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To: Yousef Rabhi, Chair, Washtenaw County Board of Commissioners

From: Curtis N. Hedger, Office of Corporation Counsel

Re: Whether the Water Resources Commissioner may Simultaneously Serve as the Public Works Director

Date: December 4, 2013

You have asked my office to review and comment on whether it is permissible under Michigan law for a Water Resources Commissioner to simultaneously serve as the Director of Public works for a County.

The County Public Works Act, (P.A. 185 of 1957, MCLA 123.731 et seq) ("Act 185") addresses how public works projects are to be addressed in a county. Under Act 185, a county may, by a 2/3rds vote, establish a department of public works to administer the public work powers conferred upon the county by the Act. Once established, the department of public works is considered to be a county agency. As such, the county retains the general control and oversight of the department of public works while the board of public works comprised of 5, 7 or 9 members appointed by the board of commissioners exercises immediate control over that department.

Significantly, MCLA 123.732 provides that the county drain commissioner (also known as the water resources commissioner in Washtenaw and other counties) shall be a member of the board of public works. This strongly suggests that the Michigan Legislature not only sees no conflict of interest with a water resources commissioner acting in a critical decision making position on the board of public works involving public works projects, but actually requires such joint participation.

Finally, it should be noted that under MCLA 123.732(3)(b), the board of commissioners could designate the water resources commissioner individually as the board of public works for that county. Again, this clearly demonstrates the Legislature's position that it is not a conflict of interest for a water resources commissioner to simultaneously serve on the public works board or to solely act as the public works board for that county.

In Washtenaw County, the Board of Commissioners has established the Public Works Department and a 7 member Board of Public Works. As mandated by Act 185, Evan Pratt as Water Resources Commissioner serves on the Board of Public Works. It has been proposed that Evan Pratt also be hired as the Director of Public Works. The power to hire this position is generally given to the Board of Public Works under MCLA 123.736. Since the Board of Commissioners retains general oversight over the Department, the hiring of a Public Works Director has also been brought for ratification to the Board of Commissioners.

#### **Michigan Law on Conflict of Interest and/or Incompatible Public Offices**

There are two Michigan statutes which arguably address the current situation. The first is the Contracts of Public Servants with Public Entities Act (MCLA 15.321 et seq). This statute addresses contracts between public entities and public servants. Generally speaking, under this Act, a public servant shall not be a party directly or indirectly, to any contract between himself or herself and the public entity of which he or she is an officer or employee. MCLA 15.322. MCLA 15.323(a), however, does not apply to a public servant who is paid for working an average of 25 hours or less for a public entity.

I understand that if Evan Pratt is ratified as the Director of Public Works, he will not work more than 25 hours per week in the position and therefore will not be paid for working more than 25 hours in a week. As such, under the exemption language of MCLA 15.323(a), it is my opinion that the Contracts of Public Servants with Public Entities Act would not prohibit Evan Pratt from serving as Public Works Director.

The second statute which could apply to this situation is the Incompatible Public Offices Act (MCLA 15.181 et seq). This Act generally prohibits a "public officer" from simultaneously holding two or more incompatible offices. The Act defines a public officer, in part, as a person who is elected or appointed to a public office of a county. As the elected Water Resources Commissioner for Washtenaw County, Evan Pratt meets the definition of a public officer for purposes of the Act. "Incompatible offices" is defined as holding multiple public offices where one of the public offices is subordinate to or supervisory over the other public office or where holding the multiple public offices would result in a breach of duty by the public officer.

As explained more fully above, it is not impermissible for a water resources commissioner, to simultaneously serve as a member of the county board of public works; in fact, Act 185 expressly requires such dual service if a public works board is established. The question

which then arises, however, is whether the water resources commissioner, as a member of the county board of public works may simultaneously serve as the public works director for that county.

The Act does not specifically define the term, “public office.” However, it does define a “public officer” as one who is elected or appointed to a public office in the county. Under Act 185, the public works director position is not filled by election or appointment. Rather, the local board of public works has the authority to “hire” a person for that position subject to the budget established by the local county board of commissioners. In Washtenaw County, before an individual may be hired as the Public Works Director, he/she must be ratified by the Board of Commissioners. Simply put, because a public works director is not elected or appointed, it does not appear that that position would qualify as a “public office.” Accordingly, the Incompatible Public Offices Act would not prohibit the same person from simultaneously serving as water resources commissioner and public works director.

More importantly, even if one could argue that the public works director is a public office, the plain language of Act 185 specifically permits the water resources commissioner to also serve as director of public works. As noted above, MCLA 123.732(3)(b), provides that a county board of commissioners may designate the local water resources commissioner to serve individually as the county board of public works. MCLA 123.736, in turn, provides that the county board of public works shall have the authority to hire a director of public works whose salary must come within the budget appropriation established by the county board of commissioners. Significantly, there is no language in MCLA 123.736 which indicates that where a local water resources commissioner serves as the public works board he may not hire himself/herself to be the public works director. This is not surprising given the fact that the water resources commissioner, the board of public works (whether comprised of individual members or the water resources commissioner) and the public works director are all working on common county public works issues.

In Washtenaw County, the Water Resources Commissioner has not been designated as the Board of Public Works. Instead, a seven-member Board (including the Water Resources Commissioner who holds one of those positions) fulfills those duties. Since there is no statutory provision under Act 185 which prohibits an individual water resources commissioner also acting as the board of public works from hiring himself/herself as the public works director, it necessarily follows that there would be no such conflict when a multi-member board of public works chooses to hire the local water resources commissioner to also act as public works director. Accordingly, in my opinion, approving Water Resources Commissioner, Evan Pratt, as the Public Works Director is not prohibited by the Incompatible Public Offices Act and, in fact, is permitted under Act 185.

