ining the confidential evaluations of such applicants contained in the credentials files sent by universities to school districts.

760611.15 (.117)

FRANK J. KELLEY,
Attorney General.

CONSTITUTION OF MICHIGAN: Art 4, § 51
Art 9, § 21
Art 9, § 23

ECONOMIC DEVELOPMENT CORPORATIONS: Nature of

INCOMPATIBILITY: Service by councilman, mayor, county commissioners, elected county officials as active member of an economic development corporation

The economic development corporations act which authorizes the creation of non-profit corporations having a public purpose is valid. Inasmuch as the economic development corporations act gives the municipality that creates it control over the non-profit corporation, it is a public agency organized for a public purpose.

Participation by a councilman, mayor, or county commissioner on the board of directors or on a project citizens district council of an economic development corporation is incompatible.

Participation by an elected county official, a school board member, or a state officer on the board of directors or on a project citizens district council of an economic development corporation may be incompatible depending upon the particular duties and functions of these public officials.

Opinion No. 5047 June 11, 1976.

Honorable Thomas H. Brown
State Representative, 37th District
P.O. Box 119
Lansing, Michigan 48901

Citing the economic development corporations act (herein the "EDC act"), 1974 PA 338; MCLA 125.1601 *et seq;* MSA 5.3520(1) *et seq,* you have requested my opinion on the following question:

> "If an Economic Development Corporation is formed as provided for in P.A. 338 of 1974, would a councilman, mayor, county commissioner, elected county official, school board member, state officer or state legislator be in conflict of interest if he joined as an active member of such a Corporation?"

The EDC act, section 4,[1] provides that the chief executive officer or county chairperson of the appropriate municipality[2] shall appoint a nine-

[1] MCLA 125.1604; MSA 5.3520(4).

[2] A municipality is defined as a county, city, village or township. MCLA 125.1603; MSA 5.3520(3).

member board of directors of the economic development corporation (hereinafter the "EDC"). No more than three of the nine board members shall be officers or employees of the municipality. No legislative authority is provided in the EDC act for the appointment of any specific officer.

To determine which, if any, conflict of interest, principles, statutes or constitutional provisions apply, it has been necessary for me to consider the EDC act. The act gives rise to two threshhold questions as follows:

1. What is the nature of an EDC established pursuant to the act?
2. Is the EDC act constitutional?

I.

THE NATURE OF THE EDC.

The EDC act is, in part, entitled "AN ACT to provide for the creation of nonprofit economic development corporations." The EDC act, however, does not provide for the creation of the corporation. The EDC act authorizes three or more persons to incorporate under the provisions of the general corporation act, 1931 PA 327; MCLA 450.62 *et seq;* MSA 21.62 *et seq.* Rather than providing for the creation of the corporation, the EDC act provides a method of municipal control of incorporators without the necessity of amending the general law for the incorporation of nonprofit corporations.

Under the general corporation act, § 117,[3] nonprofit corporations are to be incorporated "for the purpose of carrying out any lawful purpose or object not involving pecuniary gain or profit for its members or associates." To the extent that the EDC's purposes are to participate in programs to alleviate and prevent conditions of unemployment, to assist and retain local industries and commercial enterprises to strengthen and revitalize the economy of the state and its municipalities, to encourage and assist industrial and commercial enterprises in locating and expanding in the state and to encourage commercial enterprise,[4] the purposes do not appear inconsistent with the corporate purposes permitted by the general corporation act, § 117, *supra* note 3.

Consistent with the provisions of the general corporation act,[5] the EDC act[6] authorizes the nonprofit corporations to hold moneys and property incidental to their business matters, to borrow money and issue notes and bonds and to mortgage property. Under the EDC act, the municipality is not the incorporator; rather, three or more persons are the incorporators.[7] This corresponds with the provisions of the general corporation act.

Thus, the legislative intent appears to be that the EDC act authorizes the nonprofit EDC corporation to have all the rights and powers set forth in the general corporation act.

Although the EDC is authorized by the EDC act to issue bonds and

[3] MCLA 450.117; MSA 21.118.

[4] MCLA 125.1602; MSA 5.3520(2).

[5] MCLA 450.125-450.127; MSA 21.126-21.128.

[6] MCLA 125.1607; MSA 5.3520(7).

[7] MCLA 125.1604; MSA 5.3520(4).

notes without restriction,[8] it is especially authorized to issue revenue bonds.[9] Only in this section providing for revenue bonds is a provision made that the municipality is not liable for any obligations whatsoever undertaken by the corporation.

Three or more persons could incorporate a nonprofit EDC under the provisions of the general corporation act to accomplish the purposes outlined above. What then was the legislative objective in enacting the EDC act?

The objective may be discerned from the act itself. The EDC act, § 2,[10] provides in part:

> ". . . the powers granted in this act constitute the performance of essential *public purposes and functions* for this state and its municipalities. (Emphasis supplied.)

The EDC act also indicates that the municipality approves three or more persons to form a nonprofit corporation "for the municipality,"[11] that the corporation is deemed an instrumentality of the municipality for residential relocation[12] and that the municipality may take private property by condemnation for "transfer" to the corporation.[13]

The EDC act gives the municipality control. The appointment and removal of the board members rest with the municipality.[14] The EDC must work with the planning agency of the municipality[15] and must obtain the approval of the governing body of the municipality on a project plan after notice and public hearing.[16] While the planning body has before it more extensive information[17] and is obligated to consult with and obtain the advice of a citizen district council, the planning body certifies a limited information for public and governing body consideration.[18]

The exemption is provided to the EDC, and if the EDC controls the project, the project may be exempted from ad valorem taxation by the municipality.[19]

State agencies, political subdivisions, banks, insurance companies and fiduciaries are authorized to invest in the bonds and notes of the EDC.[20]

The legislative intent in the enactment of the EDC act, where authority already exists for the incorporation of nonprofit corporations, appears to

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[8] MCLA 125.1607(2); MSA 5.3520(7)(2).

[9] MCLA 125.1623; MSA 5.3520(23).

[10] MCLA 125.1602; MSA 5.3520(2).

[11] MCLA 125.1604(1); MSA 5.3520(4)(1).

[12] MCLA 125.1608(4); MSA 5.3520(8)(4).

[13] MCLA 125.1622; MSA 5.3520(22).

[14] MCLA 125.1604; MSA 5.3520(4).

[15] MCLA 125.1610; MSA 5.3520(10).

[16] Ibid.

[17] MCLA 125.1608; MSA 5.3520(8).

[18] MCLA 125.1609; MSA 5.3520(9).

[19] MCLA 125.1625; MSA 5.3520(25).

[20] MCLA 125.1623; MSA 5.3520(23).

be for the purpose of permitting the state and municipalities to carry on the purposes granted (found by the statute to be public purposes and functions) through the vehicle of a nonprofit corporation. The apparent merger of a nonprofit with public entities may be drawn to meet certain tax exemptions allowed for interest earnings on municipal obligations[21] and at the same time meets the needs felt by industrial and commercial developers who seek avoidance of premature disclosure of business plans while aggregating land for development.

II.

CONSTITUTIONALITY OF THE EDC ACT.

Whether the legislature is giving corporate capacity to an agency of government as was the case in *Advisory Opinion re Constitutionality of PA 1966, No. 346,* 380 Mich 554; 158 NW2d 416 (1968), or whether the legislature has cloaked nonprofit corporations to be formed under the general corporation act with governmental function is not clear.

Arguendo, it may be assumed that these corporations are formed for the public purposes enumerated in the act. Their functions are for public benefit. In *Huron-Clinton Metropolitan Authority* v *Boards of Supervisors of Five Counties,* 300 Mich 1; 1 NW2d 430 (1942). The court stated at page 12:

> "Subject only to limitations and restrictions imposed by the State or Federal Constitutions, the State legislature is the repository of all legislative power. Constitutional provisions are to be regarded as limitations, not grants of such power." (Citation omitted.)

In *W. A. Foote Memorial Hospital, Inc* v *City of Jackson Hospital Authority,* 390 Mich 193; 211 NW2d 649 (1973), the court stated at page 209:

> "This Court has said that legislation is 'clothed with the presumption of constitutionality' and must be sustained if within constitutional limits. It is said to be 'incumbent upon our Court to give effect to the plain and clear intent of the Legislature irrespective of possible view of any Justice or Justices that such intent is unwise or impolitic.' " (Citation omitted.)

Const 1963, art 4, § 51 provides:

> "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."

In *City of Gaylord* v *Gaylord City Clerk,* 378 Mich 273; 144 NW2d 460 (1966), the court considered the constitutionality of the industrial development revenue bond act, 1963 PA 62; MCLA 125.1251 *et seq;* MSA 5.3533(21) *et seq.* In that case, at page 294 and following, the court con-

[21] See Revenue ruling 63-20 which sets down criteria for public control in testing whether a nonprofit corporation may be treated as a municipality, but also see proposed IRS rule § 1.103-1, 41 FR 22 (February 2, 1976), which would require new and different tests.

sidered the question of whether the act and the program of the city exhibited a public purpose. It considered the provisions of Const 1963, art 4, § 51 and observed that this new section, together with traditional public policy of the state, must be held to limit the power of the legislature and the government generally to such legislative act and such governmental powers as exhibit public purpose. To this end, the court weighed the credits and debits as argued by the parties, concluding at page 297:

> "In casting up the credits and the debits, from present view, the probabilities would seem to favor the credits—that is to say, employment and other benefits to the community and the area as opposed to additional costs for schools, public utilities, and the hazard of unemployment. *Such an assessment is buttressed by the fact that the transaction is subject to the scrutiny and approval of the Michigan municipal finance commission.* (Emphasis supplied.)

I am of the opinion that the EDC corporations provided for in the act are agencies and instrumentalities of the state and its municipalities to the extent indicated herein. As agencies and instrumentalities of the state, these corporations are subject to constitutional provisions relating to their activities, such as the provisions of Const 1963, art 9, § 21, which provides for the accounting of all public moneys, state and local, and Const 1963, art 9, § 23, which provides that all financial records, accountings, audit reports and other reports of public moneys shall be public records open to inspection. Statutory provisions applicable to municipalities must also be considered. There are sections of the EDC act, however, that do not withstand constitutional scrutiny. I am constrained to conclude that the deficiencies are severable.

Section 7 of the act, *supra* note 6, grants broad borrowing power to the EDC without limitation. No municipal finance review or control is provided for as set forth in the quoted portion of *City of Gaylord* v *City Clerk, supra.* Public bodies corporate are required by Const 1963, art 9, § 13 to have their borrowing power subject to constitution and law. No limitation has been considered by the legislature under the authority granted in § 7. I am particularly aware that with the power under § 22, *supra* note 13, the EDC will have the benefit of the transfer of municipal property for the carrying out of public purpose. No attempt has been made to amend the Municipal Finance Act, 1943 PA 202; MCLA 131.1 *et seq;* MSA 5.3188(1) *et seq.* Based upon Const 1963, arts 9 and 13, and the reasoning of the *City of Gaylord* case, *supra,* I conclude that § 7 of the EDC act as it presently stands is constitutionally defective.

In an attempt to support the plan of the EDC act, any state agency or department and its political subdivisions or any agency or department thereof is purportedly authorized to do anything to aid in the planning of the project and to carry out the execution of the project; to lend, grant or contribute its funds to the corporation; to use funds and property or services to purchase obligations of the corporation; and to provide for arrangements of consumer cooperative housing as an integral part of commercial, industrial and residential development.[22]

[22] MCLA 125.1627; MSA 5.3520(27).

The EDC appears dependent upon such participation for its vitality, considering that the powers granted constitute the performance of essential public purposes for the state and its municipalities.

Section 27 of the act, *supra* note 22, is unconstitutional since it purports to convey authority contrary to the provisions of Const 1963, art 9, § 18 and art 7, § 26, which provide in part:

> "The credit of the state shall not be granted to, nor in aid of any person, association or corporation, public or private, except as authorized in this constitution." Const 1963, art 9, § 18.
>
> "Except as otherwise provided in this constitution, no city or village shall have the power to loan its credit for any private purpose or, except as provided by law, for any public purpose." Const 1963, art 7, § 26.

Also, the provision is defective for the reason that it purports to convey authority to state agencies or departments, political subdivisions and agencies or departments thereof, without provision for same in the title. Const 1963, art 4, § 24.

III.

CONFLICT OF INTEREST.

Having concluded that the EDC as contemplated by the EDC act is an agency and instrumentality of the state and its municipalities, I now respond to your question. The applicable principle of conflict would be incompatibility of two public offices, which I discussed in OAG, 1967-1968, No 4620, p 278 (August 7, 1968) in the following terms:

> "Based upon the common law, it is the public policy of the state of Michigan that the same person may not simultaneously occupy two public offices where the nature of the duties of such offices renders it improper from considerations of public policy for one person to retain both. The test of incompatibility is described as the character and relationship of the two offices. There is incompatibility where one office is subordinate to another, subject in some degree to its supervisory power, or where the functions of the two offices are inherently inconsistent and repugnant, so that the same person may not occupy them simultaneously. When such incompatibility exists, acceptance of the second office vacates *ipso facto* the first office. (Citations omitted.)
>
> "The rule of incompatibility has been extended to public employment where the duties of the public employment and the public office are incompatible so that they may not be simultaneously exercised by the same person. It has also been held that the legal consequence of such incompatibility applies so that by acceptance of the second public position, there is a vacation of the first public position. (Citations omitted.)
>
> "It must be stressed that the above are common law principles involving incompatibility of public offices and positions. In the absence of a constitutional prohibition, it is within the authority of the legis-

lature, by clear statutory provision, to permit the same person to occupy two public offices or two public positions, the duties of which are incompatible."

See also, Memorandum of Law, OAG 1973-1974, pp 299-302.

I interpret your reference to active membership in such corporation as referring to membership on the board of directors or the project citizens district council, as contemplated by §§ 4, *supra* note 1, and 12[23] of said act. Section 4 provides the manner in which applications for incorporation are submitted, and authorizes the governing body to decide which, if any, application to approve. Section 4 authorizes the chief executive officer of the municipality, or in the case of a county, the chairperson of the county board, to appoint the board of directors of the economic development corporation, no more than three of whom shall be an officer or employee of the municipality. Section 12 authorizes the governing body to appoint the members of the project citizens district council.

Participation, by any of the public officers mentioned in your letter, on the board of directors or project citizens district council as provided in §§ 4 and 12, could result in incompatibility of public office, depending upon the functions performed in such offices, and whether dual function would contravene the principles of incompatibility quoted above. For example, councilmen and county commissioners are members of the governing body and would therefore participate in a decision as to which of several competing applications might be approved. If a councilman or commissioner was a party to an application in competition with other applicants, his position as a councilman or commissioner would be incompatible with his position as an applicant to the disadvantage of other applicants. Further, a councilman or commissioner, as a member of the governing body, would advise and consent upon his own appointment directly to the project council. Both the board of directors and the project council are subordinate to and supervised by the governing body, as particularly indicated by §§ 10, *supra* note 15, and 13[24] of the EDC act. A councilman or commissioner on the governing body would participate in the acceptance, rejection, or modification of the project plan, to which he had participated as a director or member of the project council. Finally, a councilman or commissioner might participate in the amendment of the articles of incorporation or the project plan by virtue of his office on the governing body. These considerations would be contrary to the principles of incompatibility and would thus disqualify councilmen or commissioners from such dual membership. For a statutory prohibition upon dual office holding and compensation, see 1851 PA 154, § 30a,[25] which provides in part:

"No member of the board of supervisors of any county shall be eligible to receive, or shall receive, any appointment from, or be employed in any capacity whatsoever, by any officer, board, committee or other authority of such county. . . ."

[23] MCLA 125.1612; MSA 5.3520(12).

[24] MCLA 125.1613; MSA 5.3520(13).

[25] MCLA 46.30(a); MSA 5.353(1).

Similar implications would arise from a mayor serving in such a dual capacity. Although § 4, *supra* note 1, authorizes up to three officers or employees of the municipality for membership on the board of directors, and the mayor as an officer would seem to qualify, yet the mayor as chief executive officer appoints the board of directors with the advice and consent of the governing body. Given such consent, the mayor would be in a position to make and perpetuate his own appointment. In municipalities where charters authorize the mayor to be a full voting member of the governing body, he would be situated similar to a councilman, discussed *supra.* In municipalities where charters preclude elective officers from holding more than one elective or appointive office, dual membership would be contrary to the charter. In municipalities where charters preclude elective or appointive officers from receiving additional compensation, receipt of per diem under § 4 would be contrary to charter. Where dual membership could contravene the principles of incompatibility or charter provisions, the mayor would be precluded from such dual membership. I do not interpret the reference to "officers" made in § 4 as sufficiently express to authorize a mayor's membership on the board of directors where the principles of incompatibility or charter provisions militate to the contrary.

Dual membership by elected county officials, school board members or state officers does not appear to be incompatible solely by virtue of their respective offices as opposed to the board of directors or the project council. However, it would be necessary to examine the functions of those offices under prevailing circumstances which could vary. For example, a school board could conceivably be in competition with the economic development corporation with respect to certain transactions contemplated by the EDC act, § 7, *supra* note 6. A state official might be incompatible because of activities in pursuance of § 7 or in a superior or supervisory capacity over the municipality. The same could be said for elected county officials, for example, where the corporation may be at the township level.

Finally, regarding such dual membership by legislators, Const 1963, art 4, §§ 8 and 9 respectively provide:

> "No person holding any office, employment or position under the United States or this state or a political subdivision thereof, except notaries public and members of the armed forces reserve, may be a member of either house of the legislature." Const 1963, art 4, § 8.
>
> "No person elected to the legislature shall receive any civil appointment within this state from the governor, except notaries public, from the legislature, or from any other state authority, during the term for which he is elected." Const 1963, art 4, § 9.

Interpreting the latter of these two constitutional articles, the Supreme Court stated in *Young* v *Detroit City Clerk,* 389 Mich 333, 347; 207 NW2d 126, 132 (1973):

> "If the Legislature created the office, then, even if it were local in character, an incumbent legislator may not receive the office during the term for which he was elected." Citing: *Ellis* v *Lennon,* 86

Mich 468 (1891); *Fyfe* v *Kent County Clerk,* 149 Mich 349 (1907); and *Lodge* v *Wayne County Clerk,* 155 Mich 426 (1909).

Therefore, it is my opinion that the legislators would be precluded from membership on the board of directors and the project citizens district council of the economic development corporation during the term to which they were elected to the legislature.

FRANK J. KELLEY,
Attorney General.

760615.2

PUBLIC MEETINGS: County road commission budget.

COUNTY ROAD COMMISSIONERS: Public hearings on adoption of budget.

COUNTY COMMISSIONERS: Adoption of budget.

BUDGET: Adoption of budget.

A county road commission is a public board within the meaning of the public meeting act and therefore its deliberations concerning the receipt, borrowing or disbursement of funds must be open to the public.

Inasmuch as the term "local unit" is defined by the budget act, 1963 2nd Ex Sess PA 43, to refer to a county, township, city, village, authority or school district, a county road commission is not subject to the provisions thereof. Consent of the county board of commissioners is required before a county road commission may spend tax moneys on county roads.

The annual meeting at which a proposed budget is adopted by a county board of commissioners is required to be a public meeting.

Opinion No. 4985 June 15, 1976.

Honorable Edgar A. Geerlings
Michigan House of Representatives
The Capitol
Lansing, Michigan

You have requested my opinion on the following questions:

1. Are county road commissions required by law to have a public hearing on the road commission budget?

2. If the road commissions are considered to be an integral part of the county governmental unit, then what manner of "public hearing" is specifically prescribed by law?

As noted in your opinion request, Const 1963, art 7, § 32 provides:

"Any county, township, city, village, authority or school district empowered by the legislature or by this constitution to prepare budgets