CITY OF
Midland

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To:	City Council
CC:	David A. Keenan, Interim City Manager
By:	James O. Branson III, Midland City Attorney
Date:	July 13, 2017
Filed On:	July 13, 2017 per §8.4 of the Midland City Charter
RE:	Legal Opinion of the Midland City Attorney Conflict of Interest

The City of Midland has a legislative body made up of five (5) individual Councilmembers representing five (5) wards within the City. We also have sixteen (16) individual boards with approximately 125 volunteer board members. Members of the City Council are the only paid legislative representatives of the City of Midland and are paid an annual stipend averaging out to well below twenty five (25) paid hours per week. All of the Board and Commission members are unpaid appointed volunteers.

Midland has had a long history with the discussion of conflict of interest concerns. The City submitted this very question on March 17, 1981 to the then Attorney General Frank Kelly. The issue was that three (3) members of the Council were employees of The Dow Chemical Company. Thus the question of a conflict of interest and how to go forward regarding votes if conflicts do occur as a quorum would not be available to conduct business. The 1981 opinion concluded that the conflicted out members could not participate or be counted as part of a quorum. The resolution to the issue was stated that "This is a matter for the Legislature. In the absence of appropriate legislation, this matter must be resolved by the electors of the city."

The State Legislature did enact, on April 12, 1984 under Act 196 of 1973 – "Standards Of Conduct For Public Officers And Employees" MCLA §15.342(a). The brief summary of that section is that if a quorum is necessary and the officer is not paid more than twenty five (25) hours per week by the municipality and there is prompt disclosure of a potential conflict then the public officer can fully participate in the proceedings that formulates or effectuates public policy. There are provisions under this section for the awarding of contracts if potential conflicts of interest exist.

The State Law set out above is the law to follow. If there is not uniformity in the opinions of the Attorney General and our Charter and State Law, State Law is what must be followed.

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The City of Midland does have an Ethics Ordinance which has been in place since 1996. Incorporated in the ordinance are the State Law provisions regarding conflicts of interest. If an issue comes up regarding a possible ethics violation there is an Ethics Board for review and that Board may issue an advisory opinion as to the issue presented.

It is my opinion to follow the law as set out in the State Law provision and to rely on our individual members to properly disclose any potential conflict.

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1. **Charter** – since 1945 under section 4.6(e) – a quorum is three (3) and some votes do require 4/5 for action.

2. **State Law and the Attorney General Opinion**. Attorney General Opinion #6005 and dated November 2, 1981 deals with conflict of interest matters specific to Midland. There was a legislative fix as set out in the AG's opinion to Midland's conflict issue concern dated April 12, 1984.

3. **State Law – Attorney General Opinion – Charter conflict** – if any conflict exists between authorities then the State Law prevails [MCLA §117.36.]

4. **State Law – MCLA §15.342(a) in effect April 12, 1984**. This was the legislative action as discussed in the Attorney General opinion of 1981. The act is titled "Standards Of Conduct For Public Officers And Employees." [See §15.342(a), Section 2(a), (2)(3)(a)(b)(c).]

5. **City of Midland Ethics Ordinance adopted January 22, 1996.**
Specifically, Section 32-3(d) of the City of Midland Code of Ordinances is the section for "Full Disclosure". – Disclosure made before the time to perform or concurrently with performance. Must make disclosure to the other members of the body on the official record.

Respectfully submitted,

James O. Branson

James O. Branson III
City Attorney

City of Midland Charter

Sec. 4.6. Meetings of the council.

(a) The Council shall provide by resolution for the time and place of its regular meetings and shall hold at least two (2) regular meetings each month. If any time set for the holding of a regular meeting of the Council shall be a holiday, then such regular meeting shall be held at the same time and place on the next secular day which is not a holiday.

(b) Special meetings of the Council may be called by the Clerk on the written request of the Mayor, the City Manager, or of any two (2) members of the Council, on at least twenty-four (24) hours written notice to each member of the Council, designating the time, place, and purpose of any such meeting and served personally or left at his usual place of residence by the Clerk or someone designated by him. Notwithstanding the foregoing requirements for the calling of special meetings, any special meeting of the Council at which all members of the Council are present or have, in writing, waived the requirement that notice be given at least twenty-four (24) hours prior to the time specified for the holding of such meeting and at which a quorum of the Council is present, shall be a legal meeting.

(c) No business shall be transacted at any special meeting of the Council unless the same has been stated in the notice of such meeting. However, if all the members of the Council are present at any special meeting of the Council, then any business which might lawfully come before a regular meeting of the Council may be transacted at such special meeting.

(d) All regular and special meetings of the Council shall be open to the public and the rules of order of the Council shall provide that citizens shall have a reasonable opportunity to be heard.

(e) Three (3) members of the Council shall be a quorum for the transaction of business at all meetings of the Council, but, in the absence of a quorum, two (2) members may adjourn any regular or special meetings to a later date.

(f) The Council shall determine its own rules and order of business and shall keep a journal of all of its proceedings in the English language which shall be signed by the Mayor and the Clerk. The vote upon the passage of all ordinances, and upon the adoption of all resolutions shall be taken by "Yea" and "Nay" votes and entered upon the record, except that where the vote is unanimous, it shall only be necessary to so state. Each member of the Council who shall be recorded as present shall vote on all questions decided by the Council unless excused by the unanimous consent of the other members present. Any citizen or taxpayer of the city shall have access to the minutes and records of all regular and special meetings of the Council at all reasonable times.

(g) The Council may, by vote of not less than two (2) of its members, compel the attendance of its members and other officers of the city at its regular and special meetings and enforce orderly conduct therein, and any member of the Council or other officer of the city who refuses to attend such meetings or conduct himself in an orderly manner thereat shall be deemed of misconduct in office. The chief police officer of the city shall serve as the Sergeant-at-arms of the Council in the enforcement of the provisions of this section.

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6005

November 2, 1981

CONFLICT OF INTEREST:

Members of a city council who are employees of a corporation seeking quasi-judicial decisions of the council

OAG, 1981-1982, No 5864, p 64 (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.

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.

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.

Honorable Michael D. Hayes

State Representative

Capitol Building

Lansing, Michigan

Honorable Robert D. Young

State Senator

Capitol Building

Lansing, Michigan

On behalf of the city attorney for the City of Midland, you have requested my opinion on four questions pertaining to OAG, 1981-1982, No 5864, p 64 (March 17, 1981). OAG, No 5864, supra, concluded that a temporary member of the State Site Approval Board created pursuant to the Hazardous Waste Management Act, 1979 PA 64; MCLA 299.501 et seq; MSA 13.30(1) et seq, who is employed by the applicant for a hazardous waste disposal facility construction permit is in conflict of interest and must resign, permitting a new temporary member to be appointed so that a duly constituted nine member State Site Approval Board may be convened.

As stated in the city attorney's letter to you, the Dow Chemical Company and Down Corning Corporation, located in the City of Midland, each maintain a large work force and many of their workers reside within the city. 'As a consequence of the foregoing, and as you might expect, many of these individuals are actively engaged in civil and governmental affairs and in all facets of life in the city.' At the present time, employees of the Dow Chemical Company constitute three members of the five-member city council.

The four questions which have been directed to me may be phrased as follows:

> (1) Is OAG, 1981-1982, No 5864, supra, limited to the Site Approval Board for the hazardous waste facility proposed to be constructed in the City of Midland, or does the opinion have general application to the subject of conflict of interest?

In response to your first question, the factual setting in OAG, 1981-1982, No 5864, supra, involved a state site approval board convened pursuant to 1979 PA 64, supra, Sec. 17. Thus, the holding in OAG, 1981-1982, No 5864, supra, is particularly applicable in all instances where a site approval board is convened in Michigan under 1979 PA 64, supra.

The principles pertaining to conflict of interest, as discussed in OAG, 1981-1982, No 5864, supra, flow from two essential sources: statutory provisions and the common law as articulated by the courts. In both instances, evolving concepts of public policy play a prominent role.

A. STATUTORY PROVISIONS

Const 1963, art 4, Sec. 10, stating that no member of the Legislature nor any state officer shall be directly or indirectly interested in any contract with the state or any political subdivision which shall cause a substantial conflict of interest, has been implemented by the Legislature. 1968 PA 317; MCLA 15.321 et seq; MSA 4.1700(51) et seq, relates to the conduct of public servants, other than members of the Legislature and state officers, in respect to contracts with public entities. [1] It must also be noted that the City of Midland Charter, ch 3, Sec. 3.15, also prohibits city officers from having a direct or indirect pecuniary interest in any contract, job or service performed for the city.

The Legislature also enacted 1968 PA 318, MCLA 15.301 et seq; MSA 4.1700(21) et seq, which relates to substantial conflicts of interest in respect to contracts on the part of members of the Legislature and state officers. [2] In OAG, 1973-1974, No 4799, p 116, 119 (February 1, 1974), it was held that 1968 PA 318, supra, Sec. 3, was unconstitutional for the reason that it purported to restrict the term 'state officer' as employed in Const 1963, art 4, Sec. 10, which provision 'was intended to apply to 'persons who serve the state in elected or appointed positions,' . . ."

A third statute relevant to standards of conduct for public officers and employees is the state ethics act, 1973 PA 196, as last amended by 1980 PA 481, MCLA 15.341 et seq; MSA 4.1700(71) et seq. [3] 1973 PA 196, supra, Sec. 2, contains ethical standards which the Legislature has imposed upon public officers, public employees and members of state boards. See, OAG, 1981-1982, No 5864, supra. Under 1973 PA 196, supra, Sec. 3, there is created the State Board of Ethics which, pursuant to sections 1(b)-(c) and 5 of the act, possesses jurisdiction over complaints against classified or unclassified employees within the executive branch of government, and over persons appointed by the Governor or executive department officials. See, OAG, 1977-1978, No 5156, p 66, 73-74 (March 24, 1977).

Amendatory 1980 PA 481, supra, in amending 1973 PA 196, supra, has imposed the ethical standards of section 2 of the act upon employees and officers of local units of government by providing local officers and employees with protection against job-related retaliation for 'blowing the whistle' upon local conduct in violation of the ethical standards set forth in section 2 of the act. See, also, The Whistleblowers' Protection Act, 1980 PA 469, MCLA 15.361 et seq; MSA 17.428(1) et seq. However, while amendatory 1980 PA 481, supra, extended the ethical constraints of 1973 PA 196, Sec. 2, supra, to local officials and employees, the amendatory act did not expand the jurisdiction of the State Board of Ethics to hear complaints concerning allegations of unethical conduct at the local government level. [4] With respect to the ethical constraints imposed upon local officials and employees, the ethical standards set forth in 1973 PA 196, Sec. 2, supra, pertinently provide:

> '(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 shall not participate in the negotiation or 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.'

As noted in OAG, 1981-1982, No 5864, supra, '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 a business entity in which such officer has a pecuniary or personal interest.'

B. THE COMMON LAW

Where statutory regulation of conflict of interest is not applicable, it is appropriate to refer to the common law regarding conflict of interest of public officials and employees. OAG, 1981-1982, No 5916, p 218 (June 8, 1981).

The common law of the state furnishes the second source of the law of conflict of interest. In People v Township Board of Overyssel, 11 Mich 222, 225-226 (1863), the court stated:

'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 interests, 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 the law. But that is not enough. The law will not permit him to reap personal advantage from an official act performed in favor of himself.'

See OAG, 1981-1982, No 5864, supra, and OAG, 1977-1978, No 5404, p 720 (December 14, 1978).

OAG, 1981-1982, supra, cited at length from Pyatt v Mayor & Council of Borough of Dunellen in Middlesex County, 9 NJ 548; 89 A2d 1, 4 (1952), where the Supreme Court of New Jersey voided, on conflict of interest grounds, municipal ordinances vacating a street and detouring trafffic to another street where two of four councilmen voting in favor were employed by a corporation which would be benefitted thereby. The court characterized the council's deliberations on the ordinance as akin to that of a quasi-judicial tribunal, calling for the exercise of discretion. '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. . . .' [Citations omitted.]

To like effect, see Wilson v Iowa City, 165 NW2d 813, 819-820 (Iowa 1969); Baker v Marley, 8 NY2d 365; 170 NE2d 900 (1960); Aldom v Borough of Roseland, 42 NJ Super 495; 127 A2d 190 (1956), cited in Barkey v Nick, 11 Mich App 381, 385; 161 NW2d 445 (1968). Cf Abrahamson v Wendell, 76 Mich App 278, 281-282; 256 NW2d 613 (1977) (on rehearing). Under the Pyatt, supra, line of authority, participation in municipal action by an official or employee with a personal or financial interest may result in the final decision being held void. OAG, 1981-1982, No 5864, supra. On the other hand, other courts which have considered the issue '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.' [Citations omitted.] OAG, 1981-1982, No 5864, supra.

Viewing both lines of authority, the rule that may be deduced is that participation by a member of a local legislative body in formulating quasi-judicial municipal action, where such person is employed by the beneficiary of such action, results in subjecting such municipal action to direct attack as being void or voidable. It has been stated that a city council acts in a quasi-judicial capacity when it grants or denies a privilege or benefit. Blankenship v City of Richmond, 188 Va 97; 49 SE2d 321, 323 (1948). Quasi-judicial municipal action indicates official acts based on investigation, consideration, and deliberate human judgment, involving the exercise of discretion. Oakman v City of Eveleth, 163 Minn 100; 203 NW 514, 517 (1925); State v Leyse, 60 SD 384; 244 NW 529, 531 (1932); Pyatt, supra.

Where a general rule is applied to a specific interest, as in the case of a zoning change involving a specific parcel of property, a variance or conditional use permit, such action is quasi-judicial in nature. Allison v Washington County, 24 Or App 571; 548 P2d 188, 191 (1976).

In 4 McQuillin, Municipal Corporations, Sec. 13.03c, p 514 (3d Rev Ed) it is stated:

> 'A municipal council is primarily a legislative and administrative body, but is often vested with judicial or quasi-judicial functions. When sitting on charges involving the removal of an officer for cause, hearing matters relating to the detachment of territory from the municipality, hearing matter relating to permits, deciding election contests between rivals claimants for seats in the body, and in determining whether a member should be expelled on charges preferred, the council acts in the capacity of a judicial or quasi-judicial tribunal.' [Footnotes omitted.]

Thus, where a councilmember is employed by a specific party who will be benefitted by a municipality's actions of a quasi-judicial nature in a particular case, as above illustrated, and such person takes part in such action and votes thereon, the municipality's action may be held void or voidable.

In Wilson, et al v Township Board of Burr Oak, 87 Mich 240; 49 NW 572 (1891), the unanimous action of the four-member township board in ordering the laying out of a highway pursuant to statute was held void where two members of the board were personally and financially interested in the highway's construction. The court stated: 'We think, also, that the township board erred in proceeding to lay out the highway, if . . ., two members of said board, or either of them, were financially interested in its being laid out.' Wilson, supra, 87 Mich 240, 248. It should be noted that the board had rejected the plaintiff's request that the two members in question be removed from the board, and two new appointments made, pursuant to statute. Wilson, supra, 87 Mich 240, 244. See, OAG, 1981-1982, No 5864, supra. See, also, Woodward v City of Wakefield, 236 Mich 417; 210 NW 322 (1926); Abrahamson, supra; Barkey v Nick, supra.

These common law authorities, the statutes discussed above, and OAG, 1981-1982, No 5864, supra, must collectively be applied in concrete factual situations in order to determine whether a conflict of interest (or ethical violation of 1973 PA 196, as last amended by 1980 PA 481, supra) exists.

Thus, in response to your first question, it is my opinion that OAG, 1981-1982, No 5864, supra, and the authorities therein and here cited, have general application to the subject of conflict of interest in Michigan extending beyond the state site approval board.

> (2) Does the State Ethics Act, 1973 PA 196, as last amended by 1980 PA 481, and as referred to in OAG, 1981-1982, No 5864, supra, stand for the proposition that in any matter before the city council involving the Dow Chemical Company, are employees of the company who are also members of the city council automatically in conflict of interest?

The ethical constraints of 1973 PA 196, Sec. 2, supra, are mandatory provisions which 'shall' be followed by local governmental officials and employees. As stated in my answer to your first question, and as held in OAG, 1981-1982, No 5864, supra, where a municipal official is employed by the corporate beneficiary of specific municipal action which is quasi-judicial in character, such person is in conflict of interest and may not participate in, or vote upon, such action. In the event such person who is in conflict of interest does participate in quasi-judicial municipal action, the official action may be held either absolutely void or voidable where the person's vote was determinative. See, Stockwell v The Township Board of White Lake, 22 Mich 341, 352 (1871).

Thus, in response to your second question, it is my opinion that under the common law doctrine of conflict of interest as judicially articulated, and pursuant to the ethical constraints of 1973 PA 196, Sec. 2, supra, a local governmental official or employee who is also employed by the applicant or beneficiary of specific quasi-judicial municipal action is in conflict of interest, and may not participate in nor vote upon such official action.

(3) If the answer to question 2 is in the affirmative, how may the rule of necessity, as referred to in OAG, 1981-1982, No 5864, supra, be applied?

The most authoritative statement of the rule of necessity appears in United States v Will, ---- US ----; 101 S Ct 471, 481; 66 L Ed 2d 392, 406 (1980). There, the United States Supreme Court held that the federal district court, and the Supreme Court, possessed jurisdiction of plaintiff federal judges' suit concerning constitutionality of statutes affecting judicial salaries, despite the fact that all federal judges and Justices are interested in the outcome of the case. Grounding its decision upon the rule of necessity, the Court quoted from Evans v Gore, 253 US 245, 247-248; 40 S Ct 550; 64 L Ed 887 (1920):

> "Because of the individual relation of the members of this court to the question . . ., we cannot but regret that its solution falls to us . . .. But jurisdiction of the present case cannot to declined or renounced. The plaintiff was entitled by law to invoke our decision on the question as respects his own compensation in which no other judge can have any direct personal interest; and there was no other appellate tribunal to which under the law he could go."

Where another body, or another person, is able to act in place of the disqualified body or person (or persons), or where the body without the disqualified member may still act, the rule of necessity does not apply. Will v United states, supra; Stockwell, supra; Bliss v Caille Brothers Co, 149 Mich 601; 113 NW 317 (1907). See Annotation, Necessity As Justifying Action By Judicial Or Administrative Officer Otherwise Disqualified To Act In Particular Case, 39 ALR 1476, 1479-1482. Cf Shinavier v Liquor Control Commission, 315 Mich 188, 192; 23 NW2d 634 (1946).

The rule of necessity has been held by courts in other jurisdictions to be applicable to state administrative agencies exercising quasi-judicial powers. First American Bank & Trust Co v Ellwein, 221 NW2d 509, 514-517 (ND, 1974), cert den 419 US 1026; 95 S Ct 505; 42 L Ed 2d 301, reh den 419 US 1117; 95 S Ct 798; 42 L Ed 2d 816; State ex rel Miller v Aldridge, 212 Ala 660; 103 So 835 (1925); Brinkley v Hassig, 83 F2d 351 (Cir 10, 1936); Kachian v Optometry Examining Board, 44 Wis2d 1; 170 NW2d 743 (1969).

In Stockwell, supra, which involved a four-member township board convened for removal of an officer, the court, in holding void the board's action based on one member's conflict of interest stated, in dicta, that the facts did not call for application of the rule of necessity.

However, it has been held that the rule of necessity is inapplicable where there is no need for prompt adjudication of a matter. In State, ex rel Miller v Aldridge, supra, the court declined to apply the rule of necessity where the three-member State Board of Public Accountancy sought to revoke petitioner's public accountant certificate. One of the three members had disqualified himself based on interest, bias, and prejudice, but the remaining two members declined to do so. The court, in disqualifying the two remaining members of the board, stated:

> 'The act establishing this board and granting to it the power to cancel certificates theretofore issued contains no provision for supplying the place of a member who recuses himself from sitting in such a proceeding on account of being disqualified. If, therefore, appellees are required to so recuse themselves, there will be no tribunal left to hear and consider the question of cancellation of appellant's certificate, and it is insisted that under these circumstances, notwithstanding appellees' disqualifications to sit, the 'doctrine of necessity,' recognized by the authorities, requires that they should hear and determine the cause. 15 R. C. L. p. 541. In the text of this authority is the following: 'It is well established that the rule of disqualification of judges must yield to the demands of necessity, as, for example, in cases where, if applied, it would destroy the only tribunal in which relief could be had.'
>
> It may be gathered from all the authorities that the courts very generally agreed that of course the rule of disqualification is the paramount policy, and is only to yield when the necessity is so great and overwhelming that there may not be an entire failure of justice. The courts have treated the question as presenting a comparison of wrongs, or a choice of two evils. The opposition to the doctrine of necessity insists that it were better the question be delayed until the omission be remedied by legislative enactment.

> The question is one of much delicacy and difficulty of determination. As to the regularly constituted judicial officers, there does not appear any occasion will arise for the application of such doctrine, as there exist constitutional and statutory provisions to meet the situation in event of disqualification of the judge. We may be pardoned for suggesting to the law making body the enactment of a general statute applicable in such cases of disqualifications to members of boards such as here under review, when in the exercise of quasi judicial functions. We leave the question still an open one in this state, as the exigencies of this case do not require that we go further than to hold the 'doctrine of necessity' is not here applicable, and that the rule of disqualification is to be applied.
>
> 'The policy of the rule of disqualification is of paramount importance, and if it is to yield in any case it is only when there exists therefor a very great necessity to prevent a failure of justice. Such a situation is not, in our opinion, here presented.' State, ex rel Miller v Aldridge, supra. 163 So 835, 837-838. [Emphasis supplied.]

Thus, the court in State, ex rel Miller v Aldridge, supra, disqualified the board from acting in its quasi-judicial capacity in seeking to revoke Miller's license, viewing the matter of agency action in cases of disqualification of members of quasi-judicial entities as one for legislative action.

The public policy of Michigan, as enunciated and applied by the courts in cases of disqualification, is consistent with the reasoning of the Alabama Supreme Court in State, ex rel Miller v Aldridge, supra. In voiding the township board's action in Stockwell, supra, based on one board member's conflict of interest, the Michigan Supreme Court stated:

> '[Mr. Porter] was certainly so interested in the questions to be investigated and passed upon, and in the consequences to flow from the final judgment as to bring him within the rule which forbids a person to sit in judgment upon his own rights, claims and pretentions.
>
> 'But, if this were less obvious, the court ought not to be astute to discover refined and subtle distinctions to save a case from the operation of the maxim, when the principle it embodies bespeaks the propriety of its application. The immediate rights of the litigants are not the only objects of the rule. A sound public policy, which is interested in preserving every tribunal appointed by law from discredit, imperiously demands its observance.' 22 Mich 341, 349. [Emphasis supplied.]

In OAG, 1981-1982, No 5916, supra, it was held that three members of a five-member township board were disqualified from participating (or being counted for quorum purposes) in the approval of the transfer of a property tax exemption certificate for an agricultural cooperative, where the three members in question were members or stockholders of the cooperative. See People v Township Board of Overyssel, supra, and my answer to your second question.

Thus, where a member (or members) of a local legislative body is in conflict of interest in the exercise of quasi-judicial municipal action, then such person is disqualified from participation. The Legislature may wish to consider the enactment of legislation which will address instances where quasi-judicial agency or local legislative action is affected by disqualification of a member (or members) of such body. Eg, OAG, 1981-1982, No 5916, supra, fn 2 thereof.

In the situation at hand, three of the five members of the Midland City Council are employed by the Dow Chemical Company. TheMidland Charter, ch 4, Sec. 4.6(3) provides that '[t]hree (3) members of the Council shall be a quorum for the transaction of business at all meetings of the Council . . ..' OAG, 1981-1982, No 5916, supra, further concluded that a member of a local legislative body who is disqualified from voting may not be counted for purposes of establishing a quorum. See, also, 56 Am Jur 2d, Municipal Corporations, Sec. 172, pp 224-225, and fn 9. It also should be noted that with respect to the two lines of authority holding void or voidable quasi-judicial municipal action where a disqualified official participates in decision-making, as discussed in my answer to your second question, the deciding courts did not apply the rule of necessity to overcome the disqualification. Thus, the three members of the five-member Midland City Council who are employed by the Dow Chemical Company may

not participate in, nor be counted for quorum purposes, in any matter of a quasi-judicial nature involving their employer, Dow Chemical.

It is my opinion, therefore, that the rule of necessity may not be applied to permit otherwise disqualified members of a local legislative body to participate, or be counted for quorum purposes, in quasi-judicial municipal action. OAG, 1981-1982. No 5916, supra.

Thus, in response to your third question, it is my opinion that the rule of necessity may not be applied to allow the three members of the five-member Midland City Council employed by Dow Chemical to participate or be counted for quorum purposes in any quasi-judicial matter involving their employer. **This is a matter for the Legislature. In the absence of appropriate legislation, this matter must be resolved by the electors of the city.**

> (4) Does OAG, 1981-1982, No 5864, supra, and the State Ethics Act, 1973 PA 196, as last amended by 1981 PA 481, overrule or modify OAG, 1977-1978, No 5404, p 720 (December 14, 1978)?

OAG, 1977-1978, No 5404, p 720 (December 14, 1978), stated that where a city council person is also employed by a private corporation seeking tax relief authorized by statute, the council person must abstain from voting on the matter if he or she owes a fiduciary obligation to the private employer. The determination whether a fiduciary obligation to the private employer exists was stated to be dependent upon the position held by the person involved. This opinion did not reach the question whether or not the proposed action was quasi-judicial in nature.

OAG, 1977-1978, No 5404, supra, was grounded solely upon the common law regarding fiduciary obligation a public official owes the public entity which is served. The Legislature has, subsequently to OAG, 1977-1978, No 5404, supra, further addressed conflict of interest pursuant to imposing the ethical constraints of 1973 PA 196, Sec. 2, supra, upon local governmental officers and employees, by virtue of amendatory 1980 PA 481, supra. See, OAG, 1981-1982, No 5864, supra.

Thus, in response to your last question, under the facts presented, 1973 PA 196, Sec. 2, supra, and OAG, 1981-1982, No 5864, supra, require modification of OAG, 1977-1978, No 5404, supra. It is my opinion, therefore, that OAG, 1977-1978, No 5404, supra, is modified to the extent that a city councilperson or other municipal official who is employed by the intended beneficiary of quasi-judicial municipal action is in conflict of interest and may not participate in official action involving the employer of such person.

Frank J. Kelley

Attorney General

(1) 1968 PA 317, supra, was repealed by 1975 PA 227, Sec. 191. However, the repealing act was declared unconstitutional in Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich 123; 240 NW2d 193 (1976). As noted in OAG, 1975-1976, No 5019, p 386, 389 (April 14, 1976), 'the law is well established in Michigan that an unconstitutional statute is void ab initio, and not merely from the date of the judicial declaration of unconstitutionality, Briggs v Campbell, Wyant & Cannon Foundry Co, 379 Mich 160, 165; 150 NW2d 752 (1967), ...' Accordingly, 1968 PA 317, supra, remains fully in effect.

It is observed that the reasoning and conclusion of OAG, 1981-1982, No 5864, supra, in no respect was grounded upon 1968 PA 317, supra.

(2) 1975 PA 227, Sec. 191, supra fn 1, also attempted to repeal 1968 PA 318, supra. The comments made in fn 1, supra, are also applicable in all respects to 1968 PA 318, supra.

(3) 1975 PA 227, Sec. 191, supra, also sought to repeal 1973 PA 196, supra. Accordingly, the comments made in fn 1, supra, with respect to the attempted repeal by 1975 PA 227, supra, are also applicable to 1973 PA 196, supra.

(4) Amendatory 1980 PA 481, supra, Sec. 2c(1) pertinently provides:

'A person who alleges a violation . . . may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act.

'(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, the county where the complainant resides, or the county where the person against whom the civil complaint is filed resides.'

THE HOME RULE CITY ACT (EXCERPT)
Act 279 of 1909

117.36 Charter provisions; conflict.

Sec. 36.

No provision of any city charter shall conflict with or contravene the provisions of any general law of the state.

History: 1909, Act 279, Eff. Sept. 1, 1909 ;-- CL 1915, 3339 ;-- CL 1929, 2272 ;-- CL 1948, 117.36

STANDARDS OF CONDUCT FOR PUBLIC OFFICERS AND EMPLOYEES
(EXCERPT)
Act 196 of 1973

15.342a MCL 15.301 to 15.310 and MCL 15.321 to 15.330 not amended or modified; purpose of act; validity of contract in violation of act; voting on, making, or participating in governmental decisions; "governmental decision" defined.

Sec. 2a.

(1) This act shall not in any manner amend or modify the terms of Act No. 317 of the Public Acts of 1968, being sections 15.321 to 15.330 of the Michigan Compiled Laws and Act No. 318 of the Public Acts of 1968, being sections 15.301 to 15.310 of the Michigan Compiled Laws.

(2) This act is intended as a code of ethics for public officers and employees and not as a rule of law for public contracts. A contract in respect to which a public officer or employee acts in violation of this act, shall not be considered to be void or voidable unless the contract is a violation of another statute which specifically provides for the remedy.

(3) Subject to subsection (4), section 2(6) and (7) shall not apply and a public officer shall be permitted to vote on, make, or participate in making a governmental decision if all of the following occur:

(a) The requisite quorum necessary for official action on the governmental decision by the public entity to which the public officer has been elected or appointed is not available because the participation of the public officer in the official action would otherwise violate section 2(6) or (7).

(b) The public officer is not paid for working more than 25 hours per week for this state or a political subdivision of this state.

(c) The public officer promptly discloses any personal, contractual, financial, business, or employment interest he or she may have in the governmental decision and the disclosure is made part of the public record of the official action on the governmental decision.

(4) If a governmental decision involves the awarding of a contract, section 2(6) and (7) shall not apply and a public officer shall be permitted to vote on, make, or participate in making the governmental decision if all of the following occur:

(a) All of the conditions of subsection (3) are fulfilled.

(b) The public officer will directly benefit from the contract in an amount less than $250.00 or less than 5% of the public cost of the contract, whichever is less.

(c) The public officer files a sworn affidavit containing the information described in subdivision (b) with the legislative or governing body making the governmental decision.

(d) The affidavit required by subdivision (c) is made a part of the public record of the official action on the governmental decision.

(5) As used in this section, "governmental decision" means a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, ordinance, or measure on which a vote by the members of a legislative or governing body of a public entity is required and by which a public entity formulates or effectuates public policy.

History: 1973, Act 196, Imd. Eff. Jan. 8, 1974 ;-- Am. 1984, Act 53, Imd. Eff. Apr. 12, 1984

Compiler's Notes: Section 191 of Act 227 of the Public Acts of 1975 repealed §§4.401 to 4.410, 168.901 to 168.929, 15.321 to 15.330, 15.301 to 15.310, and 15.341 to 15.348. The Michigan Supreme Court, however, in Advisory Opinion on Constitutionality of 1975 PA 227, 396 Mich. 123, 240 N.W.2d 193 (1976), held Act 227 of the Public Acts of 1975 unconstitutional for being in violation of Mich. Const., Art. 4, § 24.

City of Midland Code of Ordinances

Sec. 32-3. Code of ethics.

(a) *Gift, compensation or economic interest.* No official or employee of the city shall solicit, accept or receive, directly or indirectly, any gift, compensation or anything of an economic interest, whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under any circumstance in which it can reasonably be inferred that any of the foregoing is intended to influence him or her in the performance of his or her official duties or is intended as a reward for any official action on his or her part.

(b) *Preferential treatment.* No official or employee of the city shall use, or attempt to use, his or her position to unreasonably secure, request or grant, any privileges, exemptions, advantages, contracts, or preferential treatment for himself or herself, a relative or any other person.

(c) *Use of information.* No official or employee of the city who acquires information in the course of his or her official duties, which information by law or policy is not available at the time to the general public, shall use such information to further the private economic interests of himself or herself, a relative or any other person.

(d) *Full disclosure.* No official or employee of the city shall participate, as an agent or representative of the city, in approving, disapproving, voting, abstaining from voting, recommending or otherwise acting upon any matter in which he or she or a relative has a direct or indirect economic interest without disclosing the full nature and extent of the interest. Such a disclosure must be made before the time to perform his or her duty or concurrently with the performance of the duty. If the official or employee is a member of a decision-making or advising body, he or she must make disclosure to other members of the body on the official record. Otherwise, a disclosure will be appropriately addressed by an appointed official or employee to the city manager or by an elected official to the general public. In the case of the city manager and the city attorney, he or she shall make such a disclosure to the mayor.

No official or employee or relative shall engage in any business transaction whereby the official or employee or relative may benefit financially from confidential information which the official or employee has obtained or may obtain by reason of that position or authority.

(e) *Doing business with the city.* No official, employee or relative shall engage in any business with the city, directly or indirectly, without filing a complete written disclosure statement for each business activity having an economic interest to any of the foregoing. Such a disclosure shall be made on an annual basis or prior to any decision-making not previously disclosed by an annual disclosure.

(f) *Use of city property.* No official or employee of the city shall, directly or indirectly, use or permit a relative or other persons to use city property of any kind for his or her private economic interest or that of a relative or other person. City officials or employees shall strive to protect and conserve all city property including equipment and supplies entrusted or issued to them.
(Ord. No. 1337, § 1, 1-22-96)