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TO: Manchester Community Joint Planning Commission

RE: Related questions regarding the allowable number of members for the Joint Planning Commission and potential incompatibility of offices

Two different readings of the statutes in question are possible.

Originally the MCJPC was established under the 'joint municipal planning act,' MCL 125.131 et seq., under the version of the act that became effective December 18, 2003. That previous version of the act said in MCL 125.137(1) that:

“All the powers and duties of a planning commission under each planning act are, with respect to the jurisdictional area of the joint planning commission, transferred to the joint planning commission. In exercising such powers or performing such duties, the joint planning commission shall follow the procedure provided under the planning act specified pursuant to section 5(g).” [MCL 125.135(g)]

and, MCL 125.137(2) said:

“All the powers and duties of a zoning board or zoning commission under each zoning act are, with respect to the jurisdictional area of the joint planning commission, transferred to the joint planning commission. In exercising such powers or performing such duties, the joint planning commission shall follow the procedure provided under the zoning act specified pursuant to section 5(h).” [MCL 125.135(h)]

Pursuant to the directive to make a choice, the MCJPC selected to follow the procedures set forth in the township zoning and planning enabling acts. The township planning act MCL 125.324(1) said that:

“The planning commission shall consist of not less than 5 nor more than 9 members, . . .”  
The previous version of the joint municipal planning act, consistent with the amended version, also stated in MCL 125.135 that:

“The agreement shall specify at least all of the following: (a) The composition of the joint planning commission, including any alternate members.”

The MCJPC chose to create an **eight (8)** member joint planning commission which was not inconsistent with either MCL 125.324(1) of the township planning act or MCL 125.135(a) of the joint municipal planning act.

Subsequently, all the planning acts were combined into a single new Michigan Planning Enabling Act which at MCL125.3815(2) requires that:

“A city, village, or township planning commission shall consist of 5, 7, or 9 members.”

Therefore, the question arises whether the MCJPC is limited by MCL 125.3815(2) to only having a commission of 5, 7, or 9 members, or whether MCL 125.135(a) of the municipal joint planning act allows the MCJPC to select whatever size of commission it so chooses?

The municipal joint planning act as amended regarding the transfer of powers and duties currently says:

**“125.137. Transfer of powers and duties.**

Sec. 7. (1) Subject to section 5(1)(g) and (2), all the powers and duties of a planning commission under the Michigan planning enabling act , 2008 PA 33, MCL 125.3801 to 125.3885, are, with respect to the jurisdictional area of the joint planning commission, transferred to the joint planning commission.

(2) Subject to section 5(2), all the powers and duties of a zoning board or zoning commission under the Michigan zoning enabling act, 2006 PA 110, MCL 125.3101 to 125.3702, are, with respect to the jurisdictional area of the joint planning commission, transferred to the joint planning commission. In exercising such powers or performing such duties, the joint planning commission shall follow the procedure specified pursuant to section 5(h), when relevant.”

and, in MCL 125.135, that:

“Subject to section 9, the legislative bodies of 2 or more municipalities may each adopt an ordinance approving an agreement establishing a joint planning commission. The agreement shall specify at least all of the following:

(a) The composition of the joint planning commission, including any alternate members.

(b) The qualifications, the selection by election or appointment, and the terms of office of members of the joint planning commission.

© Conditions and procedures for removal from office of members of the joint planning commission and for filling vacancies in the joint planning commission.(d) How the operating budget of the joint planning commission will be shared by the participating municipalities.

(e) The jurisdictional area of the joint planning commission, which may consist of all or part of the combined territory of the participating municipalities.

(f) Procedures by which a municipality may join or withdraw from the joint planning commission.

(g) For situations in which the powers, duties, or procedures of a planning commission under the Michigan planning enabling act, 2008 PA 33, MCL 125.3801 to 125.3885, depend on whether the municipality is (I) a township that on September 1, 2008 had a planning commission created under former 1931 PA 285, (ii) a township that did not on September 1, 2008, have a planning commission created under former 1931 PA 285, or (iii) a city or village - a designation of which of these 3 categories of municipalities' powers, duties, and procedures will be applicable to the joint planning commission. A category of municipality shall not be designated under this subdivision unless at least 1 of the participating municipalities falls within that category.

(h) For situations in which the powers, duties, or procedures under the Michigan zoning enabling act, 2006 PA 110, MCL 125.3101 to 125.3702, applicable to a planning commission depend on whether the municipality is a township or is a city or village, a designation either that the powers, duties, and procedures applicable to a township will be followed by the joint planning commission or that the powers, duties, and procedures applicable to a city or village will be followed by the joint planning commission. Powers, duties, and procedures applicable to a township shall not be designated unless at least 1 of the participating municipalities is a township. Powers, duties, and procedures applicable to a city or village shall not be designated unless at least 1 of the participating municipalities is a city or village.”

The first question is whether the phrase “The composition of the joint planning commission” in MCL 125.135(a) of the municipal joint planning act refers to solely to who may sit on the joint planning commission or whether it also includes the size of the commission. Kurt Schindler of MSU Extension Land Use Policy Institute has stated that in his opinion that the “composition” of a joint planning commission does not fall within the category of “powers, duties, or procedures” and, therefore, the requirements found in the Michigan Planning Enabling Act for regarding the size and membership of a planning commission are not required to be followed by a joint planning commission under the municipal joint planning act, MCL 125.135 and 125.137.

This area of the law is new and untested. Therefore, there are no appellate cases that review this issue, and, admittedly, there are arguments that could be made either way.

However, there are certain consequences depending on the choice made which are very significant.

Mr. Schindler states that the municipal joint planning act authority to determine the composition of the commission under MCL 125.135(a) would allow the MCJPC to determine not only the size of the commission, but also the number and type of *ex officio* members who can sit on the commission, with the sole warning that due to the incompatible office act that those

members could not vote on the same issue twice (once at the MCJPC and again at their own jurisdiction).

The consequences of the incompatibility office act is much more severe. The act in MCL 15.182 states:

“Except as provided in section 3, a public officer or public employee shall not hold 2 or more incompatible offices at the same time.”

Therefore, if the offices are incompatible, it is not just a matter of just not voting, the holding of the two offices is prohibited.

Incompatible offices are defined in MCL 15.181(b) as:

“ "Incompatible offices" means public offices held by a public official which, when the official is performing the duties of any of the public offices held by the official, results in any of the following with respect to those offices held:

- (I) The subordination of 1 public office to another.
- (ii) The supervision of 1 public office by another.
- (iii) A breach of duty of public office.”

The incompatible offices act also includes several exclusions (downtown development authority, TIF, etc.), but it does not currently include an exclusion for a joint planning commission.

No appellate cases or attorney general opinions indicate specifically whether the office of a board or council member and a joint planning commission member are incompatible, however, there are attorney general opinions which state that being a board member and a planning commission member is incompatible except where specifically permitted by law. (See e.g. Opinion 6837 from February 23, 1995) In this opinion, the attorney general found where a township had multiple members of the township board on the planning commission that the offices were incompatible under the act, but that as **one (1)** member was specifically authorized by the legislature under the planning act that as for that one member the incompatible offices act did not apply.

Similarly, the MCJPC (if not now, but definitely when/if its additional powers are phased in), would be an incompatible office with either a board or council member under the incompatible offices act.

Therefore, it is my opinion that if the MCJPC chooses to find that “membership and size” are controlled completely by MCL 125.135(a) (and if that determination was supported by a court later), that the MCJPC should not include any board or council members on the joint planning commission (as there would be no specific exclusion granted by the legislature from the incompatible offices act).

[as an aside, voting twice, once at the MCJPC and once at the members local jurisdiction is improper when either there is a conflict of interest for that member or when due process concerns arise– which is a separate issue to incompatibility of offices.]

If the MCJPC decides that the category “powers, duties, or procedures” does include the requirements of the planning act as set forth in MCL125.3815, the following consequences apply.

1. Pursuant to MCL125.3815(2), the MCJPC must include 5, 7, or 9 members.
2. Specific authority is granted (depending on which selection is made) avoiding the consequences of the incompatible offices act.

If the township rule is selected under MCL125.3815(5), then the grant of authority is as follows:

“In any other township, 1 member of the legislative body shall be appointed to the planning commission, as an *ex officio* member.”

If the village rule is selected under MCL125.3815(5), then the grant of authority is as follows:

“In a city, village, or county, the chief administrative official or a person designated by the chief administrative official, if any, the chief elected official, 1 or more members of the legislative body, or any combination thereof, may be appointed to the planning commission, as *ex officio* members, unless prohibited by charter. However, in a city, village, or county, not more than 1/3 of the members of the planning commission may be *ex officio* members.”

If the township rule is chosen, no limitation of *ex officio* members apply, but the chief administrative official of the village would be prohibited from being a member (as are all elected officers and employees).

If the village rule is chosen, the village’s chief administrative official may be a member, but the MCJPC would have to either limit the total number of *ex officio* members to 3 (based on a 9 member commission) to guarantee that the 1/3 limit is complied with or take the unproven position (but arguable) that the 1/3 limit should only apply to each separate jurisdiction.

As there are no cases or attorney general opinions supporting the choices above, I am going to rank them as I could support them in court.

1. A. A nine member commission with no *ex officio* members with a choice of village powers. This choice would appear to comply with most interpretations of the two acts.

or

- B. A nine member commission, choice of township powers, and one *ex officio* member from each participating jurisdiction (but village's chief administrative official would be excluded), and as part of choosing "composition" designate this choice. This choice would appear to comply with any interpretation, but have a very, very slight chance of an incompatibility problem.
2. A nine member commission, choice village powers, allow a total of 3 *ex officio* members. (Would allow chief administrative official, but one jurisdiction would have to forego an *ex officio* member.) This choice would appear to comply with most interpretations, but have a very, very slight chance of an incompatibility problem.
  3. A nine member commission, choice village powers, allow a total of 4 *ex officio* members. (Would allow chief administrative official). This choice would appear to comply with most interpretations, but have a very, very slight chance of an incompatibility problem. However, the potential problem of the 1/3 limitation on *ex officio* members would arise.
  4. An eight member commission with no *ex officio* members with a choice of village powers. No incompatibility problem, but potential problem if court later determines that number of members must be 5, 7, or 9.
  5. An eight member commission with *ex officio* members with a choice of village powers. Clear incompatibility problem (unless legislature adds exception) and potential problem if court later determines that number of members must be 5, 7, or 9.

In my opinion, I would rather defend choice 1(B) in court more than any other choice.

Sincerely,

Jesse O'Jack