

Ethics

So there you were: just trying to do the best job you could as a city council member while juggling all the competing demands. Answering calls from residents. Asking questions of your city manager, finance director and DPW director to keep up with what's going on. And all of a sudden, an angry resident jumps up at a council meeting, charges you with having "a conflict of interest" on a zoning matter, and says you are violating the state ethics law. Your friendly local newspaper reporter corners you after the meeting and asks, "Well, what about it? Are you in violation of the law?"

Who said serving on the city council or city commission would be easy?

Like it or not, we live in a time of unparalleled cynicism toward government at all levels. Fair or not, critics are quick to point to alleged ethical improprieties as further proof of the untrustworthiness of government officials. In this environment, even the suggestion of improper action can trigger unhappy consequences. Local officials thus need to be aware of the state laws under which they can be held accountable.

This chapter summarizes the two statutes comprising the principal ethics regulation of Michigan local government officials: The State Ethics Act, 1973 PA 196 (Act 196); and 1968 PA 317, as most recently amended in 1997, dealing with public contracts (Act 317). Every local public official in Michigan is subject to them and should be familiar with them.

What's a conflict of interest? And why do we care?

To understand the Michigan laws on the subject, let's begin with what they are trying to address: Just what is a "conflict of interest?" And why should we care about it?

The second question is easy to answer: Public office is a public trust. Elected officials are merely hired hands, delegated power from the public, obliged to exercise that power as the public's trustees. We owe a duty of loyalty to the public interest.

Actions or influences tending to undermine that loyalty are destructive to the public's confidence in government. We all should care about that.

A conflict of interest is any interest competing with or adverse to our primary duty of loyalty to the public interest. A competing interest may be a personal interest, or it may be a duty or loyalty we owe to a third party. In either case, there is a "conflict" if the competing interest impairs our ability to decide a public question objectively and independently.

That is a broad definition, and not everything which might fall within it is necessarily a problem. Each of the statutes discussed below is based upon this general concept: An influence which could impair our impartiality is a potential problem. The laws distinguish between conflicts which are permissible and those which are not.

State laws

The two statutes address different aspects of conflict and ethics issues. Act 196 is concerned with individual behavior and Act 317 regulates approval of public contracts in which local officials may have an interest. Each statute has its own peculiarities.

Act 196, the State Ethics Act

Act 196 prescribes general standards of conduct for public officers and employees. Although originally drafted to exclude local officials, in 1980 local officials were brought within its scope. (Opinion of the Attorney General (OAG) No. 6005 (1981), pp. 440-41).

The ethical constraints imposed by Act 196 are mandatory provisions to which local government officials are obliged to adhere. (OAG No. 6005, p. 443).

Act 196 establishes seven areas of prohibited conduct. A local government official shall not:

1. divulge confidential information to an unauthorized person in advance of the time set for its public release.
2. represent his or her opinion as that of the local government.
3. use governmental personnel, property or funds for personal gain or benefit or in a manner not in accord with proper procedures.
4. solicit or accept gifts, loans, goods, services or other things of value which tend to influence his or her performance of official duties.
5. engage in a business transaction in which he or she may profit from his or her official position or benefit financially from confidential information. (Instruction done outside of regularly scheduled working hours generally is exempt. Act 196, Sec. 2(5).)
6. engage in or accept employment or render services for a public or private interest which is incompatible or in conflict with the discharge of official duties or which may tend to impair his or her independence of judgment.
7. participate in the negotiation or execution of contracts, making loans, granting subsidies, fixing rates, issuing permits or certificates or other regulation or supervision relating to a business entity in which the public officer has a financial or personal interest.

In practice, subparts (6) and (7) created a serious hardship for part-time local officials – such as elected council members and commissioners – who are usually employed full-time at other jobs. The legislature in 1984 thus amended Act 196 to provide narrow exceptions to subparts (6) and (7), enabling the official to participate in and vote on the governmental decision, but only if all of the following occur:

- a. a quorum is not available because the public officer's participation would otherwise violate (6) or (7);
- b. the official is not paid for working more than 25 hours per week for the governmental unit; and
- c. the officer promptly discloses any interest he or she may have in the matter and the disclosure is made part of the public record of the governmental decision to which it pertains.

In addition, if the governmental decision is the award of a contract, the officer's direct benefit from the contract can not exceed the lesser of \$250 or five percent of the contract cost; and the officer must file a sworn affidavit as to the amount of direct benefit, which is made part of the public record.

The exceptions are of limited use since they are available only if there otherwise would be a failure to obtain a quorum.

Act 317, concerning public contracts

Unlike Act 196, which seeks to regulate the behavior of the individual official directly, Act 317 addresses conflict concerns by prohibiting local public officials from pursuing certain public contracts. Section 2 of the act provides that a local official shall not:

1. be a party, directly or indirectly, to a contract between himself or herself and the official's governmental entity.
2. directly or indirectly solicit a contract between the official's governmental entity and any of the following:
 - a. himself or herself;
 - b. any co-partnership of unincorporated association of which he or she is a partner, member, or employee;
 - c. any private corporation in which he or she is a stockholder (over certain thresholds) or of which he or she is a director, officer, or employee; or
 - d. any trust of which he or she is a beneficiary or trustee.

Act 317 further prohibits the official from either taking part in the negotiation or renegotiation of any such contract or representing either party in the transaction.

As with Act 196, there are exceptions, which were last modified by the legislature in 1997 (1997 PA 145). The principal exception is that the prohibitions do not apply to officials paid for working an average of 25 hours per week or less for the governmental entity. The prohibitions also do not apply to community college, junior college or state college or university employees. This is a more useful exception for council members and commissioners than that found in Act 196 since the quorum issue is not a precondition.

Even if the exception is available, however (meaning that the official can be a party to a contract or can solicit a contract with the governmental unit), Act 317 imposes rather strict disclosure and approval requirements. These are:

- a. Prompt disclosure of any pecuniary interest, which is made part of the public record. Disclosure must be made at least seven days prior to the meeting at which a vote will be taken.
- b. Approval requires a vote of at least 2/3

of the full membership of the approving body (not 2/3 of those present) without the vote of the official making the disclosure.

- c. The minutes must include summary information regarding the name of each party to the contract, the principal terms, and the nature of the official's pecuniary interest.

Finally, Act 317's prohibitions do not apply to contracts between public entities, regulated public utility contracts and contracts awarded to the lowest qualified bidder (other than the public official) upon receipt of sealed bids pursuant to published notice.

Ethics questions: What would you do in these situations?

Situation #1

You work for a large manufacturing company with facilities across the country. The company also happens to be your city's largest taxpayer and employer. The company applies for a tax abatement for the plant in your city. You work at another facility and the tax abatement does not impact your job. Should you vote on the abatement?

Situation #2

Before you were elected to the city council you served on your city's zoning board of appeals (ZBA), so you know the ZBA procedures very well. A few months after your election to council, your neighbor and campaign manager files a petition with the ZBA seeking a variance. Since you know how the ZBA works, he asks you to accompany him to the ZBA and to speak on his behalf. Should you do it?

Situation #3

You are a member of the board of directors of your local chamber of commerce and have been for many years. You then run for and are elected to your city commission. The chamber of commerce later proposes that the chamber and the city enter into a contract in which the city pays the chamber for economic development services. Should you vote on the contract?

Other Considerations

In addition to the two principal ethics statutes, local elected officials should be aware of other potential sources of ethical rules. One example is local charter requirements or local ethics ordinances or policies. Prior to 1997, Act 317 contained a provision which said that the act superseded all local charter provisions pertaining to conflicts of interest, and that Act 317 constituted the “sole law in this state” with respect to conflicts of interest in public contracts. This created an argument that all local ethics regulation was preempted by the act. In 1997, however, the legislature amended Act 317 to reduce the scope of the potential preemption and expressly approve of local ethics regulation in subjects other than public contracts (1997 PA 145). The legislative analysis accompa-

nying the bill makes it clear the state preemption is narrow, and therefore, that local regulation – regarding disclosure, conflicts of interest in other situations and nepotism, for example – is permitted. Local officials should consult with their city or village attorney to become familiar with such local regulations.

Local officials should also be aware of 1978 PA 566 (Act 566), which generally prohibits a public officer from holding two or more “incompatible offices” at the same time. While Act 566 is not strictly an ethics statute, it too is based upon general principles of conflict of interest by prohibiting a public official from serving in two public offices whose duties are directly adverse to one another. “Incompatible offices” is defined to mean public offices

Ethics answers

Situation #1:

No. Act 196 states that a local public official shall not participate in the granting of subsidies, issuance of permits or certificates, or any other regulation relating to a business entity in which the official has an interest. An exception may be available, but only if the official’s participation is necessary to achieve a quorum. The Attorney General has said that if the council person does participate, the council action may be void or voidable where the person’s vote was determinative. See OAG No. 5864 (1981); OAG No. 6005 (1981).

Situation #2:

No. The Michigan Court of Appeals has labeled this situation as “patently improper” and an abuse of public trust for the reason that the person making the argument to the ZBA is also one of the people charged with appointing the ZBA. This creates duress on the ZBA, raising doubt about the impartiality of the ZBA’s decision. Any decision made by the ZBA under these circumstances is void. See *Barkey v. Nick*, 11 Mich App 361 (1968).

Situation #3:

No. Although Act 317 grants to part-time officials an exception from the general rule that officials shall not take any part in the approval or negotiation of a contract between the city and any private corporation of which the official is a director, the act goes on to require that the contract may only be approved by a 2/3 vote of the full membership “without the vote of the [official].” In other words, Act 317 might permit you to vote, but your approving vote doesn’t count. See OAG No. 6563 (1989). The strict disclosure provisions will apply in any case.

held by a public official which, when the official is performing the duties of either public office, results in:

1. subordination of one office to another,
2. supervision of one office by another, or
3. a breach of duty.

The Michigan Supreme Court has said that a breach of duty occurs if the two governmental entities in which the official holds offices are parties to a contract or enter into contractual negotiations (*Macomb County Prosecuting Attorney v. Murphy*, 496 Mich 149 (2001)). Local public officials seeking to hold two public offices should first ask whether Act 566 will preclude the dual service as a way to avoid potential embarrassment.

Conclusion

Local elected officials should be mindful of the relevant laws governing ethical issues. Act 196 and Act 317 provide a good starting point for local elected officials to assure themselves that they are acting appropriately. Adhering to the provisions of these statutes will give you the comfort of knowing, if and when your friendly reporter pulls you aside, that you will be giving the right answers.

About the author . . .

Michael McGee served as a Livonia city councilmember for six years (1992-98) and authored that city's ethics ordinance. He is a member of the League's ad hoc committee on ethics provisions in city charters and is a faculty presenter to the MML Elected Officials Academy. Mr. McGee is a principal in the Detroit office of Miller, Canfield, Paddock and Stone, P.L.C., where he practices public finance law.