



Municipal Ethics – Avoiding Common Mistakes

Foster Swift Webinar Series for New Municipal Officials

Anne M. Seurync

1700 E Beltline Ave, NE, Suite 200

Grand Rapids, MI 49525

(616) 726-2200

aseurync@fosterswift.com



Opening Thoughts

- “Ethics” means what one should do.
- “There is a big difference between what we have the right to do and what is right to do.” - Justice Potter Stewart
- Conduct that is legally allowed is not always the same as what people think of as ethical conduct.



Opening Thoughts

- What do we mean when we talk about ethics for municipal officials and employees?
 - Establishing behavioral standards that promote the public's confidence and trust that the municipality is acting in the public's interest – not serving private interests.



Effectuating Municipal Ethics

- Statutes
- Local Ethics Ordinances
- Local Ethics Policies and Guidelines
- Common Law



Numerous Laws Relate to Ethics at Local Level

o Discussion:

- State Ethics Act, MCL 15.341 et seq.
- Contracts of Public Servants With Public Entities Act, MCL 15.321 et seq.
- Political Activities of Public Employees Act, MCL 15.401 et seq.
- Incompatible Offices Act, MCL 15.181 et seq.



Other Relevant Laws Regarding Public Officials' Permitted Actions

- OMA and FOIA
- Michigan Campaign Finance Act, MCL 169.201-282



Other Relevant Laws Regarding Public Officials' Permitted Actions

- Michigan Penal Code, MCL 750.1 et seq.
 - Failure to uphold or enforce the law. MCL 752.11 (bars omissions only).
 - Common law criminal offense (misconduct in office). MCL 750.505. Five-year felony.



Other Relevant Laws Regarding Public Officials' Permitted Actions

- False statement of public finances. MCL 750.489. Misdemeanor.
- Improper keeping of public funds. MCL 750.490. Misdemeanor.
- Improper purchase of goods on public credit. MCL 750.490a. Misdemeanor.
- Willful neglect of duty. MCL 750.478. Misdemeanor.



Other Relevant Laws Regarding Public Officials' Permitted Actions

- Whistleblower's Protection Act, MCL 15.362.
 - Employer may not discharge or discriminate against employee regarding compensation, terms, conditions, or privileges of employment because the employee reports a violation or suspected violation of the law.



Standards of Conduct for Public Officers and Employees (State Ethics Act)

- State Ethics Act, 1973 PA 196, MCL 15.341 et seq.
- Intended as code of ethics for public officers and employees and not as rule for public contracts.



Standards of Conduct for Public Officers and Employees (State Ethics Act)

○ Key Definitions:

- “Employee” includes a municipal employee
- “Public officer” includes an elected or appointed municipal official
- Unethical conduct means actions that violate Sec. 2
- Note Attorney General Opinion



Standards of Conduct for Public Officers and Employees

- Sec. 2: defines unethical conduct
 - Sets standards imposed on public officers and employees
- Public officer or employee must
 - Not divulge to an unauthorized person confidential information acquired in course of employment.



Standards of Conduct for Public Officers and Employees

- Not represent his or her own personal opinion as the municipality's.
- Use personnel resources judiciously, solely per the law, and not for personal gain or benefit.



Standards of Conduct for Public Officers and Employees

- Sec 2 (cont'd) Public officer or employee must not:
 - Solicit or accept any gift or loan of money, goods, or services, or other thing of value for the benefit of a person or organization (other than the state) which tends to influence the manner in which the officer or employee performs official duties.



Standards of Conduct for Public Officers and Employees

- Sec 2 (cont'd) Public officer or employee must not:
 - Engage in a business transaction in which the officer or employee may profit from his official position or authority, or benefit financially from confidential information obtained due to that position.



Standards of Conduct for Public Officers and Employees

Sec 2. Public officer or employee must not:

- Engage or accept employment or render services for a private or public interest when that is incompatible or in conflict with the discharge of the officer or employee's official duties or if it would impair his independent judgment or performance of official duties.
- Participate in negotiations or executions of contracts, permits, or other regulation or supervision relating to a business entity in which he has a financial or personal interest.
- But there are two exceptions.



Standards of Conduct for Public Officers and Employees

- Exception – above rule does not apply, and so public officer can vote on, make, or participate in making a government decision if
 - A quorum is not otherwise available;
 - The officer is not paid for working more than 25 hrs/week; and
 - Officer makes disclosure on record.



Standards of Conduct for Public Officers and Employees

- Exception – if a government decision involves awarding a contract, above rule does not apply and officer can vote on, make, or participate in making the government decision if
 - All of the above requirements are met.
 - Officer will benefit from contract less than \$250 or less than 5% of the contract cost (whichever is less).
 - Officer files affidavit that is made part of the public record.



Standards of Conduct for Public Officers and Employees

- Sec. 2b: Whistleblower Provision
 - Public officer or employee with knowledge that another officer or employee has violated the Act **may** report it to a supervisor, person, agency, or organization.
 - The reporter is not subject to dismissal, salary withholding, promotion withholding, demotion, or transfer.
- Employer must post notices and use other “appropriate means” to keep employees informed of their protections under this Act.



Standards of Conduct for Public Officers and Employees

○ Sec. 2c - Private Cause of Action

- Person who alleges a violation of 2b may sue for injunction or damages.
- Deadline: 90 days after the violation.
- Remedies: court can grant this to the complainant -- reinstatement, paying back wages, reinstate benefits, actual damages, attorney fees, and witness fees.



Standards of Conduct for Public Officers and Employees

- Employer must post notices and use other “appropriate means” to keep employees informed of their protections under this Act.



Standards of Conduct for Public Officers and Employees

- Act Creates Board of Ethics within Executive Office of the Governor
 - Board is advisory and investigatory only; can't take direct action against a person or agency.
 - Makes recommendations to appointing authority with supervisory responsibility over suspect.



Contracts of Public Servants With Public Entities Act

- 1968 PA 317, MCL 15.321 et seq.
- Local Governmental equivalent to State Conflict of Interest Act.
- Applies to members of municipal council or board and bodies that council or board may establish.



Contracts of Public Servants With Public Entities Act

- Section 2(1) – can't be a direct or indirect party.
- General Rule: public servant may not be a party (directly or indirectly) to any contract between himself and the public entity of which he or she is an officer or employee [MCL 15.322(1)].
- But there are exceptions.



Contracts of Public Servants With Public Entities Act

- Section 2(2) – No Solicitations
- General Rule: public servant may not (directly or indirectly) solicit any contract between the public entity of which he is an officer or employee and any of the following:
 - Him or herself
 - Any partnership, association of which he is a partner, member, or employee



Contracts of Public Servants With Public Entities Act

- Any private corporation of which he is a director, officer, or employee
- Any trust of which he is a beneficiary or trustee [MCL 15.322]



Contracts of Public Servants With Public Entities Act

- As to any such contract in Sec. 2(2), the public servant may not
 - Be part of the negotiations or approval of the contract
 - Represent either party in the transaction [MCL 15.322]
- But there are exceptions



Contracts of Public Servants With Public Entities Act

- Sec. 3(1) - "Disclosure-Forgiveness" Exception
 - Says Section 2 doesn't apply to a contract where the public servant is paid for working 25 hrs/week or less on average if 3 requirements are met:



Contracts of Public Servants With Public Entities Act

- 1st Requirement: Disclose - Public servant must disclose financial interest in the contract to the official body approving the contract.
 - Required Disclosure Method –
 - General Rule: 7 day notice and cooling off period
 - Publicly disclose in writing to presiding officer or clerk the financial interest in the contract 7 days before meeting at which vote will be taken. Disclosure must be made public in same manner as a public meeting notice.



Contracts of Public Servants With Public Entities Act

- Disclose financial interest at the public meeting. Vote is to be held at a meeting 7 days after the meeting at which the disclosure is made. If amount of direct benefit is more than \$5K, disclosure must be done this way.
- Do not need 7 day notice period and can give notice by affidavit if public servant making the disclosure will directly benefit from contract less than \$250 and less than 5% of public cost of contract, or if contract is for emergency repairs or services.



Contracts of Public Servants With Public Entities Act

- 2nd Requirement: Contract must be approved by at least 2/3 of the full membership of the approving body in open session without vote of public servant making the disclosure.
- 3rd Requirement: Summary information must be included in official minutes:
 - Name of each party to the contract.
 - Terms of contract, duration, \$\$, services of public entity involved, nature of public entity's employees required to fulfill the contract.
 - Nature of any pecuniary interest.



Contracts of Public Servants With Public Entities Act

- Other exceptions:

- Public servant may participate in making a governmental decision if public servant's participation is required by law.
 - If 2/3 of members are not eligible under this Act to vote on a contract or to create a quorum, member may be counted for purposes of a quorum and may vote on contract if:
 - member's benefit is less than \$250 and less than 5% of public cost of the contract, and
 - member files sworn affidavit with the body.



Contracts of Public Servants With Public Entities Act

○ Other exceptions:

- Public servants of a municipality with a population of less than 25,000 may serve as emergency medical services personnel.
- Public servants of a municipality with a population of less than 25,000 may serve as firefighter – but not full-time firefighter, fire chief, or negotiator for the firefighters.
- Municipality with a population of less than 25,000 may authorize a public servant to perform other additional services for the municipality.



Contracts of Public Servants With Public Entities Act

- Sec. 4: Prohibitions in Sec. 2 do not apply to certain contracts:
 - Contracts between public entities.
 - Contracts awarded to lowest qualified bidder, other than a public servant, upon receipt of sealed bids per published notice (as long as not amendment or renegotiations of a contract or additional payments under a contract that were not initially authorized at the time of the contract award).



Contracts of Public Servants With Public Entities Act

- Contracts for public utility services where rates are regulated.
- Contracts to buy residential property in a city or village that adopted an ethics ordinance in effect at the time the residential property was bought.
 - Public servant of city or village may buy 1 to 4 parcels not less than 18 months between each purchase.
 - Only applies if city or village adopted an ethics ordinance in effect at time of purchasing residential property.
 - Violation of residential property rule is a felony: 1 year jail or fine between \$1,000 and 3 times value of property bought.



Contracts of Public Servants With Public Entities Act

- Sec. 5 – Remedies
- Monetary
 - Contract is not absolutely void if there is a conflict.
 - Contracts involving banned conduct are voidable by court order in action by the public entity that is a party to the contract.
 - Suit is against any person, firm, or corporation that entered into the contract with actual knowledge of the prohibited conduct.
 - Actual knowledge for a corporation must be that of a person or body finally approving the contract for the corporation.



Contracts of Public Servants With Public Entities Act

- If court voids the contract, it may require reasonable reimbursement of person, firm, or corporation for services or goods provided under the contract to the extent political subdivision or state benefitted.
- Criminal
 - Violation is a misdemeanor.



Political Activities Act, MCL 15.401 et seq.

- Political Activities by Public Employees Act, 1976 PA 169 (MCL 15.401 et seq.)
- “Public employee” means a municipal employee who is not an elected official.
 - Municipal employee who is elected to office of that city must resign or be granted leave of absence from his employment during his elected term.



Political Activities Act, MCL 15.401 et seq.

- Municipal employee may become candidate to city elective office without obtaining leave.
- If the person becomes a candidate for municipal office, the municipality may require the person to take a leave of absence without pay when he complies with the candidacy filing requirements – unless that would violate a collective bargaining agreement.



Political Activities Act

- Municipal employee may
 - Become member of political party committee.
 - Be a delegate to a state convention or district or county convention of a political party.
 - Become a candidate for election to any state or other public office without first obtaining leave from his employment.
- Can't do acts allowed above during hours when that person is compensated for performing public employee duties.



Political Activities Act

- Public employer, public employee, or elected or appointed official may not
 - coerce, attempt to coerce, or command another public employee to pay, lend, or contribute anything of value
 - to a party, committee, organization, agency, or person
 - for the benefit of a person seeking or holding elected office or to further or defeat a proposed law, ballot question, or other measure to be voted on



Political Activities Act

- Employee of municipality whose rights are violated or who is subjected to any of the barred “coercive” actions may complain to the Department of Labor.
- Department of Labor holds a hearing.
- Department of Labor may award back pay and attorney fees, and reinstate the employee and all work-related benefits.
- Still have to comply with other political activities laws, including federal laws.



Incompatible Public Offices

- Incompatible Public Offices Act, MCL 15.181 et. seq.
- Section 2: Except as provided in section 3, a *public officer* or *public employee* shall not hold 2 or more incompatible offices at the same time.



Incompatible Public Offices

- “Public employee” means an employee of this state, an employee of a city, village, township, or county of this state, or an employee of a department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or of a city, village, township, or county in this state, but does not include a person whose employment results from election or appointment.



Incompatible Public Offices

- “Public officer” means a person who is elected or appointed to any of the following:
 - An office established by the state constitution of 1963.
 - A public office of a city, village, township, or county in this state.
 - A department, board, agency, institution, commission, authority, division, council, college, university, school district, intermediate school district, special district, or other public entity of this state or a city, village, township, or county in this state.



Incompatible Public Offices

- “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:
 - The subordination of 1 public office to another.
 - The supervision of 1 public office by another.
 - A breach of duty of public office.



Incompatible Public Offices

- There are many exceptions to this prohibition, including but not limited to:
 - Section 2 does not prohibit a public officer or public employee of a city, village, township, school district, community college district, or county from being appointed to and serving as a member of the board of a TIFA, DDA, LDFA, Brownfield RFA, Housing Commission, Neighborhood Improvement, Water Resource TIFA, and other specifically named authorities.
 - See Section 3(3) of the IPOA for the complete list.



Incompatible Public Offices

- Exceptions (cont'd)
 - Prohibit public officers or public employees of a city, village, township, or county having a population of less than 25,000 from serving, with or without compensation, as emergency medical services personnel as defined in section 20904 of the public health code, 1978 PA 368, [MCL 333.20904](#).



Incompatible Public Offices

○ Exceptions (cont'd)

- Prohibit public officers or public employees of a city, village, township, or county having a population of less than 25,000 from serving, with or without compensation, as a firefighter in that city, village, township, or county if that firefighter is not any of the following:
 - A full-time firefighter.
 - A fire chief.
 - A person who negotiates with the city, village, township, or county on behalf of the firefighters.



Incompatible Public Offices

- Exceptions (cont'd)

Limit the authority of the governing body of a city, village, township, or county having a population of less than 25,000 to authorize a public officer or public employee to perform, with or without compensation, other additional services for the unit of local government.



Incompatible Public Offices

○ Remedies

- Attorney General or Prosecuting Attorney – injunctive or other relief
- Action not automatically void. Only voidable if action brought by AG or Prosecuting attorney.



Municipal Ethics Regulations

- Municipalities may establish and enforce ethics regulations regarding municipal officials and employees.
- Purpose of Adopting an Ethics Ordinance – clarify behavior deemed necessary to instill trust and faith in government.



Municipal Ethics Regulations

- What to adopt?
 - Aspirational versus Punitive
 - Aspirational ordinance or resolution or policy
 - Guides public officials and employees as to expected and prohibited conduct. But no actual penalties for violations.



Municipal Ethics Regulations

- Punitive ordinance
 - Provides civil or criminal penalties for violations
 - Beware of collective bargaining agreements
 - Removal of elected officials -- must comply with law



Municipal Ethics Regulations

- Common Ethics Ordinance Concepts
 - Who it applies to? Some or all?
 - List the prohibited conduct
 - Define conflict of interest
 - Required disclosures
 - Nepotism
 - Consequences of violations



Municipal Ethics Regulation

- AG has Model Ethics Ordinance For Local Government Units

[www.michigan.gov/documents/
ag/ModelEthicsOrdDraft_287092_7.pdf](http://www.michigan.gov/documents/ag/ModelEthicsOrdDraft_287092_7.pdf)



Court and AG Opinions Regarding Conflicts of Interest

- *Wilson v Twp of Burr Oak* (1891) – error to permit two members of Township Board to participate in decision where they had financial interest in laying out of public highway
- Township board members who would benefit financially from property tax exemption to a cooperative of which they are members should not participate in approving a transfer of property tax exemption to the cooperative (OAG No. 5916, 1981)
- Township supervisor may not conduct a private business from his or her Township office. (OAG No. 5854, 1981)



Court and AG Opinions Regarding Conflicts of Interest

- No conflict for Township board member who also sits on Township's ZBA to have property that is being developed in the Township. Member should abstain from voting on zoning changes for land he owns. (OAG No. 5774, 1980)
- City assessor who serves on a bank board of directors and assesses the bank's property does not have a conflict of interest. (OAG No. 5442, No. 1979)
- Township clerk who also serves as voluntary fireman should not vote on matters that affect his compensation as a fire fighter. (OAG No. 5390, 1978)



Membership & Voting Issues

- Michigan Law may require or specifically permit joint membership:
 - For example, in a township, one member of the ZBA shall be member of the Planning Commission.
 - For cities, 1 ZBA member may be on the City Council



Membership & Voting Issues

Beware: ZBA who is also on the legislative body or PC may not participate in a public hearing on or vote on same matter the member voted on as member of legislative body or PC. MCL 125.3601(13)



Membership & Voting Issues

- PC and ZBA member may be removed for misfeasance, malfeasance, or nonfeasance on written charges and public hearing
- Before voting on matter reasonably be considered to have conflict, PC member must disclose the potential conflict to PC
 - PC is disqualified from voting if bylaws say so or majority vote by other PC members
 - Failure to disclose potential conflict is malfeasance



Membership & Voting Issues

- If City Council doesn't define conflict by ordinance, PC must do so in its bylaws
- ZBA member must disqualify himself from a vote if has a conflict of interest.
 - Failure to disqualify himself is malfeasance



Presence at Meetings – Duress Issues

- *Dep't of Transportation v Kochville* (2004):
 - Township supervisor opposed MDOT variance request before Township ZBA, expressing concern for upholding new sign ordinance and on building setback issues. Court said no conflict as speaking on public interest. No financial interest in outcome of request.
- *Hughes v Almena Twp* (2009):
 - Township Trustee's presence and comment at PC and ZBA meeting opposing landowners' PUD request, due to buffer and soil issues, was not duress.



Presence at Meetings – Duress Issues

- *Barkey v Nick* (1968):
 - City commissioner who appointed ZBA represented his brother before ZBA variance request. Court said improper duress. Due process violated and conflict of interest. ZBA's action was void.
- *Abrahamson v Wendell* (1977):
 - Township Supervisor appeared before ZBA to request a variance, acting as representative for landowner and contractor. Court said this was duress. Due process violated and conflict of interest. ZBA's action was void.



Concluding Thoughts

- The purpose of clearly defined ethics is to build and maintain public trust.
- Ethical standards should be communicated to municipal officials.

“The good of the people is the chief law.”
- Cicero



Upcoming webinars

Zoning and Land Use: What You Need to Know

February 12, 2013

Register: www.bit.ly/Zoningwebinar

Avoid Common Freedom of Information Act Mistakes

March 14, 2013

Register: www.bit.ly/FOIAwebinar

Public Sector Employment Law - The Basics

April 18, 2013

Register: www.bit.ly/Employmentwebinar

Ten Things to Know Before Your Municipality Borrows Money

May 9, 2013

Register: www.bit.ly/Bondwebinar