

Section 2: Roles and Responsibilities

Chapter 6: Ethics

So, there you were, as a trustee, trying to do the best job you could juggling competing demands—answering calls from residents; asking questions of your manager—trying to keep up with what’s going on. And suddenly, 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 village council 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 (Act 317), dealing with public contracts. Every local public official in Michigan is subject to them and should be familiar with them.

What Is a Conflict of Interest, and Why Should We Care?

To understand the Michigan laws on the subject, let’s begin with what they are trying

to address: 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 or influences 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 state laws each 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.

State Ethics Act (Act 196)

Act 196 prescribes general standards of conduct for public officers and employees by establishing seven areas of prohibited conduct. A local government official shall not:

1. divulge confidential information;
2. represent his or her opinion as that of the local government;
3. use governmental personnel, property, or funds for personal gain or benefit;
4. solicit or accept gifts/loans/goods/services, etc. 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 confidential information;
6. engage in or accept employment/render services for a public or private interest which is incompatible/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, certificates, or other regulation/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, commissioners, and trustees—who are usually employed full-time at other jobs. The Legislature 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 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 cannot 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.

Prohibitions on Public Contracts (Act 317)

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.

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, state college, or university employees. This is a more useful exception for local officials than that found in Act 196 since the quorum issue is not a precondition.

Even if the exception is available, however, care must be taken about contract approval. Act 317 imposes strict disclosure and approval requirements, including:

- 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. An approving 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.

Further, recognizing that smaller communities might be unduly limited by these requirements, Act 317 allows for certain exceptions in local units with a population of less than 25,000.

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. Act 317 permits local ethics regulation in subjects other than public contracts and therefore, 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. Act 566 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 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 Legislature has created a number of exceptions to the general rule, including exceptions for certain situations in a local unit having a population of less than 40,000, and other exceptions based upon the nature of the public office. Local officials are

advised to consult with the city or village attorney for guidance in specific cases.

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 arrangements. 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.

For more information, the League has sample ethics ordinances and policies, an ethics handbook, and the following Fact Sheets available at mml.org:

- Contracts of Public Servants with Public Entities
- Incompatible Public Offices
- Misconduct in Office by Public Officers
- Standards of Conduct for Public Officers/Employees

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.

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Specializing in municipal representation in municipal bonds and finance, communications, cable television regulation, franchises, construction contracts and disputes, employee benefits and pensions, environmental law and regulation, labor relations and discrimination, litigation, taxation and assessment appeals.

Ethics questions: What would you do in these situations?

Situation #1

You work for a large manufacturing company which also happens to be your village's largest taxpayer and employer. The company applies for a tax abatement for the plant in your village. 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 village council, you served on the zoning board of appeals (ZBA), so you know the ZBA procedures very well. A few months after your election, your neighbor 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. Can 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 village council. The chamber later proposes that the chamber and the village enter into a contract in which the village pays the chamber for economic development services. Should you vote on the contract?

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:

Yes, provided you do not have a pecuniary interest in the petition's outcome. Since you, as the person making the argument to the ZBA are also one of the people charged with appointing the ZBA, this may create duress on the ZBA, raising doubt about the impartiality of the ZBA's decision. *MDOT v Kochville Township*, 261 Mich App 399 (2003) allowed such an appearance when the local official was representing the township's public position but was not otherwise interested in the matter. In contrast, if you have a pecuniary interest in the outcome, 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 village 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.