Attorney, the public body on which the official serves can decide whether the conflict of interest should preclude the official from voting, or participating in the deliberations toward the decision. If the public body (less the vote of the potentially conflicted official) unanimously determines that the public official may participate in the decision, the public official need not abstain. The public body may determine that the official may participate in the deliberation of the question, but not vote; or, may decide that the public official may both deliberate and vote on the issue.

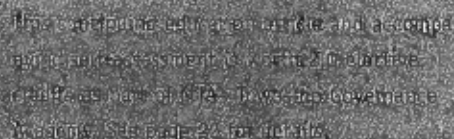
(2) If the conflict of interest arises out of a concern that the public official's voting or participation in the deliberations on the issue would create the appearance of impropriety, the following rules should apply to deciding whether the official should abstain or vote on the question:

(a) If the appearance of impropriety is sufficiently substantial that a reasonable person would seriously question whether the public official's personal interest in the outcome outweighs the public official's ability to impartially decide the issue, the public official should abstain from voting. The City Attorney can be consulted on this question, who can give an opinion as to this issue. Alternatively, the City Attorney may indicate that this is a matter that can be decided by the public body, as set forth in Rule (2)(b) below.

(b) On questions of "substantiality" and of "degree of conflict" and whether the appearance of impropriety affecting the public official is unique to that individual or common to the public at large, or common to a smaller class of which the public official is only one member, and upon approval of the City Attorney, the public body on which the official serves can decide whether the appearance of impropriety should preclude the official from voting, or

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participating in the deliberations toward the decision. If the public body (less the vote of the potentially conflicted official) unanimously determines that the public official may participate in the decision, the public official need not abstain. The public body may determine that the official may participate in the deliberation of the question, but not vote; or, may decide that the public official may both deliberate and vote on the issue.



- In case the goals and objectives provided by the manager of the business are not to achieve standards of conduct.
- In recognition of the value of the cooperation beyond the legal, as well as the decisions, interests or interests, and in line with the conduct of.

management of SARS. Communicating effectively with water utility and works effectively with individuals. Identifying the community's knowledge, needs and priorities.

some township officials, along with public officials at all other offices, find themselves accused of wrongdoing or of breaking the public's trust? Why do these types of things occur, and what steps can be taken to prevent public service from becoming a nightmare?

Township officials can avoid public humiliation and lessen the risk of losing their office—or having legal sanctions resulting from misconduct in office levied on them—by understanding that state statutes and the public expect certain behavior from public officials. To reduce ethical and legal dilemmas from arising, it is critical for all elected officials to:

- These four tenets, according to the Institute for Local Govern-

- ment's Public Service Ethics Program, are the basic elements of ethical conduct in public office.

WHAT ETHICS ARE ... AND AREN'T

Ethics are the ground rules of what one *ought* to do, not merely what one *must* or *must not* do. Unfortunately when holding public office, it's not enough to simply do the right things. To preserve the public's trust, it's equally important for the official to continually communicate his or her intentions and the reasons why certain actions are taken.

Accusations of ethical lapses can result from a wide variety of wrong judgments and poor communications. The public has its own expectations and values that may not be consistent with a public official's or public body's own sense of right and wrong. Officials may erroneously assume that conduct, which is acceptable in one's private business, is okay in the public sector as well. Others may think that if a particular action or decision is legal, it will also be perceived as being ethical.



Ethical lapses are often rationalized or justified by asserting that all of the good deeds one does in public office will cause the public to forgive a few "minor" ethical transgressions. Public apathy or media disinterest in the affairs of a particular government entity may create a cavalier attitude that people won't know and won't care. Sometimes public officials think that an apathetic public will give them the benefit of the doubt if an ethically ambiguous situation comes to light.

These assumptions are often proven wrong.

Unfortunately, one also cannot assume that ethical conduct will always be rewarded by one's constituents, as too many former township officials can attest. Sometimes doing the right thing

means paying the price of being subjected to public condemnation or even recall from office. Doing the ethical thing can require uncommon courage, even a willingness to sacrifice one's office when the voters do not support an ethical decision.

More often, however, charges of unethical conduct in office will, at a minimum, result in one or more of the following:

- Erode a public official's authority and influence on public matters,
- Divert attention away from pressing policy issues due to the energy needed to defend the questioned behavior or conduct, and/or
- Provoke a recall or formidable challenge in the next election.

Further, ethical lapses by public officials erode the public's confidence in its governmental institutions, resulting in the need to spend valuable time restoring trust or responding to distracting demands for extraordinary documentation and proof that other ethical lapses are not occurring.

MICHIGAN LAWS PROVIDE SOME GUIDANCE

Public officials can be subjected to legal sanctions when an ethical lapse falls within conduct prohibited by state law. In many ways, statutory ethical dilemmas should be the easiest issues for a public official to resolve: comply with state law. However, public officials can face great temptation when confronted by an opportunity to enjoy financial enrichment from a particular decision.

Michigan does not require public officials to disclose their sources of income or their interests in property or business concerns, so compliance often requires self-disclosure. Fortunately for townships, especially in smaller communities, people often have a more intimate awareness of each other's business dealings, so undisclosed conflicts of interests are less likely than in larger jurisdictions.

Michigan laws addressing the ethics of conflicts of interests and holding incompatible offices are rife with exceptions and qualifications. Consequently, competent legal advice is often needed to determine exactly what action the law requires.

CONFLICTS OF INTEREST

Conflicts of interest arise when a public official has a direct financial interest, positive or detrimental, in the outcome of a decision or action that he or she might take as a public official. Conflicts of interests can arise from land use decisions when the value of property owned by a public official will be impacted by the public official's vote or decision. Conflicts of interest also are created when a public official is involved in a business transaction with the public body.

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Township officials, like all other elected officials, are required by law to refrain from participating in any decision that creates a conflict of interest. *Recusing* oneself from participating in a decision requires more than merely refraining from voting. Rather, a public official is expected to publicly declare the conflict of interest, to physically remove himself or herself from the discussion, to avoid in any way influencing the outcome of the decision, and after taking all of those actions, abstain from voting.

INCOMPATIBLE OFFICES

Michigan law also addresses the prohibition against holding incompatible offices that may cause a public official to compromise his or her duty to act in the best interest of one entity to fulfill his or her duty to serve the best interests of another. Like the state conflict of interest statute, Michigan's incompatible office statute also allows for a great many exceptions.

A public official, with the help of knowledgeable legal counsel, should explore the issue of incompatible offices before accepting a

second public office. The criteria defining incompatible offices appears straightforward, but requires a deep understanding of the duties, responsibilities and relationships that might develop between the two offices. Holding incompatible offices can cloud the legal authority of the public official to act in either capacity, and the courts have the option to declare the first office vacant upon assuming the second, incompatible office. The remedy of abstaining from voting (which can solve a conflict of interest dilemma) is not available to solve an incompatible office dilemma, because offices that cause a breach of duty are inherently incompatible, and failing to vote, unless there is a conflict of interest, is a breach of duty.

AVOIDING THE APPEARANCE OF IMPROPRIETY

Acting ethically in a public position is more than merely following the law. It also means more than just doing the right thing. Ethical behavior requires conducting one's public affairs in such a way that the mere *appearance of an impropriety* is avoided.

A public official confronts an ethical dilemma when the outcome of a decision or action taken by him or her will impact, favorably or detrimentally, on personal relationships. For example, land use issues are frequently contentious and emotional, often leading to friends, coworkers or campaign supporters using their personal relationship with a public official to influence a decision. Township officials who vote a particular way may subject themselves to lost friendships, erosion of campaign support, adverse relationships with neighbors or even a loss of customers or clients in their personal business.

The ethical choice for a person who holds public office and who is on the "hot seat" is to do justice to the best interests of the entire community—even if that choice damages personal or business relationships. The risk of damaged personal relationships or political retaliation is not justification to shirk legal responsibilities. No one ever said that being an elected official is easy, and a public official may have a duty to vote, or to make administrative decisions that could anger others. ▶

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A township official who has no financial connection to an issue but who, nonetheless, has friends or relatives who *are* affected by the decision sits squarely on the horns of a dilemma. To abstain from voting shirks one's duty to act, but participating in the vote creates an appearance of bias and favoritism. Which ethical principle should prevail?

Avoiding the appearance of impropriety can be a complex matter. Transparency in all township decisions and actions will go far in instilling public confidence that the public's interest is consistently being served.

Nevertheless, public officials can face a dilemma of ethics that is not easily resolved merely by abstaining from voting. For example, an official might perceive a need to abstain from participating in a decision because the official's objectivity is in question due to friendships or other prior outside relationships with a person who would be affected by the decision. However, the official has an ethical duty to exercise the authority of his or her office by voting. Is it a breach of duty to abstain from voting for reasons other than a direct conflict of interest?

This dilemma is another case where legal counsel should be consulted, as Michigan statutes and case law are somewhat ambiguous on the question of voting duties. Appellant courts have not rendered much guidance on this issue, and various circuit courts could differ in their decisions as well. Again, legal counsel's analysis and advice should be sought, given the facts and circumstances of a specific situation. If legal counsel's conclusion is that the official has a duty to vote, then full disclosure of all extraneous issues, along with a full explanation of the rationale of one's vote to assure the community that one's actions are consistent with the values of fairness and the greater public good, will go far to eliminate the appearance of impropriety.

WHEN 'PERKS' DON'T LOOK SO PERKY

Public officials also may be tempted to enjoy special benefits that may become available by virtue of one's public office that would not be available to others. These "perks" might include offers of gifts or lavish meals, free travel, or the opportunity for personal use of township property, such as maintenance equipment or free use of copiers or phones.

It doesn't take a lot of creativity to find justifications for taking advantage of available special benefits:

- "This job pays so little, I am entitled to some freebies."
- "I put in a lot of unpaid hours, so the township owes me some free use of its equipment."
- "My vote (or business) cannot be bought by a free meal or a few drinks."
- "Everyone else is taking these benefits."

Rare is the elected official who refuses all gifts and favors, even those of minimal value. Indeed, the Michigan Legislature has, by law, set a dollar value limit on gifts to legislators, which is indexed to inflation and currently allows gifts in value up to \$52. Nonetheless, the "slippery slope" is very real, and just where the appropriate line should be drawn is likely dependent on the context of the situation, the prevailing values of one's constituents, and, of course, the comfort level of the public official.

A valid test to determine the appropriateness of receiving a special benefit is to ask oneself the following questions:

- Which course of action will most likely instill public confidence in the township and its leaders?
- How much personal discomfort would be caused if the local paper made the conduct its front-page headline?
- Would there be any hesitancy in telling one's mother?

CHOOSING AMONG COMPETING ETHICAL VALUES

In addition to fairness and acting in the greater good, ethical experts have identified a number of universal values that guide ethical public conduct. According to the Institute for Global Ethics, public officials are expected to display the following universal ethical values:

- Trustworthiness
- Responsibility
- Fairness
- Respect
- Vision
- Compassion

Ethical choices confront township officials all the time, but they may not be perceived as ethical dilemmas as much as just disagreements of public policy. Indeed, many public policy disputes are, at their cores, disagreements as to which, among competing ethical values, should prevail in particular circumstances. For example, township boards often have to decide if one of its rules or ordinances should be applied to everyone equally, or if the township ought to make exceptions when these same rules create unusual hardships in unique circumstances.

Public officials who act ethically are expected to act "in the community's best interest," but what is the "community?" Is the "community" the area confined by the township's corporate boundaries, or is "community" a broader area that shares a common culture, vision, or economic challenge? If an elected township official represents the township on the board of a regional body, to which body does the official hold the higher ethical duty—to act in the best interests of the township or the best interests of the region?

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Many arguments at the township board table are not about absolute rights or wrongs, but rather which ethical values should prevail in a particular circumstance. When choosing among competing ethical values (see chart on page 21), officials must rely on some criteria:

- Which course of action is consistent with the greatest number of these ethical values?
- Is there a course of action that is more consistent with a particular value that is more important to you?
- What action is most appropriate for a public office holder?
- What action will reflect most favorably on you and your township?

Without implying that some communities expect more ethical behavior from their elected officials than do other communities, public perception of some issues will be influenced by the context of the activity. For example, nepotism—the practice of hiring relatives or others with close ties to a public official—is widely perceived as an unethical practice because it violates the value of fairness. Yet many township officials appoint their spouses as their deputies, without provoking criticism.

Why are residents in smaller communities more tolerant of nepotism? Likely it is because the practice of having a spouse as a deputy is understood by the public as a practice that is done for the community's benefit rather than for personal benefit. In smaller communities where clerks and treasurers work out of their homes, the public is arguably better served by having spouses available to register voters or accept property taxes when the elected official is away from home. Further, these deputies often receive little, or no, compensation. On the other hand, a township clerk or treasurer in a larger township who appointed his or her spouse to a full-time position would likely face considerably more criticism.

ENSURING ETHICAL CONDUCT

Township boards will likely deal with ethical issues such as these over and over again as they resolve the myriad of issues that public bodies must confront. But what about the township board's subordinates—the department heads, employees and volunteers that make countless independent decisions on behalf of the township? What will guide their choices? How does a township board ensure that those who represent the township on everyday matters will consistently act ethically, or that, when confronted with conflicting ethical values, they will choose the course of action that is consistent with the community's values and preferences?

It's up to the township board, and its individual members, to set a high ethical example for others. In addition, the board must artic-

ulate through carefully considered policies, the type of conduct it expects of its officials, volunteers and employees and to which the township's residents and taxpayers deserve.

One of the virtues of township government is that state laws require them to operate in a manner that promotes ethical government. The statutory structure of townships deliberately diffuses power and authority to discourage the types of ethical abuses that can arise when a single individual can act with impunity. However, for state laws to consistently enforce ethical conduct, the township board must understand these legal requirements, adopt policies that require compliance, and monitor township operations to ensure accountability.

Township officials customarily operate in a virtual "goldfish bowl" where little is done without public scrutiny and being second-guessed in the local paper or over coffee at the neighborhood café. Township governments that operate in a manner consistent with law and fidelity to their grassroots tradition of public involvement will create a culture where misdeeds are unlikely to occur. Township law also provides for a greater role for electors in township affairs, and it is traditional of townships for residents to ask questions and stay engaged in township affairs.

Deliberate, careful and thoughtful consideration of the ethical implications by public officials of their actions and decisions, as well as of the decisions and actions that he or she shares with other members of a public body, will go far to ensure favorable headlines. And equally important, the public will continue to see their township government as a dependable instrument of the public good.

ACKNOWLEDGMENT

The author extends his appreciation to the Institute for Local Government's Public Service Ethics Program, an affiliate of the California League of Cities, for the development of material on which portions of this article was based. The Institute's Web site can be found at www.ca-ilg.org.

G. Lawrence Merrill,
MTN Publisher and MTA Executive Director



JAMES T. RAMER
JOEL S. MOORE

HERBERT H. EDWARDS
OF COUNSEL

LAW OFFICES
RAMER AND MOORE
POST OFFICE BOX 5
ONE SPRING STREET SQUARE
HARBOR SPRINGS, MICHIGAN 49740

TELEPHONE
AREA CODE 616
526-6214
OR
526-6215
TELEFAX
526-9343

March 1, 1993

The Honorable Mayor
and Members of City Council
City of Harbor Springs
349 East Main Street
Harbor Springs, MI 49740

Re: Conflicts of Interest

Dear Mayor and Members of City Council:

At the request of the City Manager, I have researched the question of conflicts of interest as it pertains to members of the Planning Commission and City Council voting on zoning issues when the Planning Commission member or City Council member owns property within a zoning district that is affected by the Planning Commission or Council member's vote on the zoning issue. Based on the analysis set out below, it is my opinion that each question of this type must be decided on a case-by-case basis, but the general rule is that a Planning Commission or City Council member must abstain from voting on zoning changes which affect, directly or indirectly, the person's holdings. It is obvious that such a policy, if carried to its logical extreme, would prevent the City Council, as a board, from taking any action on zoning matters, because under the City's Charter, each member of the Council must reside within the City of Harbor Springs; hence, each Council member has an interest in property that is "directly or indirectly" affected by zoning changes. It is equally obvious that the vote of a Planning Commission or Council member on the rezoning of one piece of property which is owned entirely by the Planning Commission or Council member probably involves a conflict of interest between the member's personal profit and public duty; and, hence, the member must abstain from voting. The real issue here is, where does one draw the line in terms of a conflict of interest. It is my opinion that a hard and fast rule cannot be devised, but that the following factors should be taken into consideration:

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1. Is the member's property (or the property of an immediate family member) directly or indirectly affected by the zoning action?

2. Will the zoning action have a material effect on the value, use or enjoyment of the property owned by the member?

3. Does the member's property in the affected zone constitute a small or large percentage of the property affected by the zoning action?

4. Would the member's participation in voting involve the appearance of impropriety, regardless of the actual propriety of the action?

5. Has the member disclosed the interest in the property to the appropriate body?

6. On issues where there is any legitimate and good faith question as to the member's impartiality, the member must abstain from voting.

The reasons for my opinion are set out below:

RATIONALE

There are several statutory provisions affecting conflicts of interest, and case law pertaining thereto, as it pertains to contracts, generally, and as to zoning issues, specifically. In addition, there are specific provisions in our City Charter which bear on the question, as well as decisions by the Michigan Courts of Appeal and the Michigan Supreme Court on analogous questions. In order to provide a basis for future reference, I have set out some of these provisions in this opinion, although not all may bear on this particular question. MCLA §15.181 et seq; MSA §15.1120(121), being the Michigan Prohibition on Holding of Incompatible Offices (PA 566 of 1978), prohibits any public officer from holding an incompatible office, which means that a public officer cannot serve in two offices when one office is subordinate to the other, or where one public office is supervised by another; or, when the holding of such offices involves a breach of duty of public office (e.g., a conflict of interest). The Michigan Conflict of Interests as to Contracts statute, which is found at MCLA §15.321 et seq; MSA §4.1700(51), et seq (PA 317 of 1968), prohibits any public servant from directly or indirectly

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soliciting any contract between the public entity of which he is an officer or employee and (a) himself or herself; (b) any firm of which he is a partner, member or employee; (c) any private corporation in which he is a stockholder owning more than one percent of the total outstanding stock; or, (d) any trust of which he is a beneficiary or trustee.

It is further provided that such public servant shall not take part in the negotiations for such a contract or the renegotiation thereof or amendment thereto or in the approval thereof; nor shall a public servant represent either party in the transaction. There is an exception to this rule, for persons who are not paid for working more than an average of twenty-five hours per week, which states that if the public servant promptly discloses his or her pecuniary interest in the contract to the official body which has power to approve the contract, which disclosure is made a matter of record in its official proceedings, such a contract may be approved by a vote of not less than two-thirds of the full membership of the approving body without the vote of the member making the disclosure. The final section of the Act states that it supersedes all local charter provisions which relate to the matter of conflict of interest relative to public contracts.

Section 5.1 of the City Charter of Harbor Springs contains a broader prohibition on conflicts of interest than simply prohibiting public contracts. In this regard, Section 5.1 is set out below, in pertinent part, as follows:

"No person holding any elective and or appointive office under the City government shall take any official action on any contract with the City or other matter in which he is financially interested, ..."

The Attorney General of Michigan has issued numerous decisions in the conflict of interest area, one of which specifically relates to a board member owning property within a district in which a zoning decision is sought from the board on which the member sits. The opinion is dated September 8, 1980, and is OAG No. 5774. The Attorney General extrapolated from the conflict of interest statute, cited supra, and cited the case of Abrahamson v. Wendell, 72 Mich App 80, 249 NW 2d, 302 (1976), rehearing, 76 Mich App 278, 256 NW2d 613 (1977), finding that:

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"It is clear that a member of the township zoning board of appeals must avoid even the appearance of impropriety particularly where as here, such member of the township board also sits on the zoning board. Therefore, any conflict of interest between personal profit and public duty must be scrupulously avoided ..."

The Attorney General went on to state, however, that:

"... based upon the facts which you have presented, it is my opinion that under [the township rural zoning act] and the [conflict of interest statute], that there appears to be no conflict of interest for a member of the township board to be a member of the township board of zoning appeals, where that person holds title to land within the township, and is involved with its development, *provided that such person abstains from voting on zoning changes which affect, directly or indirectly, the person's holdings.*"

As stated above, there are decisions of the Michigan Court of Appeal and the Michigan Supreme Court also dealing with the question of conflict of interest in zoning cases. No set rule can be discerned from these cases. For example, when a case was presented to the board of appeals by the petitioner's brother, who was a member of the city council, which appointed members of the board of appeals, the court held the action of the granting of a variance by the board of appeals was void. See Barkey v. Nick, 11 Mich. App. 381, 161 NW2d 445 (1968). In another case, where a board member was an uncle of the petitioner, and the board member determined that he could act in an impartial and unbiased manner, the court of appeals upheld a variance granted by the board of appeals. See Schweihofer v. Zachary, 103 Mich App 792, 303 NW2d 896 (1981). Another case in Michigan approved a decision by the circuit judge that participation in a meeting by a member who should have been disqualified made it necessary to hold a new meeting. See Quigley v. Dexter Township, 43 Mich App 308, 204 NW2d 257 (1972), reversed, 390 Mich 707, 213 NW2d 166 (1973).

On the present issue of the propriety of the Planning Commission member recommending that City Council amend the provisions of a zoning district in which the member owned property, I analyze the situation as follows:

RAMER AND MOORE

1. The member's property currently constitutes a non-conforming use under the City's zoning code. The amendments proposed would have the effect of converting his property to a conforming use; and would expand significantly the types of uses which could be made of his property. Accordingly, it is my opinion that the proposed rezoning has a material affect on the value and use of the member's property.

2. The member's property constitutes one of approximately 14 parcels within the zoning district which are subject to the rezoning, and constitutes 7.15% of the street frontage within the area proposed for rezoning. It is my opinion that the amendment has an impact on a relatively small group of property owners, rather than being one of general application to all properties within the city.

3. On the other hand, it is clear that the applicant made a complete disclosure to the Planning Commission of his interest in this property, and that this was properly noted in the record of the proceedings, on several different occasions. The specific fact of the member's ownership of the property was discussed in many meetings leading up to the Planning Commission's recommendation.

4. Although the member actually voted on the question of recommending the amendment to the City Council, six other members of the Planning Commission also voted in favor of the rezoning; none were opposed; and at the public hearing held on the proposed zoning changes, only one objection was made. Further, it appears that the City Manager and the City Planner both recommended the zoning change and that (excluding the interested Planning Commission member) a 66.66% majority of the Planning Commission voted in favor of recommending the amendment to the City Council. Finally, it is apparent that the proposal was the subject of numerous meetings of the Planning Commission, and that plenary opportunity existed for the public to participate on this question, and that the Planning Commission member did not exercise undue influence over the Planning Commission and its decision.

Based on the foregoing, it is the opinion of the undersigned that the Planning Commission member should have abstained from voting on this question: but, given the circumstances set forth above, and since the action of the Planning Commission, in this situation, is not a quasi-judicial action, but is purely an advisory action (i.e., making a recommendation to the City Council), it is my further opinion

RAMER AND MOORE

that no rehearing of this matter before the Planning Commission is necessary, as might have been the case were this a special land use proceeding before the Planning Commission, or a proceeding before the Zoning Board of Appeals. Finally, since the member was not also a member of the City Council, the strictures of OAG Opinion No. 5774 would not apply.

I hope the foregoing is assistive to the Council and to the Planning Commission in resolving future conflicts of interest. Obviously, in a town of 1,600 people, conflicts of interest will naturally occur. A rule of reason must apply in these cases so that the ends of government are not frustrated.

Very truly yours,


James T. Ramer, City Attorney
City of Harbor Springs

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§2.04 Conflicts of Interest and Disqualification

A statute which prohibits any elected officer or employee of a township from serving as a member or employee of the township zoning board has been held not to prevent the township attorney and engineer from assisting the zoning board where it does not pay them and they are not its employees.¹

The approval of a special exception was held void where the petitioner's case was presented to the board of appeals by the petitioner's brother who was a member of the city commission which appoints members of the board of appeals.²

It appears that a township board has power to establish the salaried office of commissioner of building inspection, zoning regulations, and enforcement, and that this office is not incompatible with that of township trustee.³

In some circumstances, participation in a meeting by members of a deciding body who should be disqualified may make it necessary to hold a new meeting.⁴

Action by a board of appeals has been held valid even though one of its members failed to take an oath of office and another was the petitioner's uncle, who concluded that he could act in an impartial and unbiased manner.⁵

There is some possibility that a decision made by an administrative body might be set aside on a showing that one or more members had had prehearing *ex parte* contacts concerning the matter. See §7.01 *infra*.

1. *Brown v Shelby Twp*, 360 Mich 299; 103 NW2d 612 (1960).

2. *Barkey v Nick*, 11 Mich App 381; 161 NW2d 445 (1968); *Abrahamson v Wendell*, 72 Mich App 80; 249 NW2d 302 (1976); *rev'd and remanded*, 76 Mich App 278; 256 NW2d 613 (1977).

3. *Burton Twp v Speck*, 378 Mich 213; 144 NW2d 347 (1966).

4. *Quigley v Dexter Twp*, 43 Mich App 308; 204 NW2d 257 (1972); *rev'd*, 390 Mich 707; 213 NW2d 166 (1973).

5. *Schweihofer v Zachary*, 103 Mich App 792; 303 NW2d 896 (1981).

History. As amended by Pub Acts 1978, No. 352, imd eff July 12; 1984, No. 53, imd eff April 12.

Editor's note. This section was repealed by Pub Acts 1975, No. 227, effective March 31, 1976. The repealing act was declared unconstitutional by the Michigan Supreme Court in 2 advisory opinions (396 Mich 123 and 396 Mich 465).

1-10. [Reserved for use in future supplementation.]

11. **Construction and effect.** Under departmental rule of procedure and statutory standards of ethics for public employees in effect at time, test to determine propriety of request by state police officer for supplemental employment would be potential for conflict of interest between supplemental employment and officer's existing state employment. *Garchow v. Department of Civil Service*, 88 Mich App 384.

A justice of the peace of a fourth-class city was an officer within the meaning of former § 5.1712, and was forbidden under criminal penalty to have an interest in any contract, job, work or service with the city. *Op Atty Gen*, August 14, 1956, No. 2649.

A temporary member of the state site approval board who is employed by the applicant for a hazardous waste disposal facility construction permit is in conflict of interest. Such member must resign and a new temporary member appointed so that a duly constituted nine member state site approval board may be convened. *Op Atty Gen*, March 17, 1981, No. 5864.

A member of a city council who is employed by a corporation seeking specific quasi-judicial action from the city council is in a conflict of interest and may not participate in, nor vote upon, such official action. *Op Atty Gen*, November 2, 1981, No. 6005.

OAG, 1981-1982, No. 5864, p — (March 17, 1981), holding that members of a public body possessing quasi-judicial authority may not act upon matters submitted by a corporation which also employs them, applies generally to municipal public bodies exercising quasi-judicial authority. *Op Atty Gen*, November 2, 1981, No. 6005.

The rule of necessity may not be applied to permit disqualified members of a city council to participate or be counted for quorum purposes in quasi-judicial municipal action requested by a corporation employing them. *Op Atty Gen*, November 2, 1981, No. 6005.

12. **Supplemental employment.** Departmental denial of request by plaintiff state police polygraph examiner for supplemental private part-time employment as polygraph examiner could not be upheld on judicial review on basis of exclusory testimony, without evidentiary support, as to possibility of conflict of interest between supplemental employment and defendant's duties as state police polygraph examiner. *Garchow v. Department of Civil Service*, 88 Mich App 384.

Public employee's utilization for private gain of skill obtained incident to public employment would not be prohibited as violative of statutory standards of conduct and ethics for such employee so long as such utilization would not compromise employee's primary responsibility as public employee. *Garchow v. Department of Civil Service*, 88 Mich App 384.

Holding by court of appeals that plaintiff police officer was entitled to engage in supplemental part-time private employment upon determination of no conflict of interest between potential supplemental employment and plaintiff's duties as police officer would not preclude imposition of reasonable departmental restrictions so long as they did not constitute denial of supplemental employment but addressed conflicts arising in fact between departmental requirement and plaintiff's supplemental employment. *Garchow v. Department of Civil Service*, 88 Mich App 384.

13. **Incompatible offices.** The offices of member of board of trustees of Michigan State University and director of the office of state employer are incompatible and may not be simultaneously occupied. *Op Atty Gen*, March 17, 1983, No. 6134.

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ASSESSOR: APPOINTMENT, FUNCTIONS AND DUTIES:

Section 4.13. The Council shall appoint a City Assessor. The functions and duties of the Assessor shall be limited to estimating the value of property and placing such valuations on the assessment roll; all clerical work usually attached to this office shall be handled in the office of the Clerk.

CHAPTER 5**GENERAL PROVISIONS REGARDING OFFICERS AND PERSONNEL OF THE CITY****FINANCIAL INTERESTS PROHIBITED:**

Section 5.1. No person holding any elective or appointive office under the city government shall take any official action on any contract with the city or other matter in which he is financially interested, or be a bondsman or surety on any contract or bond given to the city. Any member of the Council or other officer found guilty of violating this provision by a court of competent jurisdiction may be punished by a fine of not to exceed \$500.00 or imprisonment for not to exceed 90 days or both in the discretion of the court.

Conflict of Interest

SURETY BONDS:

Section 5.2. Any city officer elected or appointed by authority of this charter may be required to give a bond to be approved by the Council for the faithful performance of the duties of his office, in such sum as the Council by ordinance or resolution shall determine, but all officers receiving or disbursing city funds shall be bonded. All official bonds, except those of the Justices of the Peace, which shall be the same as provided by state law for such officials in townships, shall be corporate surety bonds, and the premiums thereon shall be payable by the city. All official bonds shall be filed with the Clerk.

RESIDENCE REQUIREMENTS FOR APPOINTIVE OFFICERS:

Section 5.3. Appointive officers who may not be residents of the city at the time of appointment must become residents of the city within 90 days after entering upon the duties of the office to which they were appointed and shall remain residents during their tenure of office. Appointive officers of the Utilities Department are excepted, when approved by city manager and city council.

COMPENSATION OF EMPLOYEES AND OFFICERS:

Section 5.4. (a) The compensation of all employees and officers of the city whose compensation is not provided for herein shall be fixed by the appointing officer or body within the limits of budget appropriations and in accordance with any over-all pay plan adopted by the Council.

CONFLICT OF INTEREST: Service by a retired employee of a city on the city council.

HOMERULE CITIES: Service by a retired city employee on city council as a conflict of interest.

No conflict of interest prevents a retired city employee who is receiving a pension from the city from running for the office of or serving as a member of the city's council. However, if the retiree serves as a member of the city council, he or she must disclose this interest and, if a change in the retirement plan affecting retirees is before the council, the change will require approval of 2/3 of the full membership without the vote of the retiree.

Opinion No. 5243

November 3, 1977.

Honorable William L. Jowett
State Representative
The Capitol
Lansing, Michigan 48901

You have requested my opinion as to whether a person who has retired from employment with a city and is receiving a pension therefrom is in conflict of interest if he becomes a candidate for or serves as a member of that city's council.

The conflict of interest statute which applies to public servants is 1968 PA 317; MCLA 15.321 *et seq*; MSA 4.1700(51) *et seq*.¹ Section 2 of this act provides in pertinent part:

"(1) No public servant shall be a party, directly or indirectly, to any contract between himself and the public entity of which he is an officer or employee, except as provided in section 3."

1968 PA 317, *supra*, § 3, provides:

"The provisions of section 2 hereof shall apply to all public servants who are paid for working more than an average of 25 hours per week for a public entity, but such provisions shall not apply to any other public servant: (1) if he shall promptly disclose his pecuniary interest in the contract to the official body which has power to approve the same, which disclosure shall be made a matter of record in its official proceedings; and (2) if the contract is approved by a vote of 2/3 of the full membership of such approving body without the vote of a member thereof, if any, making such disclosure."

Prior to the adoption of the 1963 Constitution, pensions granted by public authorities were not contractual obligations but gratuitous allowances which could be revoked at will by the authority, *Brown v City of Highland Park*, 320 Mich 108; 30 NW2d 798 (1948), at least while acting within reasonable limits, *Retired Policemen & Firemen of the City of Lincoln Park*, 6 Mich App 372; 149 NW2d 206 (1967). However, the first paragraph of Const 1963, art 9, § 24, now provides:

¹ This act was repealed by 1975 PA 227, § 191. However, the Michigan Supreme Court in *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich 123; 230 NW2d 193 (1976), ruled the repealing act unconstitutional for embracing more than one object, thereby leaving 1968 PA 317 unaffected by the attempted repeal.

James Ramey
7 pages

"The accrued financial benefits of such pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." [Emphasis added]

The purpose of this provision was explained by Delegate Van Dusen during the course of the constitutional convention as follows:

"MR. VAN DUSEN: Mr. Chairman and members of the committee, this proposal by the committee is designed to . . . give to the employees participating in these plans a security which they do not now enjoy, by making the accrued financial benefits of the plans contractual rights. This, you might think, would go without saying, but several judicial determinations have been made to the effect that participants in pension plans for public employees have no vested interest in the benefits which they believe they have earned; that the municipalities and the state authorities which provide these plans provide them as a gratuity, and therefore it is within the province of the municipality or the other public employer to terminate the plan at will without regard to the benefits which have been, in the judgment of the employees, earned. Now, it is the belief of the committee that *the benefits of pension plans are in a sense deferred compensation for work performed*. And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed. Now, this does not mean that a municipality or other public employing unit could not change the benefit structure of its pension plan so far as future employment is concerned. But what it does mean is that once an employee has performed the service in reliance upon the then present level of benefits, the employee has the contractual right to receive those benefits under the terms of the statute or ordinance prescribing the plan . . . It confers the contractual right. It should confer upon public employees a considerably greater degree of security with respect to the knowledge that they will receive the benefits when the time comes." [Emphasis added; 2 Official Record, Constitutional Convention 1961, pp 770-771]

Thus, the public pension plan referred to in Const 1963, art 9, § 24, is a part of the compensation of public employment that is deferred until the employee terminates his employment with the public body and is a contractual obligation of the public body. See: *Mt. Clemens Fire Fighters Union, Local 835, I.A.F.F. v City of Mt. Clemens*, 58 Mich App 635, 643; 228 NW2d 500, 504 (1975), where the court stated that the pension and retirement plan of the city was "a valuable part of the conditions of employment."

Nevertheless, 1968 PA 317, § 3, *supra*, does not prohibit a person having a potential conflict of interest from running for or serving as a part-time officer on a policy-making body. However, a retiree who serves on a city council may be placed in the position of considering matters which affect his rights as a participant in the municipal pension plan. Therefore, if a question should arise before the council which affects the retiree's benefits as a retiree, the retiree must disclose his interest and refrain from voting on the matter. 1968 PA 317, § 3, *supra*.

In summary, while no conflict of interest exists which prevents a retired city

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employee from running for the office of or serving as a member of the city's council, the retiree must refrain from voting on matters affecting the pension or retirement benefits he or she receives from the city; in addition, a change in the pension program will require approval of $\frac{2}{3}$ of the full membership without the vote of the retiree.

FRANK J. KELLEY,
Attorney General,

INCOMPATIBLE OFFICES: Member of township board and member of township board of zoning appeals

PUBLIC OFFICES AND OFFICERS: Conflict of interest and incompatibility

A member of a township board is expressly permitted by the Legislature to serve simultaneously as a member of the township board of zoning appeals.

Where a member of a township board of zoning appeals owns land within the township which is affected either directly or indirectly by zoning appeals pending before the township board of zoning appeals, the member must disqualify himself or herself when the matter is considered by the township board of zoning appeals and his or her failure to do so shall constitute misconduct for which he or she may be removed from office.

Opinion No. 5774

September 8, 1980.

Robert L. Kaczmarek
Prosecuting Attorney
County of Saginaw
Governmental Center
111 S. Michigan Avenue
Saginaw, Michigan 48602

You have requested my opinion on the following questions:

- (1) Is there a conflict of interest for a person who is a member of the township board to be a member of the township board of zoning appeals where that person holds title to land within the township and is involved with its development?
- (2) Is the office of member of the township board compatible with membership on the board of zoning appeals under these facts?

You inform me that the member of the township board who sits on the township's zoning board of appeals has property holdings within the township, which holdings are being developed. You also indicate the individual has abstained from voting upon zoning changes for parcels of land which he owns.

The township zoning act, 1943 PA 184, § 18(1), as amended by 1978 PA 637; MCLA 125.283(1); MSA 5.2963(18) (1) provides, that one member of the township board may be appointed to serve on the zoning board of appeals. Thus, the Legislature has specifically authorized the simultaneous holding by one individual of the two offices in question. However, with respect to conflicts of interest which may arise during the service of a member on the township board of zoning appeals, 1943 PA 184, § 18(1), *supra*, further provides:

"... A member shall disqualify himself or herself from a vote in which the member has a conflict of interest. Failure of a member to disqualify himself or herself from a vote from which the member has a conflict of interest shall constitute misconduct in office."

The quoted language was added to section 18(1), *supra*, by amendatory 1976 PA 131, as last amended by 1978 PA 637, *supra*. No language in 1943 PA 184, § 18, *supra*, describes further the phrase "conflict of interest."

The conflict of interest statute, 1968 PA 317, MCLA 15.321 *et seq*; MSA 4.1700(51) *et seq*, provides for the conduct of public servants in respect to contracts with public entities, and constitutes "the sole law in this state . . . in respect to conflicts of interest relative to public contracts. . . ." 1968 PA 317, *supra*, § 8. A member of the township board who simultaneously occupies the office of zoning board of appeals member is a "public servant" in both capacities within the meaning of 1968 PA 317, *supra*, § 1(a). 1968 PA 317, *supra*, § 2 provides:

"(1) No public servant shall be a party, directly or indirectly, to any contract between himself and the public entity of which he is an officer or employee, except as provided in section 3.

"(2) No public servant shall directly or indirectly solicit any contract between the public entity of which he is an officer or employee and (a) himself; (b) any firm (meaning a co-partnership or other unincorporated association) of which he is a partner, member or employee; (c) any private corporation in which he is a stockholder owning more than 1% of the total outstanding stock of any class where such stock is not listed on a stock exchange or stock with a present total market value in excess of \$25,000.00 where such stock is listed on a stock exchange or of which he is a director, officer or employee; or (d) any trust of which he is a beneficiary or trustee; nor shall he take any part in the negotiations for such a contract or the renegotiation thereof or amendment thereto or in the approval thereof; nor shall he represent either party in the transaction; except as provided in section 3."

1968 PA 317, *supra*, § 3 declares:

"The provisions of section 2 hereof shall apply to all public servants who are paid for working more than an average of 25 hours per week for a public entity, but such provisions shall not apply to any other public servant: (1) if he shall promptly disclose his pecuniary interest in the contract to the official body which has power to approve the same, which disclosure shall be made a matter of record in its official proceedings; and (2) if the contract is approved by a vote of two-thirds of the full membership of such approving body without the vote of a member thereof, if any, making such disclosure."

Thus, to the extent an individual who is a public servant enters into contracts with the public entity which the individual serves, the provisions of 1968 PA 317, *supra*, must be observed.

The language in 1943 PA 184, § 18(1), *supra*, prohibiting conflict of interest, was construed in *Abrahamson v Wendell*, 72 Mich App 80; 249 NW2d 302 (1976), *rehearing*, 76 Mich App 278; 256 NW2d 613 (1977). In *Abrahamson, supra*, a decision of a township zoning board of appeals was held void where the township supervisor appeared before the zoning board on behalf of parties as their contractor seeking a zoning variance. The township board, of which the supervisor is a member, possessed appointive power concerning membership on the zoning board; 1943 PA 184, § 18(1), *supra*. In voiding the decision by the township zoning board of appeals, the Court stated:

"In the present case, the township supervisor appeared before the township zoning board of appeals on behalf of the defendants as their contractor. As such, he sought a variance from an administrative body

over which he had powers of appointment. Further, upon granting of the variance, he could then procure a building permit and proceed with the construction. *Under these circumstances, it is difficult to believe the supervisor did not in fact have a conflict of interest between personal profit and public duty.* . . . [A]s a matter of law, the appearance by the supervisor before the body of which he had appointive powers, at least in part, must be deemed an imposition, of duress on the members of the zoning board of appeals and, as a result, the action of the board is void. . . . It is hoped that this conclusion will help bolster the public confidence in the decision makers which must represent their interests and who must seek to avoid even the appearance of impropriety." [Emphasis supplied.] 72 Mich App 80, 83; 76 Mich App 278, 281-282.

It is clear that a member of the township zoning board of appeals must avoid even the appearance of impropriety particularly where, as here, such member of the township board also sits upon the zoning board. Therefore, any conflict of interest between personal profit and public duty must be scrupulously avoided. Thus, under 1943 PA 184, § 18(1), *supra*, the failure of a member of the township board of zoning appeals to disqualify himself or herself from a vote in which the member has a conflict of interest "shall constitute misconduct" for which the person "shall be removable" from office by the township board upon written charges.

In response to your first question, based upon the facts which you have presented, it is my opinion that under 1943 PA 184, § 18(1), *supra*, and 1968 PA 317, *supra*, that there appears to be no conflict of interest for a member of the township board to be a member of the township board of zoning appeals, where that person holds title to land within the township, and is involved with its development, provided that such person abstains from voting on zoning changes which affect, directly or indirectly, the person's holdings.

Your second question addresses whether in this instance, the office of member of the township board and simultaneous membership on the township zoning board of appeals is compatible. 1978 PA 566, MCLA 15.181 *et seq*; MSA 15.1120(121) *et seq*, prohibits the holding of incompatible public offices and sets forth the standards under which such incompatibility is to be determined.

It should be noted that 1978 PA 566, *supra*, was enacted by the same legislature that subsequently enacted 1978 PA 637, which amended 1943 PA 184, § 18(1), *supra*. 1978 PA 637 did not alter the language in 1943 PA 184, § 18(1), *supra*, which provides that the township board may appoint a member of the township board as a member of the zoning board, thereby evidencing its manifest intent that the dual holding of the office of member of the township board and member of the zoning board of appeals is permitted and is, therefore, not incompatible. When enacting or amending a statute, the legislature must be presumed to have knowledge of existing statutes and laws. *Skidmore v Cupiga*, 82 Mich App 689; 267 NW2d 150 (1978), *in den*, 403 Mich 810. Generally, statutes which can stand together and relate to the same subject matter, being *in pari materia*, should be construed together and effect should be given all of them. *In Re Jones' Estate*, 334 Mich 392; 54 NW2d 697 (1952).

Construing 1978 PA 566, *supra*, in conjunction with 1943 PA 184, § 18(1), *supra*, I am constrained to conclude that while the same individual may

compatibly serve as a member of the township board and member of the township board of zoning appeals, as a member of the board of zoning appeals. the official must refrain from voting on those matters where a conflict of interest exists.

Because a member of a township board serving also as a member of the township board of zoning appeals and owning and developing land in the township may be affected by decisions made by the township board of zoning appeals involving land not owned by such member, township boards should avoid such appointments, whenever possible, as a matter of policy.

It is, therefore, my opinion that dual holding of the office of member of the township board and membership on the township board of zoning appeals is compatible. The dual office holder shall abstain from voting on matters where a conflict of interest exists, pursuant to 1943 PA 184, § 18(1), *supra*, and upon failure to do so, the member of the zoning board of appeals is subject to removal from that office.

FRANK J. KELLEY.
Attorney General.

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Date of Printing: NOV 08, 2006

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▷ **Barkey v. Nick**, 11 Mich.App. 381, 161 N.W.2d 445 (Mich.App., May 27, 1968) (NO. 3514)Citing References
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- 1 Department of Transp. v. Township of Kochville, 682 N.W.2d 553, 555+, 261 Mich.App. 399, 402+ (Mich.App. Feb 05, 2004) (NO. 240685) "" ★ ★ ★ ★ HN: 1,2,3 (N.W.2d)
- 2 Carr v. City of Ann Arbor, 2001 WL 1636354, *2 (Mich.App. Dec 14, 2001) (NO. 225456) ★
- 3 In re Water Use Permit Applications, 9 P.3d 409, 437, 94 Hawai'i 97, 125 (Hawai'i Aug 22, 2000) (NO. 21309) ★ ★ HN: 1 (N.W.2d)

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- 4 Abrahamson v. Wendell, 256 N.W.2d 613, 614+, 76 Mich.App. 278, 280+ (Mich.App. Jun 20, 1977) (NO. 23041) "" HN: 1,2 (N.W.2d)
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- 9 County of Lancaster, S.C. v. Mecklenburg County, N.C., 434 S.E.2d 604, 615, 334 N.C. 496, 512 (N.C. Sep 10, 1993) (NO. 293PA92) HN: 1 (N.W.2d)

State Administrative Materials (U.S.A.)

- 10 1983-1984 Mich. Op. Atty Gen. 281, Honorable Jelt Sietsema (1984) ★ ★ HN: 1 (N.W.2d)
- 11 1981-1982 Mich. Op. Atty Gen. 439, Honorable Michael D. Hayes Honorable Robert D. Young (1981) ★ HN: 1 (N.W.2d)
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- 18 Anderson's American Law of Zoning s 22:47, s 22:47. Conflict of interest -- Appearance of fairness (2006) HN: 1 (N.W.2d)
- 19 Michigan Pleading and Practice s 60:162, s 60:162. Exercise of discretion (2006) HN: 3 (N.W.2d)
- 20 Rathkopf's The Law of Zoning and Planning s 32:23, s 32:23. Prejudice or partiality -- Appearance by public officers (2006) HN: 1 (N.W.2d)

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- 21 Mich. Civ. Jur. Officers and Public Employees s 85, s 85. Generally (2006)
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Appellate Briefs

- 27 NORTHFIELD DEVELOPMENT CO., INC., Plaintiff, v. CITY OF BURLINGTON, a Political Subdivision of the State of North Carolina, Defendant., 2003 WL 23338188, *23338188+ (Appellate Brief) (N.C.App. May 08, 2003) Defendant-Appellee's Brief (NO. COA03-65) ★ ★ HN: 1,3 (N.W.2d)

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261 Mich.App. 399, 682 N.W.2d 553

(Cite as: 261 Mich.App. 399, 682 N.W.2d 553)

Court of Appeals of Michigan.
DEPARTMENT OF TRANSPORTATION,
Plaintiff-Appellee,
v.
TOWNSHIP OF KOCHVILLE and Board of
Zoning Appeals, Defendants-Appellants.
Docket No. 240685.

Submitted Nov. 5, 2003, at Lansing.

Decided Feb. 5, 2004.

Approved for Publication March 25, 2004, at 9:05
a.m.

Released for Publication June 24, 2004.

Background: Department of Transportation sought judicial review of a decision by township board of zoning appeals that denied requests for setback variances for properties adjacent to highway-widening project. The Saginaw Circuit Court reversed, and township and its board of zoning appeals appealed.

Holding: The Court of Appeals held that appearance of town supervisor at zoning hearings did not impose duress on board.
Reversed and remanded.

West Headnotes

Zoning and Planning ➡541

414k541 Most Cited Cases

Township supervisor's appearances before board of zoning appeals, in proceedings to grant zoning variances on behalf of property owners, did not impose duress on board; supervisor did not represent a personal interest, but maintained his fidelity to township by commenting on the interests of the township, and he did not encourage board members to serve an interest other than that which they were bound to serve.

****554 *400** Michael A. Cox, Attorney General, Thomas L. Casey, Solicitor General, and Raymond O. Howd, Assistant Attorney General, for the

plaintiff.

Cox, Hodgman & Giarmarco, P.C. (by Thomas J. McGraw), Troy, for the defendants.

Before: O'CONNELL, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendants appeal by leave granted an order peremptorily reversing defendant Kochville Township Board of Zoning Appeals' denial of ten zoning variance requests. [FN1] We reverse.

FN1. Throughout the remainder of this opinion, "defendant" refers to the board of zoning appeals.

I. Facts and Proceedings

Plaintiff, the Department of Transportation, undertook a road-widening project to improve M-84, also known as Bay Road, which runs through Kochville Township. As a result of widening the road, numerous properties along M-84 would no longer conform to the setback requirements of the township's zoning ordinance or the extent of their legal nonconformity would increase. Pursuant to MCL 213.52(2), plaintiff sought zoning variances on behalf of sixteen property owners whose signs, buildings, or parking lots would be affected by the project.

***401** Defendant convened on October 22, 2001, to separately consider each variance request and granted the first request. While defendant was considering the second variance request, Ken Bayne, the township supervisor, stated:

On behalf of the township, ... I wanted to point out that, in our new sign ordinance that was just written and approved and it's become law in the township, every one of these signs is a legal, nonconforming sign. And I don't believe it's the

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township's position that--I don't feel we should be increasing a nonconformity, and that's exactly what we're doing. And the township spent a lot of time, the better part of three or four months, on rewriting this sign ordinance to improve the safety issues along the M-84 corridor and within our business districts. And I don't think we should take the position of making these nonconformities more nonconforming than what they already are.

After Bayne made these comments, defendant denied the variance request it was considering. Defendant proceeded to consider several other variance requests that day and denied all but one request. The next day, defendant's hearings resumed. Defendant granted some requests and denied others. As defendant was considering the last variance request, Bayne addressed the board again:

I think the township would be concerned on the building setback as close to the road as it is. If something would happen to that building, they're going to be allowed to rebuild that building on the same, exact spot, and they don't have to build it according to the current **555 ordinances. They can build it according to the variance that they have, and that variance remains with that property forever.

Defendant denied the final request.

Plaintiff subsequently appealed all ten denials to the trial court and moved for preemptory reversal, claiming that Bayne's appearances before the board in his capacity *402 as township supervisor amounted to an imposition of duress as a matter of law, in light of the fact that the township board, of which Bayne is a member, has powers of appointment over defendant. The trial court granted plaintiff's motion and granted the variance requests. Defendants now appeal.

II. Standard of Review

Although "there is no single standard of review that applies in zoning cases," *Macenas v. Village of Michiana*, 433 Mich. 380, 394, 446 N.W.2d 102 (1989), we review the specific question presented in this case de novo as a question of law, *In re Jude*,

228 Mich.App. 667, 670, 578 N.W.2d 704 (1998).

III. Analysis

Defendants contend that the trial court improperly granted plaintiff's motion for preemptory reversal because the township supervisor's appearances did not constitute an imposition of duress as a matter of law. We agree.

The trial court relied exclusively on *Barkey v. Nick*, 11 Mich.App. 381, 161 N.W.2d 445 (1968), and *Abrahamson v. Wendell (On Rehearing)*, 76 Mich.App. 278, 256 N.W.2d 613 (1977), to support its conclusion that Bayne's appearances imposed duress on defendant as a matter of law. In *Barkey*, a city commissioner with power of appointment over the zoning board of appeals represented his brother and sister-in-law before the board in their request for a special exception to use part of their property as a parking lot. *Barkey*, *supra* at 383, 161 N.W.2d 445. This Court ultimately determined that the city commissioner's appearance before the board constituted an imposition of duress as a matter of law. *Id.* at 385, 161 N.W.2d 445. Similarly, *403 in *Abrahamson*, the township supervisor, possessing power of appointment over the zoning board of appeals, appeared before the board to request a variance. *Abrahamson*, *supra* at 280, 256 N.W.2d 613. At the time, the township supervisor served both as the representative for the parties requesting the variance and their contractor. *Id.* Relying on *Barkey*, this Court concluded that the township supervisor's appearance constituted an imposition of duress as a matter of law. *Id.* at 281-282, 256 N.W.2d 613.

Defendant argues that *Barkey* and *Abrahamson* are distinguishable from the instant case and that the trial court, therefore, erred by relying on them to conclude that Bayne imposed duress on defendant. We agree.

In *Barkey*, this Court stated that the appearance of the city commissioner in that case created: (1) "an abuse of trust imposed by the assumption of public office"; (2) "a personal pecuniary interest conflicting with the fiduciary duty owed all members of the public"; and (3) "a doubt in the

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public mind as to the impartiality of the board's action." *Barkey*, *supra* at 385, 161 N.W.2d 445. The Court continued by stating that

[t]he presence of the city commissioner before the board brings with it the presence and powers of his office. It is basic to due process that in all judicial and quasi-judicial proceedings the deciding power must not seek to serve [interests] other than that of the voters, taxpayers, members of the general public, justice, and due process. [*Id.* (emphasis in original).]

****556** The Court in *Abrahamson* likewise concluded that a conflict of interest existed between the township supervisor's personal interest and public duty. *Abrahamson*, *supra* at 281, 256 N.W.2d 613. Without further intervening analysis, the Court stated: "Therefore, as a matter of law, the appearance by the supervisor before the body over which he had appointive powers, at least in part, must be deemed ***404** an imposition of duress on the members of the zoning board of appeals and, as a result, the action of the board is void." *Id.* at 281-282, 256 N.W.2d 613.

Unlike the officials in *Barkey* and *Abrahamson*, Bayne did not have a personal pecuniary interest in the outcome of the proceedings. We conclude that this distinction is crucial because of the extent to which the analysis in *Barkey* and *Abrahamson* relied on the conflict between the official's personal interest and his public commitment. Although plaintiff contends that *Barkey* and *Abrahamson* apply despite this difference, we disagree. In neither case did this Court state that the same result occurs in the absence of a conflict of interest.

Additionally, the importance of the existence of a conflict of interest to the conclusions reached in *Barkey* and *Abrahamson* is emphasized by the *Barkey* Court's reliance on *Place v. Bd. of Adjustment of Borough of Saddle River*, 42 N.J. 324, 200 A.2d 601 (1964), and *Aldom v. Borough of Roseland*, 42 N.J.Super. 495, 127 A.2d 190 (1956). In these cases, the courts stressed that public officials must serve the public interest to the exclusion of self-interest. *Place*, *supra* at 332-333, 200 A.2d 601; *Aldom*, *supra* at 501-502, 127 A.2d

190. The court in *Aldom* stated, "[b]asically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official." *Aldom*, *supra* at 502, 127 A.2d 190. Moreover, *Aldom*, upon which *Place* relied, addressed whether a councilman with a personal interest in the matter should have abstained from voting, *id.* at 500, 127 A.2d 190, and did not involve a public officer with powers of appointment over the voting body.

***405** In the present case, the township supervisor did not represent a personal interest but maintained his fidelity to the township's citizens by commenting on the interests of the township. Accordingly, he did not serve an interest "other than that of the voters, taxpayers, members of the general public, justice, and due process." *Barkey*, *supra* at 385, 161 N.W.2d 445. Moreover, by representing the township's interests, he did not encourage the board members to serve an interest other than that which they were bound to serve. *Id.* Accordingly, we conclude that the instant case is not analogous to *Barkey* and *Abrahamson* and that the trial court, therefore, erred by concluding that Bayne's appearances imposed duress on defendant as a matter of law. [FN2]

FN2. To the extent that plaintiff argues that Bayne imposed duress on defendant or unduly influenced defendant as a matter of fact rather than as a matter of law, plaintiff did not properly preserve this claim. *Fast Air, Inc. v. Knight*, 235 Mich.App. 541, 549, 599 N.W.2d 489 (1999).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5774

September 8, 1980

INCOMPATIBLE OFFICES:

Member of township board and member of township board of zoning appeals

PUBLIC OFFICES AND OFFICERS:

Conflict of interest and incompatibility

A member of a township board is expressly permitted by the Legislature to serve simultaneously as a member of the township board of zoning appeals.

Where a member of a township board of zoning appeals owns land within the township which is affected either directly or indirectly by zoning appeals pending before the township board of zoning appeals, the member must disqualify himself or herself when the matter is considered by the township board of zoning appeals and his or her failure to do so shall constitute misconduct for which he or she may be removed from office.

Robert L. Kaczmarek

Prosecuting Attorney

County of Saginaw

Governmental Center

111 S. Michigan Avenue

Saginaw, Michigan 48602

You have requested my opinion on the following questions:

(1) Is there a conflict of interest for a person who is a member of the township board to be a member of the township board of zoning appeals where that person holds title to land within the township and is involved with its development?

(2) Is the office of member of the township board compatible with membership on the board of zoning appeals under these facts?

You inform me that the member of the township board who sits on the township's zoning board of appeals has property holdings within the township, which holdings are being developed. You also indicate the individual has abstained from voting upon zoning changes for parcels of land which he owns.

The township zoning act, 1943 PA 184, Sec. 18(1), as amended by 1978 PA 637; MCLA 125.288(1); MSA 5.2963(18) (1) provides, that one member of the township board may be appointed to serve on the zoning board of appeals. Thus, the Legislature has specifically authorized the simultaneous holding by one individual of the two offices in question. However, with respect to conflicts of interest which may arise during the service of a member on the township board of zoning appeals, 1943 PA 184, Sec. 18(1), supra, further provides:

' . . . A member shall disqualify himself or herself from a vote in which the member has a conflict of interest. Failure of a member to disqualify himself or herself from a vote from which the member has a conflict of interest shall constitute misconduct in office.'

The quoted language was added to section 18(1), supra, by amendatory 1976 PA 131, as last amended by 1978 PA 637, supra. No language in 1943 PA 184, Sec. 18, supra, describes further the phrase 'conflict of interest.'

The conflict of interest statute, 1968 PA 317; MCLA 15.321 et seq; MSA 4.1700(51) et seq, provides for the conduct of public servants in respect to contracts with public entities, and constitutes 'the sole law in this state . . . in respect to conflicts of interest relative to public contracts. . . .' 1968 PA 317, supra, Sec. 8. A member of the township board who simultaneously occupies the office of zoning board of appeals member is a 'public servant' in both capacities within the meaning of 1968 PA 317, supra, Sec. 1(a). 1968 PA 317, supra, Sec. 2 provides:

'(1) No public servant shall be a party, directly or indirectly, to any contract between himself and the public entity of which he is an officer or employee, except as provided in section 3.

'(2) No public servant shall directly or indirectly solicit any contract between the public entity of which he is an officer or employee and (a) himself; (b) any firm (meaning a co-partnership or other unincorporated association) of which he is a partner, member or employee; (c) any private corporation in which he is a stockholder owning more than 1% of the total outstanding stock of any class where such stock is not listed on a stock exchange or stock with a present total market value in excess of \$25,000.00 where such stock is listed on a stock exchange or of which he is a director, officer or employee; or (d) any trust of which he is a beneficiary or trustee; nor shall he take any part in the negotiations for such a contract or the renegotiation thereof or amendment thereto or in the approval thereof; nor shall he represent either party in the transaction; except as provided in section 3.'

1968 PA 317, supra, Sec. 3 declares:

'The provisions of section 2 hereof shall apply to all public servants who are paid for working more than an average of 25 hours per week for a public entity, but such provisions shall not apply to any other public servant: (1) if he shall promptly disclose his pecuniary interest in the contract to the official body which has power to approve the same, which disclosure shall be made a matter of record in its official proceedings; and (2) if the contract is approved by a vote of two-thirds of the full membership of such approving body without the vote of a member thereof, if any, making such disclosure.'

Thus, to the extent an individual who is a public servant enters into contracts with the public entity which the individual serves, the provisions of 1968 PA 317, supra, must be observed.

The language in 1943 PA 184, Sec. 18(1), supra, prohibiting conflict of interest, was construed in Abrahamson v Wendell, 72 Mich App 80; 249 NW2d 302 (1976), rehearing, 76 Mich App 278; 256 NW2d 613 (1977). In Abrahamson, supra, a decision of a township zoning board of appeals was held void where the township supervisor appeared before the zoning board on behalf of parties as their contractor seeking a zoning variance. The township board, of which the supervisor is a member, possessed appointive power concerning membership on the zoning board; 1943 PA 184, Sec. 18(1), supra. In voiding the decision by the township zoning board of appeals, the Court stated:

'In the present case, the township supervisor appeared before the township zoning board of appeals on behalf of the defendants as their contractor. As such, he sought a variance from an administrative body over which he had

powers of appointment. Further, upon granting of the variance, he could then procure a building permit and proceed with the construction. Under these circumstances, it is difficult to believe the supervisor did not in fact have a conflict of interest between personal profit and public duty. . . . [A]s a matter of law, the appearance by the supervisor before the body of which he had appointive powers, at least in part, must be deemed an imposition, of duress on the members of the zoning board of appeals and, as a result, the action of the board is void. . . . It is hoped that this conclusion will help bolster the public confidence in the decision makers which must represent their interests and who must seek to avoid even the appearance of impropriety.' [Emphasis supplied.] 72 Mich App 80, 83; 76 Mich App 278, 281-282.

It is clear that a member of the township zoning board of appeals must avoid even the appearance of impropriety particularly where, as here, such member of the township board also sits upon the zoning board. Therefore, any conflict of interest between personal profit and public duty must be scrupulously avoided. Thus, under 1943 PA 184, Sec. 18(1), supra, the failure of a member of the township board of zoning appeals to disqualify himself or herself from a vote in which the member has a conflict of interest 'shall constitute misconduct' for which the person 'shall be removable' from office by the township board upon written charges.

In response to your first question, based upon the facts which you have presented, it is my opinion that under 1943 PA 184, Sec. 18(1), supra, and 1968 PA 317, supra, that there appears to be no conflict of interest for a member of the township board to be a member of the township board of zoning appeals, where that person holds title to land within the township, and is involved with its development, provided that such person abstains from voting on zoning changes which affect, directly or indirectly, the person's holdings.

Your second question addresses whether in this instance, the office of member of the township board and simultaneous membership on the township zoning board of appeals is compatible. 1978 PA 566, MCLA 15.181 et seq; MSA 15.1120 (121) et seq, prohibits the holding of incompatible public offices and sets forth the standards under which such incompatibility is to be determined.

It should be noted that 1978 PA 566, supra, was enacted by the same legislature that subsequently enacted 1978 PA 637, which amended 1943 PA 184, Sec. 18(1), supra. 1978 PA 637 did not alter the language in 1943 PA 184, Sec. 18(1), supra, which provides that the township board may appoint a member of the township board as a member of the zoning board, thereby evidencing its manifest intent that the dual holding of the office of member of the township board and member of the zoning board of appeals is permitted and is, therefore, not incompatible. When enacting or amending a statute, the legislature must be presumed to have knowledge of existing statutes and laws. Skidmore v Czapiga, 82 Mich App 689; 267 NW2d 150 (1978), lv den, 403 Mich 810. Generally, statutes which can stand together and relate to the same subject matter, being in pari materia, should be construed together and effect should be given all of them. In Re Jones' Estate, 334 Mich 392; 54 NW2d 697 (1952).

Construing 1978 PA 566, supra, in conjunction with 1943 PA 184, Sec. 18(1), supra, I am constrained to conclude that while the same individual may compatibly serve as a member of the township board and member of the township board of zoning appeals, as a member of the board of zoning appeals, the official must refrain from voting on those matters where a conflict of interest exists.

Because a member of a township board serving also as a member of the township board of zoning appeals and owning and developing land in the township may be affected by decisions made by the township board of zoning appeals involving land not owned by such member, township boards should avoid such appointments, whenever possible, as a matter of policy.

It is, therefore, my opinion that dual holding of the office of member of the township board and membership on the township board of zoning appeals is compatible. The dual office holder shall abstain from voting on matters where a conflict of interest exists, pursuant to 1943 PA 184, Sec. 18(1), supra, and upon failure to do so, the member of the zoning board of appeals is subject to removal from that office.

Frank J. Kelley

Attorney General

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STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 5864

March 17, 1981

CONFLICT OF INTEREST:

Temporary member of state site approval board employed by applicant for permit

HAZARDOUS WASTE MANAGEMENT ACT:

State Site Approval Board--Conflict of interest of temporary members

PUBLIC OFFICERS AND EMPLOYEES:

Conflict of interest

State Ethics Act

A temporary member of the State site approval board who is employed by the applicant for a hazardous waste disposal facility construction permit is in conflict of interest. Such member must resign and a new temporary member appointed so that a duly constituted nine member State site approval board may be convened.

Dr. Howard A. Tanner

Director

Department of Natural Resources

Box 30028

Lansing, Michigan

You have requested my opinion on a matter of first impression involving the Hazardous Waste Management Act, 1979 PA 64; MCLA 299.501; et seq; MSA 13.30(1) et seq. Your question involves potential conflict of interest in the temporary membership of the site approval board. The board has ultimate authority in approving or denying the issuance of a construction permit for establishment of a hazardous waste disposal facility within a municipality.

You state that the first site approval board under 1979 PA 64, supra, has been convened in Midland County to review an application by the Dow Chemical Company to establish a hazardous waste facility in the City of Midland. With respect to the four temporary members of the nine member site approval board, discussed infra, two appointments thereto have been made by the Midland City Council. The two remaining appointments have been made by the Midland County

Board of Commissioners.

I am advised that with respect to the two temporary members appointed by the City of Midland, one person is employed by Dow Chemical as an industrial hygienist. The other temporary city member, formerly employed by Dow Chemical, is a chemist for Samtest, Inc. I am advised that Samtest, Inc., performs for Dow Chemical certain chemical testing at various times, and that such testing constitutes approximately 10% of Samtest's business. As to the two temporary county members, one person is a member of the Midland County Board of Commissioners and is employed by the Michigan Division of Dow Chemical. The other county member is a former executive of Dow Chemical who retired in 1964 and who presently holds approximately 400 shares of stock in Dow Chemical. This individual receives a fixed amount pension from Dow Chemical under a pension plan administered by an insurance company.

Thus, you inquire whether the four temporary members, in view of their past and present employment nexus with Dow Chemical, are in conflict of interest in performing their statutory duties on the site approval board.

I. STATUTORY FRAMEWORK OF 1979 PA 64

1979 PA 64, supra, establishes a detailed procedure for review and approval of siting of hazardous waste disposal facilities, ⁽¹⁾ and vests final authority of such approval or disapproval in a state board known as the site approval board.

Under section 18(1) of the Act, it is provided that a hazardous waste disposal facility shall not be established without a construction permit from the Director of the Department of Natural Resources. Immediately following receipt of an application which complies with the requirements of section 18(2) of the Act, section 19 provides that the Director shall undertake a detailed review of the application.

Where the Director has approved or has not rejected an application within 75 days after its receipt, the Director, through the chairperson ⁽²⁾ of the state site approval board, ⁽³⁾ infra, shall notify the permanent members of the board, and also notify the county and municipality 'in which the proposed disposal facility is to be located for their appointment [within 45 days of such notice] of the temporary positions to the [site approval] board.' 1979 PA 64, supra, Sec. 20(1)-(2).

Section 17 of the Act provides for the establishment of a nine (9) member state site approval board. ⁽⁴⁾ The board is comprised of 5 permanent members and 4 temporary members. The five permanent members of the site approval board are appointed as follows: three state members are appointed, respectively, by the directors of the departments of Public Health, State Police, and Natural Resources, and each member so appointed shall not serve for more than two years; the remaining two permanent members are appointed by the Governor, with the advice and consent of the Senate, and their term shall be three years. 1979 PA 64, supra, Sec. 17(2)(a)-(b).

The four temporary members of the site approval board are appointed, two each, by the governing body of the county, and municipality, in which the facility is proposed to be located, within 45 days after notification by the chairperson of the board. 1979 PA 64, Sec. 20(1)-(2), supra. The temporary members serve on the site approval board until the construction permit application for the particular project under consideration is approved or rejected, and is no longer subject to their review. 1979 PA 64, Sec. 17(1), supra, fn 4.

The Act establishes a unique mechanism whereby a separate site approval board is convened in each municipality where approval is sought for a permit to construct a hazardous waste facility, and the board, after taking final action on such application, goes out of existence, its statutory mission accomplished.

The affected local units are each authorized to appoint two temporary members to the board. Two temporary members shall be residents of the municipality in which the disposal facility is primarily proposed to be located, and are appointed by the governing body of such municipality. The remaining two temporary local members shall be residents of the county where the disposal facility is proposed to be located (one of whom shall be a resident of a municipality where the disposal facility is proposed to be located); both county members shall be appointed by the county board of commissioners. 1979 PA 64, supra, Sec. 17(2)(c)-(d).

Following appointment of the temporary members by the county and municipal governing bodies, fulfilling the statutory scheme of state and local representation, the site approval board is deemed legally constituted:

'[t]he board shall be created at that time. . . . ' 1979 PA 64, Sec. 20(1)-(2), supra.

Detailed review powers based on prescribed criteria concerning an application for a hazardous waste disposal facility are vested in the site approved board by section 20(6)-(7) of Act:

'(6) The board shall deliberate the impact of the proposed disposal facility on the municipality in which it is to be located and make a final determination on the construction permit application.

'(7) The board shall consider, at a minimum:

(a) The risk and impact of accident during the transportation of hazardous waste.

(b) The risk and impact of contamination of ground and surface water by leaching and runoff from the proposed disposal facility.

(c) The risk of fires or explosions from improper storage and disposal methods.

(d) The impact on the municipality where the proposed disposal facility is to be located in terms of the health, safety, cost, and consistency with local planning and existing development. The board also shall consider local ordinances, permits, or other requirements and their potential relationship to the proposed disposal facility.

(e) The nature of the probably environmental impact, including the specification of the predictable adverse effects on the following:

(i) The natural environment and ecology.

(ii) Public health and safety.

(iii) Scenic, historic, cultural, and recreational value.

(iv) Water and air quality, and wildlife.

(f) An evaluation of measures to mitigate adverse effects.'

Based on the statutory minimum criteria the board considers under section 20(7), supra, of the Act in making its decision on a permit application, it is apparent that informed participation by the temporary board members is contemplated. The statutory criteria focus primarily upon the local effect and impact of establishing a facility within a municipality. While the five permanent members must be cognizant of the criteria in passing upon an application, it is the four temporary members who reside within the area proposed to be affected who must represent particular local concerns in the review process, and impart these local concerns to the permanent members.

Following review of the application by the site approval board, section 21(1) of the Act provides:

'The board either shall approve or reject the construction permit application, and the director shall issue or deny the construction permit accordingly. . . . A local ordinance, permit requirement or other requirement shall not prohibit the construction of a disposal facility.'⁽⁵⁾

See 1979 PA 64, Sec. 20(6), supra.

1979 PA 64, Sec. 17(4), supra, provides that 5 of the 9 members of the state site approval board constitute quorum, and 'the concurrence of 5 members of the board shall constitute a legal action of the board.' Therefore, while the four temporary members do not possess veto power over the ultimate decision of the board, the fact that four of the nine votes on the board are local in nature safeguards local participation in the review process, based on the minimum statutory criteria contained in section 20(7), supra.

Thus, the action of the state site approval board in approving or denying the construction permit application, which action pre-empts local regulation under 1979 PA 64, Sec. 21(1), supra, is final and binding upon the Director and the state, and constitutes final action for purposes of judicial review. Const 1963, art 6, Sec. 28.

II. CONST 1963, ART 4, Secs. 51

AND 52

1979 PA 64, supra, effectuates the provisions of Const 1963, art 4, Sec. 51:

The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health.'

See Washtenaw County Heath Dept v T&M Chevrolet, Inc, 406 Mich 518, 524; 280 NW2d 822 (1979).

The Act also effectuates Const 1963, art 4, Sec. 52:

The conservation and development of the natural resources of the state are hereby declared to be of paramount public concern in the interest of the health, safety and general welfare of the people. The legislature shall provide for the protection of the air, water and other natural resources of the state from pollution, impairment and destruction.'

In Ray v Mason County Drain Commissioner, 393 Mich 294, 306; 224 NW2d 883 (1975) the Court, per Justice Williams speaking for six justices, in discussing the Michigan Environmental Protection Act, 1970 PA 127, MCLA 691.1201 et seq; MSA 14.528(201) et seq, stated:

But the EPA does more than give standing to the public and grant equitable powers to the circuit courts, it also imposes a duty on individuals and organizations both in the public and private sectors to prevent or minimize degradation of the environment which is caused or is likely to be caused by their activities. The EPA prohibits pollution, destruction, or impairment of the environment unless it can be shown that 'there is no feasible and prudent alternative' and that defendant's conduct 'is consistent with the promotion of public health, safety and welfare in light of the state's paramount concern for the protection of its natural resources . . . 'MCLA 691.1203; MSA 14.528(203).'

The Legislature in establishing environmental rights set the parameters for the standard of environmental quality but did not attempt to set forth an elaborate scheme of detailed provisions designed to cover every conceivable type of environmental pollution or impairment. Rather the Legislature spoke as precisely as the subject matter permits and in its wisdom left to the courts the important task of giving substance to the standard by developing a common law of environmental quality.' [footnotes omitted.]

See OAG, 1969-1970, No 4590, p 17, 30 (January 27, 1969) where it is stated that Const 1963, art 4, Sec. 52, supra,

'imposes upon the legislature a duty to protect the air, water and other resources of the state from the ravages of pollution and to this extent it prohibits the legislature from enacting any law which, if carried out, would violate the constitutionally declared policy.'

Thus, the Legislature in 1979 PA 64, supra, has provided that the site approval board, a state board, acts on behalf of the State in protecting and promoting the public health and natural resources.

III. CONFLICT OF INTEREST

(A) PUBLIC POLICY

It must be noted that State public policy has been expansively defined by the courts. In Groehn v Corporation and Securities Commission, 350 Mich 250, 263; 86 NW2d 291 (1957), it is stated that public policy:

'may be said to be the community common sense and common conscience, extended and applied throughout the State to matters of public morals, public health, public safety, public welfare, and the like. It is that general and well-settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all the circumstances of each particular relation and situation.'

In People ex rel Plugger v Township Board of Overysel, 11 Mich 222 (1863), the Michigan Supreme Court held void, on public policy grounds, a contract of which the relators-contractors sought enforcement by mandamus. The Court stated with respect to the fiduciary duties of public officers:

'All public officers are agents, and their official powers are fiduciary. They are trusted with public functions for the good of the public; to protect, advance and promote its interest, and not their own. And, a greater necessity exists than in private life for removing from them every inducement to abuse the trust reposed in them, as the temptations to which they are sometimes exposed are stronger, and the risk of detection and exposure is less. A judge cannot hear and decide his own case, or one in which he is personally interested. He may decide it conscientiously and in accordance with law. But that is not enough. The law will not permit him to reap a personal advantage from an official act performed in favor of himself. For these reasons, we hold the contract we are asked to enforce by mandamus, void as against public policy . . . [Citations omitted.]

The public were entitled to their best judgment, unbiased by their private interests, and by accepting the [public] office they became bound to exercise such judgment, and to use their best exertions for the public good, regardless of their own. They had no right, while they continued in office, to place themselves in a position where their own interests would be hostile to those of the public.' 11 Mich 222, 225-227. [Emphasis supplied.]

See OAG, 1967-1968, No 4646, p 253 (June 18, 1968).

In Pvatt v Mayor & Council of Borough of Dunellen in Middlesex County, 9 NJ 548; 89 A2d 1 (1952), the Supreme Court of New Jersey, through Justice (now United States Supreme Court Justice) William J. Brennan, Jr. speaking for the unanimous Court, stated with respect to municipal action on certain ordinances where two of four councilmen voting in favor were in conflict of interest based on their employment by the corporate beneficiary of the ordinances:

The ordinances must, in any event, be set aside upon the final ground urged by appellants, that is, that the affirmative votes by which they were adopted were infected with the taint of self-interest. The council deliberated as a quasi-judicial tribunal when deciding whether to pass the ordinances. The process calling for the exercise of discretion by the governing body according to the weight of conflicting public considerations is judicial in quality. Therefore, the ordinances are voidable if any one of the councilmen who participated as quasi-judges was at the time disqualified by reason of private interest at variance with the impartial performance of his public duty. . . . It is an ancient principle of Anglo-American justice that 'no man shall be a judge in his own cause'. Bonham's Case, 8 Co., 113 b, 118 a, 77 Eng. Rep. 646, 652 (K.B. 1610).' 89 A2d 1, 4. [Citations omitted.]

The Supreme Court of Iowa in Wilson v Iowa City, 165 NW2d 813, 819-820 (1969), stated that where a vote is cast on official municipal action by a person in conflict of interest,

[t]he concurrence of an interested member in the action taken by the body taints it with illegality.

The infection of the concurrence of the interested person spreads, so that the action of the whole body is voidable.

This is the general rule. It is supported by a twofold reason, viz.: First, the participation of the disqualified member in the discussion may have influenced the opinion of the other members; and, secondly, such participation may cast suspicion on the impartiality of the decision. It being impossible to determine whether the virus of self-interest affected the result, it must needs be assumed that it dominated the body's deliberations, and that the judgment was its product.' 165 NW2d 813, 819-820, citing from Piggot v Borough of Hopewell, 22 NJ Super 106; 91 A2d 667, 670 (1952).

Public officials, as decision-makers, 'must seek to avoid even the appearance of impropriety.' Abrahamson v Wendell,

76 Mich App 278, 281-282; 256 NW2d 613 (1977) (on rehearing).

(B) PUBLIC POLICY--THE STATE ETHICS ACT, 1973 PA 196

1973 PA 196, as last amended by 1980 PA 481 (effective March 31, 1981), prescribes standards of conduct for public officers and employees, and creates a State Board of Ethics. ⁽⁶⁾ MCLA 15.341 et seq; MSA 4.1700(71) et seq. In pertinent part, amendatory 1980 PA 481 amended 1973 PA 196, supra, Sec. 1(c), to include within the act's ambit 'an elected or appointed official of this state or a political subdivision of this state.' Thus, the temporary members of the site approval board, who are appointed by political subdivisions of the state under 1979 PA 64, Sec. 20(2)(c)-(d), supra, are specifically declared to be 'public officers.'

However, since the site approval board is a state board, exercising delegated state power pursuant to the mandate of Const 1963, art 4, Sec. 51 and 52, supra, all members of the board are subject to the state policy and ethical constraints imposed by 1973 PA 196, supra.

Section 2 of 1973 PA 196, supra, contains the standards which the legislature has imposed upon public officers, public employees and members of state boards. In pertinent part, 1973 PA 196, Sec. 2, supra, provides:

'(6) A public officer or employee shall not engage in or accept employment or render services for a private or public interest when that employment or service is incompatible or in conflict with the discharge of the officer or employee's official duties or when that employment may tend to impair his or her independence of judgment or action in the performance of official duties.

'(7) A public officer or employee shall not participate in the negotiation of execution of contracts, making of loans, granting of subsidies, fixing of rates, issuance of permits or certificates, or other regulation or supervision relating to a business entity in which the public officer or employee has a financial or personal interest.' [Emphasis supplied.]

Pursuant to section 1(d) of the act, it constitutes 'unethical conduct' for a public officer to violate the provisions of section 2. Thus, the public policy of the state, as contained in 1973 PA 196, Sec. 2(6)-(7), supra, declares it to be unethical conduct for a public officer, employee, or member of a state board to take official action on permits or other regulations relating to a business entity in which such officer has a pecuniary or personal interest.

Based on the judicial statements of public policy with respect to conflict of interest, and the legislative proscription of unethical conduct set forth in the State Ethics Act, 1973 PA 196, supra, your question as to conflict of interest concerning the temporary members of the site approval board will be addressed.

IV. APPLICATION OF AUTHORITIES TO TEMPORARY MEMBERS OF SITE

APPROVAL BOARD

Under 1973 PA 196, Sec. 2(7), supra, no public officer or public employee or state board member may 'participate in the . . . issuance of permits . . . or other regulation or supervision relating to a business entity' in which the person 'has a financial or personal interest.' Further, even 'the appearance of impropriety' must be scrupulously avoided. *Abrahamson v Wendell*, supra.

By virtue of their employment nexus with the applicant, Dow Chemical Company, a fact which sets them apart from other members of the public, the two temporary members employed by Dow Chemical will be placed in a situation of conflict of interest in seeking to serve 'both masters.' See 1973 PA 196, Sec. 2(6)-(7), supra; *Pyatt*, supra; *Wilson*, supra.

As to the other two temporary members who are former Dow employees, their interest may be viewed as indirect and, thus, these two members will not be placed in conflict of interest by their service on the board.

Abstention by the two temporary members who are in conflict of interest from the final decision of the board will effectively limit the legislatively mandated input of the local municipalities through the four temporary positions

accorded them in reviewing and passing upon the permit for the establishment of a hazardous waste disposal facility. Indeed, the Legislature has indicated that a duly-constituted site approval board 'shall be created' following the appointment of all four temporary members to the board. 1979 PA 64, Sec. 20(1)-(2), supra. Furthermore, abstention by the two temporary members who are in conflict of interest may result in a situation where the five permanent members of the board, without full local representation by four temporary members, may take legal action on the permit application and so bind the municipalities, contrary to the legislative requirement of a nine member board.

Under the Rule of Necessity, disqualification of the two temporary members will not deprive the permit applicant of site approval board review and final action on its pending application. Eg, Bliss v Caille Brothers, Inc, 149 Mich 601, 609-610; 113 NW 317 (1907). Instead, the remedy for the violation of conflict of interest and ethical constraints of 1973 PA 196, Sec. 2(6)-(7), supra, is the resignation of the two temporary members in question, and the appointment of two new members by the Midland County Board of Commissioners, and the Midland City Council, respectively. 1979 PA 64, Sec. 17(2)(c)-(d), supra. Following such resignation and proper appointment, ⁽¹⁾ a duly constituted nine member site approval board 'shall be created' which may legally proceed to pass upon the pending application, thereby impartially promoting and fully protecting the concerns of the local affected municipalities in the permit review process.

It is fully anticipated that the two temporary members of the site approval board who are deemed to be in conflict of interest will resign their positions and facilitate the expeditious appointment of two new temporary members to the board. The opinion of the Attorney General commands the allegiance of all state agencies. Traverse City School District v Attorney General, 384 Mich 390; 185 NW2d 9 (1971); OAG, 1977-1978, No 5156, p 67, 76-77 (March 24, 1977).

It is noted that if the state site approval board, as presently constituted, with the two temporary members in question taking part, were to make a final decision on the pending application, its action may be held void under one line of authority. Pyatt, supra; Wilson, supra; Baker v Marley, 8 NY2d 365; 208 NYS2d 449; 170 NE2d 900 (1960); Aldom v Borough of Roseland, 42 NJ Super 495; 127 A2d 190 (1956); Abrahamson v Wendell, supra; Barkey v Nick, 11 Mich App 381, 385; 161 NW2d 445 (1968).

Other courts have held that the vote of a disqualified public officer does not vitiate official action where the tainted vote was not necessary to pass the issue, particularly where there are multiple votes, only one of which is illegal. These decisions hold such official action is voidable. Eways v Reading Parking Authority, 385 Pa 592; 124 A2d 92 (1956); Singewald v Minneapolis Gas Co, 274 Minn 556; 142 NW2d 739 (1966); Copple v City of Lincoln, 202 Neb 152; 274 NW2d 520 (1979).

CONCLUSION

It is, therefore, my opinion that two of the four temporary members of the site approval board, having a direct employment nexus with the permit applicant, Dow Chemical, are in conflict of interest. The participation of either of these two temporary members in the process of issuing such permit may result in rendering void or voidable the final decision of the site approval board. The two temporary members in question must resign and two new temporary members shall be appointed, thereby legally constituting a full nine member site approval board.

Frank J. Kelley

Attorney General

⁽¹⁾ 1979 PA 64, supra, Sec. 4(2) defines 'hazardous waste' as:

'waste or a combination of waste and other discarded material including solid, liquid, semisolid, or contained gaseous material which because of its quality; concentration; or physical, chemical, or infectious characteristics may cause or significantly contribute to an increase in mortality or increase in serious irreversible illness or serious incapacitating, but reversible illness, or pose a substantial present or potential hazard to human health or the environment if improperly treated, stored, transported, disposed of, or otherwise managed. . . .'

The word 'disposal' is defined in 1979 PA 64, supra, Sec. 3(6) as:

'the incineration, long term storage, treatment, or the discharge, deposit, injection, dumping, spilling, leaking, or placing of a hazardous waste into or on land or water in a manner that the hazardous waste or a constituent of the hazardous waste enters the environment, is emitted into the air, or is discharged into water, including ground water.'

Finally, 1979 PA 64, Sec. 3(7) defines 'disposal facility' as:

'the location, equipment, or facility where hazardous wastes are disposed of, including a disposal facility associated with, within, or adjacent to facilities generating the waste.'

(2) The chairperson of the site approval board, infra, who is the permanent board member from the Department of Natural Resources 'shall notify the local governing body of the municipality and county government of a construction permit application filed with the department, and shall instruct the municipality or county to appoint the necessary representatives to the board.' 1979 PA 64, supra, Sec. 17(3); see Sec. 17(2)(a) and Sec. 3 (4)-(5).

(3) Id.

(4) 1979 PA 64, supra, Sec. 17(1) pertinently provides that:

The site approval board shall be established to review and grant or deny final approval for each site construction permit application recommended for approval by the department. A separate board shall be established in each municipality in which a disposal facility is proposed to be located which is the subject of a construction permit application. [Emphasis supplied.]

(5) This language, in providing that a local ordinance permit requirement, or other requirement shall not prohibit construction of a disposal facility, indicates a legislative intent to pre-empt local regulation. People v Llewellyn, 401 Mich 314, 322-325; 257 NW2d 902 (1977), cert den, 435 US 1008 (1978). This fact of pre-emption heightens the importance of the role of the temporary municipal members of the site approval board.

The critical factor of effective participation by the temporary members is further evinced by section 20(8) of the Act, which pertinently provides '[t]he board also shall to the fullest extent practicable integrate by stipulation the provisions of the local ordinances, permits or requirements.'

(6) Amendatory 1980 PA 481 had its genesis in HB 5088. In OAG, 1979-1980, No 5736, p 862 (July 10, 1980), it was concluded that HB 5088 (and, thus amendatory 1980 PA 481) may not apply to state employees within the classified civil service, over whom the Civil Service Commission has constitutional authority pursuant to Const 1963, art 11, Sec. 5.

(7) In OAG, 1975-1976, No 4869, p 95 (June 4, 1975) to which is appended a letter opinion to Rep. Hollister dated February 3, 1975, it was concluded that no conflict of interest exists where the spouse of a member of a local board of education is employed by the same school district and the board member-spouse votes on contractual matters which have a direct impact on his or her spouse. OAG, 1979-1980, No 5520, p 233 (July 9, 1979) held a physician may vote on legislation relating to the legalization of Laetrile despite the fact that many of the legislator-physician's professional colleagues officially opposed legalization. In OAG, 1979-1980, No 5681, p 688 (April 1, 1980) it was held that a member of the legislature is not in conflict of interest when the legislator votes upon legislation in which his or her spouse may have some interest.

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